THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 479/2020

In the matter between:

CANTON TRADING 17 (PTY) LTD T/A
CUBE ARCHITECTS **APPELLANT**

and

FANTI BEKKER HATTINGH N O **RESPONDENT**

Neutral citation: *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N O* (479/2020) [2021] ZASCA 163 (1 December 2021)

Coram: SALDULKER, MATHOPO and MOCUMIE JJA and PHATSHOANE and UNTERHALTER AJJA.

Heard: 20 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand down is deemed to be 09h45 on 1 December 2021.

Summary: Arbitration – who decides whether the parties consented to refer a dispute to arbitration when there is a dispute of fact as to their consent – separability and competence-competence – the discretion of the high court to adjudicate the question of the existence of an arbitration agreement – the requirements for the application of a robust approach to adjudicate disputes of facts not met.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Naidoo ADJP and Daffue and Reinders JJ sitting as court of appeal.)

1 The appeal is upheld with costs.

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

'(*a*) The appeal is upheld with costs.

(*b*) The order of the high court is set aside and substituted with the following order:

"The application is remitted to the high court to determine whether the application should be referred to evidence, and if so on what terms, or whether the application should be dismissed".'

JUDGMENT

Mocumie JA and Unterhalter AJA (Saldulker and Mathopo JJA concurring.)

[1] The central question in this appeal is whether the Free State Division of the High Court (the high court) was correct to order the appellant (Canton Trading) to submit certain disputes to arbitration.

[2] Canton Trading appealed the high court's order to the full court of the Free State Division of the High Court (the full court). The full court dismissed its appeal. Canton Trading appeals that order, with the special leave of this Court.

[3] The background facts are as follows. Canton Trading is a firm of architects. During 2011, the respondent, the Qwaha Trust (the Trust), commenced its use of the professional services of Canton Trading. Canton Trading rendered professional architectural services to the Trust in respect of various projects. Some seven projects were undertaken.

[4] During 2013, the respondent wished to expand the Itau Mill on plot 47 Qwaggafontein, Bloemfontein (the project) and approached Canton Trading to engage

its services for the project. Canton Trading orally accepted the offer to do so. As the principal agent of the Trust, on 5 February 2014, Canton Trading negotiated and concluded a building agreement referred to as the Joint Building Contracts Committee Series 2000 Standard Building Agreement (the JBCC agreement) with a building contractor, Royal Anthem Investments 12 CC (the contractor). Canton Trading was appointed as the Trust's principal agent under clause 42.4 of the JBCC agreement. When the JBCC agreement was concluded, Mr Johan Louw (identified as the project manager) signed the JBCC agreement, representing Canton Trading as the principal agent and duly appointed representative of the Trust. A document, styled the 'Appointment of Professional Service Provider' (PSP), was prepared by Canton Trading's attorneys and presented to the Trust during March 2014. The PSP was not signed by either of the parties. Nonetheless, throughout the project, Canton Trading rendered services and was paid by the Trust upon presentation of its invoices.

[5] Canton Trading acted as the Trust's principal agent until 2 August 2014. The JBCC agreement was terminated on the instructions of the Trust on the basis of defective work performed by the contractor. The Trust took up the position that Canton Trading had failed to perform its duties as its principal agent and issued a letter of demand in which it invited Canton Trading to agree to the appointment of a mediator, failing which, in terms of clause 23 of the PSP, the dispute was to be submitted for mediation and arbitration.

[6] Correspondence was exchanged between the attorneys of the parties. In a letter dated 15 September 2017, the attorneys acting for Canton Trading acknowledged receipt of the demand of the Trust, and responded that they were considering their client's position and would revert. On 2 November 2017, the attorneys for the Trust reminded Canton Trading's attorneys that a dispute had been raised in terms of clause 23.6 of the PSP and that Canton Trading had failed to confirm that the matter was to be referred to a mediator. They afforded Canton Trading a period of 21 (twenty-one) days, as envisaged in clause 23.6 of the PSP, to confirm the appointment of either Judge Hancke and or Judge Cilliers (both retired judges), to act as the arbitrator and for the matter to be referred to arbitration.

[7] On 7 November 2017, Canton Trading's attorneys informed the Trust that their client was not prepared to mediate and that Canton Trading was in principle prepared to proceed with the arbitration process. On 20 November 2017, and in response to the letter of 2 November 2017, Canton Trading's attorneys informed the Trust that they were satisfied with the appointment of Judge Hancke as the arbitrator and requested that the Trust's attorneys prepare a draft arbitration agreement. The Trust's attorneys responded on 29 November 2017. They indicated that Judge Hancke had agreed to serve as arbitrator and enclosed a draft arbitration agreement to be signed by Canton Trading, in the event that the draft was satisfactory.

[8] On 5 December 2017, Canton Trading's attorneys responded. They indicated that the attorney who had been working on the matter had resigned and another attorney had been assigned to deal with the matter; they were happy with the appointment of Judge Hancke as the arbitrator and requested a pre-arbitration meeting on 24 January 2018. On 7 December 2017, the parties confirmed and agreed that the pre-arbitration meeting was to be held without the arbitrator.

[9] On 24 January 2018, the pre-arbitration meeting was held. At this meeting, the arbitration agreement was discussed and the parties agreed to the appointment of Judge Hancke, his remuneration and their liability for payment. During the meeting, Canton Trading specifically requested that the following paragraph be inserted into the pre-arbitration agreement:

'The pre-arbitration agreement is further subject to the condition that the Defendant (Canton Trading) must obtain the approval/consent of the Defendant's insurer (in the event of it being the Defendant's version that there is no signed agreement to submit to arbitration) of the arbitration agreement.'

[10] Canton Trading's attorneys inserted this clause on the instructions of their client's insurer. On 30 January 2018, Canton Trading's attorneys informed the Trust's attorneys that they had consulted with their client. Their instructions were that the parties had not signed the PSP and that the arbitration provision in the PSP was therefore unenforceable. They invited the Trust's attorneys to issue summons should their client wish to proceed with the matter. The Trust then afforded Canton Trading seven days to sign the amended pre-arbitration agreement. Canton Trading's

attorneys responded on 26 February 2018. They indicated that Canton Trading does not recognise the existence of the arbitration agreement.

[11] The Trust approached the high court on motion for an order in the following terms:

'(a) That the respondent be ordered to submit to arbitration to have the disputes set out in the Arbitration Agreement which is attached to the applicant's founding affidavit as annexure ''B''s adjudicated;

(b) That the Respondent be ordered to pay the costs of this application.

(c) Further and/or alternative relief.'

[12] The high court recognised that Canton Trading had set out in its answering affidavit its version as to why no agreement had been concluded to submit any dispute to arbitration. The high court, nevertheless, decided that it would adopt what it considered to be the robust approach referenced in *Fakie NO*[1]*.* The high court considered the issue before it to be as follows: 'The question therefore revolves around the veracity of the respondent's denial, viewed in the light of the evidence as a whole.' The high court concluded that 'the mere fact that the document was never signed, as has been the case in the past with several contracts since before 2011 when this one in dispute came into existence, did not in the circumstances of this matter, necessarily, lead to the conclusion that it did not form the basis of the agreement regulating the relationship between the parties'. It held furthermore that, 'the perceived disputes raised by the respondent as to the existence and binding effect of the written document [are] clearly untenable, palpably implausible and uncreditworthy'. The high court consequently found that there was an arbitration agreement concluded between the parties which had come into existence.

[13] The high court ordered Canton Trading to submit to arbitration the disputes set out in the arbitration agreement, as amended, and that Canton Trading was to pay the costs of the application. It granted the following order:

'1. The arbitration agreement, annexure B to the applicant's founding affidavit, is amended by the deletion of the second paragraph on page 1 thereof as well as part A and the first sentence of Part B on page 3 thereof.

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[1] *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA).

2. The date of 10 March 2018 in paragraph 7.2 thereof is replaced by the date of 19 October 2018.
3. Prayer A of the notice of motion is granted subject to the amendments in paragraphs 1 and 2 above.
4. [The] respondent [is ordered to] pay the costs of the [application], including the costs occasioned by the employment of senior counsel.'

[14] Canton Trading appealed to the full court and contended that, first, the high court entered the arena between the parties and granted relief not sought. As such, it did not exercise its discretion judicially and within the parameters prescribed by the law. Second, the applicable legal principles in the adjudication of motion proceedings, namely that motion proceedings are decided on the version of the respondent, was not adhered to and the strict requirements for the application of a robust approach were not met, especially in circumstances where neither party sought the application of such an approach. Third, the Trust had failed to prove that there was *animus contrahendi*.

[15] The full court did not agree with these contentions and found against Canton Trading. It held that, 'where a party relies on the provisions of Rule 6(5)(*g*), as the appellant seems to have done, it is common sense, that the court is called upon to examine the very dispute in order to determine whether it creates a genuine dispute of fact or not.' The full court held further that the high court, acting in terms of Rule 6(5)(*g*), had reasoned correctly, and exercised one of the permissible options available to it in terms of the applicable law. The full court went on to record that 'the appellant conceded that a signed agreement was not a prerequisite for a written document to have a binding effect. This concession was properly made, as it is evident from the provisions of the Arbitration Act 42 [of] 1965, that it does call for a written agreement to be signed in order for it to be valid and binding. The high court undertook an extensive examination of the respective versions of the parties as they appear in the papers and found that the appellant's denial of the existence of an agreement was palpably untrue and not worthy of credence, warranting the rejection of its version. I am unable to fault the reasoning or the conclusion of the court in this respect'. The full court went on to dismiss the appeal with costs. Thus, the appeal to this Court.

[16] Counsel for Canton Trading submitted that the case for the Trust was delineated in paragraph 4 of its founding affidavit and later made clearer in para 2.5 of its replying affidavit: the high court was to adjudicate upon one issue only, namely, whether the appellant should be compelled to submit to arbitration - othing more. Paragraph 4 of the founding affidavit reads:

'Lest there be any confusion, the relief referred to *supra* does not constitute relief in terms of which the [a]pplicant seeks to have any dispute between the parties which has arisen out of or by virtue of any agreement between the parties adjudicated. The [a]pplicant seeks only to compel the Respondent to submit to arbitration to have such dispute(s) adjudicated upon by the forum agreed upon between the parties.'

Para 2.5 of the replying affidavit reads:

'It is therefore respectfully submitted that the question whether or not a valid arbitration agreement had been concluded between the applicant and the respondent falls squarely within the purview and jurisdiction of the proposed arbitrator and the applicant therefore does not move for an order in terms of which the Court is asked to make a determination in respect of such question. What the applicant moves for is solely that the respondent be compelled to submit to arbitration to have the question which is referred to above adjudicated by [an] arbitrator.'

[17] In its answering affidavit before the high court at para 3 the appellant stated:

'. . . the respondent's case and defence [is] that there is no operative and/or binding and/or enforceable arbitration agreement in existence between the applicant and the respondent in terms of which the respondent can be ordered to submit to arbitration.'

Furthermore, at para 3.6 it states '. . . I emphasise that it is the respondent's case and defence that it did not enter into *any* ***written agreement*** with the applicant with the necessary *animus contrahendi* to submit any dispute between the applicant and itself to arbitration.' (Emphasis added.)

[18] Counsel for Canton Trading contended that initially neither of the parties requested the high court to find whether there was a bona fide factual dispute as to the existence of the arbitration agreement. What the Trust sought was an order compelling Canton Trading to submit to arbitration. Instead, the high court disregarded Canton Trading's evidence. It decided, without being requested to do so, that there was no real bona fide dispute of fact which could not be resolved on the papers. The contention was made that it was common cause that there was a dispute of fact as to

whether there was an agreement to arbitrate and the only question for the high court to decide was whether that issue should be referred to arbitration. Instead, the high court found that an arbitration agreement existed as between the parties.

[19] To persuade this Court that the high court exceeded its powers, counsel for Canton Trading argued that this Court in *Fisher and Another v Ramahlele and Others*[2] set limits within which a court may exercise its discretion in motion proceedings. The essence of this submission was to the effect that, ordinarily, a court may not *mero motu* raise a new issue for adjudication not identified on the papers by the parties, save where it was a question of law that emerged fully from the evidence, it was necessary to decide the matter, and no party was caused prejudice.

[20] Counsel for Canton Trading further relied on *Fiona Trust & Holding Corp and others v Privalov and others*[3] which he contended supported the case for the appellant, the court there stated at para 38:

'The judge relied on *Ahmed Al-Naimi v Islamic Press Agency* [2000] 1 Lloyds Rep 522 to decide as a matter of his discretion that *it was more convenient for the court to decide the question whether the charterparties and the arbitration clause were invalidated by the alleged bribery of the owners' agents because it was best that the matter should be decided only once.* If the matter were truly a matter of his discretion that exercise of it might well be difficult to criticise, but the discretion of the court only arises if there is truly a "question whether there is a valid arbitration agreement". As we have sought to explain, once the separability of the arbitration agreement is accepted, there cannot be any question but that there is a valid arbitration agreement. Al Naimi (in which Judge Lloyd's four options are all set out and approved) was different because in that case there was a real question as to whether any arbitration agreement had come into existence or (perhaps more accurately) whether the agreement that did exist under a preceding contract covered disputes that arose pursuant to a subsequent ad hoc contract. If there is a contest about whether an arbitration agreement had come into existence at all, the court would have a discretion as to whether to determine that issue itself but that will not be the case where there is an overall contract which is said for some reason to be invalid e.g. for illegality, misrepresentation or bribery and the arbitration agreement is merely part of that overall contract. In these circumstances it is not necessary to

[2] *Fisher and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) paras 13-15. See also *Molusi v Voges N.O and Others* [2016] 6 ZACC; 2016 (3) SA 370 (CC) with reference to *Naidoo and another v Sunker* [2011] ZASCA 216; [2012] JOL 28488 (SCA) and cases cited.

[3] *Fiona Trust & Holding Corp and others v Privalov and others* [2007] 4 All ER 951 (HL).

explore further the various options canvassed by Judge Humphrey Lloyd since we do not consider that the judge had the discretion which he thought he had.' (Emphasis added.)

[21] In response, counsel for the Trust relied on several authorities of this Court[4] and the Constitutional Court[5] to make the following submission: the parties had wrongly delineated the legal issue to be determined by the high court in their papers, namely, to compel the appellant to submit to arbitration. For this reason, the high court was empowered to adopt a robust approach. The presiding judge indicated his *prima facie* view that the parties had it wrong on the legal issue to be determined, which view counsel for Canton Trading had also accepted. He contended that, to indicate that the parties accepted the course adopted by the high court, it was placed on record on behalf of the Trust that it would abide the decision of the court. The Trust further contended that Canton Trading had also accepted the approach which the high court had proposed to the parties.

[22] The key issue before this Court was crystalized during argument as follows. In the face of a dispute of fact that an agreement existed to refer disputes between the parties to arbitration, was there any basis to find that the parties had agreed to refer to arbitration the very dispute as to the existence of an agreement to arbitrate? If that is not what the parties agreed to, then, was it competent for the high court to decide the dispute as to whether there was an agreement to refer the disputes to arbitration?

[23] We proceed to consider whether the parties agreed to refer to arbitration their dispute as to whether there existed an arbitration agreement. We shall reference this dispute as the 'existence dispute'. If there was a referral of the 'existence dispute' to arbitration, then it follows that the high court could not decide the existence dispute, and was in error in doing so.

[24] We have read the judgment of Phatshoane AJA (the second judgment). The second judgment concludes that the parties indeed agreed to refer the 'existence dispute' to arbitration. The second judgment places emphasis upon particular

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[4] *Fakie NO* fn 1 citing *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); fn 2.
[5] Fn 2.

provisions of the PSP. The Trust contended that that the PSP set out the terms of its agreement with Canton Trading, whereas Canton Trading denied that this was so.

[25] Clause 23 of the PSP provides that certain disputes shall be referred to mediation, failing which, the disputes shall be submitted to arbitration. Clause 23.1, in familiar language, reads as follows:

'Any dispute arising between any of the Parties in regard to: the interpretation of; or the effect of; or the carrying out of; or any other matter arising directly or indirectly out of, this Agreement ("the Dispute") shall be referred to a mediator agreed upon between the Parties'.

Clause 23.2 goes on to state that if the parties cannot agree on a mediator or resolve the dispute by way of mediation, then the dispute shall be submitted and decided by arbitration. The following words are then written, 'Save as set out herein, the arbitration shall be conducted in accordance with the rules and regulations of the Arbitration Foundation of South Africa Limited (AFSA), in force from time to time'.

[26] The second judgment sets out the AFSA rules, in relevant part. Sub-article 11.2.2 of the commercial rules of AFSA confer upon the arbitrator the power 'to rule on his own jurisdiction, including rulings on any dispute in regard to the existence or validity of the arbitration agreement or the scope thereof.' Since clause 23.2 of the PSP requires that an arbitration must be conducted in accordance with the AFSA rules, those rules grant a wide power to the arbitrator to rule on questions of jurisdiction, including whether an arbitration agreement exists. This competence, the second judgment finds, requires a duly appointed arbitrator and not the courts to decide whether the PSP constitutes an agreement by the parties to arbitrate, and hence whether an arbitration agreement exists. Therefore, the high court could not determine the existence issue, and fell into error in doing so.

[27] This line of reasoning raises important issues as to the competence of the high court to decide whether an arbitration agreement has come into existence, in the face of a dispute between litigants as to whether this is so.

[28] In *North East,*[6] this Court, following a line of English cases, recognised that parties may agree that a dispute pertaining to the validity of an agreement is to be determined by way of arbitration, even though the arbitration clause referring the dispute to arbitration forms part of the agreement that is subject to the validity challenge. There is nothing contradictory in this position. The parties enjoy autonomy to agree that categories of dispute arising between them will be submitted to arbitration for resolution, rather than be determined by the courts. Precisely which disputes are to be submitted to arbitration is a question of what has been agreed, and the interpretation of the parties' written agreement. Generally, the parties intend that all their disputes will be decided under a unitary jurisdiction, either by the courts or by way of arbitration, and not under a bifurcated jurisdiction, where some disputes are determined by the courts and others by submission to arbitration.[7]

[29] It follows that the parties may agree that disputes arising as to the validity or enforceability of an agreement must be determined by way of arbitration and not before the courts. The arbitration clause that gives expression to this agreement may form part of the written agreement of which the validity or enforceability is disputed. If the arbitrators uphold the challenge to the validity or enforceability of the agreement, their decision vacates their jurisdiction to decide any further dispute arising from the agreement. There is nothing paradoxical about this outcome. The parties agreed that this competence was to be conferred upon the arbitrators. Their exercise of this competence is precisely what the parties intended.

[30] This reasoning of the second judgment is predicated upon the premise that there was an agreement between the parties as to the disputes that are to be submitted to arbitration. Those disputes may include the enforceability and validity of the agreement. But what if the very agreement to submit these disputes to arbitration is itself subject to challenge? *North East*[8] affirmed the following *dictum* in *Heyman v Darwins Ltd*[9]*,* '[i]f the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause,

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[6] *See North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA).
[7] Ibid para 21.
[8] Ibid para 12.
[9] *Heyman v Darwins Ltd* [1942] 1 All ER 337 (HL) at 343F.

for the party that denies he has ever entered into the contract is thereby denying that he has ever joined in the submission.'

[31] Since the submission of a dispute to arbitration requires the consent of the parties, if the very agreement that requires the submission is challenged on the basis that such agreement never came into existence, a dispute exists as to whether there was submission of the dispute to arbitration at all. The problem that then arises is this: who decides the 'existence dispute', the courts or the arbitrators?

[32] The question as to who decides whether a dispute goes to arbitration or remains in the courts is one of ever greater significance, given the enhanced role that arbitration enjoys in the resolution of disputes, both domestically and in transnational law. This question may arise at different stages. As the present matter illustrates, there may be litigation at the commencement of a dispute as to whether the courts should decide the dispute or whether it should be sent to arbitration. Sometimes, however, the issue crystalizes for the first time before the arbitrators. They are asked to decide whether they enjoy jurisdiction to hear the dispute. The arbitrators may determine the issue. Finally, a court may be called upon to decide whether the arbitrators correctly assumed jurisdiction over the dispute, if the arbitrators' award is taken on review or enforcement proceedings are brought.

[33] There are a large variety of issues that may be raised by a litigant opposing arbitration at the commencement of a dispute. It may be said that the agreement containing the arbitration agreement is invalid or unenforceable, that no arbitration agreement came into existence, that the arbitration agreement is not in writing, that the dispute does not fall within the scope of the arbitration agreement or that the right to arbitration has been waived. This list, although not exhaustive, is simply illustrative. A court faced with issues of this kind will want to steer a course between the discouragement of time-wasting obstructionism and protecting a party from being forced to arbitrate a dispute without their consent.

[34] Two approaches have been adopted by the courts so as to assist in deciding challenges to arbitration that are brought by a litigant at the commencement of a dispute. The first approach is based on separability. Ordinarily, the parties enter into

a contract that contains an arbitration clause. If the challenge is that the contract is invalid, unenforceable, or, as here, the contract never came into existence, then it may appear logical that the arbitration clause must fail, if the contract falls to be impugned. But, that is not inevitably so. The arbitration clause may give expression to the intention of the parties that the question of validity, enforceability or, indeed, the very existence of the main contract, is to be submitted to arbitration. If that is how the arbitration clause is properly interpreted, then the court may be inclined to conclude that the parties concluded an arbitration agreement that is separate from the main agreement. What the parties consented to was that the arbitrators should determine the question of the validity or the existence of the contract, and the court should then give effect to their consent. Absent a direct challenge to the validity or existence of the arbitration clause, the court will in these circumstances require the parties to submit the existence or validity dispute to arbitration.

[35] The other approach is based on the principle of competence-competence also known as 'Kompetenz-Kompetenz' (referring to its German origins), or the principle of 'compétence de la compétence'.[10] This principle has a positive and a negative aspect. The positive aspect is largely uncontroversial. Arbitrators enjoy the competence to rule on their own jurisdiction and are not required to stay their proceedings to seek judicial guidance. The negative aspect of the principle may be formulated as follows. Where the dispute has already been referred to an arbitrator, the court will not rule upon the validity, existence or scope of the arbitration agreement, but will leave these questions

[10] *Kompetenz-kompetenz* is a jurisprudential doctrine whereby a legal body, such as a court or arbitral tribunal, may have competence, or jurisdiction, to rule as to the extent of its own competence on an issue before it. Regarding its German origin, see P Landolt, 'the inconvenience or Principle: Separability and Kompetenz-Kompetenz'. *Journal of International Arbitration* 30, no. 5 (2013): 511-530 at 513, footnote 4: 'This German name for the principle has established itself in English usage. In its original German usage, it designated not the general notion of the arbitral tribunal's powers to come to a determination on its own jurisdiction but a more specific notion, i.e., a variant of the general notion.' Furthermore, E Gaillard and J Savage (*Fouchard, Gaillard and Goldman on International Commercial Arbitration,* Kluwer Law International, The Hague, 1999 at 396-397) explain: 'German legal terminology lends a meaning to the expression which differs substantially from that which the expression is intended to convey when used in international arbitration. If one were to follow the traditional meaning of the expression in Germany, "kompetenz-kompetenz" would imply that the arbitrators are empowered to make a final ruling as to their jurisdiction, with no subsequent review of the decision by any Court. Understood in such a way, the concept is rejected in Germany, just as it is elsewhere. From a substantive viewpoint, the paradox is all the more marked for the fact that in Germany the question of whether the courts should refuse to examine the jurisdiction of an arbitral tribunal until such time as the arbitrators have been able to rule on the issue themselves (the negative effect of the 'competence-competence' principle), has never
been accepted [. . .].'

of jurisdiction for the arbitrator to decide, at least initially. But, even if the dispute has not yet been referred to arbitration, the court may be disinclined to decide the question of jurisdiction, unless the arbitration agreement is manifestly void. Once the arbitrator has ruled and rendered an award, the courts may finally decide any issue of jurisdiction, if the award is brought on review or its enforcement is sought. In this formulation, the principle of competence-competence gives effect to the principle of judicial restraint. The jurisdiction that has most plainly adopted negative competence-competence is the French Code of Civil Procedure.[11]

[36] While the principle of competence-competence is formulated in different ways in different jurisdictions; but it has not been applied by South African courts[12], the principle recognises that courts will be inclined to allow the arbitrator to decide questions of jurisdiction, unless the challenge before the court shows that there is a manifest basis to resist the submission to arbitration. Ultimately, the application of the principle is a matter of timing. It does not vacate the court's ultimate power to determine the question of an arbitrator's jurisdiction, but defers its exercise in favour of allowing the arbitrator to render an award, including an award on the issue of jurisdiction. The principle thus favours the facilitation of arbitration and restricts pre-emptive court challenges to the jurisdiction of an arbitrator, save in the clearest of cases. Given the respect that South African law accords to the autonomy of parties to agree to submit their disputes to arbitration, and in line with s 39(1)(*b*) and (*c*) of the Constitution of South Africa, there is warrant for South African courts, in appropriate cases, to consider the application of the principle of competence-competence[13].

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[11] Article 1458 of the French New Code of Civil Procedure (1981) which reads as follows, 'Whenever a dispute submitted to an arbitral tribunal by virtue of an arbitration agreement is brought before a court of the state, such court shall decline jurisdiction. If the arbitral tribunal has not yet been seized of the matter, the court should also decline jurisdiction unless the arbitration agreement is manifestly void.'

[12] Articles 8(1), 8(2) and 16 of the UNCITRAL Model Law, and Article II (3) of the New York Convention. There is no reported case in South Africa yet on the application of the principle of competence-competence despite a number of academic writings on the principle and its application in foreign jurisdictions. See Kluwer Law International,2005, *International Arbitration Agreements and Competence-competence in International Commercial Arbitration*; Park, WW, *The Arbitrator's Jurisdiction to Determine Jurisdiction*, in Van Den Berg JA(ed), International Arbitration 2006: Back to Basics, ICCA Congress Series, Vol 13, ICCA & Kluwer Law International ,2007 and authorities cited.

[13] Section 39(1)*(b)* and *(c)* of the Constitution of the Republic of South Africa, Act 108 of 1996:
(1) When interpreting the Bill of Rights, a court, tribunal or forum—
…
(*b*) must consider international law; and
(*c*) may consider foreign law.

[37] In *Zhongji*[14], this Court found that the arbitration clause was an agreement distinct from the terms of the agreement of which it formed part. As in the present matter, the arbitration clause referenced the AFSA rules which permitted the arbitrator to decide any dispute regarding the existence, validity or interpretation of the arbitration agreement. The court held that the arbitration agreement must be given effect to and it was for the arbitrator to determine the issues of jurisdiction that had been raised before the high court. *Zhongli* thus recognised and applied the doctrine of separability so as to enforce the arbitration agreement.

[38] What *North East* and *Zhongji* make plain is that the parties have wide-ranging autonomy to agree that matters concerning the validity, enforceability and existence of an agreement shall be referred to arbitration. If they have consented to such a referral, then the courts will respect their agreement and will not decide these matters. It will be for the arbitrators to do so. And this holds good, even though the arbitrators will thereby be deciding upon their own jurisdiction. An arbitration clause may be found to subsist separately from the main agreement of which it forms part, and may thus be enforced, even if there is a challenge to the validity, enforceability or existence of the main agreement. However, where there is a challenge to the arbitration agreement itself, so as to put into question the consent of the parties to have any dispute submitted to arbitration, the court will have to consider how best to deal with that challenge. The court may decide the challenge. But, as discussed above, the court may also decide that it would be preferable to decline the invitation to do so, and under the guidance of the principle of competence-competence, allow the arbitrators the opportunity to first render an award on the question of their jurisdiction.

[39] Turning then to the matter before us, we are in agreement with the second judgment that, on the papers before the high court, there was a thorough-going dispute of fact as to whether the parties had concluded an agreement on the terms of the PSP. Canton's evidence was not perfunctory, and in the face of that evidence, the high court could not, on motion, proceed to decide the matter on the basis of its assessment of the probabilities.

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[14] *Zhongji Development Construction Engineering Co Ltd v Kamato Copper Co Sarl* [2014] ZASCA 160; 2015 (1) SA 345 (SCA) at para 50.

[40] This difficulty is compounded by the failure of the high court to recognise the principles that we have endeavoured to set out above. The PSP referred to the AFSA rules, which recognise the wide jurisdiction of the arbitrator to determine the existence dispute. Canton Trading contended that no agreement was concluded embodying the terms of the PSP, including terms that reference the commercial rules of AFSA. The position set out in the answering affidavit of Canton Trading is that no agreement was reached with the Trust on the terms of the PSP. Hence, there was no submission to arbitrate the 'existence dispute' on the basis of the commercial rules of AFSA that give arbitrators the power to rule on their own jurisdiction, including any dispute as to the existence or validity of the arbitration agreement. The reference to the commercial rules of AFSA forms part of the PSP which Canton Trading contended was never agreed to with the Trust. Once there is a dispute of fact between the parties on this issue, which we find to be so for the reasons fully traversed in the second judgment, the high court was not in a position to simply enforce the commercial rules of AFSA and have the existence dispute determined by an arbitrator under those rules. Whether the arbitration clause in the PSP was intended to constitute a separate agreement that referred the existence dispute to arbitration cannot be determined on the papers. That very matter is disputed on the basis of the contradictory evidence marshalled by the parties. Whether the reference to the commercial rules of AFSA in the PSP indeed constituted a separate agreement that the parties concluded to determine the existence dispute would thus need to be referred to evidence by a court so as to decide the issue.

[41] This is where we part company from the second judgment. The second judgment identifies the dispute of fact between the parties as to whether agreement was reached on the terms of the PSP, but goes on to find that this dispute falls within the remit of the powers given to an arbitrator under the commercial rules of AFSA. We find that where submission to those very rules is disputed, then we cannot refer the 'existence dispute' to an arbitrator under the commercial rules of AFSA because it is disputed, on the basis of evidence adduced by Canton Trading that it consented to any such submission. Put differently, the powers of an arbitrator under AFSA's commercial rules would permit the determination of the existence dispute, if a separate agreement had been concluded between the parties to submit the existing dispute to

such arbitration. But, where there is a dispute on the evidence as to whether such submission occurred, a court may not assume the consent of the parties to a referral which is disputed.

[42] If, as we find, the high court was not in a position to find, in the face of the dispute of fact, that the parties had concluded a separate agreement to refer the 'existence dispute' to arbitration, what should the high court have done then?

[43] Canton Trading contended that the high court fell into error because it determined the dispute as to the existence of the arbitration agreement when the parties had not moved it to do so. This, contended Canton Trading, was an impermissible and unfair exercise of the high court's powers. We do not agree. Once the high court had discerned the dispute of fact as to the existence of the arbitration agreement, provided the parties were given proper notice of the high court's position, there is no abuse of discretion if the court then sought to raise with the parties how best the court should deal with the dispute. However, where the high court fell into error was to undertake an assessment of the probabilities on the evidence before it and then determine that there was an agreement on the terms of the PSP. What was required was a consideration of whether the application was to be dismissed or whether the challenge to the existence of the arbitration agreement would be better determined by way of a referral to evidence and the consideration of the issues of separability and the applicability of the concept of competence-competence.[15] The full court, endorsing as it did the approach of the high court, was also in error when it dismissed the appeal.

[44] For these reasons, the following order issues.

1 The appeal is upheld with costs.

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

'(*a*) The appeal is upheld with costs.

(*b*) The order of the high court is set aside and substituted with the following order:

[15] In line with what is noted in para 36 above.

"The application is remitted to the high court to determine whether the application should be referred to evidence, and if so on what terms, or whether the application should be dismissed".'

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BC MOCUMIE

JUDGE OF APPEAL

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D UNTERHALTER

ACTING JUDGE OF APPEAL

[45] I have read the judgment of my colleagues Mocumie JA and Unterhalter AJA (main judgment). I am grateful for their recital of the background facts, the contentions of the parties and the issues. It will therefore not be necessary for me to repeat them save to the extent necessary for present purposes. The main judgment concludes that the appeal against the decision of the full court be upheld with costs. On the view I take, the appeal should be upheld in part.

[46] Properly distilled, two crisp questions arise for consideration in this appeal. First, whether the high court had a discretion to determine the existence of an arbitration agreement between the parties. Secondly, if it had the discretion, whether that was exercised judicially.

[47] It has always been recognized that an arbitration agreement does not necessarily oust the jurisdiction of the courts.[16] In terms of s 3(2)(*b*) of the Arbitration Act 42 of 1965 (the Arbitration Act) the court may, at any time on the application of any party to an arbitration agreement, on good cause shown, order that any dispute referred to in the arbitration agreement not be referred to arbitration. What is immediately discernible is that there had been no application by any of the parties for

[16] *Universiteit Van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333G.

an order that any of their disputes ought not be referred to arbitration. What was before the high court was an application by Mr Fanti Bekker Hattingh, in his capacity as the trustee of the Qwaha Trust, the respondent (the Trust), to compel Canton Trading 17 (Pty) Ltd t/a Cube Architects, the appellant (Canton Trading), to submit to arbitration. Being an application for injunctive relief, it is apparent that it was not founded on s 3(2)(*b*).

[48] The Trust elected in its papers, having been so legally advised, to formulate a course in respect of which its dispute had to be disposed of in the high court on these terms:

'Lest there be any confusion, the relief referred to *supra* [an order to compel Canton Trading to submit to arbitration] does not constitute relief in terms of which the applicant seeks to have any dispute between the parties which has arisen out of or by virtue of any agreement between the parties adjudicated. The applicant seeks only to compel the Respondent to submit to arbitration to have such dispute(s) adjudicated upon by the forum agreed upon between the parties.'

At para 49 Mr Hattingh, the deponent to the Trust founding papers, states:

'Be that as it may, the enforceability of the arbitration clause constitutes a dispute which falls within the ambit of what the parties contemplated at the time of conclusion of the Professional Service Provider Agreement as a dispute which would be ventilated and adjudicated upon in arbitration.'

[49] Mr Hattingh, in his iteration in reply, stated that the Trust did not move for an order in terms of which the court was asked to make a determination in respect of the existence of the arbitration agreement. Significantly, he said:

'2.3 ...(I)t is generally accepted by the South African Courts that there is no rational basis upon which parties to an agreement will wish to have questions of validity or enforceability of an agreement determined by one tribunal (a Court of Law) and questions of performance arising from the same agreement decided by another tribunal (an Arbitrator or Arbitration Tribunal).

2.4 Furthermore, the applicant has been advised that, in light of an arbitrator's powers to determine his or her own jurisdiction in respect [of] an issue that arises from a referral to arbitration itself, there exists no reason why a dispute about whether or not a claim arising from the Respondents performance in terms of the agreement between the Applicant and the Respondent is indeed arbitrable should not be decided by an arbitrator.

2.5 ….(T)he question whether or not a valid arbitration agreement had been concluded between the Applicant and Respondent falls squarely within the purview and jurisdiction of the proposed arbitrator…

95.1 ….(T)he Applicant clearly and unequivocally stated that the Applicant does not seek to have any dispute between the parties which has arisen out of or by virtue of any agreement between the parties adjudicated in these proceedings.'

[50] In support of its application to compel, the Trust relied on the Joint Building Contracts Committee (JBCC) Series 200 Standard Building Agreement dated 05 February 2014 which the Trust, as the employer, concluded with Royal Anthem Investment 12 CC (Royal Anthem), the contractor (the JBCC agreement). At para 1.2 of the contract data, employer addendum code 2101-EC, Canton Trading was employed as a principal agent. The agreement was signed by all the parties including Canton Trading as the principal agent. In its founding papers the Trust made prodigious recital of the dispute settlement procedures contained in clause 40 of the JBCC agreement which includes adjudication, mediation or arbitration. In my view, the agreement contributes little to its course. The JBCC was to be administered and or enforced by Canton Trading against the contractor on behalf of the Trust. On Canton Trading's version, which is not seriously disputed, clause 40 was applicable to disputes between the employer, the Trust, and its agents (which would include Canton Trading), on the one hand, and the contractor on the other.

[51] More central to the parties' opposing positions is a contract styled an 'Agreement for the Appointment of a Professional Service Provider' (the PSP agreement), allegedly concluded between the Trust, as the contractor and Canton Trading as the service provider. The PSP agreement was drafted by Canton Trading's attorneys and presented to the Trust during March 2014. Neither Canton Trading nor the Trust signed this agreement. Clause 23 of this agreement stipulates, in part, that any dispute arising between the parties with regard to the interpretation of or the effect of or the carrying out of or any other matter arising directly or indirectly out of the agreement (the dispute) shall be referred to a mediator agreed upon between the parties. Where the parties are unable, either to agree on a mediator or to resolve the dispute by way of mediation, within 60 days of the dispute having been raised in writing, then the dispute shall be submitted to and decided by arbitration. Crucially, for

present purposes, it further provides that 'the arbitration shall be conducted in accordance with the Rules and Regulations of the Arbitration Foundation of Southern Africa (AFSA), in force from time to time.' In terms of clause 23.5 the parties shall not be precluded from approaching any court or competent authority for an interdict or other injunctive relief of an urgent nature.

[52] The commercial rules of AFSA, applicable to domestic arbitrations, supplement any specific provisions of an arbitration agreement to arbitrate under the aegis of or according to the rules of the foundation, in so far as such specific provisions are silent on matters provided for in the rules.[17] In terms of sub-article 10.1.2 of the commercial rules:

'(I)n cases where the party cited as defendant disputes that he was a party to the arbitration agreement, or that the arbitration agreement is still valid and binding, or that the claim falls within the terms of the arbitration agreement, (all of which disputes are hereinafter referred to as "jurisdictional disputes"), then (unless the party against whom the jurisdictional dispute is raised, informs the arbitrator that he does not wish to proceed until such dispute has been decided by a court) first decide the jurisdictional disputes, and, if he decides them against the party raising any or all of such disputes, then make a ruling for a period for the delivery of a statement of defence (if not already delivered) and counterclaim, if any, in accordance with 6.1.5, and a statement of defence to any counterclaim in accordance with 6.4, and then proceed as set out below.'

Sub-article 11.2.2 provides that the arbitrator shall have the power:

'(T)o rule on his own jurisdiction, including rulings on any dispute in regard to the existence or validity of the arbitration agreement or the scope thereof.'

[53] In respect of construction arbitrations, if the parties only intend that AFSA appoint an arbitrator from its panel, the 'Unadministered Rules' would apply. Article 23(1) of those rules provides:

'The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the Arbitration Agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is a nullity shall not automatically invalidate the arbitration clause.'

[17] Article 3.3 of the Commercial rules of the Arbitration Foundation of Southern Africa (AFSA).

[54] The high court, in its enquiry, recorded that it became common cause when the application to compel was argued, that the question whether the arbitration agreement was extant had to be considered by the court. The court did so and came to the conclusion that the arbitration agreement was in place. The exercise of this discretion is a contentious issue in this appeal.

[55] When parties agree to refer a matter to arbitration, unless the agreement provides otherwise, they implicitly, if not explicitly (and, subject to the limited power of the high court under s 3(2) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator.[18] When confronted with a jurisdictional objection arbitrators are not obliged forthwith to throw up their hands and withdraw from the matter until a court has clarified their jurisdiction.[19] The hallmark of arbitration is that it is an adjudication flowing from the consent of the parties to the arbitration agreement who define the powers of adjudication and are equally free to modify or withdraw that power at any time by way of further agreement.[20] The remarks by O'Regan ADCJ in *Lufuno Mphaphuli*[21] having considered the international and comparative law are apposite:

'Courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently…'

And at para 236:

'…The international conventions make clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from the terms of the arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes.'

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[18] *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun* (*Pty*) *Ltd* [1993] ZASCA 158; [1994] 1 All SA 453 (A) at 169.

[19] *Radon Projects* (*Pty*) *Ltd v NV Properties* (*Pty*) *Ltd* [2013] ZASCA 83; [2013] 3 All SA 615 (SCA); para 28.

[20] *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (South Africa) (Pty) Ltd and Another* [2002] ZASCA 14; 2002 (4) SA 661 (SCA) para 25.

[21] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC) para 235.

[56] In *Zhongji,*[22] this Court had an occasion to consider whether the high court was correct in, *inter alia*, dismissing an application for a declaratory order that a particular dispute was 'arbitrable', in almost similar circumstances as the present, where the respondent disputed, amongst others, having been a party to the dispute resolution procedures provided for in the main agreement. The parties had also concluded an interim agreement which did not contain dispute resolution procedures. In its amended notice of motion, the appellant sought declarators that, *inter alia*, the respondent was bound by the arbitral regime catered for in the main agreement in relation to disputes in connection with or arising out of the main agreement or the execution of the works thereunder. The main agreement provided that, unless the parties otherwise agree, disputes between the parties 'shall be finally settled under the Rules for the Conduct of Arbitrations as published by the Association of Arbitrators (Southern Africa)'. Rule 12.1 of the sixth edition of the Rules of the Arbitration Association applied. It provided that: 'The arbitrator may decide any dispute regarding the existence, validity, or interpretation of the arbitration agreement and, unless otherwise provided therein, may rule on his own jurisdiction to act.'

[57] In *Zhongji* this Court determined that once the arbitration tribunal had been duly appointed in terms of the main agreement, the rules of the Arbitration Association would give the tribunal itself jurisdiction to decide the issues which may be raised before it, including those which had been raised both in the high court and this Court. That in light of an arbitrator's power to determine his or her jurisdiction there was no reason why the dispute about whether or not the claims arising from the appellant's performance in terms of the interim agreement was indeed arbitrable should not be decided by the arbitration tribunal prior to an application to the high court. It was held that the process of arbitration had to be respected. If the high court were to have pronounced on these issues, it would have acted contrary to the provisions of the arbitration clause by determining issues that are within the auspices of the arbitrator in terms of the arbitration agreement. The arbitration had to be given the opportunity to run its course before the court considers any application relating thereto. Accordingly, the appellant's application to the high court was premature and perhaps unnecessary.

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[22] Fn 13.

[58] Insofar as the PSP agreement was, on the face of it, valid, in particular clause 23 thereof, which expressly sets out the arbitration process, it ought to have been given effect to by the high court. The fundamental error on the part of the high court was to approach the application on the basis that the dispute on the existence of the arbitration agreement meant that the arbitral tribunal had no power to determine its own jurisdiction. In fairness to the high court and the full court, it would appear that the courts' attention was not drawn to the provisions of the rules because none of the courts expressed themselves on the impact which these rules would exert upon consideration of the key question. An arbitration clause embodies an agreement that is distinct from the terms of the agreement of which it forms a part. Sometimes the fact that it is embodied in another agreement may affect its validity because a challenge to the validity of the agreement in which it is incorporated is also a challenge to the validity of the arbitration agreement. In the absence of such a challenge, however, the arbitration agreement must be given effect to in accordance with its terms.[23]

[59] Clause 23 of the purported PSP arbitration agreement read with the rules of the AFSA delineates the powers of the arbitral tribunal, which includes the determination of its own arbitral jurisdiction. The high court ought not to have *mero motu* arrogated to itself the power assigned to the arbitrator. By so doing it interfered with the parties' contractual autonomy allied to the notion of contractual freedom. Based on the interspersed negation of the court's power to interfere, as reflected in the papers, it ought not to have decided the point. On the view I take of this matter, the question whether the high court exercised a discretion and the nature thereof does not arise. Otherwise stated, the high court had no jurisdiction to determine the question.

[60] The effect of an order that the high court had no jurisdiction will be that all the proceedings and orders granted in the application are to be regarded as nullities.[24] In a footnote to *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty)*

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[23] Ibid para 50.
[24] Compare *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (A) at 16A-B which concerns the effect of a recusal application.

Ltd t/a Eye & Lazer Institute[25] the Constitutional Court affirmed this principle as follows:

'In *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* 2012 (3) SA 325 (SCA) the Supreme Court of Appeal, reaffirming a line of cases more than a century old, held that judicial decisions issued without jurisdiction or without the citation of a necessary party are nullities that a later court may refuse to enforce (without the need for a formal setting-aside by a court of equal standing). This seems paradoxical but is not. The court, as the fount of legality, has the means itself to assert the dividing line between what is lawful and not lawful. For the court itself to disclaim a preceding court order that is a nullity therefore does not risk disorder or self-help.'

[61] The full court's conclusion, that the high court 'acted within the parameters of the law', was factually and legally misdirected. This should be dispositive of the entire appeal. However, it would be necessary to turn attention to the second leg of the enquiry which is a self-standing issue for adjudication. The argument and the judgments of the high court and the full court centred around the question whether the high court exercised its discretion judicially. The enquiry on this aspect is conducted on the basis, accepting for argument's sake, that the high court had jurisdiction to determine the question of the existence of the agreement.

[62] A consideration of the question whether the high court exercised its discretion judicially would require a brief analysis of the facts. During the early stages of 2014 the Trust wished to expand the building from which it operated its business. To put this into effect, on 5 February 2014, the Trust concluded the JBCC agreement with Royal Anthem. Canton Trading, a firm of architects, was appointed as the principal agent for the project. During March 2014, a month or so following the signing of JBCC agreement, Canton Trading's attorneys forwarded the PSP agreement to the Trust which, to reiterate, the parties did not sign.

[63] The Trust contends that Canton Trading was negligent in the performance of its duties. On 2 August 2017 it invoked the arbitration clause (clause 23 of the PSP agreement) and caused a letter of demand together with its statement of claim to be

[25] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC) at 512 fn 78.

served upon Canton Trading. In this letter the Trust notified Canton Trading that it declared a dispute in respect of Canton Trading's incompetent execution of its obligations as the principal agent under the JBCC agreement. That in terms of clause 23 of the PSP agreement the dispute had to be referred to mediation failing which arbitration.

[64] During the period stretching from 11 September 2017 to 7 December 2017 an exchange of correspondence between the Trust and Canton Trading's attorneys ensued. The following can be distilled from these letters: the unsigned PSP agreement was forwarded to Canton Trading's attorney who promised to revert on the proposed mediation; the Trust forwarded reminders on the proposed mediation and eventually accepted that Canton Trading resisted mediation; the Trust accordingly suggested that arbitration be commenced forthwith and proposed two names of prospective arbitrators; when this was met with silence on the part of Canton Trading the Trust put a time-frame within which Canton Trading had to revert on the appointment of the arbitrator. Canton Trading's attorneys advised the Trust that it was taking instructions on the appointment and was prepared 'in principle' to proceed to arbitration; Canton Trading agreed to the appointment of the arbitrator.

[65] A pre-arbitration meeting was held on 24 January 2018 out of which several disputes of fact emerged on the papers as regards what was or was not said during the meeting. The Trust attorneys drew-up a pre-arbitration agreement on the basis of what was professed to have been agreed to between the parties during the pre-arbitration meeting. Amongst the issues allegedly agreed to was that Canton Trading would be afforded an opportunity to file its statement of response, that the arbitration would be regulated by the uniform rules of court not those of the AFSA and that the parties would be afforded a right to appeal. Canton Trading is said to have requested that a conditional clause be inserted in the arbitration agreement as follows:

'The arbitration is further subject to the condition that the defendant must obtain the approval/consent of the defendant's insurer (in the event of it being the defendant's version that there is no signed agreement to submit to arbitration) of the arbitration agreement.'

I interpose that where an offer to submit to arbitration is made, the acceptance of the offer must be unconditional and unqualified, failing which there is no proper acceptance and no binding agreement to go to arbitration.[26]

[66] On the Trust's version, the parties performed fully in terms of the PSP agreement and submits that a verbal agreement was reached during March 2014 on the same terms as set out in the PSP agreement. Canton Trading had forwarded its professional fee schedule and invoiced the Trust for services rendered in terms of the PSP agreement. Payment was duly honoured.

[67] Canton Trading, on the other hand, put up an irreconcilable version. It frequently rendered architectural services to the Trust on various projects since 2011 apart from the services rendered during 2014 which form the basis of the present dispute. The relationship was governed by verbal agreements. The PSP agreement, it says, was simply an incomplete template which was made available to the Trust in respect of the project in issue. For instance, the documents containing personnel schedule, the plan setting out the project, the scope of work and the pricing data were never completed. It is undisputed that the fees were negotiated and agreed upon through e-mails during the execution of the project. Canton Trading gainsaid that the parties conducted themselves in accordance with the contents of the document prepared by its attorneys.

[68] Canton Trading avers that even in respect of the previous projects the standard template would be forwarded to the Trust without any written agreement ever being reached between the parties. It intimates that the deponent to the Trust's papers 'is simply not a man interested in paper work and as a result it was never possible to finalise and/or complete a written document with [the Trust] even in respect of the previous projects, [that] is to say, to agree on the terms thereof and/or to finalise and sign same.' No written agreement, it continued, was ever entered into, discussed or considered including an enforceable arbitration agreement in terms of which it could be ordered to submit to arbitration.

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[26] *Raphaely v Stephan* 1915 CPD 6 at 9.

[69] This Court restated the following trite principles in *National Scrap Metal:*[27] Where the high court decides a matter without the benefit of oral evidence, it has to accept the facts alleged by the respondent unless they were so far-fetched, or clearly untenable, that the court is justified in rejecting them merely on the papers. An attempt to evaluate the competing versions of either side is thus both inadvisable and unnecessary as the issue is not which version is the more probable but whether that of the respondent is so far-fetched and improbable that it can be rejected without evidence. More onerous is that the test in that regard is 'a stringent one not easily satisfied'. In considering whether it has been satisfied it is necessary to bear in mind that, all too often, after evidence has been led and tested by cross-examination, things turn out differently from the way they might have appeared at first blush.[28]

[70] The high court recorded that the Trust relied:

'(O)n either verbal or tacit acceptance of the provision of the agreement thereby constituting a verbal agreement the terms of which is reflected in the agreement or at least an oral agreement following from the alleged fact that both parties fully gave effect to the provisions of the written agreement.'

In various parts of its affidavit the Trust appears to be ambivalent about the nature of the arbitration agreement it purportedly concluded with Canton Trading. In para 14 of its founding affidavit the Trust set out the 'salient expressed, alternatively implied, alternatively tacit terms of the verbal PSP agreement. This is reiterated in para 47 as follows:

'The arbitration clause which the applicant places reliance on in casu (*whether in writing or verbal or whether explicit or implied*) clearly delineates that the parties are required to submit to arbitration "any other matter arising directly or indirectly out of, this agreement". The any other matter which is referred to in the applicable clause, will undoubtedly include a dispute as to the validity or enforceability of the agreement and/or the arbitration clause.'

It did not end here, in its reply the deponent state: 'the parties agreed to submit to arbitration in writing in terms of clause 23 ...alternatively, parties agreed verbally to submit to arbitration.'

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[27] *National Scrap Metal (Cape Town) (Pty) Ltd and Another V Murray & Roberts Ltd and Others* [2012] ZASCA 47; 2012 (5) SA 300 (SCA).
[28] Ibid paras 21-22.

[71] The requirement that an arbitration agreement be in writing does not mean that it has to be signed or otherwise executed by both parties to the arbitration. All that is required is that the parties have agreed that the dispute in question, or all disputes of a particular character, be submitted to arbitration, and that agreement has been reduced to writing. Thus, it matters not that the agreement is oral, provided that a written memorial thereof is produced. An oral agreement to arbitrate not reduced to writing is therefore not subject to the provisions of the Act nor are other forms of dispute-resolution proceeding.[29] What is remarkable is that the high court accepted that the Trust verbally agreed or 'at least did so tacitly by giving effect' and performing in terms of the agreement. It is therefore beyond comprehension that it would reject Canton Trading's version as a bare denial.

[72] The high court found it astonishing that Canton Trading, as a professional firm of architects, would accept its task as the principal agent on the basis of a verbal agreement to render services at a reasonable fee. However, on the evidence, the contract pricing data had not been completed and indeed the fees were determined on the basis of e-mails. The high court also questioned the absence of an explanation from Canton Trading why its attorneys made the PSP agreement available to the Trust and had also forwarded agreements in respect of the previous projects. It also remarked that, in its papers, Canton Trading never alleged that the Trust raised an objection to any of the terms of the agreements at any stage during the previous projects.

[73] I strain to fathom how the Trust would take issue with the terms of the agreements submitted when its deponent is said to have been indifferent to any paper work. Canton Trading's case that the parties acted in terms of oral agreements - that the Trust's deponent was 'simply not a man interested in paper work' and that it was never possible to agree on the terms of the agreements and finalise them, was never seriously disputed. It is not uncommon in the business world, particularly where there had been a longstanding beneficial contractual relationship, as in this case, for parties

[29] *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another*. [2014] ZASCA 151; 2015 (1) SA 106 (SCA) para 46.

to conduct their business affairs without a great degree of formality. Harms JA observed:

'Businessmen are often content to conduct their affairs with only vague or incomplete agreements in hand. They then tend to rely on hope, good spirits, *bona fides* and commercial expediency to make such agreements work.'[30]

[74] Much store was set by the high court that Canton Trading's attorney took instructions from his client prior to directing letters to the Trust's attorneys, which conveyed that Canton Trading was prepared to submit to arbitration. Canton Trading says its attorney, upon receipt of the letter of 1 August 2017, which called on parties to submit to mediation on the basis of clause 23 of the PSP agreement, on face value assumed and accepted the accuracy of its contents. Pursuant to this, the attorney sought from the Trust's attorneys and was placed in possession of the PSP agreement. His attention was not drawn to the absence of the requisite signatures on the agreement. At all relevant times, he says, he was under the mistaken impression that there was an agreement entered into and duly signed by the parties. When the attorney directed correspondence to the Trust, including the e-mail of 7 November 2017, for which he was severely criticised by the high court, to the effect that 'Our client is not prepared to mediate. We are taking instructions on the appointment of the arbitrator and we are obviously in principle prepared to proceed with the arbitration process,' he was still labouring under the *bona fide*, but mistaken, belief that the agreement was in place and had not obtained instructions from Canton Trading on the existence of a binding arbitration agreement.

[75] Canton Trading's attorney stated that the correspondence dispatched to the Trust's attorneys were provisional and pragmatic logistics regarding a possible submission to arbitration. A day prior to the pre-arbitration meeting on 23 January 2018, it dawned on him that he had been mistaken about the existence of the arbitration agreement. On 24 January 2018, well after the pre-arbitration meeting by the parties' respective legal teams, Canton Trading says it pertinently instructed its legal team that there was no arbitration agreement entered into or agreed upon. It therefore notified the Trust of its resistance to submit to arbitration.

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[30] *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* [1996] ZASCA 140; 1997 (2) SA 548 (SCA) at 561G.

[76] The statements and conduct of an agent affords no admissible proof of the existence or the scope of his authority.[31] From the correspondence exchanged through the use of the words 'in principle prepared to proceed with the arbitration process', one gains the impression that Canton Trading's attorneys were cautious to make it plain that their client consented or submitted to arbitration. Their request that a condition be inserted in the pre-arbitration agreement that Canton Trading obtain the approval/consent of its insurer concerning the agreement to submit to arbitration, in my view, signifies the indecision. A general mandate by a client to his attorney to attend to a dispute by negotiating with his adversary's attorney is not a tacit authorisation to the attorney to submit to arbitration, nor would the attorney's submission to arbitration be incidental to such a brief.[32]

[77] There is no evidence to controvert Canton Trading's attorney's lack of express authority to consent to the arbitration. Neither is there any evidence to show that he reported to his client the outcome of the negotiations between himself and the adversary's attorney. The criticism levelled against Canton Trading's attorney by the high court, that 'it is unthinkable that an experienced attorney' would take a decision to submit to arbitration without the client's instruction, while it may be justified does not take the matter any further absent evidence showing Canton Trading's express consent. For acts of great prejudice an attorney needs a special mandate.[33]

[78] There was, in this case, intractable disputes of fact not capable of resolution by means of motion proceedings. From the aforegoing limited analysis of the issues raised in the affidavits, it can hardly be said that Canton Trading's version was so far-fetched or untenable that the high court was justified in rejecting it merely on the papers. To reiterate, it is a rare occurrence that the courts would reject the respondent's version on this basis, even if it is improbable in a number of respects, because our courts are always alive to the potential for evidence and cross-

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[31] *Inter-Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industria Ltd and Another* 1979 (3) SA 740 (W) at 750B.
[32] Ibid at 751H.
[33] *Bikitsha v Eastern Cape Development Board and Anothe*r 1988 (3) SA 522 (E) at 527I; *Ras v Liquor Licensing Board, Area No 11, Kimberley* 1966 (2) SA 232 (C) at 237E - 238C.

examination to alter its view of the facts and the plausibility of evidence.[34] The adoption of a robust approach by the high court in disposing the application, in my view, constitutes a material misdirection. Not only is it at variance with the well-established principles applicable to motion proceedings, but it also amounted to a denial of a fair trial of issues. Insofar as the full court found differently it erred and its decision cannot be supported. As I see it, the issues raised would not have merited the dismissal of the application but would have required the leading of oral evidence. In light of my conclusion that it was not open to the high court to decide the issues that fell within the aegis of the arbitral regime the remittal of the matter does not arise.

[79] On the question of relief: it was premature for the Trust to have approached the high court to compel Canton Trading to submit to arbitration because s 15(2) of the Arbitration Act and the rules of the AFSA provide adequate remedies in instances of defaulting defendants. However, Canton Trading's rigid stance, in flatly refusing to submit to arbitration, is problematic. The order prayed for in the notice of motion is that Canton Trading submit to arbitration to have the disputes as set out in the arbitration agreement, which is attached to the Trust's founding affidavit as annexure B, adjudicated. Annexure B is a revised version of the arbitration agreement which the Trust attorneys drafted following the pre-arbitration meeting of 24 January 2018 which, as alluded to, was marred by disputes of fact. It would be undesirable to make an order which compels the parties to attend arbitration on the basis of that agreement.

[80] Evidently, a period of four years has lapsed since the Trust declared the dispute in terms of clause 23 of the PSP agreement with no end in sight. Section 19(*d*) of the Superior Courts Act 10 of 2013 empowers this Court to render any decision which the circumstances may require. The inherently pragmatic approach, actuated by dictates of justice and common fairness to the parties, would be to issue an order which compels Canton Trading to submit to arbitration. I can conceive of no prejudice. However, it would be objectionable to attempt to define the terms of reference for the arbitration. It lies within the domain of the arbitrator and the parties to delineate the issues and the scope of the arbitration process.

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[34] *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* [2016] ZASCA 119; 2017 (2) SA 1 (SCA) para 36; see also *National Scrap Metal (supra)* fn 25 paras 21-22.

[81] For all the above reasons, I would uphold the appeal in part. Save for the costs of the proceedings in the high court and the full court, which the Trust ought to bear, insofar as both parties would have achieved partial success on appeal, I would have made no costs order for the proceedings in this Court.

[82] Accordingly, I would have ordered that:

1 The appeal is upheld in part.

2 Canton Trading 17 (Pty) Ltd, the appellant, is ordered to submit to arbitration.

3 The order of the full court is set aside and in its place is substituted the following:

‘The appeal is upheld with costs.

The order of the high court is set aside and replaced with the following:

“The application is dismissed with costs”.’

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M V PHATSHOANE

ACTING JUDGE OF APPEAL

Appearances:

For appellant:	G F Heyns SC
Instructed by:	VDT Attorneys, Pretoria
	Honey Attorneys, Bloemfontein
For respondent:	P Zietsman SC and R van der Merwe
Instructed by:	P D Yazbek,
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