

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A272/2014

In the matter between:

ZELDA MARGARETHA COSTA N.O.

First Appellant

DANIEL COETZEE N.O.

Second Appellant

JOHANNES NICOLAAS JACOBUS VAN

DER WESTHUIZEN N.O.

Third Appellant

(In their capacity as trustees for the time being of
the Klein Botrivier Trust No. IT 852/2007)

ESTATE OF THE LATE ALBERTO COSTA

Fourth Appellant

and

ARVUM EXPORTS (PTY) LTD (formerly

Unlimited Fruit (Pty) Ltd)

First Respondent

UNLIMITED FRUIT (PTY) LTD (formerly

Arvum Exports (Pty) Ltd)

Second Respondent

ARVUM FINANCE (PTY) LTD

Third Respondent

JUDGMENT DELIVERED 9 MAY 2016

SAVAGE J:

Introduction

[1] This is an appeal against the judgment and orders of the Court *a quo* which enforced the terms of a fruit Supply and Marketing Agreement ('SMA') and a Production Loan Agreement ('PLA') entered into between the late Mr Alberto Costa on behalf of the Klein Botrivier Trust ('KBT') and the respondents, Arvum Exports (Pty) Ltd, Unlimited Fruit (Pty) Ltd and Arvum Finance (Pty) Ltd, associated sister companies carrying on business as fruit supply chain managers, agents and exporters.

[2] The KBT is a family trust founded in March 2007 by the late Mr Costa prior to his murder in February 2011. Mr Costa, his wife Mrs Zelda Costa (the first appellant) and Mr Daniel Coetzee (the second appellant), an independent auditor, were appointed trustees of the KBT from its inception until Mr Costa's

death. Following Mr Costa's death Mr Johannes van der Westhuizen (the third appellant) replaced Mr Costa as a trustee of the KBT. Included amongst the KBT's income and capital beneficiaries were Mr Costa, his wife and children and their descendants, another family trust known as the Alberto Costa Trust ('ACT') and farm managers Mr Christiaan Burger and Mr Matthys Visagie.

[3] In 2007 Portion 0 of the Farm 1022 Klein Botrivier was acquired and registered in the KBT's name as the only asset of the KBT. This land formed part of the farm Botterkloof (which consisted of Portion 10 of the Farm 851 named 'Boter Kloof' owned by the ACT, and that portion of the farm Klein Botrivier owned by the KBT).

[4] Mr Costa was a well-respected farmer who had since 2004 been involved in a business relationship with the respondents, by whom he was known as a man of honesty and integrity, in whom they had '*absolute confidence*' and who they knew to be '*solely responsible for the management and control of farming operations and consequently in effective charge of the Trust's business affairs*'. In 2007 Mr Costa approached Mr Nicolaas Steenkamp, a director of the first respondent, Arvum Exports (Pty) Ltd, with the request that the respondents finance fresh plantings on Botterkloof, which the respondents were made to understand had been acquired or was being acquired through a trust. This approach was made with a proposal that the respondents be appointed supply and marketing agents for the fruit produced on the farm with the first respondent in January 2007 having been granted a South African Plant Breeders' Licence to propagate, exploit and distribute the Flavor Fall varietal exclusively. Negotiations between Mr Costa and the

respondents continued over some time with a draft agreement prepared in February 2008 not being executed. Finally at a meeting on 11 May 2009 the terms of the proposed PLA and SMA were agreed with the respondents undertaking to plant the protected plum variety 'Flavor Fall' on Botterkloof. At this meeting Mr Steenkamp asked Mr Costa to produce a resolution of trustees confirming his authority to act on behalf of the KBT. On 18 May 2009 Mr Costa faxed a resolution dated 8 March 2007 to the respondents following which the PLA and SMA were executed on 12 July 2009. The resolution of 8 March 2007 was signed by the three trustees of the KBT and read as follows:

'...Alberto Costa in his capacity as trustee of the Klein Botrivier Trust IT 852/2007 is hereby appointed and authorized to sign the necessary documentation.'

[5] Under the terms of the PLA the respondents advanced approximately R730 000 to facilitate and enhance production by funding the supply of fruit trees of the Flavor Fall variety which were planted on the KBT's land. The debt was not reflected as a liability in the financial statements of the KBT, ACT or in Mr Costa's personal financial statements. The redemption of the loan was provided for in part by giving the respondents the right to withhold and appropriate certain amounts each year which would fall due on the sale of the fruit crop on Botterkloof which the first respondent was appointed as agent to export, market and sell.

[6] From 12 July 2009 until May 2012 the provisions of the PLA and SMA were implemented in relation to the fruit on Botterkloof. The trees of the Flavor Fall varietal were planted on the farm and approximately 65 000 cartons of

fruit produced were delivered to the respondents and dealt with in terms of the agreements. The respondents paid out approximately R2.5 million under the SMA in respect of fruit received, with more than half of these deliveries and payments made after Mr Costa's death in the 2011/2012 season.

[7] After the death of Mr Costa the respondents took steps to obtain the signature by the trustees of the KBT of the non-propagation agreement in respect of the Flavor Fall varietal planted on the farm, which agreement Mr Costa had, according to the respondents, intended to but '*never got around to*' signing. After Mrs Costa in September 2011 indicated to the respondents that her attorney had advised that signing the non-propagation agreement would put her in breach of the PLA, a meeting was convened on 20 September 2011 between the parties at the offices of the appellants' attorneys. At this meeting the appellants did not raise any issue regarding the validity of the PLA and SMA but sought that particular clauses in the agreements be clarified. After the meeting the appellants' attorney, Mr Johannes Spamer, emailed the respondents recording that:

'...It was important for Zelda to receive confirmation from you on behalf of Fruits and Arvum of the spirit of the agreements concluded between the Trust and Fruits/Arvum and your willingness to amend the agreements to reflect the spirit and to record the same in clear terms.

We appreciate the investment that Fruits and Arvum made and Zelda appreciate (sic) the relationship, however, explained and appreciated by yourself, Alberto had a very different and personal style in his relationships and understanding which Zelda does not share and it is

important for her to make sure that the parties' understanding is correctly recorded - the responsibility of the business now being squarely on her shoulders...

We appreciate your confirmation that Fruits is committed to obtaining the price bands as set out in the Agency and Marketing agreement and that it is and was intended by Fruits that their commitment will guarantee the price - it ensures peace of mind on Zelda's part knowing that she can depend on your commitment and if you do not meet that commitment to her business, that she would be entitled to look at Fruits with damages and cancellation. The performance on the part of Fruits is as important to Zelda as her commitment to you and your investment in the Trust is. It is also reassuring to Zelda that the penalty clause, clause 11, will not serve to penalise her where there are vis major or where poor farming practice and accidents preventing her from meeting the estimated crop forecast.'

[8] Mr G J "Riel" Malan of the respondents replied the following day via email clarifying that he *'did not commit to change anything in the contracts that are in place. As you know – we have no reason to'*. He stated that the respondents were nevertheless willing to consider the signature of an addendum to the existing agreements and reiterated that the signature non-propagation agreement was required.

[9] In March 2012 Mrs Costa informed the respondents that Mr Costa's farming business was now being conducted by the trustees of ACT. On 2 May 2012, in response to rumours he had heard regarding the sale of the farm, Mr

Malan emailed Mrs Costa. No response was received until 17 May 2012 when the appellants' attorneys wrote to the respondents indicating that it was only in September 2011 that Mrs Costa had become aware of the PLA and SMA. The letter continued:

'...Our investigation into the validity of the agreements has revealed that the other two trustees at the time were unaware of the transactions contained in the agreements. Mr Costa did not inform his co-trustees of the agreements and the Trust did not authorise Mr Costa to enter into the agreements or to sign documents for and on behalf of the Trust. The resolution which you provided to Mrs Costa last year with the agreements as proof of the late Mr Costa's authority to enter into the agreements, predates the agreements by some two ... years and does not relate to these transaction.

In these circumstances the agreements are void ab initio and the Trust is not bound by the same.'

[10] On 28 June 2012 the respondents' attorneys replied that the respondents had *'throughout acted on the belief and understanding that valid agreements'* existed and had performed in terms of these agreements over a three-year period.

[11] After no amicable resolution of the matter was reached, on 5 October 2012 the respondents approached the Court seeking urgent interim relief declaring the PLA and SMA to be binding on the KBT; interdicting and restraining the KBT from transferring possession of, disposing of or

commercially exploiting any of the fruit, trees, bud stock, root stock or other vegetative matter of the Flavor Fall variety; and directing the KBT to deliver to the respondents the certain fruit in respect of the 2012/2013 stone fruit season and subsequent years for the duration of the SMA. An interdict was also sought to prevent the KBT from selling, delivering or dealing with any plum or nectarine stone fruits referred to in the SMA in contravention of the plant breeders' rights for the Flavor Fall varietal. In his founding affidavit Mr Steenkamp as a director of the first respondent recorded that as part of the process of executing the agreements Mr Costa had indicated that he was authorised to represent the KBT and provided the respondents with a copy of the 8 March 2007 resolution.

[12] In opposing the respondents' application, Mrs Costa filed an answering affidavit together with unsigned confirmatory affidavits of Mr Coetzee and Mr Van der Westhuizen. No trust resolution recording a decision of the KBT to oppose the application was produced. Mrs Costa denied that she had been aware of the PLA and SMA prior to September 2011 in spite of her role in attending to the administration of the KBT and claimed that Mr Steenkamp was '*lying*' when he alleged differently in the founding papers. The KBT, according to Mrs Costa, had been formed to acquire the farm Klein Botrivier. Its only asset was the land, its only business that of renting the farm Klein Botrivier to Mr Costa and its only source of income the rental income paid to it by Mr Costa (and later the ACT) who conducted his farming operation on the farm. She stated that the respondents did not supply trees to the KBT but to Mr Costa, who undertook the farming operation in his own name, and that Mr

Costa and the ACT had possession or control of fruit and not the KBT. The respondents had conducted business with Mr Costa in his personal capacity when he farmed on the farm Botterkloof before the formation of the KBT, had received invoices from him and made payments into his personal bank account. It was stated further that Mr Costa lacked either actual or ostensible authority to sign the PLA and SMA on behalf of the KBT and the 8 March 2007 resolution provided to the respondents had been '*passed to authorise Alberto to sign bank documents when the KBT purchased the farm Klein Botrivier*'. Mr Costa was not able to make decisions for or on behalf of the KBT without the authority of the trustees, the other trustees were not aware that he had provided the resolution to the respondents or signed the PLA and SMA and that the authority to sign documentation did not equate to authority to conclude binding juristic acts. In addition, Mrs Costa disputed the respondents' *locus standi* to seek to enforce the plant breeders' rights in relation to the Flavor Fall varietal planted on the farm and denied that there had been any threatened or actual infringement of the plant breeders' rights.

[13] Subsequent to the filing of Mrs Costa's answering affidavit, the respondents' notice of motion was amended to seek in the further alternative, in the event of it being held that the agreements were not binding on the KBT for want of authority to bind the trust, an order declaring that Mr Costa breached his warranty of authority to represent the trust in concluding the agreements. The respondents contended that the appellants sought to hide behind the supposedly separate identities of Mr Costa, the KBT and the ACT

and that if Mr Costa lacked actual authority to execute the PLA and SMA, he held the ostensible authority to do so.

[14] The matter came before a single judge in this division on 23 November 2012 who referred two issues to oral evidence:

1. whether the late Mr Costa was authorised to conclude the PLA and SMA on behalf of the KBT; and
2. assuming he had not been so authorised, whether the KBT should nevertheless be held to be bound by PLA and SMA by reason of any pertinent abuse of the trust form by Mr Costa and/or Mrs Costa and Mr Coetzee.

[15] In June 2013 Mrs Costa, on behalf of the KBT, brought a counter-application in which an urgent declaration was sought that the SMA and PLA had been validly cancelled and were of no force and effect; that the interim order made on 23 November 2012 had lapsed due to the respondents' failure to comply with the time limits provided for discovery, alternatively that it be varied on the basis of changed circumstances. After the matter was determined not to be urgent, it was ordered that the counter-application be heard together with the issues referred to oral evidence.

[16] The parties agreed that the issues to be determined at the hearing of oral evidence were:

1. whether Mr Costa had actual or ostensible authority to enter into the two agreements and if not, whether the KBT was nonetheless bound by the agreements as a result of an abuse of

the trust form;

2. if Mr Costa was not authorised and the KBT is not bound, whether Mr Costa breached his warranty of authority;
3. whether if the KBT was bound by the SMA and PLA, whether the agreements have been validly cancelled by the KBT or should be enforced;
4. if the SMA is void or not binding on the KBT, whether the respondents are entitled to the interdictory relief in respect of the removal, delivery and/or destruction of the Flavor Fall varietal; and
5. costs.

[17] At the hearing on these issues three witnesses testified: Mr Burger for the respondents; and Mrs Costa and Mr Coetzee for the appellants. The evidence showed that the resolution of 8 March 2007 was the only resolution of the KBT of general import signed by all three trustees. It had been telefaxed to the respondents from the home shared by Mr and Mrs Costa when the respondents had sought from Mr Costa proof of authority to contract on behalf of the KBT and Mrs Costa had sent the same resolution to Absa Bank in 2009 for a different purpose. Also shown was the fact that no minutes or trust resolutions existed in respect of a number of KBT transactions.

[18] The Court *a quo* determined that on the probabilities Mr Costa had actual authority to contract with the respondents on behalf of the KBT but that in any event, at the very least, ostensible authority had been established. Mrs

Costa and Mr Coetzee were found to have left Mr Costa '*armed with the resolution, to have free reign over the business affairs of the KBT*' and the respondents acted reasonably on the representation made by Mr Costa that he had authority to contract on behalf of the KBT. The authority conferred by the resolution, which was never revoked by the trustees, did not restrict Mr Costa to the signature of particular documents and Mr Costa signed the agreements on behalf of the KBT. The KBT was found to be bound by the PLA and SMA and to have been in breach of the agreements since its repudiation of the PLA and SMA in May 2012. The cancellation of the agreements by the KBT was determined to be invalid in there was no proven breach of such agreements by the respondents. Furthermore, the KBT was found to be in *mora* since May 2012 given its refusal to deliver all of the fruit to the respondents that it was obliged to in accordance with the terms of the SMA. As a result, the KBT was not entitled to cancel the agreements on the basis that a party in *mora* may not exact performance by the other, or cancel, until it has cured its breach. The Court *a quo* found that the respondents were excused from making any performance which would require the cooperation of the KBT. In addition, effect was given to the terms of the non-propagation agreement with relief granted against the appellants in their personal capacities and the appellants' counter-application was dismissed.

Discussion

[19] It is trite that a trust is not a legal person unless statute provides otherwise,¹ being an accumulation of assets and liabilities that form the separate entity of a trust estate. Its estate vests in the trustees who are required in their administration of the estate to exercise fiduciary responsibility over it on behalf of and in the interests of another.² Given its lack of legal personality, a trust can only act through its trustees in the manner specified in the trust deed and, unless the contrary is stated in the trust deed, the trustees must act jointly if the trust estate is to be bound by their acts.³ While the primary responsibility for ensuring compliance with the formalities of the trust deed and the authority conferred by it lies with the trustees,⁴ an outsider dealing with a trust has a manifest interest in ensuring that trustees have authority to act.⁵

[20] While clause 6.2.10 of the KBT trust deed empowers the trustees to institute or defend legal proceedings, clause 5.3 requires that:

‘Tensy spesifiek andersins bepaal in hierdie trustakte, sal besluite wat die trustees neem, geskied by wyse van ‘n gewone meederheid van die stemme van trustees teenwoordig op ‘n vergadering.’

[21] Where a decision is not taken at a meeting, clause 5.5 entitles all trustees to sign a decision taken in writing even if in more than one document.

¹ *Commissioner for Inland Revenue v MacNeillie’s Estate* 1961 (3) SA 833 (A) 840D-H; *Commissioner for Inland Revenue v Friedman* NO 1993 (1) SA 353 (A) 370E-I.

² *Land & Agricultural bank of SA v Parker and another* 2005 (2) SA 77 (SCA) at para 20.

³ *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk*

⁴ 2005 (2) SA 77 (SCA) at para 12. Parker at para 33.

⁵ *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) at para 24. *Standard Bank of South Africa Ltd v Koekemoer* case number 73/03, judgment of 27 May 2004, para 12

[22] Although decisions of a trust must be taken in accordance with the provisions of the trust deed, the law of agency permits trustees, subject to the terms of the trust deed, expressly or impliedly to authorise someone to act on their behalf and that person may be one of the trustees.

*'...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.'*⁶

[23] Authority to act may be actual or ostensible subject to the provisions of the trust deed. It is expressed when it is given by express words, such as the resolution passed by trustees authorising one of the numbers to sign documents. It is implied when it is inferred from the conduct of the parties in circumstances such as when a representation is made by words or conduct that the agent had authority to act, when the representation is made in a form which reasonably leads to outsiders acting on the strength of it and place reliance on it and when the reasonableness of that reliance leads to resultant prejudice being caused.⁷ Where there is no challenge raised in the pleadings to the authority of a trustee to act (such as is the case on appeal in relation to Mrs Costa's authority to litigate) it must be accepted that the requisite

⁶ *Nieuwoudt and Another NNO v Vrystaat Miele (Edms) Bpk* 2004 (3) SA 486 (SCA) at para 23.

⁷ *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and others* 2002 (1) SA 396 at para 26 citing *Hely-Hutchinson v Brayhead Ltd and another* 3 All ER 98 at 102A.

authority existed even in spite of the absence of a resolution to prove such authority.⁸

[24] The resolution provided to the respondents by Mr Costa authorised him as a trustee to sign '*the necessary documentation*' with no specific reference made to the PLA or SMA, nor to '*the*' documentation referenced in the resolution. Mrs Costa's claim that the resolution had been passed to enable Mr Costa to sign the documents to take transfer of the farm was not supported by the fact that on the same day a resolution empowering Mr Costa to sign the necessary documentation to take transfer of the farm had been signed by trustees. Furthermore, Mrs Costa did not dispute that the same resolution provided by Mr Costa to the respondents had on a different occasion been provided to Absa Bank for a different purpose. In so doing it is apparent that the resolution relied upon by Mr Costa had been used previously as a resolution of general import to facilitate trust business.

[25] Counsel for the appellants sought to rely on the decision of the Supreme Court of Appeal in *Niewoudt NO v Vrystaat Mielies (Edms) Bpk*⁹ in which a clause in a trust deed was found to apply only to the signing of documents for official purposes. In that matter the relevant clause provided that:

'23.4 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

⁸ *Ganes and another v Telecom Namibia Ltd* [2004] 2 All SA 609 (SCA) at para 19. See too *Eskom v Soweto City Council* 1992 (2) SA 703(W) at 705C-J.

⁹ 2004 (3) SA 486 (SCA) at para 10.

trust se sake verband hou, nodig is, namens die trustees te teken.'

[26] The facts of *Nieuwoudt* are however distinguishable from the current matter in that clause 5.5 of the KBT trust deed, which provides that a written decision signed by all trustees has the same force and effect as if such decision was taken at a duly constituted meeting of trustees, does not limit such decision to official documents only. In this respect the trust deed considered in *Nieuwoudt* and the terms of the KBT trust deed are distinct.

[27] The evidence shows that Mr Costa was the central figure in the establishment, structure and operation of the KBT, the ACT and the Botterkloof farm. The vehicle of the family trusts he had created was used by him in circumstances in which he and his wife were both trustees and simultaneously among the principal beneficiaries of the KBT. Mr Costa farmed the land which was owned by the KBT, notionally renting from the KBT and the ACT those portions of the land owned by each trust although he paid no rental to either trust with the 'rental' income allegedly earned by the KBT paid to Mr Costa as a 'rental distribution received'. No resolution of the KBT authorised the rental of the farm by Mr Costa or the payment of the rental distributions to him.

[28] Mr Coetzee, the third trustee of the KBT, confirmed in evidence that it was accepted by trustees that Mr Costa could sign documentation on behalf of the trust and that Mr and Mrs Costa were entitled 'on their own' to make use of the resolution which Mr Costa had provided to the respondents. In her evidence Mrs Costa conceded that the authority conferred by the resolution

did not restrict Mr Costa to sign particular documents and that no other resolution of general import authorised Mr Costa's signature of documents on behalf of the KBT, including the transactions he undertook to apply for the KBT's VAT registration and for loan finance to acquire the property.

[29] The VAT paid by the KBT on the purchase price of the farm was paid out to Mr Costa without any resolution passed authorising this distribution to him. All contracts were kept at the home of Mr and Mrs Costa from where Mrs Costa undertook the trust administration. No trust minutes were kept and with 500 clients Mr Coetzee accepted that he was not part of the day-to-day activities of the trust but would be approached regarding trust decisions Mr or Mrs Costa wished to take and was prepared to give effect to their wishes.

[30] Mr Costa represented to the respondents that he had authority to conclude the PLA and SMA by indicating as much verbally and through his conduct, providing the respondents on request with proof of such authority in the form of a copy of the 8 March 2007 resolution. This resolution on the face of it gave him express authority to act on behalf of the other trustees of the KBT and led the Court *a quo* to find that actual authority existed with the result that the agreements concluded were determined to be binding upon the KBT. trustees conferred the necessary authority on Mr Costa to undertake the juristic acts that he did binding the KBT.¹⁰

[31] In *Hely-Hutchinson v Brayhead Ltd and Another*,¹¹ which has been

¹⁰ Kerr *Law of Agency* 4th ed (LexisNexis Butterworths, Durban 2006) at 27.

¹¹ [1968] 1 QB 549 (CA) at 583 A-G.

incorporated into our law,¹² Lord Denning MR explained the concepts of actual and apparent authority as follows:

'[A]ctual authority may be express or implied. It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it. Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by

¹² See *NBS Bank* (supra); *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd* 2012 (5) SA 323 (SCA); and *Glofinco v Absa Bank* 2002 (6) SA 470 (SCA).

saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation...'

[32] Actual authority and ostensible or apparent authority are the opposite sides of the same coin.¹³ From the terms of the resolution of 8 March 2007, which resolution had not been revoked by the trustees, Mr Costa had been granted authority to sign documentation on behalf of the KBT. Mrs Costa accepting in evidence that this authority was not limited to particular documents. As much was borne out by not only Mr Costa's conduct but also by Mrs Costa's own use of the same resolution and by Mr Coetzee's admission that the resolution could be used by Mr or Mrs Costa.

[33] It is so that a third party is not entitled to assume, merely from the fact that one trustee can be authorised to exercise the powers of all of them, that such authorisation has been given.¹⁴ At the same time our Courts have held that trusts are to function in accordance with principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them in a manner that ensures that the trust form is not abused.

¹³ *Makate v Vodacom (Pty) Ltd* (CCT52/15) [2016] ZACC 13 at para 45.

¹⁴ *Chevron Engineering (Pty) Ltd v Nkambule and others* 2004 (3) SA 495 (SCA) at para 22.

As was stated by Cameron JA in *Land & Agricultural Bank of SA v Parker and others*¹⁵:

'The courts have the power and the duty to evolve the law of trusts by adapting the trust idea to the principles of our law (Braun v Blann and Botha NNO and another).¹⁶ This power may have to be invoked to ensure that trusts function in accordance with principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them.¹⁷ This could be achieved through methods appropriate to each case.

[37.1] As mentioned earlier, within its scope the rule that outsiders contracting with an entity and dealing in good faith may assume that acts performed 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, may well in suitable cases have a useful role to play in safeguarding outsiders from unwarranted contestation of liability by trusts that conclude business transactions.

[37.2] The inference may in appropriate cases be drawn that the trustee who concluded the allegedly unauthorised transaction was in fact authorised to conduct the business in question as the agent of the other trustees. (In Nieuwoudt, the matter was sent back for evidence to be heard on how the farmer there

¹⁵ 2005 (2) SA 77 (SCA) at para 37.

¹⁶ 1984 (2) SA 850 (A) at 859F-G.

¹⁷ Compare Van Coppenhagen J in *Vrystaat Mielies (Edms) Bpk v Nieuwoudt en 'n ander NNO* 2003 (2) SA 262 (O) at para 12.

conducted the ordinary business of farming without being authorised thereto by his wife, the other trustee.) Such an inference may in a suitable case be drawn from the fact that the other trustees previously permitted the trustee or trustees in effective charge of affairs free rein to conclude contracts. A close identity of interests between trustee-beneficiaries, as in most family trusts, may make it possible for the inference of implied or express authority to be more readily drawn.

[37.3] It may be necessary to go further and extend well-established principles to trusts by holding in a suitable case that the trustees' conduct invites the inference that the trust form was a mere cover for the conduct of business 'as before', and that the assets allegedly vesting in trustees in fact belong to one or more of the trustees and so may be used in satisfaction of debts to the repayment of which the trustees purported to bind the trust. Where trustees of a family trust, including the founder, act in breach of the duties imposed by the trust deed, and purport on their sole authority to enter into contracts binding the trust, that may provide evidence that the trust form is a veneer that in justice should be pierced in the interests of creditors.'

[34] Mr Costa presented the respondents with the resolution which authorised his signature of 'the' documentation on behalf of the KBT. This resolution evidenced his express authority, even in spite of its reference to 'the' documentation and the date of such resolution. It is of relevance that Mr

Costa provided the resolution to the respondents in response to their request that he evidence his authority and that he conducted himself in accordance with this authority, not only vis-à-vis the respondents but in relation to other third parties. Furthermore, no other resolution of general import was used by Mr Costa or the trustees of the KBT in undertaking transactions on behalf of the KBT. As trustees and beneficiaries of a family trust Mr and Mrs Costa had a close identity of interests, with Mr Coetzee informed of the decisions Mr and Mrs Costa wished to make relating to the KBT. In addition, Mrs Costa undertook the KBT's administration and used an office at their home to do so, keeping all relevant documentation relating to the KBT at this office which support a conclusion that she was aware of the agreements signed and of the resolution having been provided by Mr Costa to the respondents to prove his authority to do so.

[35] The probabilities do not support a conclusion that the PLA and SMA were entered into between the respondents and Mr Costa in his personal capacity in the course of his farming business. This is so given that the trees of the Flavor Fall varietal supplied were planted on land owned by the KBT, as a consequence of which the trustees of the KBT held a direct interest in the benefits which accrued from 2009 to the KBT under the terms of agreements and flowing from the planting of the trees on the trust's land. Given this fact, it is material that had the trustees not granted to Mr Costa the authority to enter into the PLA and SMA with the respondents, they did not raise this until 2011. Mrs Costa's role in the administration of the KBT and her relationship to Mr Costa, make this failure even more remarkable. Having regard to all of these

circumstances, the finding of the Court *a quo* cannot be faulted that on the facts if actual authority did not exist, ostensible authority certainly did.

[36] In May 2012 when the PLA and SMA were purportedly cancelled there was no evidence of a proven breach of the agreements by the respondents. It follows that the purported cancellation of the PLA and SMA by the appellants was invalid and that from this date the KBT was in *mora*. The appellants' contention that the performance required of the respondents was to make payment to the KBT in respect of fruit already delivered and that such payment was not dependant upon KBT continuing to supply fruit to the respondents is without merit. A party in breach of the terms of an agreement is not entitled to exact performance by the other party, nor cancel, until it had cured its breach.¹⁸ Given the breach of the agreements by the appellants the respondents were excused from making any performance that would require the cooperation of the KBT.

[37] In respect of the relief sought by the respondents relating to the plant breeder's rights, the Court *a quo* correctly concluded that the respondents had provided the KBT with a certificate of plant breeder's rights which indicated Zaiger's Inc. Genetics as the registered holder of the rights in respect of the Flavor Fall variety. The respondents were shown as the authorised agent and licensee granted exclusive rights to exploit the Flavor Fall variety in South Africa. There was no dispute that the KBT owned the property on which all the Flavor Fall trees had been planted, in compliance with the terms of the PLA. In terms of s 23 read with s 23A of the Plant Breeders Act 15 of 1976, the KBT

¹⁸ Van der Merwe et al Contract: General Principles (5th ed) at 323

was precluded from producing, marketing or selling the variety other than by way of a prior licence under s 25 or s 27 of the Act. The respondents accordingly held the necessary *locus standi* to enforce the plant breeder's rights and consequently were entitled to the interdictory relief sought. With only certain aspects of the relief in relation to the plant breeders' rights sought in the alternative in the event that the SMA was found to be void or not binding on the KBT, the Court *a quo* did not misdirect itself in the manner it approached the issue.

[38] In making an order of specific performance against the trustees of the KBT in their personal capacities the Court *a quo* relied on this as '*one of those unusual cases where wider relief, in order to ensure compliance*' in circumstances in which there had been no objection raised to this (amended) relief. An order made against the trustees of the KBT in their personal capacities was not warranted on the facts of this case. As a general rule a trustee is sued in his or her official capacity save for limited circumstances in which a trustee may hold himself or herself out to undertake personal responsibility or where personal liability is incurred for example as a result of wrongful conduct or arising from a breach of trust.¹⁹ Holding the trustees in their personal capacities to be liable anticipates the failure on the part of the trustees of the KBT to comply with their official obligations as such under the terms of the order of Court in circumstances in which contempt proceedings provide an appropriate mechanism to enforce compliance with the order were there to be none. It follows that save for setting aside that part of the orders of

¹⁹ Honore's South African Law of Trusts (5th ed) at 29.

the Court *a quo* made against the appellants in their personal capacities, the appeal falls to be dismissed.

[39] There is no reason as to why the costs of this appeal should not follow the result with such costs to include the costs of two counsel.

Order

[40] In the result, I propose that an order is made in the following terms:

1. Subject to paragraph 2 below the appeal is dismissed with costs, including the costs of two counsel.
2. Paragraphs 2, 3, 4 and 5 of the orders of the Court *a quo* are altered only to the extent that the word 'personally' as it appears in each paragraph is removed and substituted with the words 'in their official capacities'.

K M SAVAGE

Judge of the High Court

I agree and it is so ordered.

YEKISO J

JUDGE OF THE HIGH COURT

VELDHUIZEN, J

[1] I have read the judgment of Savage J but, unfortunately, do not agree with her conclusion. These are my reasons. Her judgment contains the history of the matter and I do not find it necessary to repeat it.

[2] It is settled law that trustees of a trust must act jointly unless the trust deed provides otherwise.²⁰

[3] Therefore, in an application or action where a contract allegedly entered into between the claimant and a trust is relied on the starting point must be the trust's trust deed. Clause 5.3 of the KBT trust deed provides:

'Tensy spesifiek andersins bepaal in hierdie trustakte, sal besluite wat die trustees neem, geskied by wyse van 'n gewone meederheid van die stemme van trustees teenwoording op 'n vergadering.'

[4] The applicants relied on a resolution dated 8 March 2007 as authority for Mr Costa to have entered into the PLA and SMA agreements. This

²⁰ *Niewoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 493 (SCA); *Land and Agricultural Development Bank of SA v Parker* [2004] 4 All SA 261 (SCA)

resolution, which was signed by all three the trustees for the time being, reads:

'...Alberto Costa in his capacity as trustee of the Klein Botrivier Trust IT 852/2007 is hereby appointed and authorized to sign the necessary documentation.'

[5] The trial judge found that this resolution constituted actual authority for Mr Costa to enter into the agreements. I do not agree. Although trustees may appoint someone to act on its behalf, it is clear to me that the resolution relied upon by the respondents could never have been brought into existence for the purpose of empowering Mr Costa to conclude all and any agreements on behalf of the trust and more especially the entering into the PLA and SMA agreements. It is significant that these agreements were only entered into more than two years after the resolution had been taken. This fortifies my view that the resolution was given for a different purpose and was not to serve as a general mandate to enter into agreements on behalf of the trust. The plain language of the resolution, in any event, simply authorizes Mr Costa to sign 'the necessary documentation'. It refers to specific documentation and not all or any documentation. It is not a general authority empowering him to conclude agreements on behalf of the trust.

[6] The trial court also concluded that, should the resolution not constitute actual authority, Mr Costa had ostensible authority to

enter into the agreements on behalf of KBT. This was not the case made out by the respondents in their founding affidavit.

[7] In the founding affidavit Mr NJ Steenkamp stated:

'25. I in any event had every reason to believe – quite apart from the content of the resolution itself – that Alberto did have the authority of his co-trustees to contract on behalf of the Trust and no reason to think that he was misleading in that regard. As I have stated above, Alberto was solely responsible for the management and control of the farming operations and consequently in effective charge of the Trust's business affairs. In all the years I dealt with Alberto and the Trust, all its affairs and dealings were conducted with Alberto, and that included monetary and financial matters, contracts etc.'

[8] One must distinguish between the day-to-day running of farming operations and the entering into of agreements on behalf of the trust. Steenkamp states that Mr Costa attended to 'financial matters, contracts etc.' but does not give any facts to support this statement. In this matter, we know that Mr. Costa leased the farm from the trust and it is therefore not surprising that he would have attended to the day-to-day management of the farming

operations. Without more information that does not justify the inference that he has authority to enter into all and any agreements on behalf of the trust. This much the respondents must have realized. Why else would they insist on a written resolution authorizing Mr. Costa to enter into the PLA and SMA agreements?

[9] After Mr. Costa's death correspondence followed between the parties' attorneys. I find the letter of the respondents' attorney dated 28 June 2012 significant. This letter sets out the history and then continues as follows:

'In dealing with the above and so as to present our clients view on the position we find ourselves in we need to distinguish between the two agreements:

1. For present purposes, and if accepted that no resolution existed authorising Mr. Costa to enter into the Loan agreement, such agreement was indeed void *ab initio*.
2. As far as the SMA is concerned we also accept the fact that no resolution exists authorising Mr Costa to enter into such agreement on behalf of the Trust. That would then potentially also lead thereto that the agreement be void *ab initio*. This however is not necessarily the case. You will note from the agreement that although it clearly was envisaged that the parties would be out client Unlimited

Fruit contracting with the Trust the late Mr Costa, on signing the agreement, added his own name in his own handwriting so as to be one of the contracting parties. The typed reference to the Trust was not deleted.

3. In light of the aforementioned it stands to be reasoned that the contracting parties therefore were either Alberto Costa and the Trust jointly and our client Unlimited Fruit or, as the surrounding facts suggest, the intention was that Alberto Costa altogether replaced the Trust as the party contracting with Unlimited Fruit.
4. Up and until March 2011 the relationship in respect to the SMA was between Unlimited Fruit and Alberto Costa personally. All payments were made to Mr Costa directly into his bank account and there was no question of the involvement of the Trust at all.'

[10] It appears that, at least insofar as the SMA is concerned, the respondents themselves did not regard the trust to be a party thereto.

[11] We do not here have to do with a party who did not appreciate the requirement for the entering into of a contract with a trust. The respondents' employees knew full well that a trust resolution was required before they could enter into a binding

agreement with it. Not only was the resolution presented to them by Mr. Costa more than two years old but it also could not have conveyed to them that it constituted authority for Mr. Costa to enter into the agreements.

[12] It is my conclusion that no binding agreements between the trust and the respondents came into being. For this reason, the respondents' claims should have been dismissed.

[13] It follows that the applicants claim for cancellation of the contract(s) was ill founded for the reason that there were no contracts in existence to cancel. I agree that their claim for cancellation, was rightly dismissed although for different reasons.

[14] This brings me to the interdictory relief that was granted. The requirements for a final interdict was laid down in *Setlogelo v Setlogelo* 1914 AD 221 at 227. An applicant must show the existence of a clear right; that an injury had been committed or is reasonably apprehended; and the absence of any other satisfactory remedy.

[15] I am prepared to accept that the respondents have shown that they have a clear right to the Flavor Fall plums and

nectarines varietal. The difficulty I have is with the second requirement. This requirement received very little attention in the trial court's judgment. I could find no evidence that the appellants were infringing the respondents' rights or intended to do so. In my view the respondents had failed prove the second requirement for a final interdict and the trial court erred in granting it.

[16] In the result I would make the following order: the appellants' appeal:

- (a) in respect of the main application is upheld with costs including the costs of two counsel and the orders of the trial court is replaced with the following order:
 - (i) The applicants' applications are dismissed with costs including the costs of two counsel;
- (b) in respect of the interlocutory application, is dismissed with costs.

A.H. VELDHUIZEN, J

JUDGE OF THE HIGH COURT

