



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: 29564/2022

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: NO
15 November 2023	
DATE	SIGNATURE

In the matter between:

MARTHINUS JACOBUS BEKKER N.O

1st Applicant

PHAHLAPHAHLA HUMPHREY LEBEPE N.O

2nd Applicant

In the capacities as Joint Liquidators of Florenza
Proprietary Limited (*In Liquidation*)

and

L AND J GEMMEL PLANT SERVICES (PTY) LTD

Respondent

JUDGMENT

Coram NOKO J***Introduction***

[1] The applicants brought an application to set aside payment of the sum of R2 072 605.00 paid by Diesel Power Opencast Mining (Pty) Ltd (*Diesel Power*) on behalf of Florenza (Pty) Ltd (in Liquidation) ("*Florenza*") in favour of the respondent. The payments were paid at the instance and request of Florenza to discharge its indebtedness to the respondent. Diesel Power paid the aforesaid amounts in discharge of its indebtedness to Florenza. The applicants seek to set aside that payments as it is considered a void disposition in terms of section 341(2) of the Companies Act 61 of 1973.¹

Background.***Agreements between the parties.***

[2] As a way of background there are three contracts entered into between different parties relevant to this *lis*. The first agreement was entered into between Anglo-American (*Anglo*) and Diesel Power the terms of which are not relevant for the purposes of this *lis*.

[3] The second contract was between Diesel Power and Florenza in terms of which Florenza was sub-contracted by Diesel Power to provide mining equipment at Anglo American's Zibulo mining site.

¹ Section 341(2) of the Companies Act 61 of 1973 provides that "*Every disposition of its property (including rights of action) by any company being wound up and unable to pay its debts made after the commencement of the winding up, shall be void unless the Court otherwise orders.*"

[4] Florenza then entered into plant hire agreement with the respondent to supply the mining equipment as required to fulfil its obligations under the agreement entered into with Diesel Power.

[5] The invoicing would therefore commence with the respondent issuing an invoice to Florenza and the latter will submit its invoice to Diesel Power. Diesel Power would then issue the invoice to Anglo and the payment would follow the same path.

[6] The respondent contends that an arrangement was entered into in terms of which Diesel Power (*promittens*²) agreed to pay the respondent directly for the invoices submitted by Florenza (*stipulans*³) from monies received from Anglo. This agreement is identified by the respondent as *stipulatio alteri*.

Insolvency of Florenza

[7] The application for liquidation of Florenza was launched by Maralco Business Advisors CC trading as Maralco Plant Services, on 6 February 2018. In the premises the effective date of winding up was 6 February 2018. This application for liquidation was granted by this division (functioning as Mpumalanga Circuit Court) on 27 February 2018.

[8] The applicants were appointed as provisional joint liquidators on 22 March 2028 and their appointment was confirmed at the first meeting of creditors of Florenza held on 16 February 2022.

² A party who confers a benefit to a third party at the instance of the stipulans.

³ A party who stipulates the benefit that he wishes to be conferred to a third party.

Indebtedness to the respondent.

[9] The applicants received correspondence from the respondent on 18 June 2018 lodging a claim against Florenza in the sum of R9 178 688.39. The respondent subsequently issued summons on 22 November 2018 against the applicants in their capacities as joint liquidators of Florenza and also cited Diesel Power. Diesel Power was cited based on the arrangement entered into, referred to in paragraph 6 above, in terms of which the Diesel Power agreed to pay the respondent directly from the funds received from Anglo in settlement of invoice which Diesel Power would have issued to Anglo.⁴

[10] Diesel Power had previously paid the respondent amount of R2 072 605.00 in three tranches, viz, R 1 300 000,00 paid on 7 February 2018, R200 000,00 paid on 16 February 2019 and R572 605.00 paid on 22 February 2018.

[11] These are the payments which the applicants now contend that they are susceptible to be set aside in terms of the section 341(2) of the Companies Act 1973.

Issues

[12] The issue for determination is whether the amount paid to the respondent by the Diesel Power constituted a void disposition as contemplated by section 341(2) of the Companies Act 61 of 1973.

Submissions by the parties.

⁴ See para 12 of the particulars of claim at CL002-38 where it is stated that “[T]he 1st Defendant has received payment of these invoices from Anglo American but neglects, refused and or fails to pay the plaintiff- as agreed.”

[13] The applicants contend that the payments were effected after Florenza was placed under liquidation (on 6 February 2018) with the first payment effected on 7 February 2018. The said payments are therefore susceptible to be set aside in terms of section 341(2) of the Companies Act. The applicants further contended that the defence predicated on the principle of *stipulatio alteri* as raised by the respondent is unsustainable based on various reasons.

[14] Firstly, the agreement in terms of which the respondent was to benefit from direct payments from Diesel Power did not specify the respondent as the anticipated beneficiary, without which the requirements for the *stipulatio alteri* was not met. In retort the respondent contended, correctly, so that it is not a requirement that the beneficiary of the agreement should be identified.

[15] Secondly, that *stipulans*, Florenza, would after the arrangement no longer a party to the agreement with Diesel Power and would be substituted by the respondent. To which the respondent contended that Florenza was not excused from other obligations arising from the agreement entered into with Diesel Power. Florenza was excluded in as far as payment of invoices from the respondent were concerned.

[16] Payments which were made by Diesel Power were on the instructions from Florenza and this implied that there could not have been any direct dealing between the respondent and Diesel Power. This was just an administrative or procedural issue, so the respondent submitted, and did not vitiate the tenor of the arrangement entered into between the parties.

[17] If anything, so the applicants' argument went, the arrangement for the payment of invoices satisfies the requirements for *adiectus solutionis causa* in terms of which

Florenza has just instructed Diesel Power to settle the respondent's invoices without necessarily having the respondent introduced as a party to the contract with Diesel Power as envisaged in terms of the *stipulatio alteri* principle.

[18] The respondent further elaborated regarding its defence as follows, that Diesel Power and Florenza have agreed on 2 November 2017 that for the benefit of the respondent Diesel Power should pay the respondent directly and Florenza was substituted by the respondent in the contract between Florenza and Diesel Power relative to payments of the respondents' invoices. The said arrangement was accepted by the respondent in a meeting on 17 January 2017 between all the parties and same was therefore binding on Diesel Power. The fact that the respondent still had to send invoices to Florenza was just a procedural arrangement between the parties and can ergo not be invoked to gainsay the argument that there was *stipulatio alteri*.

[19] The respondent referred to the judgment in *ELDACC Pty Ltd v Bidvest Properties (Pty) Ltd*⁵ where Ponnan AJA in illustrating the principle of *stipulatio alteri* stated that the insurer would enter into a contract with the policy holder (*the stipulans*) in terms of which the insurer undertakes to pay a third party on behalf of the stipulans on the understanding that once an offer is accepted a contract would be established between the third party and the insurer.

[20] The respondent's counsel further referred to *DF v LF N.O and IProtect Trustees (Pty) Ltd*⁶ where the court held that the beneficiary would ordinarily accept the benefits

⁵ (682/10) (2011) ZASCA 144 (26 September 2011)

⁶ (12469/2016) [2016] ZAJHBGLD.

as is, together with obligations (with or without deficiencies) which the parties may wish to impose on the third party.

Legal principles and analysis

[21] As a prelude, principles, and requirements apropos *stipulatio alteri* as were canvassed in various court pronouncements will be chronicled as follows.

[22] A *stipulatio alteri* (a contract for the benefit of a third party) refers to a “... contract concluded between A and B for the benefit of a third party who by accepting the benefit becomes a party to that contract so that it is A and C who are bound to each other.”⁷ Once the third party accept the benefit, the second party acquires an independent right to enforce the performance from the first party.⁸ In addition, the second party would fall out of the picture altogether.⁹

[23] As such it would follow that a “... mere conferring of a benefit is therefore not enough, what is required is an intention on the part of the parties to a contract that a third person can, by adopting the benefit, become a party to the contract.”¹⁰ Once the third party accept the benefit the first two parties may not resile from the agreement and a valid contract is established between the third party and the *promittens*.

⁷ *Loggenberg N O & Others v Maree* (286/2017) [2018] ZASCA 24 (23 March 2018).

⁸ *Eldacc (Pty) Ltd v Bidvest Properties (Pty) Ltd* (682/10) [2011] ZASCA 144 (26 September 2011) at para [6].

⁹ *Nine Hundred Umgeni Road (Pty) Ltd v Bali* 1986 (1) SA 1 at 5B-C. Reference was made of *Bagradi v Cavendish Transport Co (Pty) Ltd* 1957 (1) SA 663 (D) at 291 where it was stated that “... by notifying its acceptance of the benefits of the contract. When a company does that, then the person contracting as trustee falls out of the contract altogether. Therefore, unless and until he falls out of the contract all together, he may accept a repudiation by the other party to the contract and cancel the contract as well as sue for damages.”

¹⁰ *Total SA (Pty) Ltd v Bekker* NO 1992(1) SA 617 at 625 E-G.

[24] It was held in *Pieterse v Shrosbee and Others; Shrosbee NO v Love and Others* 2005(1) SA 309 SCA that what is required is an intention on the part of the stipulans that a benefit upon acceptance by a third party would confer rights that are enforceable at the instance of the third party against the *promittens*.

[25] The question which now require a determination is whether the arrangement between the respondent, Florenza and Diesel Power satisfied the requirements for *stipulatio alteri* in the sense that the respondent ultimately contracted directly with Diesel Power. As will be shown below there are factors which militates against the conclusions which the respondent enjoins the court to arrive at.

[26] First, the respondent could not exert its rights independent of Florenza. The arrangement was that the invoice from the respondent must still be issued to Florenza and not directly to the Diesel Power. This factor derails any alleged intention that there was an arrangement for a direct relation with Diesel Power.

[27] Secondly, Diesel Power would only pay the invoice received from Florenza if such invoice has been agreed to by Florenza.¹¹ The upshoot hereof is that without Florenza's approval no invoice shall be submitted to Diesel Power and no payment shall be made to the respondent. This position cannot be construed as a procedural issue as asserted by the respondent. Without Florenza the respondent would not be able to claim directly from Diesel Power. The respondent contends indeed Florenza did fall out of payments obligations¹² but still had to lodge a claim¹³ with the liquidators. It appears to have been

¹¹ The email of 3 November 2017 states that "... DP pays the supplier the agreed invoice between the supplier and Florenza for rental of the equipment and then the difference to Florenza". See Respondent's Heads of Argument at para 3.2 on CL010-2. (underling and emphasis added).

¹² See Respondent's Heads of Argument at CL 010-8.

¹³ See a respondent's formal letter lodging a claim at CL002-29.

acknowledged by the respondent that no direct claim could be lodged, and this is also buttressed by the fact that the respondent submitted an invoice to and even had to issue summons against the applicants.

[28] The claim that the respondent acquired an independent status in relation to Diesel Power is not supported by the facts as the parties were very specific that the contract with Florenza remains intact.¹⁴ There was no indication, explicitly or tacitly, that invoicing and or payments is excluded from obligations in the contract between the alleged *stipulans* and *promittens*.

[29] This arrangement is akin to, as correctly stated by the applicants' counsel, what is referred to as *adiectus solutionis causa*, which occurs where a creditor asks a debtor to make payment to a third party whereas with *stipulatio alteri* the rights and obligations are transferred to the third party and the latter being able to enforce them. It was stated by the authors of Contract: General principles¹⁵ that "[I]n certain instances, the debtor has a right to perform to someone other than the creditor, a so called adiectus solutionis cause. The adiectus is not a creditor and can therefore not claim performance from the debtor."

[30] I therefore conclude that there was no benefit akin to what is envisaged in *stipulation alteri* and to this end the defence predicated on the principle of *stipulatio alteri* is unsustainable and bound to fail.

[31] The respondent having conceded that the payments were effected after Florenza was placed under liquidation it is my conclusion that the said payments are void

¹⁴ See Respondent's Answering Affidavit, para 21.5., CL007-8, where it is stated that "... the subcontract agreement will not change and Florenza will still be required to honour their contractual obligations."

¹⁵ See Van Huyssteen, Lubbe & Reinecke, *Contract: General Principles*, 5th ed, Juta, 2016 at 501 See also *Continental Illinois Bank v Greek Seamen's Pension Fund* 1989 (2) SA 515 (D& CLD) at 540C-D.

disposition as contemplated in terms of section 341(2) of the Companies and susceptible to be and are hereby set aside.

Costs

[32] The costs should follow the results.

Conclusion

[33] I grant the following order:

1. *The respondent is ordered to pay the applicants the following amounts:*

- 1.1. *R1 300 000.00 plus interest at 10.25% per annum calculated from 28 February 2018 to date of final payment.*
- 1.2. *R200 000.00 plus interest at 10.25% per annum calculated from 28 February 2018 to date of final payment.*
- 1.3. *R572 605.00 plus interest at 10.25% per annum calculated from 28 February 2018 to date of final payment.*

2. *The respondent is ordered to pay costs of the application.*



Mokate Victor Noko
Judge of the High Court
Gauteng Division, Pretoria.

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 15 November 2023.

Appearances.

Counsel for the applicants:	Adv J van Rooyen
Instructed by:	Doo E Bruwer Attorneys
Counsel for the Respondent:	Adv L Keijser
Instructed by	Vorster Incorporated
Date of hearing:	15 February 2023
Date of Judgment:	15 November 2023