IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 25524/2019

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

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DATE

In the matter between:

MATLALA, MARY-ANNE PHUTI	Applicant
and	
MMELA INVESTMENT HOLDINGS (PTY) LTD	First Respondent
CLAIMS ADMINISTRATION & RECOVERY SERVICES (PTY) LTD	Second Respondent
MR MOHOBI RAMATSETSE	Third Respondent

Delivered: This judgment 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 11 July 2022.

JUDGMENT

MALINDI J:

[1] The parties are referred to as in the main action.

[2] The plaintiff has filed a declaration consequent to the matter being referred to trial. The defendants filed an exception to the declaration alleging that it does not disclose a cause of action in contract against the first and second defendants, alternatively, that it is vague and embarrassing.

[3] The plaintiff sues all three defendants on the basis that she entered into a contract with the third defendant to the effect that the first and second defendants will be formed by the third defendant and that the two of them would hold shareholding and management positions in the other two defendants. She pleads that the third respondent acted on behalf of the first and second defendants. The basis of the exception is that at the time that the plaintiff alleges to have entered into the alleged contract with the third defendant, the first and second defendant had not been formed and could therefore not be bound by such a contract. The defendants' counsel has referred to *Steenkamp NO v Provincial Tender Board, Eastern Cape*[1] which states the principle that an agent cannot lawfully enter into a contract on behalf of an entity that does not exist. In the alternative, that the plaintiff does not spell out how the first and second defendants are to be held liable.

[4] The plaintiff submits that the declaration, in particular, paragraphs 6, 14 and 16 provide details of the agreement between the plaintiff and the third defendant that in terms of the agreement the first and second defendants will be formed for the purposes of carrying out their agreement. In this regard the contract was

1 2006 (3) SA 151 (SCA) at [48].

entered into for the benefit of the two defendants (*stipulatio alteri*) and the two defendants bound themselves to carry out the agreement between the plaintiff and the third defendant. The plaintiff submits that this is equivalent to a third party accepting the terms of a *stipulatio alteri*.

[5] Counsel for the defendants strenuously argued that the fact that the first and second defendant were not in existence at the time of the contract between the plaintiff and the third defendant, there could be no contract between the plaintiff and the other two defendants and/or furthermore that the contract was accepted as binding on them after they were formed.

[6] The contract needs a brief scrutiny. The plaintiff and the third defendant were acting in their personal capacities when they entered into a contract. They were not acting on behalf of an existing company or companies. They were the principal parties to the oral agreement. They agreed to form entities through which they would conduct business with the Department of Justice and Correctional Services ("DoJ"). In doing so none of them were acting as agents of a third entity and for its benefit or more properly, for its availment to accept the opportunity under the contract. In other words, the first and second defendants were not contemplated to benefit out of an existing company. They were the parent companies, so to speak, that were going to enter into contracts with the DoJ. They were formed to benefit the plaintiff and the defendants in proportions agreed between them.

[7] The Court need therefore decide whether the plaintiff has a cause of action against the two companies which have excluded her from such benefit in the manner pleaded by her, including against the third defendant, who is a Director and Managing Director of the two companies.

[8] In my view, there is no third party involved in this contractual relationship for whose benefit a contract was entered into. Therefore, it is a matter for evidence[2] for the plaintiff to prove the agreement with the third defendant to form the first and second defendants for their mutual benefit as pleaded. The third defendant was not acting on behalf of the other defendants because there was no pre-incorporation memorandum.

[9] Even if I am wrong in this regard I am of the view that the requirements for a *stipulatio alteri* are satisfied. If the plaintiff and the third defendant had a separate agreement to form the first and second defendants for their benefit or availment to the opportunity to be part of such contract they accepted the terms thereof when the terms agreed between the plaintiff and the third defendant were subsequently incorporated into their founding documentation and, in particular, making the plaintiff a shareholder and director of the two entities as agreed between the plaintiff and the third defendant. In other words, they availed themselves of the opportunity to conduct business with DoJ on the terms that the plaintiff will be entitled to their directorship and commensurate benefits.[3] In this regard the following was said by the SCA:[4]

"[9] In such a case the policy holder (the 'stipulans') contracts with the insurer (the 'promittens') that an agreed offer would be made by the insurer to a third party (the 'beneficiary') with the intention hat, on acceptance of the offer by that beneficiary, a contract will be established between the beneficiary and the insurer. What is required is an intention on the part of the original contracting parties that the benefit, upon acceptance by the beneficiary, would confer rights that are enforceable at the instance of the beneficiary against the insurer, for that intention is at the 'very heart of the stipulatio aleri' (Ellison Kahn: 'Extension Clauses in Insurance Contracts' [1952) 69 SALJ 53 at 56). Thus the beneficiary, by adopting the benefit, becomes a party to the contract (see Total South Africa (Pty) Ltd v Bekker NO [1991] ZASCA 183; 1992 (1) SA 517 (A) at 625 D-G)."

2 See: *McKelvey v Cowan NO* 1980 (4) SA 525 (Z).
3 *Steenkamp NO* at [48}: on the existence of a pre-incorporation agreement and ratification of the contract.
4 *Pieterse v Shrosbree NO & Others* 2005 (1) SA 309 (SCA) at [9].

[10] By adopting the benefit conferred upon them by the plaintiff and third defendant, the first and second defendants became a party to the contract that renders them liable to be sued as has happened in this case.

[11] As to the costs of the exception, the defendants were neither unreasonable or reckless in pursing the application. Had they not done so and were victorious at the conclusion of the trial that might have had an effect on the costs order. I am of the view therefore that although the application stands to be dismissed each party should bear its own costs.

[12] In the circumstances, the following order is made:

1. The exception application is dismissed.

2. Each party is to pay its own costs.

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G MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

FOR THE APPLICANT: Adv G Shakoane
Adv K Maphwanya

INSTRUCTED BY: Prince Mudau & Associates Attorneys

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DATE OF THE HEARING:	4 July 2022
DATE OF JUDGMENT:	11 July 2022