



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 682/10

In the matter between:

ELDACC (PTY) LTD

Appellant

and

BIDVEST PROPERTIES (PTY) LTD

Respondent

Neutral citation: *Eldacc (Pty) Ltd v Bidvest Properties (Pty) Ltd* (682/10)
[2011] ZASCA 144 (26 September 2011).

Coram: CLOETE, VAN HEERDEN, CACHALIA and SERITI JJA

and PLASKET AJA

Heard: 12 SEPTEMBER 2011

Delivered: 26 SEPTEMBER 2011

Summary: Contract: stipulatio alteri: legal relationship between parties, discussed.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Van der Linde AJ sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

CLOETE JA (VAN HEERDEN, CACHALIA and SERITI JJA and PLASKET AJA concurring):

[1] The appellant, Eldacc (Pty) Ltd, entered into a written agreement of lease in terms of which it let commercial property to Rennies Distribution Services (Pty) Ltd for a period of ten years. Clause 35 of the agreement contained an option to purchase the leased property. That clause began with the heading: 'OPTION TO PURCHASE THE LEASED PREMISES'. It comprised two parts. The first part, after the sub-heading 'OPTION', read as follows:

'35.1.1 The LESSOR hereby irrevocably grants to the LESSEE or its nominee being any subsidiary of the Bidvest Group Limited in existence as at the date of signature hereof (hereinafter referred to as the LESSEE only for the purposes of this clause 35) an option to purchase the PROPERTY from the LESSOR on the terms and conditions contained in this clause. This clause constitutes a stipulatio alteri in favour of the aforesaid nominee, the benefits of which the nominee may accept at any time, subject to the provisions of clause 35.1.2 below.

35.1.2 If the LESSEE wishes to exercise the option, it shall do so by written notice to that effect given to the LESSOR on or before 1 June 2007 at the LESSOR'S ADDRESS. Should the LESSEE not exercise the option to purchase so afforded it on or before 1 June 2007, then the option shall lapse.

35.1.3 In the event that LESSEE exercises the option, then the resulting sale will be on the terms contained in this clause 35.'

There followed a number of clauses which set out these terms, under the sub-heading 'SALE', which comprised the second part of the clause.

[2] Counsel for Eldacc accepted that the provisions of clause 35 quoted above did indeed constitute a stipulatio alteri, and he cannot be faulted for doing so: *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 (1) SA 7 (A) at 16D. In addition, it was common cause that Rennies orally nominated the respondent, Bidvest Properties (Pty) Ltd (then known by another name); that Bidvest was a subsidiary of the Bidvest Group Ltd and was in existence at the date the lease agreement was signed; and that Bidvest, within the time period laid down in clause 35.1.2, sent a letter signed on its behalf to Eldacc exercising the option contained in clause 35.

[3] Eldacc purported to cancel the resulting agreement. Bidvest brought motion proceedings in the South Gauteng High Court for specific performance and ancillary relief. Van der Linde AJ granted the relief sought and refused leave to appeal, which was subsequently granted by this court.

[4] The only argument persisted in on appeal by Eldacc was based on clause 30 of the agreement between Eldacc and Rennies, which provided: 'No variation of the Agreement and of this clause 30 and no agreed cancellation of the Agreement shall be of any force or effect unless reduced to writing and signed by the authorized representatives of the Parties.'

Eldacc's argument was that its undertaking to Rennies comprised two parts:

- (a) an offer to sell the property on defined terms to Rennies or its nominee; and
- (b) an agreement to keep the offer open for acceptance until the date specified.

So far the argument is sound: this is the basis upon which Prof R G McKerron explains the stipulatio alteri in his article 'The Juristic Nature of Contracts for the Benefit of Third Persons' (1929) 46 *SALJ* 387.¹ But the argument continued that acceptance by Bidvest of the offer could not take place until it

¹Prof McKerron's explanation has stood the test of time, as pointed out by Prof J C Sonnekus, 'Enkele opmerkings om die beding ten behoeve van 'n derde' 1999 *TSAR* 594 at 611 in fine.

had acquired Rennies' right to have the option kept open; the acquisition of that right required it to be substituted for Rennies in clause 35 of the agreement between Eldacc and Rennies; and as that substitution involved a variation, it had to be in writing and signed by at least Eldacc and Rennies because of the provisions of clause 30.

[5] The argument is unsound in law. Rennies had the right to compel Eldacc to abide by its undertaking to keep the offer open in favour of its nominee, both before and after the nomination: *African Universal Stores Ltd v Dean* 1926 CPD 390 at 395. But the right that Bidvest had to accept the offer was independent of such right. For that very reason, it was unnecessary for Bidvest to acquire Rennies' right to protect the offer before Bidvest exercised its right to accept the offer. Acquisition of the former was not a precondition for the exercise of the latter.

[6] Eldacc's counsel repeatedly submitted that once the third party (Bidvest) accepted the benefit (the offer to sell), the third party 'stepped into the shoes' of the stipulator (Rennies) in the latter's agreement with the promisor (Eldacc). This analysis is also unsound. There have been cases in which this court has said that by accepting the promise made by the promisor, the third party 'becomes a party to' the contract between the stipulator and the promisor: *McCulloch v Fernwood Estate Ltd* 1920 AD 204 at 205-6 (summarising the effect of the decision in *Tradesmen's Benefit Society v Du Preez* (1887) 5 SC 269); *Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd*; *Joel Melamed & Hurwitz v Vornier Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 172E, 172I-in fine and 173B; *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 625F-G; *Pieterse v Shrosbree NO & others*; *Shrosbree NO v Love & others* 2005 (1) SA 309 (SCA) para 9. But it has never been suggested that the third party succeeds to the rights of the stipulator. On the contrary, this court has made it clear repeatedly that the *vinculum iuris* or legal bond created upon acceptance of the benefit by the third party, is between the third party and the promisor.

[7] Innes CJ said in *McCulloch* at 206:

'The third person having once notified his acceptance and thus established a *vinculum juris* between himself and the promisor would be liable to be sued, as well as entitled to sue.'

[8] Schreiner JA said in *Crookes NO & another v Watson & others* 1956 (1) SA 277 (A) at 291B-F:

'[I]n the legal sense, which alone is here relevant, what is not very appropriately styled a contract for the benefit of a third person is not simply a contract designed to benefit a third person; it is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two² (*cf Jankelow v Binder, Gering and Co* 1927 TPD 364) . . . [T]he typical contract for the benefit of a third person is one where A and B make a contract in order that C may be enabled, by notifying A, to become a party to a contract between himself and A. What contractual rights exist between A and B pending acceptance by C and how far after such acceptance it is still possible for contractual relations between A and B to persist are matters on which differences of opinion are possible; but broadly speaking the idea of such transactions is that B drops out when C accepts and thenceforward it is A and C who are bound to each other.'

(Although contained in a minority judgment, the passage quoted is not inconsistent with the majority judgment; it has been generally accepted as a correct statement of the law; and it has twice been approved by this court, in the *Joel Melamed & Hurwitz* case at 172D-F and in the *Total* case at 625E-F.)

[9] Ponnar AJA said in the *Pieterse* case in paragraphs 9 and 10:

'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 that, 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 alteri*" (Ellison Kahn "Extension Clauses in Insurance Contracts" (1952) 69 *SALJ* 53 at 56). Thus the beneficiary, by adopting the benefit, becomes a

²See *Mpakathi v Kghotso Development CC & others* 2003 (3) SA 429 (W) paras 15 and 16. The SCA on appeal made no finding on the conclusion reached by the court a quo applying this dictum: 2005 (3) SA 343 (SCA) paras 6 and 7.

party to the contract (see *Total South Africa (Pty) Ltd v Bekker NO 1992 (1) SA 617 (A)* at 625D-G).

10. On the death of the insured, provided that the nomination has not been revoked during the insured's lifetime, any claim to the policy proceeds by the beneficiary against the insurance company would be based on the contract of insurance between the deceased and the insurance company. It is to the insurance company and no one else that the beneficiary would have to look for payment.'

[10] In truth, there was no variation whatever of the agreement between Eldacc and Rennies. What happened was exactly what was envisaged in clause 35: Rennies nominated Bidvest, a subsidiary of the Bidvest Group Ltd that was in existence as of the date of signature of the agreement; Bidvest accepted the offer made by Eldacc; and there was a resulting sale by Eldacc to Bidvest on the terms contained in clause 35.

[11] The appeal is dismissed with costs including the costs of two counsel.

T D CLOETE
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:

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