REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/29988

DATE:17/08/2011

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

....
DATE SIGNATURE

In the matter between:

JOZISTAT (PTY) LTD Applicant

And

TOPAZ SKY TRADING 217 (PTY) LTD First Respondent

VIVIENNE KORZIA ATTORNEYS Second Respondent

J U D G M E N T

WEPENER, J:

[1] This is an urgent application in which the applicant seeks to compel the first respondent to deliver clearance certificates to it in respect of certain properties which the applicant alleges it is entitled to transfer into its name.

[2] At the outset of the matter Mr Aucamp, who appears for the first respondent, raised a point *in limine* that no case for relief was made out in the founding affidavit.

[3] The approach to be taken in such matters has been set out in Bowman N.O. v De Souza Roldao 1988 (4) SA 326 T at 327.

> "*In limine Mr Zeiss, who appears for the respondent, argued that the applicant has not made out a case in the founding affidavit to entitle him to any relief in terms of the notice of motion; he submits that there is a material and fatal lacuna in the founding affidavit which cannot be cured.*
>
> *Generally speaking, an applicant must stand or fall by his founding affidavit; he is not allowed to make out his case or rely upon new grounds in the replying affidavit. See, for example, Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635 in fin - 636 where Diemont JA said the following:*
>
> > *'When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustee v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases*
> >
> > > *"... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts*

stated therein, because those are the facts which the respondent is called upon either to affirm or deny".

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged

"it is not permissible to make out new grounds for the application in the replying affidavit".'

What should be set out in the founding affidavit and the particularity required has been dealt with in a number of cases; see, for example, Joseph and Jeans v Spitz and Others 1931 WLD 48; Victor v Victor 1938 WLD 16 at 17 and Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T) at 369B. Each case will depend on its own facts. The correct approach is set out in the Titty's Bar case supra as follows:

'It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit.'

This type of objection must be considered on the basis of an exception to a declaration or a combined summons.

The relevant considerations are:

(a) the founding affidavit alone is to be taken into account;

(b) the allegations in the founding affidavit must be accepted as established facts;

(c) are these allegations, if proved, sufficient to warrant a finding in favour of the applicant?"

[4] The relevant facts of the matter can be summarised as follows: The applicant, a company, seeks an order directing the first respondent to forthwith make payment of the outstanding clearance amounts as furnished by the Rustenburg City Council for the issue of clearance certificates in relation to properties which the applicant alleges it is entitled to transfer into its name. The deed of sale reads that it is made and entered into between the first respondent as seller and Mohamed Ameen Daya “To an behalf of a cc or company to be formed” .

[5] Although the words “To and behalf” are non-sensical on their own, the parties accepted that it meant acting on behalf of a cc or company to be formed.

[6] At the end of the document there is a space for the signature of the purchaser. Below the signature the following words appear: “acting for and on behalf of a cc or a co to be formed”.

[7] Ms Ternent on behalf of the applicant argued that having regard to the matter of *Martian Entertainments (Pty) Ltd v Berger* 1949 (4) SA (EDL) 582, the use of the word “acting on behalf of” should be given a proper meaning by having regard to the terms of the agreement itself as well as the admissible evidence, which is available.

[8] Approaching the matter as an exception one only has regard to the founding affidavit and the annexures thereto. If regard is had thereto, the first impression gained is that Daya acted on behalf of a close corporation or a company to be formed. He says so in so many words below his signature. Ms Ternent referred me to two clauses of the agreement, which according to the argument shows that the terms of the agreement support the fact that Daya did not act as representative of the company or close corporation to be formed, but as a principal on behalf of a third party.

[9] This argument is necessary by virtue of the provisions of section 35 of the Companies Act, 61 of 1973 (the Companies Act) which is common cause is the applicable Act. S 35 reads:

> "*Any contract made in writing by a person professing to act as agent or trustee for a company not yet incorporated shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly incorporated as if it had been duly incorporated at the time when the contract was made and such contract had been made without its authority: Provided that the memorandum on its registration contains as an object of such company the ratification or adoption of or the acquisition of rights and obligations in respect of such contract, and that such contract has been lodged with the Registrar together with the registration of the memorandum and articles of the company*".

[10] It is common cause that the applicant which is alleged to be the company that was formed, did not provide that its memorandum upon

registration, contained as a object the ratification or adoption of the acquisition of the rights and obligations in respect of the contract.

[11] In short, it is common cause that the applicant's actions fall short of the requirements of S 35 of the Companies Act. The result thereof is that the contract purportedly entered into by the applicant before it came into existence is a nullity (see *Swart v Mbutzi Development (Edms) Bpk* 1975 (1) SA 544 (T) and *Steenkamp N.O. v Provincial Tender Board (Eastern Cape)* 2006 (3) SA 151 (SCA) at 170 – 171.

[12] Meskin, in *Henochsberg on the Companies Act*, says as follows at page 60:

> "*Moreover, under the common law, the relationship of principal and agent cannot exist where the principal is non existent: Thus, a contract purportedly entered into by an agent on behalf of a non-existent company is also a nullity and it is incapable of being ratified by the company after its incorporation because ratification is possible only where at the time the contract is concluded the relationship of principal or agent already exists (Kelner v Baxter (1866) LR 2 CP 174; McCullogh v Fernwood Estate Ltd 1920 AD 204 AT 207-208, 213 to 214; Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk 1970 (3) SA 367 (A) at 348, 396…*".

[13] If Daya acted as an agent on behalf of the company to be formed the matter is at an end and the purported ratification by the applicant in absence of compliance with s 35 of the Companies Act is of no force and effect.

[14] However, Ms Ternent argued that, having regard to what was said in *McCullogh v Fernwood Estate* supra, at 205 – 209 there exists a *stipulatio alteri* where a contract made by a person (Daya) as principal in his own right with a second person, (first respondent) for the benefit of a third party (the applicant) and that such agreement does not fall foul of the provisions of s 35 of the Companies Act.

[15] However, the two clauses to which Ms Ternent referred to for the argument that they, read together with the evidence, show that Daya acted as principal and not as agent do in my view no assist the applicant. The clauses are 5.1 and 5.1.1 which clauses refer to the plural “purchasers” and not only to a “purchaser”.

[16] The use of the plural “purchasers” does not in my view assist the applicant. The reference does not make Daya a principal or co-purchaser. The terms of the agreement do not consequently assist the applicant to ward off the consequence as was found in the *Martian* case referred to supra at 590; “In that case the purchasers where described in the heading of the contract as purchasers “for and on behalf of a limited liability company to be formed.” “That”, said the learned Judge “*prima facie* looks as if they were acting as agents of the company about to be formed”, and no doubt he had in mind the words of Innes CJ in *Lindt v Spicer Bros (Africa) Ltd* (1917) AD 147 at p 151 – “to say that a man entered into a contract, acting on behalf of

another, is to allege in the absence of any qualifying statement that he entered into it as the agent of that other".

[17] Although Ms Ternent argued that the agreement does not utilise the word "agent" I am mindful of what Trollip JA said in *Sentrale Kunsmis Verspreiders supra* at 397 G that when using the expression, "a person professing to act as an agent or a trustee" means a person who acts as an agent for the company, whether he called himself an agent or a trustee".

[18] The further argument on behalf of the applicant is that pursuant to the judgment in the *Martian* case *supra*, regard should also be had to the admissible evidence. In this regard it was argued that Daya, and not the company to be formed, made the initial payment of the deposit. In my view that does not elevate Daya from an agent which he professed to be to a principal who entered into the contract. Significantly, the agreement is silent as to the liability of Daya in the vent of the company not being formed. One would have expected a provision which provided that Daya would incur personal liability had that been the intention of the parties.

[19] I am consequently unable to conclude that Daya acted as principal in the sense that he entered into the agreement on the basis of a *stipulatio alteri* i.e. the contract made by Daya as principal in his own right with the seller for the benefit of a company to be formed.

[20] Indeed, it is not the applicant's case on the founding papers that such a contract came into existence. Its case was set out in the founding affidavit in clear terms as follows: "On 1 October 2010, and at Johannesburg, the applicant, represented by me, acting for and on behalf of a company to be formed, and the first respondent, represented by Prokas, entered into a written deed of sale…".

[21] There is no suggestion by Daya of an agreement entered into by him as principal for the benefit of a company to be formed.

[22] The result is that the applicant has not made a case in its founding affidavit to show a *stipulatio alteri* and the exception or point *in limine* taken by Mr Aucamp, is well taken. The allegations in the founding affidavit are insufficient to find in favour of the applicant in relation to the *stipulatio alteri* argument.

[23] As s result of the fact that the agreement falls foul of s 35 of the Companies Act and that the *stipulatio alteri* argument fails, it is not necessary to decide the other issues argued before me including the application to supplement the replying affidavit.

[34] In all the circumstances the application is dismissed with costs.

Date delivered 17/08/2011

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