REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 12469/2016

1.	POTENTIALLY REPORTABLE:	YES
2.	OF INTEREST TO OTHER JUDGES:	NO
3.	REVISED	YES

_____
SIGNATURE

DATE: 10 MAY 2017.

4.	REVISED TO EXCLUDE CERTAIN NAMES FOR PURPOSES OF PUBLICATION ONLY:	YES

_____
SIGNATURE

DATE: 29 JUNE 2017.

In the matter between:

D F Plaintiff

and

L F First Defendant

L F N.O. Second Defendant

iPROTECT TRUSTEES (PTY) LIMITED N.O. Third Defendant

JUDGMENT

Barrie AJ:

1. The plaintiff in this matter is Mr D. F. ("Mr F."). The first defendant is Ms L. F. ("Ms F."), in her personal capacity. Ms F. is also the second defendant. She is cited as second defendant in her capacity as trustee of the XXXX YYYY Trust ("the trust"). The third defendant is the second trustee of the trust, iProtect Trustees (Pty).

2. Ms F. and the third defendant are the only trustees of the trust. I shall herein refer to them as "the trustees" when referring to them jointly, in their capacity as trustees of the trust..

3. In terms of his particulars of claim, Mr F. seeks, among others, repayment of a sum of R3.5 million that he paid to the trustees on 23 January 2015. He made the payment in accordance with the terms of a written agreement, termed a "Settlement Agreement" ("the settlement agreement" or "the agreement"), that he had earlier, at a time before the trust had been established, reached with Ms F.. The introductory clause of the settlement agreement indicates that it arose from termination of a personal relationship between Mr and Ms F. (who I shall refer to as "Mr and Ms F." or as "the F.es").

4. Apart from his claim against the trustees for repayment of the R3.5 million, Mr F. seeks repayment from Ms F. in her personal capacity (i.e. as first defendant) of a sum of USD 587 573.53 that he paid to her in terms of the settlement agreement and, as an alternative to his R3.5 million claim against the trustees, damages of R3.5 million against Ms F., again in her personal capacity.

5. On what I have before me it appears that only Ms F. is defending the action. There is no notice of intention to defend from the third defendant in the court file, nor any other indication that the third defendant is participating, or intends to participate, in the litigation.

6. Ms F. has, both as first and second defendant, delivered an exception to Mr F.'s particulars of claim, but only in relation to the claim against the trustees for repayment of the R3.5 million.

7. Mr L Hollander, instructed by attorneys Darryl Furman & Associates, appeared before me on behalf of the excipient, Ms F.. Mr W J Vermeulen SC, with Ms M Maschwitz, instructed by attorneys Paul Friedman & Associates Inc., appeared for Mr F.

8. The particulars of claim state that Mr and Ms F. concluded the settlement agreement during September 2014.[1] The settlement agreement sought to achieve agreement between them regarding their parental responsibilities and rights pertaining to their minor child, XXXX, as well as regarding the tertiary education of ZZZZ[2]. It also sought to achieve settlement of all monetary obligations between the F.es arising from the termination of their relationship[3]. Only the terms of the settlement agreement that are relevant to the first subject are now relevant.

9. Mr and Ms F. in terms of the settlement agreement agreed that their parental responsibilities and rights regarding the minor child, as referred to in sections 18(2)(a)(b) and (c)[4] of the Children's Act, 2005, would continue to be exercised by them jointly, but that the minor child's primary place of residence would be with Ms F.. They spelt out in some detail what Mr F.'s rights of contact with the minor child would be. Although the particulars of claim are not entirely clear on this point, it appears that the actuating cause of the action is Ms F.'s allegedly not allowing Mr F. to have contact with the minor child as had been agreed in terms of the settlement agreement.

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1 That might be a mistake. The copy of the settlement agreement annexed to the particulars of claim reflects that Mr F. signed it on 1 December 2014.

2 My assumption is that ZZZZ is also a child, but is now a major. However, save that the settlement agreement refers to Mr and Ms F. as having "*parental responsibilities*" regarding ZZZZ's tertiary education, my assumption is unconfirmed and might be wrong.

3 In clause 2 thereof.

4 Respectively, the responsibilities and rights to care for a child, to maintain contact with a child, and to act as guardian of a child.

10. The particulars of claim quote from the clause of the agreement in terms of which Mr F. made payment of the sum of R3.5 million that he now claims from the trustees. The subclauses that are relevant to the exception provide that:

> "*3.* *MAINTENANCE FOR XXXX & ZZZZ*
>
> *3.1* *The parties agree that D. shall make a once-off maintenance payment in respect of ZZZZ and XXXX in the amount of R3,500,000.00 ('the maintenance amount').*
>
> *3.2* *The maintenance amount shall be paid to the bank account to be opened for the XXXX YYYY Trust, of which trust Aaaa and/or Bbbb Cccc and/or Dddd (from Eeee Pharmacy) will be appointed trustees to administer the maintenance amount for XXXX and ZZZZ's best interests.*"

11. Further subclauses of clause 3 of the agreement specify, among other things, what the obligations of the to be appointed trustees would be in administering the R3.5 million trust fund.

12. It appears that the F.es' original intention regarding who the trustees of the trust other than Ms F. would be, was not implemented. The trust was eventually established in terms of a separate deed of trust ("the trust deed") appointing Ms F. and the third defendant as trustees. A copy of the trust deed is annexed to the particulars of claim. Mr F. was in terms thereof the founder of the trust, which related to an initial trust fund of R500.00 that he would settle on the trustees.

13. Mr and Ms F.' signatures to the trust deed are dated 5 November 2014, but that of the third defendant's representative 5 December 2014. The trustees' status and obligations as trustees of the trust would have arisen at the time that Mr F. settled the initial trust fund on the trustees. No averments in this regard are made in terms of the particulars of claim,

but it was accepted by all in argument that this occurred after the settlement agreement had been concluded.[5]

14. The particulars of claim allege that Mr F., pursuant to clause 3.1 of the settlement agreement, made payment to the trustees of the R3,5 million[6] and then go on to state as follows:

> "*12. In concluding the agreement as aforesaid, the First Defendant misrepresented to the Plaintiff that she was willing and/or able to implement the agreement in respect of the material terms as quoted above.*
>
> *13. In truth and in fact, at the time when the First Defendant made such misrepresentations to the Plaintiff as aforesaid, the First Defendant well knew that she had no intention of complying with the material terms of the agreement and in fact her sole intention was to appropriate the amount of USD 587 573,53 and to procure the appropriation by the Trust of the amount of R3 500 000,00 in the knowledge that she would, after the appropriation of the aforesaid amounts refuse to comply with any of the obligations in terms of clause 2 of the agreement; alternatively, that she would repudiate the agreement without having complied with her obligations in terms of clause 2 of the agreement.*
>
> *14. The Plaintiff was induced by such misrepresentations to enter into the agreement and to make payment of the amounts foreshadowed in the agreement to the First, Second and Third Defendants, in their aforesaid capacities, whereas had he known the true facts, he would not have concluded the agreement at all, nor would he have made the payments as aforesaid.*
>
> *15. The First Defendant, in making the aforesaid misrepresentations, was actuated by the intention to defraud the Plaintiff by inducing him to enter into the agreement and to make the payments as referred to in paragraphs 10.1 and 10.2 above.*
>
> *16. The Plaintiff was in fact induced by the aforesaid misrepresentations to enter into the agreement and to make the payments as referred to in paragraphs 10.1 and 10.2 above.*
>
> *17. Absent the misrepresentations, the Plaintiff would not have entered into the agreement, and would not have made the payments as aforesaid.*
>
> *18. As a result of the agreement having been induced by fraud, such agreement is voidable at the instance of the Plaintiff, and the Plaintiff hereby elects to withdraw from the agreement on account of such agreement having been induced by fraud; alternatively, that the Plaintiff hereby cancels the agreement.*

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5 Which has the concomitant that Ms F. could not have acted as representative of the trustees when she concluded the settlement agreement.

6 On 23 January 2015, as referred to already.

19. In the premises, the First Defendant is liable to repay the Plaintiff in the amount of USD 587 573,53.

20. The Second and Third Defendants in their capacities as trustees of the Trust are liable to repay the amount of R3 500 000,00 to the Plaintiff; alternatively, as a result of the First Defendant's misrepresentation as aforesaid, the Plaintiff suffered damages in the amount of R3 500 000,00, being the amount which the Plaintiff paid to the Second and Third Defendants in their capacities as trustees of the Trust and which amount, but for the First Defendant's misrepresentation, the Plaintiff would not have paid."

15. Ms F.' exception is to the effect that:

"*2. The basis upon which the Plaintiff claims repayment from the Trust of the amount of R3 500 000,00 is:*

*2.1 a written agreement concluded between the Plaintiff and the First Defendant, a copy of which is annexure '**DF1**' to the Plaintiff's particulars of claim ('the agreement');*

2.2 the Plaintiff having made payment to the Trust in the amount of R3 500 000,00 pursuant to the conclusion of the agreement;

2.3 the agreement allegedly being voidable at the instance of the Plaintiff consequent upon an alleged fraudulent misrepresentation on the part of the First Defendant prior to the conclusion of the agreement which allegedly induced the Plaintiff to conclude the agreement;

2.4 the plaintiff electing to withdraw from the agreement alternatively cancelling the agreement consequent upon the agreement being voidable as alleged by the Plaintiff; and

2.5 the Trust being obliged, in the circumstances referred to in paragraphs 2.1 to 2.4 above, to repay to the Plaintiff the amount of R3 500 000,00.

3. The Trust is not a party to the agreement. This is apparent ex facie *the agreement, and the Plaintiff does not plead as much.*

4. By virtue of the Trust not being a party to the agreement, and notwithstanding that the Plaintiff made payment to the Trust of the amount of R3 500 000,00 pursuant to the agreement, ex facie *the Plaintiff's particulars of claim the cancellation by the Plaintiff of the agreement does not give rise to an obligation on the part of the Trust to repay to the Plaintiff the amount of R3 500 000,00.*

5. In the premises:

5.1 The Plaintiff's particulars of claim lack averments necessary to sustain a cause of action against the Trust.

5.2 The Plaintiff's particulars of claim are excipiable in respect of the Trust."

16. Mr Hollander's argument that the particulars of claim are excipiable in relation to the claim against the trustees was, simply, that a claim for restitution of the R3.5 million cannot lie against the trustee - because the trust had not yet been established at the time when the F.es concluded the settlement agreement, the trustees were not party to the agreement, nor to the misrepresentations that, allegedly, occurred when it was concluded.

17. Mr Vermeulen's argument was that, because Ms F. was always going to be a trustee of the trust, the material misrepresentations that Ms F. allegedly committed that induced Mr F., among others, to agree to pay the R3.5 million to the prospective trustees of the trust, have to be attributed to the trustees. She was, accordingly, not an independent third party, as suggested by Mr Hollander. He also argued that clauses 3.1 and 3.2 of the settlement agreement constituted a *stipulatio alter*[7]. He argued that the trustees, on taking office and on acceptance of the benefit bestowed on them in terms of the *stipulatio alteri*, acceded to the settlement agreement and that it was, accordingly, not correct that they were not party thereto.

18. I suggested to Mr Vermeulen that if the relevant clauses of the settlement agreement were a *stipulation alteri*, it might well not, in law, be necessary that Ms F.'s alleged misrepresentations be attributed to the trustees to entitle Mr F. to resile from the settlement agreement and to reclaim restitution from the trustees. Mr Vermeulen's response was that the principle that a party to a contract cannot claim rescission on the basis of a misrepresentation emanating from a third party, as affirmed in **Karabus Motors**

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7 The Latin description is used here in preference to the term "*contract/agreement for the benefit of a third party*" (Afrikaans: "*Kontrak/ooreenkoms ten behoewe van 'n derde party*"), because it is concise and also conveys (as does the Afrikaans "*beding ten behoewe van 'n derde*", translating to "*contractual provision for the benefit of a third party*") that, in given circumstances, the relevant contractual provision(s) may be part only of an agreement of wider import.

(1959) Ltd v Van Eck[8]**,** was an insurmountable obstacle to Mr F.'s relying merely on Ms F.'s alleged misrepresentations at the time that the settlement agreement was concluded, as a basis for reclaiming the R3.5 million later paid to the trustees, on their taking office. He, accordingly, squarely based his submissions that the exception has to be refused on his argument that Ms F.'s alleged misrepresentations have to be attributed to the trustees.

19. The problem with Mr Vermeulen's argument is that the particulars of claim are not framed to accommodate potential attributing of Ms F.'s alleged misrepresentations to the trustees. If paragraph 13 of the particulars of claim had been worded so as also to cover Ms F.'s intentions at the time that the trustees accepted the benefit bestowed on them, the particulars of claim would have disclosed a cause of action that would have obviated the cause of complaint set out in Ms F.'s exception. However, the particulars of claim confine Mr F.'s alleged entitlement to rescind the settlement agreement as arising from Ms F.'s alleged misrepresentations at the time that the settlement agreement was concluded.

20. The exception can, nevertheless, not be upheld.

21. Mr Vermeulen's submission that clauses 3.1 and 3.2 of the settlement agreement constitute a *stipulatio alteri* for the benefit of the prospective trustees of the trust (as beneficiaries, but as trustees for the purposes and subject to the obligations set out in the further subclauses of clause 3) is, undoubtedly, correct. Mr F. performed in terms of the *stipulatio alteri* when he paid the R3.5 million to the trustees in January 2015.

22. In **McCullough v Fernwood Estate Ltd**[9] Innes CJ described a *stipulatio alteri* in the following terms:

> "*An agreement for the benefit of a third person is often referred to in the books as a stipulation. This must not be taken, however, in the narrow meaning of the Civil law, for in that sense the* stipulatio *did not exist in Holland. It is merely a convenient expression to*

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8 **Karabus Motors (1959) Ltd v Van Eck** 1962 (1) SA 451 (C).
9 **McCullough v Fernwood Estate Ltd** 1920 AD 204.

denote that the object of the agreement is to secure some advantage for the third person. It may happen that the benefit carries with it a corresponding obligation. And in such a case it follows that the two would go together. The third person could not take advantage of one term of the contract and reject the other. The acceptance of the benefit would involve the undertaking of the consequent obligation. 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. If, for instance, the stipulated benefit took the form of an option to purchase specified property at a certain price, the acceptance of the offer would involve a liability to pay the price which could be legally enforced. Otherwise the third person would be in the position of being able to sue upon a contract involving reciprocal obligations without being liable to an action if he refused to discharge his part of them."*[10]

23. The late Professor JC de Wet, in the introduction to his (second) doctoral thesis **Die Ontwikkeling van die Ooreenkoms ten Behoewe van 'n Derde**[11] described the *stipulatio alteri* in the following terms:

"*'n Ooreenkoms ten behoewe van 'n derde is 'n ooreenkoms tussen twee persone (A. en B., waardeur die een (B., die promittens) hom teenoor die ander (A., die stipulans) en 'n derde person (D.) wil verbind om aan die derde 'n reg te laat toekom. Slegs A., die stipulans en B., die promittens, is handelende partye. D., die derde, neem gladnie deel aan die onderhandeling nie.*"[12]

24. In **Crookes N.O. & another v Watson & others**[13] Centlivres CJ[14] stated that:

"*Dr de Wet in his learned thesis on '**Die Ontwikkeling van die Ooreenkoms ten Behoewe van 'n Derde**' discusses the authorities at length and on page 141 says that there were three theories which I gather to be as follows:*

(1) As soon as the agreement is executed between the settlor and the trustees (for convenience sake I am using the terms I have used in this judgment) the beneficiary obtains an irrevocable right.

(2) The beneficiary obtains no right on the mere execution of the agreement between the settlor and the trustees. The agreement constitutes an offer of a donation by the settlor to the beneficiary through acceptance of which the beneficiary obtains a jus perfectum *against the trustees.*

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10 **McCullough v Fernwood Estate Ltd** 1920 AD 204, at 205-206.

11 JC de Wet **Die Ontwikkeling van die Ooreenkoms ten Behoewe van 'n Derde** (thesis, Leiden) (1940) published by AW Sijthoff's Uitgevers Maatschappij N.V.

12 "*An agreement for the benefit of a third party is an agreement between two persons (A and B), whereby the one (B, the promittens) seeks to bind himself towards the other (A, the stipulans) and a third person (D), to bestow a right on the third party. Only A, the stipulans, and B, the promittens, are participating parties; D, the third, does not participate in the conclusion (negotiation) of the contract.*"; See also De Wet & Van Wyk **Kontraktereg en Handelsreg** (5th ed) Vol 1 pp 103 and 108.

13 **Crookes N.O. & another v Watson & others** 1956 (1) SA 277 (A).

14 Whose conclusions were concurred in by Van den Heever JA and Steyn JA.

(3) The beneficiary does obtain a right on the mere execution of the agreement between the settlor and the trustees, but his right is dependent on the will of the settlor who can before the beneficiary accepts discharge the trustees of the obligation to hand over the subject matter of the agreement to the beneficiary.

Dr de Wet favours the third theory which he says is that of the majority of the commentators. The learned writer criticises the decisions of this Court in ***Van der Plank N.O. v Otto*** *1912 AD 353, and* ***McCullough v Fernwood Estate Ltd*** *1920 AD 204, in which the second theory was adopted."*[15]

25. The learned Chief Justice, with reference to the judgment in **Commissioner of Inland Revenue v Estate Crewe & Another**[16]**,** concluded that

"*As Dr de Wet has pointed out in his valuable treatise there were three theories, the second of which was deliberately chosen by this court and it seems to me that it is now too late to ask this court to depart from its previous decisions.*"[17]

26. The more recent judgment in **Pieterse v Shrosbree N.O. & others; Shrosbree N.O. v Love & others**[18], as is often the case when a *stipulatio alteri* is at issue, related to life insurance policies. In the unanimous judgment of the Supreme Court of Appeal, delivered by Ponnan AJA, it is stated that:

"*[8] A contract of life insurance comes into existence when a person (the proposer) proposes for the insurance which is accepted by the insurer. The person on whose death the insurance is payable is the life insured. The person who is entitled to enforce the benefits payable under the policy is the owner. The proposer, the life insured and the owner may be the same person or two or three different persons. A proposer may effect the insurance either in his/her own favour or in favour of someone else. If the proposer effects the insurance in favour of someone else, the contract of insurance is a contract for the benefit of a third party and may be accepted by such third party who thereupon becomes the owner. Policies commonly entitle the owner to nominate a beneficiary on condition that the nomination will confer no rights on the nominated beneficiary during the owner's lifetime. The legal nature of such a nomination is a* stipulatio alteri *(a contract for the benefit of a third person).*

[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*

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15 **Crookes N.O. & another v Watson & others** 1956 (1) SA 277 (A) at 286A-D
16 **Commissioner for Inland Revenue v Estate Crewe & another** 1943 AD 756.
17 **Crookes N.O. & another v Watson & others** 1956 (1) SA 277 (A) at 287C-D.
18 **Pieterse v Shrosbree N.O. & others** 2005 (1) SA 309 (SCA).

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 party to the contract (see **Total South Africa (Pty) Ltd v Bekker NO** 1992 (1) SA 617 (A) at 625D-G).*"[19]

27. The authority for the statement that "*the beneficiary, by adopting the benefit, becomes a party to the contract*" is, ultimately, the judgment of Schreiner JA in **Crookes v Watson** to the effect that:

"*… in the legal sense, which alone is 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 two*"[20],

and

"*The 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.*"[21]

28. Albeit that the judgment of Schreiner JA was a judgment dissenting from the majority of the court[22], Schreiner JA's above pronouncements are regarded as authoritative. They have, however, been interpreted to connote that the beneficiary comes in as a party to the original contract between the stipulator and the promisor.[23] It is also important to note that Schreiner JA's statement that "*B drops out when C accepts and thenceforward it is A and C who are bound to each other*" is not expressed as inherent to the *stipulatio alteri* as such, but as expressing in general terms what a *stipulatio alteri* seeks to achieve.

29. The authors Van Huyssteen, Lubbe and Reinecke in Chapter 9 of the current, 5th edition, of **Contract: General Principles**, under the heading "*The Construction of a Third Party*

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19 **Pieterse v Shrosbree N.O. & others** 2005 (1) SA 309 (SCA) at par [8] and [9].
20 **Crookes N.O. & Another v Watson & others** 1956 (1) SA 277 (A) at 291A-C.
21 **Crookes N.O. & Another v Watson & others** 1956 (1) SA 277 (A) at 291E-G.
22 Concurred in by Fagan JA, who gave a separate judgment.
23 See **Total South Africa (Pty) Ltd v Bekker NO** 1992 (1) SA 617 (A) at 625D-G; **Joel Melamed v Hurwitz v Cleveland Estates (Pty) Ltd** 1984 (3) SA 155 A at 172D-E.

Contract", state as follows regarding the jurisprudential underpinnings of the *stipulatio alteri*:[24]

"9.92 *In order to fully understand the nature and consequences of a contract in favour of a beneficiary, there must be clarity about its structure. The crucial issue is whether or not the beneficiary acquires an immediate, if conditional, right upon the conclusion of the third party contract or merely an expectation (*spes*).*

9.93 *There are three main streams of thought on the construction of a contract in favour of a beneficiary. According to a fairly generally held view, the promisor is under a duty towards the stipulator to make and uphold an offer to the beneficiary. The content of the offer apparently is an undertaking by the promisor to render the benefit, as described in the original contract, to the beneficiary.*

9.94 *Upon acceptance of this offer a second contract comes into being, namely a contract between the promisor and the beneficiary. This second contract (not the original contract) is the source of the beneficiary's rights and duties. It is said that the stipulator drops out of the picture as soon as the beneficiary accepts. This second contract appears to be nothing but an ordinary contract concluded in the ordinary way by offer and acceptance which incidentally flows from a so-called contract in favour of a third party.*

9.95 *Should this construction be accepted, the new contract between the promisor and the beneficiary would have to be treated like any other contract, for example where misrepresentation occurred during the conclusion of the second contract. However, there is no guidance from the case law as to the effect of such a misrepresentation. In terms of this construction not only rights but also duties may be created in this way for a third party. A disadvantage of the construction is that, before acceptance, the beneficiary has nothing more than an offer at her disposal and this cannot serve as a basis for any interim protection.*

9.96 *A second opinion is that a contract in favour of a beneficiary is a contract in terms of which the stipulator and the promisor intend to create a right for the beneficiary as an outsider by means of the very contract between the two of them. It is suggested that, although the courts have often used a variety of expressions to explain what exactly the beneficiary must accept, the most satisfactory interpretation would be that the beneficiary must accept not an offer but the benefit, that is to say the right that the original parties intended to create for her.*

9.97 *In terms of this approach, acceptance does not mean acceptance of an ordinary offer, but it is a unilateral juristic act that serves to confirm and stabilise the right that the beneficiary is intended to derive from the contract between the stipulator and the promisor. At the same time, acceptance provides justification for conferring a right on the beneficiary under the original contract between the stipulator and the promisor, in spite of the fact that the beneficiary was not a party to that contract and possibly did not even know of it.*

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[24] L F van Huyssteen, G F Lubbe, M F B Reinecke **Contract: General Principles** (5th edition) pp 262-266 (footnotes omitted).

9.98 *According to this view there is only one contract, but this single contract gives birth to two obligations. The first obligation exists between the stipulator and the promisor and the second exists between the promisor and the beneficiary. In view of this, there is no reason why the stipulator should disappear from the scene after acceptance by the beneficiary (she, after all, retains an interest in the execution of the contract), and there is also no reason why the original contract must undergo a metamorphosis into a tripartite contract.*

9.99 *In terms of the one contract approach, acceptance by the beneficiary can be seen as a potestative suspensive condition that qualifies the intended obligation between the promisor and the third party. In the case of a revocable benefit two additional conditions apply, namely that the stipulator does not revoke the benefit before a valid acceptance is made and that the beneficiary survives the stipulator. The beneficiary derives an immediate right from this conditional obligation but it is probably not amenable to cession. This conditional right becomes unconditional when the beneficiary accepts or confirms it by a unilateral declaration of intent.*

9.100 *The existence of the conditional right explains why there is no real need for a formal offer to be made by the promisor to the beneficiary and also why neither the stipulator nor the promisor, acting alone, can prevent the beneficiary from accepting an irrevocable benefit. It also explains why the executor of a deceased beneficiary is entitled to accept the benefit after her death (in case of an irrevocable nomination) and why the beneficiary may confirm her right despite the death of the stipulator or the promisor and despite the insolvency of the stipulator.*

9.101 *Assuming that there is only one contract, rescission of the contract due to misrepresentation, or any other legal ground, will extinguish all rights created by it, including the right of the beneficiary. The same applies where the founding contract is cancelled due to breach of contract by the stipulator. On the other hand, any misrepresentation by the beneficiary during acceptance is of no significance. These matters have, however, not been put to the test before the courts as yet.*

9.102 *The important advantage of the one contract approach is that it presents a basis for interim protection of the beneficiary because of the acknowledgment that she has an immediate, if conditional, right.*

9.103 *Could the beneficiary also be burdened by duties in terms of the one contract approach? Since the beneficiary is required to accept the benefit if she wants to enforce it, she must decide whether to accept or reject the proposed obligation in its entirety, including the rights as well as the duties. This would be in conflict with the common law principle that a contract in favour of a third party can create rights for the beneficiary but no duties.*

9.104 *The approach which enjoys the most support in the case law also involves two contracts, but it differs from the two contracts approach sketched above. It can be regarded as a hybrid approach in that it combines the first two approaches. Thus in* ***Pieterse v Shrosbree NO and Others; Shrosbree NO v Love and others****, involving a beneficiary nomination in a life policy, the Supreme Court of Appeal stated that the stipulator requires the promisor in terms of the contract in favour of a third party to make an agreed offer to the beneficiary, so that a contract can be concluded between the promisor and the beneficiary. The court spoke of an 'agreed' offer but did not throw any light on its contents except to declare that, upon acceptance of this 'agreed offer', the beneficiary derives a right from the original contract between the stipulator and the*

promisor. The beneficiary must therefore look to the promisor to render the benefit to her. Moreover, the court confirms that, upon acceptance, the erstwhile third party becomes a party to the original contract.

9.105 *It would seem that the 'agreed offer' denotes an offer to invite the beneficiary to become a party to the original contract between the stipulator and the promisor. After acceptance, the beneficiary would presumably be in the same position as the one in which she would have been if, from the start, she had accepted the benefit under the contract. She would also incur any corresponding duties. If this interpretation of the court's view is correct, the original contract has changed colours by becoming either a tripartite agreement or else an amended contract between the promisor and the beneficiary (if the stipulator in fact disappears, as we are given to understand in certain cases). The function of the second contract would then be to effect such a change.*

9.106 *The court in* ***Pieterse*** *did not express itself on whether or not, prior to acceptance of the benefit, a beneficiary acquires any right, whether contingent or otherwise. However, on a previous occasion the Supreme Court of Appeal did state that before acceptance of the benefit a beneficiary in terms of a life policy has nothing more than the power to accept an offer addressed to her. Consequently, where the beneficiary was insolvent and refused to accept the benefit on offer, her trustee could not lay claim to the policy by accepting the benefit.*

9.107 *In a subsequent case,* ***Unitrans Freight (Pty) Ltd v Santam Ltd****, it was categorically emphasised that prior to acceptance a third party has no right whatsoever, whether contingent or otherwise. According to the court, the beneficiary has nothing more than a mere expectation (spes), which could, for instance, not survive her death. Why it is necessary to deny a beneficiary a conditional right at all costs is not clear – is it perhaps a leftover of the English doctrine of privity of contract? Unfortunately, both decisions are not of an incisive nature but rather superficial in that they did not consider all the ramifications, such as whether such a point of view leaves room for any interim protection of the beneficiary. Whether these decisions will be the final word on the matter remains to be seen."*[25]

30. The authors favour the second "*stream of thought*", which, essentially, represents the viewpoint of Professor De Wet[26]. They conclude that:

"***9.108*** *It is not perfectly certain which construction of a contract in favour of a beneficiary will eventually be preferred by the courts. There is support for each of the above approaches, for some more than for others, but no absolute finality has been achieved. In the light of the protection to which a third party is entitled even before acceptance and which he or she up to now enjoyed to some degree, preference is given to the view that the beneficiary derives an immediate, though conditional, right from the original contract between the stipulator and the promisor and that this right is merely confirmed and stabilised by acceptance. No second contract is involved. The third party does not join the original contracting parties and, consequently, the original contract is not changed into a tripartite agreement. This simple construction is not in conflict with any basic principle. Moreover, it makes it possible to convincingly label the contract between the stipulator and the promisor as a contract in favour of an outsider or third party.*"

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25 **Unitrans Freight (Pty) Ltd v Santam Ltd** is reported at 2004 (6) SA 21 (SCA).

26 Who, in terms of his thesis, came to the conclusion that the common law authorities provided no clarity and were quite inconclusive on the subject. De Wet, *op. cit.* at pp 140-146.

31. The statement in the excerpt quoted above from the judgment in **Pieterse v Shrosbree N.O. & Others** that the agreement between the stipulator and the promisor is to the effect that the promisor "*would*" make an agreed offer to the beneficiary (i.e. will make the offer at some future time, after the agreement between the stipulator and the promisor had been concluded) is not part of the *ratio decidendi* of the judgment and is not supported by any authority that I could find. It, moreover, seems to me to be contrary to what was stated in the excerpts from **McCullough v Fernwood Estate Ltd** and **Crookes & another v Watson & others**, quoted above, that emphasise that the benefit that is (or will, at an appointed time, become) open for the beneficiary to accept, arises immediately when the agreement between the stipulator and the promisor is concluded. Also, if the beneficiary, "*by adopting the benefit becomes a party to the contract*" between the stipulator and the promisor, it can hardly arise from an offer that the promisor, alone, made to the beneficiary.

32. Applying traditional offer and acceptance methodology to the *stipulatio alteri* confuses matters. Offer/acceptance methodology is a lawyer's tool that assists to determine whether agreement has been achieved between parties and, if so, when and where it occurred. Although a benefit bestowed in terms of a *stipulatio alteri* is, speaking generally, a type of offer that is (or will become) open for the beneficiary to accept, it does not readily fit into traditional offer/acceptance methodology, which proceeds from the premise that, to constitute an offer, the intention of the one party to contract with the other party on certain terms has to be communicated to the other party.[27] That does not apply to a benefit bestowed on a third party in terms of a *stipulatio alteri*.[28]

33.

33.1 The essence of a *stipulatio alteri* is an agreement between the stipulator and the promisor in terms of which the promisor undertakes to deliver something to the

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27 Van Huyssteen, Lubbe & Reinecke **Contract: General Principles** (5th edition) pp 263, footnote 172.
28 **Mutual Life Insurance Co of New York v Hotz** 1911 AD 556 at 567 – 568.

beneficiary (or to do or refrain from doing something relating to the beneficiary), if and when the beneficiary accepts the benefit arising from their agreement.

33.2 The "benefit" may, in given circumstances, have other agreed strings attached to it that are intended to burden the beneficiary, if he/she were to accept it. It may also in terms of the agreement between the stipulator and the promisor not be susceptible of being accepted immediately, but only at some future time.

33.3 The benefit conferred in this manner is not an offer (in the strict sense), but the product of the agreement between the stipulator and the promisor. Accordingly, the existence and validity of the benefit bestowed are dependent upon the existence and validity of the agreement between the stipulator and the promisor that sought to create it.[29]

33.4 It is then for the beneficiary (when he/she learns, by whatever means, that it the benefit available for him/her to accept) to decide whether to accept or refuse the benefit.

33.5 This, potentially, brings the traditional offer/acceptance methodology into play, but only regarding the question whether the beneficiary's right to claim performance in terms of the benefit has been established.[30] Until that occurs the stipulator and promisor are able, by mutual agreement, to revoke the benefit[31].

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29 Matters of severability left aside.

30 See Farlam & Hathaway, **Contract – Cases, Materials and Commentary** (3rd edition) by GF Lubbe and CM Murray (1988) note 3 at p 408.

31 Unless they had agreed that it would be irrevocable. Acceptance of potential irrevocability of a *stipulatio alteri* is, of course, destructive of the notion that, pending acceptance of the benefit, the beneficiary has nothing more than a so-called *spes*, i.e. a hope or expectation to obtain an enforceable right if and when he/she accepts the benefit (as opposed to a conditional, and sometimes tenuous, right to accept the benefit, enabling the beneficiary, on exercising that right, to claim performance of the promised subject matter of the benefit). If the stipulator and promisor's agreement to confer the benefit on the beneficiary is, before acceptance of the benefit by the beneficiary, simply a matter operating contractually between the stipulator and promisor, not conferring any legal right on the beneficiary,

33.6 But the benefit that is available for the beneficiary to accept is not made available by the promisor alone. It is a benefit of fixed content agreed to by the stipulator and the promisor that is in terms of the contract that they have made, available to the beneficiary to accept.

33.7 If the beneficiary accepts the benefit he/she accepts it as is, i.e. subject to such obligations that the stipulator and the promisor sought to impose on the beneficiary and, subject to any deficiencies that might, potentially, attach to the agreement that brought it into existence. In that sense the beneficiary, by accepting the benefit, accedes to the original contract between the stipulator and the promisor, but the extent to which he/she becomes party to obligations owed by or to the original parties (or, indeed, potentially to further third parties, as is the case here) depends on the content of the benefit "package" that he/she has accepted and, thus, agreed to.

33.8 In the simplest form of a *stipulatio alteri*[32], the beneficiary's acceptance of the benefit entitles him/her to claim performance from the promisor of whatever the promisor undertook (towards the stipulator) to perform towards the beneficiary. The beneficiary's acceptance does not carry with it any necessary corolary that the stipulator's status as a party to the overall contractual arrangement in terms of the *stipulatio alteri* falls away.

34. My conclusion is, accordingly, that if a stipulator by material misrepresentation induces a promisor to agree to a *stipulatio alteri* conferring a benefit on a third party beneficiary, and the promisor elects to rescind the agreement on the basis of the stipulator's misrepresentation, the *stipulatio alteri* is rescinded and with it the benefit conferred on the

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there would be no reason, in principle, why the stipulator and the promisor would not be able, by their later agreement before the beneficiary accepts the benefit, to undo an "irrevocable" *stipulatio alteri*.

[32] An undertaking by the promisor gratuitously to perform something that would be to the beneficiary's advantage.

third party beneficiary.[33] If the third party beneficiary has already accepted the benefit conferred on him/her, and performance by the promisor in terms thereof has already taken place, the rescission gives rise to an obligation on the part of the third party beneficiary to restore, insofar as it is possible to do so, what he/she received in terms of the benefit accepted and executed. The obligation of the promisor to perform in terms of the benefit conferred by the *stipulatio alteri* and, in so doing, to deliver or to do or not to do (whatever the nature and content of the benefit conferred might have been) cannot be viewed independently of the agreement between the stipulator and the promisor in terms of which the benefit arose.

35. **Karabus Motors** is, of course, good authority, but only as far as it goes. Insofar as Watermeyer J stated that:

> *"*(i)*t is a general rule of our law that if the fraud which induces a contract does not proceed from one of the parties, but from an independent third person, it will have no effect upon the contract. The fraud must be the fraud of one of the parties or of a third party acting in collusion with, or as the agent of, one of the parties*",

he addressed a contractual relationship between two parties in the usual course and not a *stipulatio alteri* that is voidable at the instance of a party thereto on the basis of the misrepresentation of his/her counter-party.

36. In these premises, Ms F.'s exception, fails.

37. Ms F. defends the action in her personal capacity, as well as in her capacity as trustee of the trust. As I have referred to already, there is no notice of intention to defend from the third defendant and no indication that the third defendant is actively participating in the proceedings, or intends to do so. No argument was addressed to me regarding whether a costs order can or should be given against Ms F. in her capacity as trustee of the trust, or, indeed, regarding whether she, as only one of the two trustees of the trust, can solely and

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[33] Which conclusion is, to my mind, not at all incompatible with the notion that the beneficiary,"*by adopting the benefit becomes a party to the contract*".

without intervention or consent of the third defendant defend the action insofar as it seeks relief against the trustees jointly.

38. The trust deed that forms part of the papers makes it clear that the trustees have to act jointly and, if they are unable to agree to do so, the resultant dispute, disagreement or deadlock has to be referred to a mediator, whose decision[34] would then be final and binding on the trustees.

39. In these circumstances, I cannot grant an order of costs against Ms F. in her capacity as second defendant, i.e. as trustee of the trust. I am, in any event, of the view that a costs order, that will ultimately operate against the trust fund, will, in all circumstances, be inappropriate.

WHEREFORE I order that:

1. The exception against the plaintiff's particulars of claim is dismissed.

2. The first defendant is to pay the plaintiff's costs of the exception.

3. The taxing master shall allow the plaintiff's costs of employing two counsel.

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F. G. BARRIE
Acting Judge of the High Court

APPEARANCES:

COUNSEL FOR THE EXCIPIENT / FIRST AND SECOND DEFENDANT:	L HOLLANDER
ATTORNEYS FOR EXCIPIENT / FIRST AND SECOND DEFENDANT:	DARRYL FURMAN & ASSOCIATES

[34] Save regarding matters pertaining to the remuneration and/or monetary consideration (payable to the trustees).

COUNSEL FOR THE RESPONDENT / PLAINTIFF:	W J VERMEULEN SC M MASCHWITZ
ATTORNEY FOR RESPONDENT / PLAINTIFF:	PAUL FRIEDMAN & ASSOCIATES INC.
DATE OF HEARING:	24 OCTOBER 2016.
DATE OF JUDGMENT:	24 OCTOBER 2016.