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THE EXTENT OF RIGHTS UNDER THE SOEKOR LEASES

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ASHTON SCHIPPERS

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I. INTRODUCTION

The adoption of the Third United Nations Convention on the Law of the Sea[1] has revolutionized international approaches to the regulation of the world's oceans. Although the convention is not yet in force, some of its provisions can be regarded as international customary law, in particular, its provisions on the expansion of coastal state jurisdiction.

The exploitation of hydrocarbon resources off the South African coast in the vicinity of Mossel Bay presents new opportunities and challenges for this country, especially in the sphere of technology. The venture involves astronomical costs and a major development of the relevant areas as is evident from the following:

The cost aspect is becoming "an even greater Frankenstein monster"[2]. In 1985, the Minister of Energy Affairs Danie Steyn publicly quantified the project at R4800m. Those figures were based on a 40c US$ exchange rate and included R1700m for a refinery. The Minister's pre-election announcement in 1987 was that the cost of the project would be R5500m only for the off-shore development. Later those figures were clarified as R4193m for the so called FA gas field and R1307m for the so called EM gas field[3]. On 27 April 1988, the Mossgas project received Cabinet approval. The cabinet ordered a rework of the cost factor and SOEKOR estimated the figure on both the on-shore and off-shore stages at R5300m[4].

A new industrial area will flank the site for Mossel Bay's refinery. This area will extend to a rail line in the north.
New harbour facilities which will include a support infrastructure for off-shore operations, are planned[5].

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Work has started on a new dam to supply water to the plant and Escom is extending its supply of electricity to the area. Various residential and business areas are being extended and developed with adjacent areas such as George developing into a strategic alternative for the long term South Coast gas industry[6].

It is estimated that the first gas will come ashore on 1 June 1991 and that for the next 35 years Mossgas will produce 25000 barrels a day from its off-shore reservoirs. Research has shown that the South Coast seems more like the North Sea. "Initially close in-shore finds were mainly gas; as the search moved into deeper water the hydrocarbon mix became more oil.[7]"

It is against this background that the extent of rights under the SOEKOR leases will be examined. The discussion in this paper is limited to certain provisions embodied in the Prospecting Lease (PL) and the Mining Lease (ML) entered into between SOEKOR and the government in terms of the Mining Rights Act 20/1967.

II. THE NATURE OF THE CONTRACT AS BETWEEN SOEKOR AND THE GOVERNMENT

a) General

While the state may enter into any lease or sale with any private person, it is an oversimplification to say that private law will govern such a relationship and that the state will be bound by the contract like any other contractual party.

Cattan[8] states that because of the similarity in the intrinsic contractual elements of these two classes of contracts that a controversy arose among French jurists as to whether there was any difference between a civil contract and an "administrative contract".

He states that notwithstanding similarities between their constitutive elements, state contracts cannot be entirely assimilated to ordinary contracts concluded between individuals. The differences which exist between these two types of contracts arise from the presence of certain public elements in state contracts. These public elements owe their existence to the subject matter, their conditions or the public law role of the state. On the other hand, the mere presence of one of these elements does not per se[9] affect the nature of the contracts. Mann[10] states that one of the tests used to determine the legal nature of a contract to which the state is a party, is the form and nature of the transaction. Was it concluded as a treaty or as a contract; was it done in commercio or in the exercise of sovereign rights? It is submitted that although the leases between SOEKOR and the government contain elements of both public and private law, the government in concluding the leases, performed an act in commercio.

According to Cattan[11] the basic differences between state contracts and other contracts are inter alia the following:

1) The conditions required for the formation of the contract. The basis for the existence of the prospecting and mining leases is found in the Mining Rights Act[12].

2) The subject matter of the contract. The right to prospect for natural oil vests in the state[13].

3) The grant of special powers and privileges. In terms of the contracts SOEKOR may import or export equipment, machinery or materials under rebate of the full customs duty[14]. Although this provision is contractual it is different in principle in that parties to an ordinary contract may not unilaterally abrogate statutory provisions relating to customs duty.

4) The sovereignty and public personality of the state as a contracting party. Cattan[15] states that this principle affects certain incidents of contract, particularly its enforcement. Mitchell[16] states that recognition of the principle that states may be held less firmly or differently to contracts than an individual citizen is only a novel application of a principle already recognised in the law of contract. The "sanctity of contract" is often infringed by the law e.g. the laws relating to insolvency justifies the termination of a contract in the general public interest. However it must be pointed out that in the case of insolvency, it is a statutory provision which terminates the contract. Parliament may legislate in respect of any matter by virtue of its sovereignty. This is not a case of a public authority being at liberty to terminate contracts for some reason related to the public good.

Mitchell[17] further states that what novelty there exists lies in the justification of a particular rule for public contracts, viz. the theory of governmental effectiveness. A state will exercise a power of self-preservation and will denounce obligations which if carried out, will jeopardize its existence. He points out that in international law this right of self-preservation is to a limited extent recognised and preserved in Article 51 of the Charter of the United Nations. In national law however, "self-preservation" must go beyond the preservation of territorial integrity. Mitchell's public law analogy is not very good. When a state acts under Article 51 it acts as against an unlawful invasion of its rights[18]. If the state in national law, for the purposes of "self-preservation" acts in breach of its contractual obligations, such action cannot be based on an unlawful act on the part of the other contracting party; in fact, it is the government which, in this instance, commits "breach of contract". A government and its agencies exist to govern, as in South Africa, within the limits of the constitution.

Mitchell[19] takes the view that it would be reasonable if, in recognition of the principle of governmental effectiveness, the law allowed, in the internal sphere, a freedom of action greater than that allowed to individuals. Therefore no contract would be enforced in any case where some essential government activity would be thereby rendered impossible or seriously impeded. The principle of governmental effectiveness should however, only be applied where justification for this exists. On this principle it is submitted that if the cabinet should at a later stage consider the Mossgas project non-viable e.g. if it were to plunge the economy into dire straits, the government could renège on its obligations in terms of the contracts[20]. In such a case, the contracts would obviously not be void ab initio but SOEKOR's rights would simply terminate when the inconsistencies of the obligations of government and those of contract become apparent. In other words, the principle of governmental effectiveness should not be allowed to get out of hand. It must be limited in some way. Hence termination of a contract by the state should be linked with the impossibility of fulfilling public law duties. It is difficult to suggest that in such an event, compensation to SOEKOR would be payable as the termination of the contract by the government, would be lawful.

Mitchell[21] aptly sets out the position:

"... when we say that the function of government is to govern we are admitting not only that the organs of government have a different position, in the sense of greater power and greater responsibilities, from that of an individual citizen, but we are also admitting, at least so far as we are speaking of democratic forms of government, ..., that these powers of government are conferred not for the benefit of the government as such but for the benefit of the community as a whole. The recognition of special privileges, in the sense suggested, is therefore only a recognition of the platitude that public benefit (public law duties) may on occasions outweigh private right."

b) The particular nature of the contracts between SOEKOR and the Government

As stated earlier, the right to prospect for natural oil is vested in the state. The grant by the state is something in the nature of a concession or a privilegium distinguishing it from the "mineral lease" granted by the holder of mineral rights to a grantee, which is essentially of a contractual nature[22].

In Neebe v Registrar of Mining Rights[23], the issue was whether the applicant was compelled to pay licence monies to the Registrar for a period during which neither the applicant nor any person on his behalf enjoyed beneficial occupation of prospecting claims. The situation arose due to the outbreak of hostilities between the British government and the South African Republic. The Registrar admitted the failure of enjoyment as alleged but contended that the full arrears of licence money had to be paid.

Counsel for the applicant argued that the relationship between the state and the holder of a prospecting claim was in essence one of letting and hiring; alternatively that it was a species of emphyteusis; further alternatively that it was a relationship to which the equitable doctrine of Roman Law should be extended whereby relief was granted to a lessee or emphyteuta who was deprived of the enjoyment of the property.

Innes CJ[24] considered the relevant Roman-Dutch authorities in detail. Regarding the applicant's first contention, he held that the rights and obligations of a lessor and lessee were founded entirely on contract. The right of mining for and disposing of precious minerals was vested in the state by statute.

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The lessee under Roman-Dutch Law had a right to the use of the land only and had to return it uninjured to the lessor at the expiration of the lease. He could not appropriate the substance of the thing hired. The claim holder on the other hand, had the right to extract a portion of the soil and to extract the minerals from it, the very thing which a lessee could not do.

No actio locati as in the case of a lease was available to the government to sue for licence money. A mining lease could thus not be regarded as a lease in the ordinary sense.

The court then considered whether the lessee's position was anologous to that of an emphyteuta[25]. After referring to the relevant authorities the court held that emphyteutis was neither a sale nor a lease but was a contract of its own special nature having its own special incidents. This tenure so established was the basis for the erfpacht of Roman-Dutch law. The holder of land under emphyteusis was entitled to the full use and enjoyment of the surface of the soil and of its fruits. He was vested with the equitable dominium of the soil and had an actio in rem. He was not, however, allowed to mine for minerals[26].

The holder of a prospecting claim has no dominium in the soil but is allowed to extract and appropriate the minerals which it contains. His tenure was therefore no more emphyteusis than it was a contract of lease.

The court concluded that the tenure under which the applicant held his claim was one sui generis specially created by statute. The incidents therefore must be gathered from the terms of the statute which established it. It was unnecessary to classify the rights of a claimholder or to "... attempt to place them absolutely into any juristic pigeonhole known to the Roman-Dutch law..."[27].

Wessel J[28] supported this finding and stated that a privilegium was conferred upon a person extracting minerals, by the state.

Hudson J in Income Tax Case 429[29] held that the judicial decisions in South Africa were unanimous in holding that there was great academic difficulty in finding an appropriate juristic niche for the extract nature of a mineral lease. e.g. the court referred to Edwards (Waaikraal) G.M. Co. Ltd. v Mamogale, N.O., and Bakwena Mines Ltd.[30] where the court had to decide whether or not there was a difference between a sale and a lease of mineral rights. In deciding that there was, Curlewis, J.P. stressed the fact that there are points of similarity between leases of mineral rights and ordinary leases of land. Contrary to the latter view, Wessels J in Ex Parte Lanham's Executors[31] drew a sharp distinction between a lease of mineral rights and an ordinary lease. In Gowan v Christie[32] Lord Cairns held "what we call a mineral lease is really when properly considered, a sale out and out of a portion of the land."

Franklin and Kaplan[33] submit that the proper approach to adopt is that laid down by Curlewis JP in the Edward's[34] case, viz. "Now, while I agree that a lease of minerals is not, strictly speaking, a lease in the ordinary sense as known to our law, I shall not attempt to classify it under any juridical phraseology known to Roman-Dutch Law, but treat as a form of contract well-known and recognised in, though perhaps peculiar to, this country."

The nature of the contracts between SOEKOR and the government are sui generis. They embody private as well as public law elements. The private law elements in the leases are the contractual and commercial characteristics of the agreements.

The respective rights and obligations of the parties are also defined in the leases e.g. the government's right to insist that SOEKOR, its personnel and those of its contractors comply with South African laws, codes and customs[35]; the guarantee that the contractual rights and obligations created by the leases shall not be altered without the consent of SOEKOR and the exemption from compliance with certain post 1977 legislation[36].

Further private law elements in the leases are the choice of law and the method for the settlement of disputes[37]. The public law elements in the leases are inter alia the form and conditions of the agreement. These are determined by the Mining Rights Act[38]; the granting to SOEKOR of special rights, privileges and facilities which include the right to construct and maintain, on-shore or off-shore, any and all facilities for prospecting and mining operations, including roads, any installations and works required in the furtherance of its activities as well as communication systems[39].

Certain public laws especially those relating to tax and customs duty are modified in favour of SOEKOR[40].

Although it embodies both public and private law elements, the contractual nature of the agreement remains unaffected. Cattan[41] states that there is no reason to distinguish between the legal nature of concessions where the terms and conditions are statutorily or administratively predetermined and the legal nature of concessions whose terms and conditions are negotiated and settled by the parties. In both cases, the contract comes into existence only as a result of consensus. If this approach is followed it would mean that irrespective of the statutorily predetermined form and conditions, the relevant leases should be interpreted by the same general principles as would be applicable were standard form contracts not used.

It serves to strengthen the argument that to say that states may be held less firmly or differently to contracts than an individual is only to claim a novel application of a principle already recognised in the law of contract and the theory of governmental effectiveness alluded to above[42].

Cattan[43] correctly states that "... the grant to the concessionaire of special rights privileges and facilities is not intended to alter the nature of the agreement but is made in effectuation of a contractual equilibrium." Such grant represents the state's contribution to the success of the enterprise which does not cause such enterprise to lose its private character.

The contracts between SOEKOR and the government combine both public private and public law elements moulded together to create a unique relationship for the purpose of exploiting a state-owned resource for the mutual benefit of both parties.

III. THE AMBIT OF THIRD PARTY RIGHTS UNDER THE SOEKOR LEASES

a) The relevant clauses in the leases

The ML provides that:

"SOEKOR shall not carry out operations in or about the mining block in such manner as may interfere unjustifiably with navigation or fishing or with the conservation of the living resources of the sea, and SOEKOR shall, as far as is reasonably possible, give due consideration to any representations by the Government in this regard[44]."

"SOEKOR... shall take all such necessary steps and do all such acts, matters and things and carry out their mining operations in such manner as will adequately safeguard and protect the rights property and person of any person or persons from any damage caused by or through or in consequence of the exercise by SOEKOR ... of the right to mine under this Mining Lease ..."[45]

Similar provisions are found in the prospecting lease[46]. The relevant leases are contracts which exist as between SOEKOR and the Government. Any undertaking by SOEKOR is purely contractual and the question arises whether persons, not being parties to the contracts could derive any rights.

b) A stipulatio alteri?

1) General principles governing the stipulatio alteri

i) A party called the stipulans (S) contracts in his own name with another, the promittens (P) to make some performance to the third party (T).

ii) De Wet[47] follows the view of Voet[48] that the Roman-Dutch authority for the stipulatio alteri is the fideicommissum inter vivos. T aquires the right to performance by virtue of the benefit stipulated for by S, subject to the condition that S does not release P from his obligation to T. This right is transmissible. T can "reinforce" his right by accepting the benefit from S.

iii) T does not create any legal relationship between himself and P by any act on his (T's) part. As long as S does not release P from his obligation to render performance to T, P remains bound to T.

De Wet recognises that it could be argued that T in this case could acquire a right without his consent. This, De Wet says "... is net in skyn 'n beswaar[49]." for an heir also acquires a right without his consent which he can repudiate at will. In like manner, T can simply reject the benefit if he does not wish to accept it. A construction whereby T first accepts the benefit from P is a denial of the stipulatio alteri. De Wet further states as apparent, the objection that T's right could be terminated if S discharges P. The right which T acquires from the agreement between S and P is subject to the condition that S does not discharge P. As indicated earlier however, T could "reinforce" his right by accepting the benefit from S. In this event S could no longer discharge P. "Discharge" by S is inapposite where P had already rendered performance to T or where T has demanded performance.

De Vos[50] criticises De Wet's view that a right can be acquired by T before acceptance and that the third party's position is analogous to that of an heir who can repudiate the benefit at will.

According to De Vos, the basis of contractual rights is consensus. No rights can be acquired unless an offer is accepted.

The offer must be tied up with a preliminary contract, a pactum de contrahendo, in respect of which there must have been acceptance. Our law does not recognise a unilateral promise which binds.

Joubert[51] also criticises De Wet's view in this regard. He states that the unstable right which T acquires against P is a right flowing neither from a contract between creditor and debtor nor from any other known source of obligation.
De Wet's construction of the stipulatio alteri is therefore based on a novel causa obligationis being based upon an agreement between a debtor and a third party.

Van der Merwe[52] refers to De Wet's construction of the stipulatio alteri as a "weergalose juridiese frats" He states that it is in fact S's intention not to bind himself to T for in that event he could simply have contracted with T. S intends to create a legal relationship between P and T.

It is submitted that De Wet's analysis of the stipulatio alteri is not juridically sound. If T acquires an immediate right from the contract between S and P, then S by releasing P commits breach of contract towards T. T can now no longer hold P liable since S has released P, but can hold S liable because he (S) has released P. If S does not release P then according De Wet's construction P, prior to acceptance can enforce his right to the benefit. The immediate "onbestendige reg" which T acquires is subject to the condition that S does not discharge P. This right could be reinforced by T's acceptance of the right. How can it then be said that if T accepts the right, S's power to destroy that right, remains unaffected?

De Wet's view, with specific reference to the acceptance by the third party of the benefit and consequently the vesting of his right to enforce the same, is not one which followed by the courts.

In Mutual Life Insurance Co. of New York v Hotz[53], Innes J, held that:

"In Tradesmen's Benefit Society v Du Preez (5 SC p269) it was held that a contract might be validly entered into for the benefit of a third party, and that the latter, if he adopted the stipulation[54] made in his favour, could sue upon it. This case was followed upon that point by the Transvaal Court in Hyams v Wolf and Simpson (T.S. 1908, p 78); and I am not aware of any South African decision to the contrary. The principle is supported by a considerable weight of Roman-Dutch authority, and may be regarded as now firmly established in our law. But if the third party desires to enforce a stipulation made in his favour, he must accept it, for until he has notified his decision to the promissor, there is no vinculum juris between them."

Similarly, in McCullogh v Fernwood Estate Ltd.[55] Innes CJ regarded as firmly established in our practice, the rule that two persons might validly contract for the benefit of a third person, and that the latter, on accepting the stipulation might enforce his rights by action upon the contract itself.

Watermeyer J in Commissioner for Inland Revenue v Estate Crewe and Another[56], questioned De Wet's construction of the stipulatio alteri, specifically that the third party acquires a right upon execution of the contract.

With reference to the latter decision, Centlivres CJ in Crookes, N.O. and Another v Watson and Others[57] held that the AD deliberately chose the construction that the beneficiary obtains no right on the mere execution of the agreement between S and P and that it was then too late to ask the court to depart from previous decisions. Regarding acceptance, the court held that "... 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[58], to become a party to a contract between himself and A..." This dictum was held to be an authoritative statement of the law by Corbett JA in Joel Melamed and Hurwitz v Vorner Investments, Joel Melamed and Hurwitz v Cleveland Estates[59].

Nienaber J in Consolidated Frame Cotton Corporation v Sithole[60] confirmed this principle where he stated "... What happens is that a right is created for him by the two principal contracting parties, which right is confirmed and completed by his acceptance ...[61]" This approach was further confirmed in Barnett and Another v Abe Swersky and Associates[62] as well as in numerous other decisions[63].

Swanepoel[64] suggests the following construction for the stipulatio alteri:

The undertaking by P to render performance to T is part of the agreement between S and P. Both S and P offer this benefit to T. T has nothing to do with P's liability to render performance to T. The benefit remains an offer to T. S as well as P intend to confer the benefit on T. Thus acceptance by T constitutes both acceptance from P as well as S.

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When T accepts the benefit, two legal relationships are created viz. between T and P and between T and S. In this sense there are three agreements with the basic idea being that eventually P will be bound to T for all practical purposes.
It is for this reason that T claims performance from P.
According to Swanepoel, there is no reason in principle why T could not claim performance from S by virtue of the contractual relationship between S and T. This cumbersome construction carries with it its own refutation. There are three legal relationships created i.e. between S and P;
T and S; T and P which all look toward performance by P in favour of T. Lee[65] states emphatically that "If, in consequence of a transaction between A and B, rights and duties run through A and vest in C, so as to establish a contractual relationship between C and B, A falling out of the contract altogether, call it what you will, it is agency and nothing else. The stipulatio alteri is a triangle. It cannot by any manipulation be transformed into a straight line."

Swanepoel's construction is tantamount to a complete denial of a stipulatio alteri. Getz[66], points out that it should not be accepted unless it is impossible to frame a theory which recognises and satisfactorily accounts for, a single contract whereby benefits are conferred upon a third person.

Getz suggests two possible solutions to the problem of defining the stipulatio alteri[67]. On the one hand the third party's right arises and is irrevocable immediately upon the conclusion of the contract. Alternatively one could take the view that while his right arises immediately, it only becomes irrevocable upon his becoming aware of the contract made for his benefit. Getz further states that both are tenable positions and neither could be dogmatically described as right or wrong.

In justification of the first solution, Getz[68] states that if two parties contract with the deliberate intention of acquiring rights and assuming duties in relation to each other, they are mutually bound and the contract cannot be altered except by mutual consent. It should therefore make no difference that one of them owes duties to third person in addition to those owed to the other.

It is submitted that this view is but an application of De Wet's theory on the stipulatio alteri It presupposes a condition that S does not discharge P. The fact that one of the parties owes a duty to the third party does make a difference viz., the essence of the stipulatio alteri. S makes an indirect donation to T which, as De Vos[69] correctly states, is achieved by T's willingness to enter into a contract with P.

It is also important to note that Getz's construction of the stipulatio alteri requires T to notify S and not P of his willingness to accept the benefit. This is contrary to our case law that P places himself in the position of an offeree toward T. The critcism of Hutchison[70] in this regard is effective:

"It is clearly the intention of the parties that it is B, not A, who is to be bound to C. How, too, can we hold that acceptance by C from A creates a vinculum juris between C and B, rather than between C and A? If A makes an offer to C, which is accepted, then surely the vinculum juris is between A and C; but this defeats the intention of the parties. In fact, in that case we do have a straightforward contract of donation.

It is submitted that it is of the essence of the stipulatio alteri that it is B who must perform, not A. Although the contract resembles a donation by A to C in fact it is no such contract, for it is the promittens who becomes bound to perform to C ..." The alternative view advanced by Getz, but for his views on acceptance by the third party is one which is in keeping with the case law.

What then is a practical construction for the stipulatio alteri?

1) S and P, acting in their own names enter into a contract whereby P undertakes to render some performance to T.

2) T obtains no right upon the mere execution of the agreement between S and P.

3) T must accept the benefit of the stipulation made in his favour.

4) Upon acceptance of the benefit of the stipulation T becomes party to the contract with S and P. He now has rights and can sue in his own name for performance.

5) A stipulatio alteri can be combined with another conditional contract between S and P e.g. where P promises the benefit to S, subject to the resolutive condition that if T accepts that benefit within a stated time, the first contract is extinguished. The contract between S and P could also be subject to a suspensive condition so that if the benefit is not accepted by T with a stated time, S would be entitled to claim the benefit promised from P.

6) Where the stipulation makes provision for the third party to render counter performance, he not only accepts the right to the performance from P but also the duty to render counter performance. In McCullogh v Fernwood Estate Ltd.[71] Innes CJ held:

"It may happen that the benefit carries with it in 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 promissor would be liable to be sued, as well as entitled to sue."

7) S and P must intend to confer an enforceable right upon T. As in the case of any other contract, there must be consensus as regards the consequences which the parties wish to create. This requirement forms the basis for the arguments advanced in this paper and will be discussed in detail.

In Wallach's Trustee v Wallach[72], W insured his life with the expressed object to benefit his wife and children. Upon insolvency, he subsequently ceded the balance of the amount due on the policy to his brother for the benefit of his wife and children. Upon his death, the trustee of his insolvent estate claimed the policy so ceded. Section 28 of the Transvaal Insolvency Law, in force at the time, enacted that a policy of life insurance bona fide effected by the insolvent within a minimum period of two years before the granting of the order of sequestration for the benefit of the wife or children "shall fall outside the sequestrated estate."

The court held that the trustee was entitled to the proceeds of the policy. Lord De Villiers CJ[73] took the the view that when the Act spoke of intention to benefit the wife and children, it meant more than mere intention, and implied some act done by which the intention was carried into effect. Innes JA[74] drew a distinction between policies drawn in the insolvent's favour (as in the present case) but with the object of benefitting the wife or children, and policies expressed to be for the benefit of the wife or children, and drawn in their favour (as in New York Mutual Life Insurance Co. v Hotz)[75].

It is not stated in the judgement whether De Villiers AJA and AFS Maasdorp AJA concurred in the minority judgement of CG Maasdorp AJA although the latter in his judgement stated[76]: "We are not driven to the conclusion ..." However, it is submitted that the principle regarding the intention was correctly formulated in the minority judgement, viz. "It does not therefore, from the language of the section, follow that a policy taken out with the intention of benefitting the wife and children, will confer any benefit upon them until the intention is carried out by making them parties to an agreement which can be legally enforced by them[77] ... if a policy taken out with an intention to confer a benefit on the wife or children, but to which she cannot as a contracting party assert and vindicate her right ... the protection will have the effect of benefitting the husband only."

The question whether contracting parties intended to confer the benefit of a stipulation on a third party was fully considered in Baikie v Pretoria Municipality[78]. In this case, land belonging to an assigned estate was sold by public auction on condition that the arrear rates due to the municipality should be paid by purchaser (appellant).

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The latter contended that the promise to pay arrear rates was not a stipulatio alteri and that the respondent therefore, had no locus standi to sue for arrear rates. Stratford J[79] upheld the appeal on two grounds:

i) That there was every motive for the seller to stipulate in his own interest for the discharge, on his own behalf, and not for the benefit of the municipality, of a debt which he was legally obliged to pay.

ii) That if the stipulation was made for the benefit of the municipality, the seller could then hold the buyer to his promise pending the municipality's adoption of the contract. The seller therefore could not sue for its performance and if the municipality failed to adopt within a reasonable time, the seller would lose all the benefit of the undertaking, "... In my opinion the seller could not possibly have intended or wished consequences such as these so little beneficial to himself." The court correctly held that neither the seller nor the purchaser contemplated that it would be necessary that the municipality be informed of the stipulation.

In this case, according to Christie[80], the court clearly interpreted the word "benefit" in the sense of material advantage or gain. I am unable to agree with this submission. Firstly, the reasons for the judgement, in particular that the parties did not intend to confer any benefit (in the sense of an enforceable right) on the municipality negates such a conclusion[81]. Secondly, Stratford J was acutely aware that the "benefit" is not synonomous with material advantage. In this regard he held "The truth is that in arriving at intention, to ascertain where the benefit of performance lies, is of great, and sometimes of decisive importance. I merely wish to emphasise that it is not always decisive and can never overrride the clear intention of the parties, once ascertained[82]."

That the term "benefit" is not synonomous with material gain or advantage was clearly spelt out in Malelane Suikerkorporasie (Edms) Beperk v Streak[83]. Marais J held that the legal figure whereby A enters into a contract with B in terms of which a benefit accrues to C if C decides to accept the benefit (together with all the disadvantages and duties which there may be), is well known in our law. Despite the support for the "consideration" idea, it was already accepted in Tradesmen's Benefit Society v Du Preez[84] that:

"Once a just cause has been established, a third person may, in my opinion adopt and ratify a stipulation made on his behalf by another. From the moment of such ratification being announced to the promissor, he is bound to complete his promise for the benefit of such person." A change of accent occurred in Hyams v Wolf and Simpson[85] where Innes CJ stressed two requirements for a stipulatio alteri:

"The contract must be made, if not in the name of C, then with a view to his benefit, and for that benefit entirely; and C must ratify and accept the contract while it is still open to him to do so[86]." The dictum of Marais J regarding the results of equating "benefit" with material advantage is persuasive: "Nou is dit dadelik vanselfsprekend dat as alle beweerde bedinge ten behoewe van derdes op hierdie deurdringende manier ontleed en beoordeel moes word, min (indien enige) bedinge staande sal bly. Dit sou net suiwer liefdadige oorwegings wees wat die toets van suiwerheid sou kon hoop om te deurstaan. Dit kan nie die regsposisie wees nie[87]." He then referred to McCullogh v Fernwood Estate[88], conclusively settling the matter: acceptance of the benefit could involve an undertaking to render counter performance. In the latter case the two would go together.

The court, referring to New Consort Gold Mines Ltd. v Kritzinger and Another[89], held that the person or body intended to be benefitted by the stipulation in question, was not the third party, if the third party's "benefit" was merely accidental," to the main contract. The right of election between acceptance and refusal of the offered contract was in itself a "benefit".

In Jankelow v Binder, Gering and Co.[90], a debtor entered into a contract with the assignee of his estate to purchase from the latter all the assets in the assigned estate for a sum calculated to give all concurrent creditors a net amount of 10s in the £ on their claims. Plaintiff, a creditor who had never proved his claim, sued the debtor on this contract.

De Waal JP held that on the terms of the agreement, that a contract between the assignor and the assignee for the benefit of individual creditors was never intended. The assignee simply agreed to hand back the estate to the assignor on condition that a certain sum which was stipulated as the purchase price was paid by the debtor to the assignee.

The intention of the parties to create a stipulatio alteri was considered fully in George Ruggier and Co. v Brook[91].

In this case, one F gave the plaintiff a mandate to sell certain immovable properties to the defendant.

Defendant subsequently made an increased offer to plaintiff which included an offer to pay plaintiff R500 for his services. F accepted defendant's offer. Plaintiff sued for the amount of R500 in a magistrates court, which granted absolution from the instance. In an appeal Milne JP[92] held that the expression "for the benefit of", in relation to a person who is not a party to the contract, imports something more than the notion of a material benefit. Referring to Jankelow v Binder, Gering and Co.[93], he held that the fact that third parties would derive certain benefits as a result of the carrying out of the contract, does not necessarily mean that it was intended[94] that such parties could, by adoption, become parties to the contract. The court further referred to Cookes, N.O. and Another v Watson and Others[95]. The minority judgement of Schreiner JA in the latter case was confirmed by the AD as an authoritative statement of the law, viz. that a contract for the benefit of a third person is a contract that is designed to enable a third person to come in as a party to the contract with one of the other two. The facts of George Ruggier were distinguishable from Baikie's[96] case. In the latter case, neither party contemplated that the terms of their contract would be communicated to the municipality. Milne J.P.'s conclusions are persuasive[97]. "... I do not think there is to be derived any juristic satisfaction from holding that the seller could enforce the defendant's undertaking but not the plaintiff. Regarding the case from any common sense angle, how can it be said to matter in the lease to the defendant that he should rather pay this money to the seller than to the commission agent to whom he actually addressed the offer to pay it?

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It seems to me that the plaintiff, in proposing this very term to defendant, cannot but be regarded as providing for a right in him to claim the money from the defendant in the event of the plaintiff's succeeding in inducing the seller to conclude a bargain upon the terms proposed."

In Salisbury Bottling Co. (Pvt) Ltd. v Lomagundi Distributors (Pvt) Ltd.[98], the plaintiff bottler sued the defendant distributor for an amount owing in respect of bottles supplied. The defendant admitted its indebtedness but counter-claimed for damages for breach of an alleged agreement in terms of which the plaintiff was precluded from supplying bottles to the defendant's competitor within the defendant's territory. It appeared that the plaintiff had concluded contracts with a certain export corporation which the defendant alleged were for the benefit of distributors such as itself. The court held that the mere fact that a contract may inure to the benefit of a third party does not make it a contract for the benefit of such party which he is open to accept, thereby becoming a party thereto. The court, in support of the latter proposition, relied on Jankelow v Binder Gering and Co.[99] as well as Crookes N.O. and Another v Watson and Others[100] The court found that it was more probable that the corporation, in restricting the plaintiff rights to its own territory, was seeking to retain control of the industry in its own hands rather than conferring a benefit on other distributors.

A clear distinction was drawn between an intention to create a stipulatio alteri and an incidental benefit to a third party in Protea Holdings Ltd. and Another v Herzberg and Another[101] In this case, the applicant applied for an order enforcing a restraint of trade clause in a service contract.

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In 1968, Protea Holdings as purchaser, concluded an agreement with Herzberg and one Bellstedt in terms of which Protea Holdings acquired a 90% interest in Herz Chemical Corporation (Pty) Ltd. On the same day, one Herzberg and Herz Corporation entered into a service agreement. Herzberg was appointed as managing director of Herz Corporation. The service agreement included a restraint clause in terms of which Herzberg was bound, for a period of three years, not to engage in any undertaking of a similar nature within certain geographical limits. The service agreement was signed by Herzberg and a representative of Herz Corporation. It was also signed by the deputy chairman and managing director of Protea Holdings. The latter's signature was unqualified and was without an accompanying resolution by the board of Protea Holdings directing him to sign on behalf of the Company. Bellstedt, the other party to the agreement of sale was placed under a similar restraint but in his case it was embodied in the agreement of sale. In 1980 differences arose between Herzberg and Protea Holdings as a result of which Herzberg gave notice terminating his service contract. He commenced employment with a competitor of Protea Holdings. Protea Holdings argued inter alia that on a proper construction of the service contract, the restraint undertaking was for the benefit of Protea Holdings which the latter had accepted.

In support of the latter contention, it alleged the following inter alia:

1) Herzberg acknowledged that by reason of his prior association with Herz Corporation, he acquired and would in future acquire knowledge of the company's trade secrets and clientele.

2) Herzberg agreed to the restraint not merely by virtue of his employment but in consideration of the purchase by Protea Holdings of his shares in the company.

3) Herzberg acknowledged that the restraint was reasonably necessary to preserve the trade secrets and clientele of Herz Corporation, Protea Holdings and its subsidiary or associated companies.

4) The deputy chairman and managing director signed the service contract. This signified acceptance on the part of Protea Holdings.

The first respondent argued that it was never the intention of the board of Herz Corporation that the signature of the deputy chairman and managing director should serve to make Protea Holdings a party in the contract; neither that it should constitute an acceptance of any alleged offer contained in the service agreement which was intended to be open to acceptance by Protea Holdings. He contended that the signature intended to serve and did serve to confirm Protea Holdings' knowledge of the agreement.

The court held[102] that the signature of the deputy chairman was intended to convey no more than that Protea Holdings had knowledge of the service contract. The deed of sale was conditional upon a service contract, not a particular one. Although Protea Holdings did have an interest in ensuring that Herzberg was prevented from competing with Herz Corporation, it did not give Protea Holdings the right, qua shareholder, to step in and accept the benefit of the restraint clause, thereby becoming a party to it. The interest which Protea Holdings had in the restraint clause was an interest as controlling shareholder and the interest of Herz Corporation was that of employer.

The interests of the two companies differed to that extent. In further support of the fact that the parties did not intend that Protea Holdings should become a party to the service contract by way of a stipulatio alteri, the court held that Protea Holdings had every opportunity of including a restraint clause in the deed of sale as it did in the case of Bellstedt. Protea Holdings in fact chose not include a restraint in the sale agreement. It was content to make the sale conditional upon a service contract. The court further held that Protea Holdings was obviously satisfied with the terms of the restraint as it would adequately have protected the interests of Protea Holdings as well as those of its subsidiary and associated companies.

It was therefore not necessary nor vital to the protection of such interest that Protea Holdings or any of its subsidiary or associated companies should have become parties to the service contract by accepting the benefits of that contract. It is against the background of the above facts and findings that the principle i.e. that the contracting parties must intend to create a stipulatio alteri, can fully be grasped. The dictum of Friedman J is conclusive[103]. Referring to Crookes N.O. v Watson[104] he stated:

"The question whether a contract is one which falls into the category described as being 'for the benefit of a third party' depends on whether it was intended that a third party should be empowered to adopt and become a party to the contract. The mere fact that the contract contains some benefit for a third party does not justify the conclusion that it is a contract for the benefit of that third party in the legal sense."

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The facts in Joel Melamed and Hurwitz v Vorner Investments; Joel Melamed and Hurwitz v Cleveland Estates[105] were briefly the following: The appellants, partners in a firm of attorneys, were shareholders in a company called Township Management Consultants (Pty) Ltd. (TMC), a company incorporated to carry on the business of establishing and managing townships. The latter was empowered inter alia, to appoint attorneys to effect the transfer of erven belonging to the respondents. The appellant firm was appointed as conveyancer to attend to the transfer of the properties. Transfer took place accordingly for ten years until respondents terminated the appointment of TMC as township manager and Melamed and Hurwitz as conveyancers. Appellants sued the respondents for damages arising out of an unlawful cancellation of the firm's appointment as conveyancers. They claimed in the alternative that this appointment was a stipulation for the benefit of a third party, which they had accepted.

Regarding the allegation of a stipulatio alteri, the relevant provisions of the Cleveland contract read as follows: "The purchaser shall pay the costs of this deed of sale and all costs of and incidental to transfer of the property including stamp and transfer duty. Transfer of the property shall be passed to the purchaser by the sellers conveyancers, Joel Melamed and Hurwitz, as soon as the full purchase price plus interest and all other amounts, charges and costs payable in terms hereof, have been paid,..." Corbett JA[106] held that there could not be read into this provision an intention on the part of the parties to the contract, viz. Cleveland and the purchaser, to confer upon Melamed and Hurwitz the benefit of being appointed to do the necessary work and an intention that Melamed and Hurwitz could, by accepting this "benefit", become a party to the contract. The purpose of the above clause was to regulate the passing of transfer as between seller and purchaser and made certain provisions in that regard.

The clause contained no express promise in favour of the appellants and no express benefit was conferred on that firm. Melamed and Hurwitz were merely mentioned incidentally in connection with the stipulation that transfer had to be passed by the seller's conveyancer. Corbett J concluded[107]: "No doubt it was considered convenient that the purchaser should know who the seller's conveyancer was. I think that both parties would have been surprised to be told that in agreeing to clause 10 they were not only conferring this "benefit" on Melamed and Hurwitz but also permitting the latter, by acceptance, to come in as a party to the contract." The court further held that its findings were of equal application to the Vorner contract.

The AD in this case expressly confirmed[108] the minority judgement of Schneiner JA in Crookes N.O. v Watson and Others[109], viz..." in the legal sense, which alone here 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 if the other two ..."

In Consolidated Frame Cotton Corporation Ltd. v Sithole and Others[110] respondents were employed by appellents. Respondents joined the Textile Workers Industrial Union (TWIU) and each of them completed and signed a written form authorising appellant to deduct the TWIU subscription from his or her remuneration.

The various stop order authorisations were submitted to appellant by the TWIU and appellant thereafter made the necessary deductions. Subsequently the respondents purported to resign from the TWIU and sought to withdraw the written authorisations to the appellant and the TWIU with immediate effect. The appellant took the view inter alia that since the resignations were in conflict with the TWIU's constitution, the authorisations remained good; that the entire arrangement should be construed as a contract between appellant and respondents in favour of the TWIU which the latter accepted and therefore it was no longer open to be withdrawn. The court held[111] that it was of the essence of appellant's contention that:

1) the terms of the constitution were incorporated into the stop order authorisations

2) appellant and each member intended that a right be created for the TWIU which the latter could enforce against the appellant, viz. to claim payment of the member's subscriptions.

Appellant's only basis for its contention that the terms of the constitution were incorporated by reference into the contract between the appellant and each respondent as embodied in the stop order authorisations, was the fact that the stop order authorisation and the application form for membership of the TWIU appeared on one and the same page. Nienaber J[112], it is submitted, correctly, held that the juxtaposition of the two documents was a matter of convenience only and had no contractual significance. Even if the terms of the constitution were incorporated by reference, each stop order authorisation need not of necessity have been the exclusive means of effecting payment.

Thus if a member were to effect payment by e.g. tendering his membership dues in cash, he would still be complying with the terms of the constitution, according to the relevent document. The stop order authorisation only loses its effect if membership of the TWIU ceased. The court further held that intention was decisive. Did the appellant and the respondent individually intend to create a right in favour of the TWIU which the latter could enforce against appellant if it failed to transmit the subscriptions to it? Could the TWIU after acceptance of the benefit retain that right for as long as an employee remains a member of the TWIU even in the face of an express revocation of that authority? The court concluded[113] that both questions should be answered in the negative and that another interpretation, equally, if not more feasible, was that the entire arrangement was a matter of convenience so as not to contravene the provisions of the Basic Conditions of Employment Act. The stop order was therefore not a stipulatio alteri.

Finally the intention of contracting parties in the creation of a stipulatio alteri was considered in Barnett and Another v Abe Swersky and Associates[114] Plaintiff, a firm of attorneys sued first defendant, alternately first and second defendants jointly and severally, the one paying the other to be absolved, for an amount allegedly payable in terms of an undertaking contained in an agreement of sale. In terms of the latter, a company, Crest Enterprises (CE) (Pty) Ltd. (the seller) sold the equity in another company to first appellant (the purchaser) in his personal capacity and in his capacity as nominee for a company to be formed.

The purchaser had the right, in terms of the agreement to nominate by notice in writing to the seller, a person or trust in his place as purchaser of the equity subject to him binding himself as surety and co-principal debtor in solidum with his nominee for the due performance of all the terms of the agreement. A further clause (17) of the agreement read as follows " The purchaser undertakes and agrees to effect payment to Abe Swersky and Associates of all their costs as between attorney and client relating to the drafting and drawing of these presents and the implementation of the terms and conditions thereof as also stamp duty on this agreement." Respondent in the court a quo successfully showed that the revelant clause displayed a common intention by the contracting parties that respondent, by accepting the benefit, became a party to the contract and was entitled to claim his fees directly from the first appellant.

Van Heerden J[115] held that the revelant clause had to be considered in the light of the complete contract of which it formed part. The court also had to take into account the fact that respondent had at all material times acted as attorneys for the seller and that the purchaser's own attorneys had acted on his behalf throughout the transaction. Against that background, the court held that clause 17 was a contractual undertaking by the purchaser to and in favour of the seller that he would pay the respondents' fees. The name of respondent was inserted merely for purposes of identification and convenience. The court further found that certain other clauses in the contract negated any intention that respondent became a party to the contract. These clauses provided for the personal liability of the purchaser if a company were to be formed or a nominee appointed as purchaser. This personal liability was to the seller only, not to the respondent and was intended to create a contractual relationship between the purchaser and seller only.

c) Application of the principles of the stipulatio alteri to the relevant provisions in the leases

i) General

Protection for third party interests is particularly relevant in view of the fact that the services of numerous sub contractors are being engaged in the Mossgas project, e.g. a contract worth R35m was awarded to Globe Engineering in Cape Town for construction of two modules of the off-shore platform. When completed, the modules which would incorporate plant and equipment worth more than R60m will be transported from Cape Town to Mossel Bay by the biggest heavy-lift vessel in the world[116]. Gencor which has a 30% stake in the Mossgas project plans to use the synthol gas conversion process i.e. the conversion of natural gas to a 50/50 mix of diesel and petrol. This process does not exist anywhere in the world, not even on a laboratory bench[117]. It is more likely that the interests of sub-contractors or sub-lessees would be infringed.

ii) General principles governing the interpretation of contracts.

It is generally accepted in South African Law that the basis of a contract is consensus, alternatively, where there is no consensus, there is no contract. Prima facie therefore it is anomalous to speak of the interpretation of a contract.
Van Warmelo[118] correctly states that the apparent anomaly disappears when one has regard to the fact that consensus must be expressed somehow. From this expression of will third parties, e.g. a judge must determine consensus, i.e. to give meaning to the expression which would accord with the intention of the contracting parties.

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Van Warmelo's premise is that the content of an agreement must be inferred from the declarations of intention of the parties, whether orally or otherwise. The rules of interpretation should be used to give meaning to such declaration or, as in the case of a written contract, to the words used. Jansen[119] adopts the same view.

Potgieter[120] takes the view that the "uitleg van 'n kontrak gerig is op die vasstelling van die gemeenskaplike bedoeling van die kontraktante ten tye van die kontraksluiting ..."

The courts refer to the "common intention" of the parties but have not always attached the same meaning to the word "intention" e.g. In Trollip v Jordaan[121] Steyn CJ referred to Steenkamp v Webster[122] where the court, regarding interpretation, held that the intention of the parties must be sought, not in that which either party had in mind, but in the words used. In determining the content of and meaning to be attached to a contract, parties should not be allowed to contradict that which has been reduced to writing. Steyn CJ held the latter to be general principles but not the law of the Medes and the Persians! Jansen[123] submits that Steyn CJ envisaged a real psychological meaning where he stated "... dat hul wil en bedoeling sterker dan hul word is[124]."

On the other hand, Wessels J in Union Government v Smith[125] held:

"... It is our first duty to see what the parties intended by the language they used." The latter approach was followed in Glyphis v Tuckers Land Holdings Ltd[126] where the court referred to the dictum in Worman v Hughes[127] viz. "... the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract."

In Cinema City v Morgenstern Family Estates[128] however, it was emphasized that the intention of the parties must be ascertained and followed.

In suggesting the approach to be followed in the interpretation of the relevant clauses in the SOEKOR leases, two questions must be answered, viz.

1) Should they be read in isolation or in context?

2) Is the context limited to the contracts themselves?

1) The relevant contracts should be interpreted as a whole, every clause or term should be read in conjunction with the rest. In Swart en 'n Ander v Cape Fabrix (Pty) Ltd.[129] Rumpff CJ held that" ... Wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uitgeknip en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en die opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel."

   The latter dictum was quoted with approval in List v Jungers[130] where the court in construing the meaning of the word "guarantee", followed the dictum of Jansen JA in Sassoon Confirming and Acceptance Co. (Pty) Ltd. v Barclays National Bank Ltd.[131] viz,"... the 'ordinary meaning of words appearing in a contract will necessarily depend upon the context in which they are used, their interrelation, and the nature of the transaction as it appears from the entire contract[132].

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It may, for example be quite plain from reading the contract as a whole that a certain word or words are not used in their popular everyday meaning, but are employed in a somewhat exceptional, or even technical sense. The meaning of a contract is, therefore not necessarily determined by merely taking each individual word and applying to it one of its ordinary meanings."

"Similarly, the AD in Bank of Lisbon and South Africa Ltd v De Ornelas and Another[133] per Joubert JA held that, "... In my opinion it appears from reading the deeds of suretyship and the mortgage bonds as a whole[134] that the above cited passages are clear and unambiguous. On the proper construction of these passages in their contextual settings I am satisfied that they were intended to cover any transaction which might arise out of the customer / banker relationship between the company and the Bank."

In Pritchard Properties (Pty) Ltd. v Koulis[135], referring to Swart en Ander v Cape Fabrix (Pty) Ltd.[136], Cillië AJA held that "the next step in the interpretation of clause 4 is to consider it as part of the whole written contract[137]." Similarly, in Barnett and Another v Abe Swersky and Associates[138], the court held that "clause 17 must accordingly be considered in the light of the complete contract of which it is a part, to ascertain whether the parties ... intended to confer a benefit upon plaintiff..."

2) It is submitted that the context of the SOEKOR contracts is not limited to the contracts themselves. Schreiner JA in Jaga v Dönges[139A] held that the 'context' is not limited to the language of a statute. Often of more importance was the matter of the statute, its apparent scope and purpose and to a certain extent its background.

Although this case dealt with the interpretation of statutes, the principle holds good for the interpretation of contracts, according to case law[139B]. Schreiner JA held that the approach to the work of interpreting may be along one of two lines. One may split the enquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted appears to have one clear ordinary meaning. In this sense the context will only be considered if the language admits of more than one meaning. In the second instance the context and the language could be interpreted together at the ouset of interpretation. He concludes that the result should always be the same, irrespective of which line of approach is adopted, since, "... in the end, the object to be attained is unquestionably the ascertainment of the meaning of the language in its context." Schreiner JA's analysis of the two approaches is persuasive:

"...But each has its own peculiar dangers. (with the first approach) ... the context may ... receive on exaggerated importance so as to strain the language used, along the other line there is the risk of verbalism and consequent failure to discover the intention of the ... (contracting parties) The difference in approach is probably mainly a difference of emphasis, for even the interpreter who concentrates primarily on the language to be interpreted cannot wholly exclude the context, even temporarily; and even the interpreter who from the outset tries to look at the setting as well as the language to be interpreted cannot avoid the often decisive first impression created by what he understands to be the ordinary meaning of that language. Seldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; the clearer the language, the more it dominates over the context and vice versa, the less clear it is, the greater the part that is likely to be played by the context[140]."

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Christie, correctly, states that the context does not stop at the four corners of the written contract. He cites Van der Post v Twijfelhoek Diamond Prospecting Syndicate[141] where contract was read in conjunction with two earlier contracts on the same subject matter.

The basis for the origin and the continued existence of the relevant contracts is the Mining Rights Act. There exists both a PL and a ML which, it is submitted cannot be interpreted individually but should be interpreted together. The 'context' of the two contracts of necessity includes interpretation of the Mining Rights Act.

The PL provides that:

"The terms and conditions of any mining lease to which SOEKOR shall become entitled in terms of the said Act, and which are deemed to have been recommended by the Mining Leases Board, shall be as prescibed in Addendum "A" hereto which forms an integral part of this Prospecting Lease ...[142]".

The cession by SOEKOR of all or part of its rights and obligations under the ML is regulated by the Mining Rights Act and is subject to approval by the Minister[143].

The common intention of SOEKOR and the government therefore, has to be ascertained with reference to the relevant contracts and the Mining Rights Act. In the pursuit of the "common intention", the interpreter as Christie[144] points out, "... is on slippery ground but the language of the contract to which both parties have assented or must be taken to have assented offers a firmer footing, so it is there that the common intention of the parties must be sought, and in order to take proper advantage of this firmer footing the inquiry must start with the grammatical or ordinary sense of the words."

It is submitted that Christie is correct[145] where he states that there is apparent conflict between certain dicta in the Union Government[146] case and the Worman[147] case. They appear to conflict simply because they are taken out of context. This view is supported by Jansen JA[148] that South African law should continue to proceed from the premise that the basis of a contract is consensus. The dictum in the Worman case would then not be regarded as a denial of the real intention of the contracting parties but would confirm that such intention is embodied in the symbols or wording used.

iii) Specific application of the principles governing the stipulatio alteri and the interpretation of contracts to the relevant provisions in the SOEKOR leases

As stated above, it is an essentiale of the stipulatio alteri that the stipulans and the promittens must intend to create an enforceable right for the third party. On the authority of the case law cited, this requirement is an unchallengeable proposition of our law.

The parties could not have intended to create a stipulatio alteri as is evident from the following provisions: (For the sake of completeness these provisions will be quoted in full.)

SOEKOR shall carry on or cause to be carried on prospecting operations on the prospecting area in a workmanlike manner, unless SOEKOR can satisfy the MINISTER that it has been prevented from doing so by causes beyond its control[149].

SOEKOR shall keep all relevant books, plans and records relating to prospecting operations under this Prospecting Lease in an accurate and available form[150].

SOEKOR shall submit in triplicate to the Secretary for Mines, Pretoria -

a) regular quarterly statements reflecting: -

i) the number of persons employed;

ii) the site and depth of every borehole being drilled and the formations penetrated;

iii) the monies expended on prospecting; and

iv) particulars regarding any occurrence of natural oil and/or any other mineral of potential value encountered[151];

b) from time to time, as results become available: -

i) generalised logs of all boreholes, including exact geographical position, depth, formation and date of starting and stopping, and

ii) the results of all geophysical and other prospecting operations[152].

Any person authorised thereto in writing by the MINISTER shall be entitled, at all reasonable times -

a) to enter into and upon the prospecting area;

b) to inspect equipment used or to be used in connection with SOEKOR's prospecting operations;

c) to examine installations, boreholes, plant, appliances and works made or executed by SOEKOR in pursuance of this Prospecting Lease;

d) to inspect and make abstracts or copies of any books,

plans, geological, geophysical, drilling and other records, returns, plans or maps which SOEKOR is required to keep or make in accordance with the provisions of this Prospecting Lease; and

e) to receive a representative portion of extracted borehole samples for laboratory analysis and tests, provided that SOEKOR shall be entitled to the results of any such test or analysis[153].

SOEKOR shall maintain all installations, erected for the safety of operations, and all boreholes which have not been abandoned and plugged, in good repair and condition and shall execute all operations in or in connection with the prospecting area in a proper and workmanlike manner in accordance with methods of prospecting customarily used in good oilfield practice and, without prejudice to the generality of the foregoing, SOEKOR shall take all steps practicable in order to prevent ... pollution of shore areas[154].

SOEKOR shall comply with any reasonable instructions given by the MINISTER in writing from time to time relating to any of the matters set out in sub-clause (1) of this Clause and the plugging of any borehole shall be done in an efficient and workmanlike manner in accordance with good oilfield practice[155].

SOEKOR shall protect all boreholes drilled in the course of prospecting operations conducted under this Prospecting Lease[156].

Similar provisions are found in the Mining Lease[157].

From an interpretation of the above provisions it is abundantly clear that they serve as a system of checks and balances for SOEKOR's prospecting and mining operations. The wording of the relevant provisions is clear. If one were to apply either of the two methods of interpretation suggested by Schreiner JA in Jaga v Dönges[158] the result is inevitably the same: If one were to concentrate on the language used you cannot "think away" the contextual setting i.e. a system of checks and balances, in fact rigid control over SOEKOR's operations. On the other hand the ordinary meaning of the words is striking and does create a decisive first impression. The difference in approach would therefore be a difference in emphasis as Schreiner JA concludes.

Certain provisions in both leases oblige SOEKOR to conduct its operations in a workmanlike manner. If it is unable to do so, due to causes beyond its control it must notify the Minister to that effect. If it is argued that this clause constitutes a stipulatio alteri, why then did the parties consider it necessary that the Minister be notified? The stipulatio alteri, like any other contract is subject to the principles of supervening impossibility of performance, i.e. if performance of an obligation promised under a contract becomes wholly impossible after the contract has been entered into through no fault of any party to it, the person promising to perform that obligation is excused performance and any counter performance on the part of the other party, is also excused[159]. In fact the ML states that:

"Failure on the part of SOEKOR to fulfil any of the terms and conditions provided for in this Mining Lease and to conform to the terms and provisions of the said Act and ... of such laws ... shall not be deemed to be a breach ... on the part of SOEKOR, insofar as such failure results from any act, cause ... or event outside the control of SOEKOR including, ... acts of God, war insurrection, civil commotion, blockade, strikes, flood, storm, lightning, fire or earthquake. If SOEKOR, by reason of the aforegoing is prevented from fulfilling its obligations, it shall immediately notify the Minister to that effect[160]." It is submitted that the express provision requiring the Minister to be notified is so worded and designed to vest in the government virtually absolute control over SOEKOR's operations.

The leases refer to "prospecting operations", "all operations in or in connection with the prospecting area[161]," "all operations in or in connection with the mining block[162]," which have to be executed in a workmanlike manner. These terms are not defined in the leases, therefore they should be given their ordinary grammatical meaning.

It is submitted that the phrase "all operations", whether they relate to mining or prospecting is an all encompassing provision. The operations in or about the prospecting or mining block that would unjustifiably interfere with navigation, fishing or the conservation of living resources of the sea, thus fall within the ambit of "all operations". The express provision that SOEKOR shall comply with any reasonable instructions given by the Minister regarding the conduct of its operations clearly denies any intention on the part of the contracting parties, of creating a <u>stipulatio alteri</u>.

If there was any intention to create an enforceable right i.e. to enable the third party to come in as a party to the contract with SOEKOR and the government, why vest the government with the right to make representations? Surely the third party, upon mere acceptance could enforce his right? It is contrary to the very nature of the stipulatio alteri that the government, as stipulans should have any further rights against SOEKOR once a third party has accepted. In the Joel Melamed and Hurwitz[163] case Corbett JA, with reference to Crookes' case held that "... the idea of such transaction is that B drops out when C accepts and thenceforward it is A and C who are bound to each other."

It cannot be suggested that the right of the Minister to make representations pertains to advice. It is an enforceable right and must be acted upon e.g. SOEKOR should take positive steps so as not to interfere with navigation or refrain from a particular activity which unjustifiably interferes with navigation or fishing. Failure to do so might result in cancellation of the contract, e.g. The PL provides that:

If SOEKOR fails to observe and carry out any of the provisions of this Prospecting Lease, the Minister shall ... have the right ... to terminate this Prospecting Lease ...[164]" It is submitted that "any provision" includes representations by the Minister. Therefore, if a third party were to suffer damages because SOEKOR did not carry out its operations in a workmanlike manner, it would have to make representations to the Minister who in turn would take up the matter with SOEKOR. From an interpretation of the relevant clauses, it is clear that the parties did foresee that third party interests might be infringed.

However, both clauses relating to SOEKOR's compliance with the Minister's representations provide that SOEKOR shall comply only to the extent "as is reasonably possible". The latter, it is suggested, implies an objective test i.e. "the reasonable explorer and exploiter of natural gas," and is in keeping with what is referred to in the leases as "methods of prospecting or mining customarily used in good oilfield practice[165]."

It can therefore be inferred from the particular provisions under discussion, that third party interests could be infringed as long as such infringement was reasonable, in the opinion of the Minister. They certainly do no confer a stipulatio alteri on the person or body whose rights have been infringed. Infringement of third party interests would therefore not per se constitute "breach of contract". It is submitted that the relevant provisions (assuming a South African court has jurisdiction) could possibly, on the test for fault suggested above, found an action in delict.

Any attempt to infer a stipulatio alteri from clauses 7 or 11 in particular "is given a death blow" by the following provision:

"If SOEKOR fails to carry out the provisions of Clauses 7 or 11, written notice shall first be given by the Minister to SOEKOR calling upon it to comply with the provisions of the said Clauses within 3 (three) months...[166]"

This is a far cry from the creation if an enforceable right for a third party! If SOEKOR does not comply with representations by the Minister within the said period, it is the intention of both contracting parties that the Minister shall have the right to terminate the contract.

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As submitted earlier, the term "all operations" is an all encompassing provision. Clause 30 (1) of the prospecting lease and 26 (1) the ML do not provide for representations to the Minister regarding the protection of rights property and persons in the conduct of SOEKOR'S operations. It could therefore be argued that the right of the Minister to make representations and hence the denial of an immediate enforceable right by a third party, extend to these provisions as well. It is conceded that a case could be made out on the basis that the parties could have expressly provided for such a right for the Minister. As alluded to, the provisions in the contract are directed at rigid control over SOEKOR'S operations[167]. The creation and composition of SOEKOR itself, the provisions regarding sub letting, cession and the statutory requirements therefore reinforce this idea of rigid control. The dictum in Sachs v Dönges[168] is apposite,"... Often of more importance is the matter of the statute (contract), its apparent scope and purpose, and within limits, its background ..."

If we say that clauses 30 (1) of the PL and 26 (1) of the ML constitute stipulations for the benefit of a third party, the following situations could arise:

1) The government would have the right to hold SOEKOR to its undertaking to conduct its operations in such manner as will adequately safeguard third party interests.

In African Universal Stores Ltd. v Dean[169] the plaintiff alleged that in terms of a certain contract defendant had undertaken inter alia to acquire certain agencies on behalf of a company but that the defendant was engaged in buying and selling goods, using the agencies, for his own personal profit. The defendant denied that the latter undertaking was a stipulatio alteri.

The court held that the plaintiff, as one of the contracting parties, was entitled to hold the defendant to his agreement pending the decision of the third party and granted to the plaintiff an interdict restraining the defendant from doing or continuing to do any act which had the effect of nullifying his undertaking. Similarly in Semer v Retief and Berman[170] the applicant's case was that the first respondent granted second respondent a written option to purchase certain property. The rights under the latter were made over to the applicant. The applicant, in his capacity as trustee for a company to be formed, duly exercised the option. He informed first respondent that should the company not be registered, that he (applicant) would be personally bound by the terms of the exercise of the option. In an application interdicting the first respondent from passing transfer to the second respondent, the court held that in the absence of any stated time limit, the seller had to allow a reasonable time to elapse to enable the projected company to adopt the contract.

It is submitted that the government would never have to resort to an application for an interdict. The provisions in the leases themselves render any such application superfluous. Firstly, the relevant clauses provide that:

"SOEKOR ... shall and (does) thereby undertake to hold harmless and indemnified the government ... against any claim ... which may be instituted by any person as a result of any injury, loss, (including loss of life) charges or expenses which may be suffered or sustained by any person ... and shall refund to the government ... all costs charges and expenses which the government ... may be put to or sustain in connection with or arising out of any such claim ...[171]."

In the light of the latter provision, it is submitted that an application for an interdict (it would of necessity be an urgent application) would not be granted as the government would certainly not suffer prejudice by having to wait for a hearing in the ordinary course[172].

It cannot be doubted that if such an order were granted it would be extremely difficult, if not impossible for the court to supervise and enforce the execution of such a decree especially if the act or omission in respect of which an interdict is sought, occurs off-shore. Such an order would in any event entail the rendering of services of a personal nature[173]. It could however be argued on the basis of the arguments advanced in respect of clauses 7 and 11 above, that the party bringing an application for an interdict has no locus standi.

Secondly, the leases specifically provide that:

"If SOEKOR fails to observe and carry out any of the provisions of this Prospecting Lease, the Minister shall have the right ... to terminate this prospecting lease and ... if SOEKOR fails to carry out or comply with any other provision contained in this prospecting lease, written notice shall first be given by the Minister to SOEKOR, calling upon it to carry out or comply with such provision within a period of thirty (30) days[174]."

The ML provides that the Minister may cancel the ML and eject SOEKOR from the Mining block:

"If SOEKOR fails to carry out and observe any conditions of this Mining Lease relating to the adequate working of the mining block, unless the Minister is satisfied that SOEKOR has been prevented from carrying out and observing such condition by the influx or scarcity of water, serious accident; damage to the mine or equipment, or any other cause beyond the control of SOEKOR; if SOEKOR fails to carry out and observe any other provisions of this Mining Lease[175]."

It further provides that:

"Before this Mining Lease is cancelled ..., the Minister shall cause written notice to be served upon SOEKOR, calling upon it to carry out and observe the relevant provisions within 90 (ninety) days after the date of such notice, and this Mining Lease shall not be cancelled if SOEKOR, complies within the said period with the Minister's requirements or ... within the said period furnishes the Minister in writing with reasons deemed adequate by the Minister for SOEKOR'S failure to carry out and observe the relevant provisions[176]."

It is submitted that the above clauses effectively eliminate any suggestion of a stipulatio alteri in any provision of the leases. The words "any other provision" in the PL must be given its ordinary meaning. It would therefore include the provisions relating to the rights property and persons of other persons. The PL specifically provides that written notice shall (a peremptory requirement) be given to SOEKOR to comply with the relevant provision. It certainly does not provide a third party with a right, which upon acceptance would enable him to enter into a contractual relationship with SOEKOR and the government. The relevant provisions reinforce the submission that SOEKOR has agreed to be contractually bound to the stringent control and supervision of its operations and that a party who has suffered damage has only a right to make representations to the Minister. The provisions of the ML specifically, supports the latter view. It was never the intention of the parties to create a stipulatio alteri.
The leases confer on the government a right of specific performance, failing which the Minister has a right to terminate. SOEKOR remains entitled to infringe third party interests provided it has an adequate reason for doing so. Whether the reason for infringement, is valid, is determined purely subjectively by the Minister. This fact strongly supports the submission as regards the meaning to be attached to the words "SOEKOR shall compensate such persons ... in the event of a legal liability" referred to in the leases[177].

It is submitted that this "legal liability" is to be determined by the Minister. If SOEKOR therefore, in the opinion of the Minister, furnishes adequate reasons for the infringement of third party interests, that is the end of the matter. There is no action in favour of and no compensation payable to the third party.

2) Grotius states that a third party may accept a promise and thereby acquire a right unless the promisor has revoked the promise before acceptance by the third party. However, in the McCullogh case, Innes J held that pending the decision of the third party, "The promissor cannot revoke his undertaking, but I can in the meantime release him[178]." Similarly, in the Tradesmen's Benefit Society[179] case, the court held that a promissor was not entitled to cancel his promise before notice of acceptance by the third party. The court in Commissioner for Inland Revenue v Estate Crewe and Another[180] held that the promissor could possibly unilaterally revoke the stipulation. Galgut J in Commercial and Industrial Holdings (Pty) Ltd. v Braamfontein Industrial Sites (Pty) Ltd.[181] on the authority of the Crewe case, held that the third party could not be deprived of the benefit by the unilateral action of either the promissor or the promissee. It is not denied that the parties acting together may cancel the agreement[182]. However, it is submitted that the promissor could not revoke the stipulation unilaterally. The dictum of Watermeyer CJ in the Crewe case was held to be of little weight by Schreiner JA in Commissioner for Inland Revenue v Estate Merensky[183]. He further held that it was out of step with the views of the majority in the Crewe[184] case. In any event, McKerron[185] correctly states that a promise which could be revoked by the promissor at will would be a contradiction in terms and if that be so, it would be no more than a revocable offer which would rule out of the law altogether, contracts for the benefit of third persons.

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In the light of the argument that the underlying purpose of the leases is virtually absolute control of SOEKOR'S operations, how can it be suggested that the relevant clauses constitute stipulationes alteri? Could the government in a single clause in the leases respectively have conferred an enforceable right on a third party which it could not unilaterally revoke? The answer must be in the negative.

3) Once the third party has accepted the stipulation in his favour, neither SOEKOR nor the government may by mutual agreement cancel the stipulation. When must the third party signify his acceptance? Neither clauses 26 (1) of the ML nor 30 (1) of the PL provide for any period within which the benefit is to be accepted. Acceptance should therefore take place within a reasonable time. In Mutual Life Insurance Co. of New York v Hotz[186], P insured his life with the appellant. The latter agreed to pay the amount assured on P's death to P's father (the third party), who lived in Russia. The father died without having accepted the benefit of the policy, in fact ignorant of its existence.

P approached the appellant and endeavoured to obtain the surrender value of the policy. The appellant adopted the stance that the legal representatives of P's father were entitled to the benefits of the policy and that a cession of their rights to P was necessary before P could become entitled to the surrender value of the policy. P subsequently purported to cede the policy to the respondent who successfully applied to a local division of the Supreme Court for an order compelling the appellant to notice and register the cession to himself as well as payment of the surrender value of the policy. The AD per Lord de Villiers CJ[187] took the view that it was still competent for the representatives of P's father, after his death to notify the stipulation made in his favour by his son. It was therefore not safe for the Company which would not know what had passed between father and son to pay the amount to the latter without proof that the representatives of the father had foregone any rights which they might have had under the policy.

Innes J[188] concurred in the latter view and held that the stipulation may be accepted at any time while it remained open. The length of time during which a contract in favour of a third person remained open for acceptance, according to the court, must depend on the circumstances of each case.

The difficulty with the casuistic construction of the stipulatio alteri on the basis of "offer" and "acceptance" is immediately apparent. The above case goes contrary to the general principle that an offer lapses upon the death of an offeree[189]. Related to the question of acceptance is the question as to how long the benefit should remain open for acceptance. A possible indicator would be the tenure of the leases. The tenure of the PL is twenty years or such further periods as the Minister may determine[190]. The ML if not terminated, will continue until SOEKOR is of the opinion that sources of natural oil have become exhausted[191]. In the latter case it could be argued that the third party could accept the benefit of the stipulation for as long as SOEKOR conducted mining operations. On the authority of Mutual Life v Hotz[192] such acceptance could take place by the successors of a prospective third party.

SOEKOR may not claim an order for specific performance against the government of the obligations proposed in the stipulation for the third party. This is so because the benefit is one to render performance to the third party and not to SOEKOR. In Gardner v Richardt[193] the plaintiff, in his capacity as trustee for a company in the course of formation purchased certain land as principal. No company was formed for the purpose of adopting the contract and plaintiff in his personal capacity claimed transfer of the property. Plaintiff contended that as he incurred personal liabilities on the contract and could be compelled to take transfer in the event of a company not being formed, he also had the right to claim transfer into his own name. Friedman AJ[194] did not agree with this contention.

On the authority of Mutual Life v Hotz[195] and Byworth v Stevenson[196] he held that to allow such a right could result in the company for whose benefit he so contracted being deprived of the benefit intended for it. The correctness of this decision was confirmed in Nine Hundred Umgeni Road (Pty) Ltd. v Bali[197]. The above discussion has shown that:

a) The government cannot unilaterally revoke the benefit stipulated for the third party.

b) If by mutual agreement the parties do not terminate the stipulatio alteri then, pending acceptance by the third party, the government cannot insist that SOEKOR render performance to the third party, or that SOEKOR render performance to the government.

This effectively means that if the third party were not to accept the benefit within a reasonable time, the government will lose all benefit of the undertaking. It also means that for a period of at least twenty years, the government is powerless to take any action against SOEKOR for its failure to adequately safeguard third party interests. An application for an interdict to restrain SOEKOR from acting in conflict with its duties under the contract could be met with the retort that the government is adequately protected by an indemnity clause. In the light of the provisions in the leases referred to in connection with the control by the government of SOEKOR's operations, could this have been the intention of the parties? The answer must be an adamant "no!" In support hereof, the dictum of Stratford J in the Baikie case is conclusive:

"It is not stipulating for another but for myself when I stipulate that something shall be done for a third person, if I have a personal and appreciable interest in its being done[198]." Furthermore, if the clauses are read in context, there is no interest and no motive why the government should stipulate for the benefit of a third party.

The words "rights, property and persons of other persons" are, it is submitted, mentioned either incidentally or for the purpose of complying with a statutory provision.

The Mining Rights Act provides that any mining lease which is granted under Section 25 (1) g of the Act, shall provide for the payment of compensation by the holder of the lease for damage caused in the exercise of his rights under the lease or any act or omission incidental thereto[199]. The section refers only to damage to land, crops or improvements on land and would therefore cover acts or omissions caused in the exercise of on- shore operations. It is submitted that this provision extends to off-shore operations on the authority of the dictum in Jaga v Dönges[200]. At the time of the enactment of the Mining Rights Act, no off-shore explorations for oil and natural gas were undertaken. In order to give meaning to this section, it must apply to off-shore operations as well.

It could therefore be argued that the provisons relating to compensation for the infringement of third party interests was inserted in compliance with a statutory provision. It cannot be argued that this section imposes an obligation on SOEKOR and the government to create a stipulatio alteri. This section simply stipulates for compensation, not how such compensation is to be made. In any event such "benefit" is essentially material in nature and is not synonomous with the creation of an enforceable right for a third party.

In determining whether the parties created a stipulatio alteri 'intention' must not be confused with 'motive'. The facts of the Malelane[201] case, succintly summarised, are the following:

A and B conclude an agreement that A will pay a sum of money to C (who will eventually be identified by B) on a definite date. This money is to be paid unconditionally i.e. exactly as if it were a donation, into C's estate, should C at the opportune time decide to accept the gift.

The court held that the motive or design with the contract between A and B may well have been to benefit B and not only C, but that the benefit to B was of no consequence.
Marais J[202] took the view that there could be no question of an adjectus solutionis causa because B had no right of recovery against C arising out of the contract with A or out of the legal tie which would arise between A and C if C accepts the benefit. Whether B had any backdoor claim to C's assets (e.g. through the possession of shares in C or under a contract already concluded between B and C), had nothing to do with the purpose of the main contract; such purpose was clearly to benefit C. The court further held that the right of election between acceptance or refusal of the offered contract or other legal tie is already in itself a "benefit" stipulated for such third party by the principal contracting parties, A and B.

In view of the latter decision, there can be a stipulatio alteri in the relevant clauses only if the intention or main purpose with it is to confer on a third party an enforceable right, should SOEKOR not respect third party interests. A third party should also be able to avail himself of the right for the entire duration of the leases. The clauses under discussion fall far short of establishing that position.

The presence of any motive or incentive to benefit a third party in the relevant clauses does not justify the inference of a stipulatio alteri; such motive or incentive would still stand in direct contrast with the provisions requiring the Minister to give SOEKOR written notice to comply with its undertaking to respect rights, property and persons of third parties[203].

A detailed examination of the relevant provisions themselves denies any inference of a stipulatio alteri. Firstly, SOEKOR expressly undertakes personal liability to the Government against any claim which may be instituted by any person[204].

Stroud[205] defines an indemnity as " ... a contract express or implied, to indemnify against a liability, and the liability under which is coterminous with the liability it is intended to cover, and is independent of whether somebody else makes default or not..."

SOEKOR therefore undertakes that in the event of a loss it will make restoration to the government by way of payment. Here the position of SOEKOR is analogous to that of the purchaser (first defendant) in Barnett and Another v Abe Swersky and Associates[206]. SOEKOR's liability is to the government only. Nowhere in the relevant provisions, is it stated that SOEKOR will indenmify any third person. The provisions were therefore intended to create a contractual relationship with the government only. The wording furthermore indicates that the parties envisaged that third parties would institute certain claims against the government, hence the indemnity clause. If then, as stated earlier performance is to be claimed from the promittens, SOEKOR, surely the parties would have been aware of that fact upon conclusion of the leases? It is indeed circuitous to stipulate an enforceable right for a third party in an agreement with SOEKOR and then for the government to consider and possibly entertain, against an indemnity, a claim by such third party.

Secondly, clauses 30 (1) of the PL and 26 (1) of the ML provide that SOEKOR shall compensate the third party only " in the event of a legal liability for any damage so caused" Assuming the existance of a stipulatio alteri in the above clauses, it would simply not suffice for the third party, if he has suffered damage to say that: "I am now accepting the benefit of the stipulation and hereby enforce my right to claim compensation." What can the third party sue for? He certainly cannot sue for immediate payment of compensation. He has to establish some form of legal liability on the part of SOEKOR.

If therefore, the parties intended to create a stipulatio alteri, an immediate enforceable right would have been afforded to the third party upon mere acceptance; this forms the basis for the liability of the promittens. The only inference that can be drawn is that the parties comtemplated liability outside the sphere of contract, presumably in delict. "Legal liability", it is submitted, could possibly relate to a fault requirement involving either dolus or culpa (again assuming a South African court has jurisdiction).

Both leases further provide that:

"Except as to differences arising in respect of income tax payments ... any difference or questions which may at any time arise between the Minister and SOEKOR as to the construction, meaning or effect of this Mining Lease (or Prospecting Lease), or as to the rights, obligations or liabilities of SOEKOR or the Minister hereunder, including termination, shall in accordance with and subject to the provisions of the Arbitration Act 1965, be referred to three arbitrators ..."[207].

A third party obviously cannot be a party to such arbitration proceedings. The Arbitration Act clearly defines a party as "a party to the agreement or reference"[208].

The principles of interpretation of contracts apply here as well. The words " any difference or question which may at any time arise," regarding rights obligations or liabilities of the parties must be given their ordinary grammatical meaning.

From a practical point of view, this provision causes immense difficulty for a third party alleging a stipulatio alteri. If such party should claim performance from SOEKOR, especially with regard to conduct which has a continuous effect of infringing third party interests, SOEKOR could deny the existence of a stipulatio alteri and insist that the provision in issue be referred to arbitration.

The same situation could arise where, say, the government orders that SOEKOR perform to the third party, or the parties could mutually refer the interpretation of the particular clause to arbitration. In all these cases, the third party is without any remedy, pending determination of the matter by an arbitration tribunal.

The fact that any dispute regarding the rights and obligations of the parties be referred to arbitration indicates, albeit somewhat loosely, that the parties never intended to create an enforceable right, for a third party, which upon acceptance would enable him to come in as a party to the contracts.

IV. CONCLUSIONS

1) The contracts between SOEKOR and the government are sui generis and embody both private and public law elements.

2) In establishing whether certain clauses in the leases constitute stipulationes alteri, both leases should be interpreted in conjuction with the Mining Rights Act and the contracts should be interpreted as a whole.

3) It is an unchallengeable proposition of our law that before a stipulatio alteri will be inferred from any provision in a contract, the contracting parties must intend to create an enforceable right for the third party so as to allow the third party to "come in as a party with one of the other two[209]."

4) There does not exist any provision in any of the leases which constitutes a stipulatio alteri; in fact certain provisions in the leases themselves, militate against any such construction; it was clearly not the intention of the parties to create any stipulatio alteri.

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LIST OF ABBREVIATIONS

BYIL	British Yearbook of International Law
ML	Mining Lease
P	Promittens (Promissee)
PL	Prospecting Lease
S	Stipulans (Promissor)
SALJ	South African Law Journal
SOEKOR	Suidelike Olie-Eksplorasiekorporasie (Eiendoms) Beperk.
T	Third Party
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg.
TSAR	Tydskrif vir die Suid Afrikaanse Reg.

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F O O T N O T E S

1. UNCLOS III 1982
2. Cape Business News Vol. 8 No. 4 December 1987 1
3. Ibid
4. Cape Business News Vol. 8 No. 9 May 1988 1
5. Ibid (n 2) 4
6. Ibid
7. Ibid (n 4)
8. Henry Cattan: The Law of Oil Concessions in the Middle East and North Africa 1967, Oceana Publication Inc. New York 2
9. Cattan (n 8) 3
10. FA Mann: The Law Governing State Contracts BYIL, Oxford University Press 1944 25
11. Ibid (n 9)
12. Act 20/1967
13. Section 2 of the Mining Rights Act 20/1967
14. ML 10.1 ; ML 13.4
15. Cattan (n 8) 4
16. JDB Mitchell: The Contracts of Public Authorities, First Edition 1954. G. Bell and Sons Ltd. London 5
17. Mitchell (n 16) 6
18. Hercules Booysen: Volkereg: 'n Inleiding 1980 Juta 8
19. Mitchell (n 16) 7
20. It is submitted that this right to terminate exists notwithstanding Section 14(3) of the Mining Rights Act which provides that the provisions of a Mining Lease entered into in terms of the Act shall be binding on the state.
21. Mitchell (n 16) 8
22. WA Joubert and TJ Scott: The Law of South African (LAWSA) Vol. 18 Durban, Butterworths 1983 para 396 297
23. 1902 TS 65
24. Ibid 80 - 81
25. Ibid 82 - 83
26. On the authority of Voet 6.3.11.

27. Ibid (n 23) per Innes J 83
28. Ibid 85
29. S.A. Tax Cases Vol. X 355 360 - 361
30. 1927 TPD 288
31. 1908 TS 330
32. LR 2 HL SC 273
33. B.L.S. Franklin and M. Kaplan. The Mining and Mineral Laws of South Africa, Durban Butterworths 1982 608
34. Ibid (n 30) 296
35. PL 19 (a)
36. PL 33 (1), 33 (2), ML 30, 32
37. PL 32 (1), ML 28.1
38. Ibid (n 12)
39. PL 4; ML 14.1
40. ML 8, 10 (1), 13.4
41. Cattan (n 8) 28
42. Ibid (n 17)
43. Cattan (n 8) 29
44. ML 17
45. Ml 26.1
46. PL 7; 30 (1)
47. JC De Wet en AH Van Wyk: De Wet en Yeats. Die Suid Afrikaanse Kontraktereg en Handelsreg. Durban Butterworth 1978 94
48. 36.1.9; 36.1.7; 39.5.43
49. De Wet ibid (n 47)
50. W De Vos: General Principles of the Law of Contract 1984 146
51. DJ Joubert: General Principles of the Law of Contract Juta 1987 190
52. Tydskrif vir die Hedendaagse Romeins Hollandse Reg (THRHR) 1964 248
53. 1911 AD 556 567
54. My emphasis
55. 1920 AD 204 207
56. 1943 AD 656 675

57. 1956 (1) SA 277 (A) 291
58. My emphasis
59. 1984 (3) SA 155 (A) 172
60. 1985 (2) SA 18 (N) 23 - 24
61. My emphasis
62. 1986 (4) SA 407
63. Malelane Suikerkorporasie (Edms) Beperk v Streak 1970 (4) SA 478 (T); Avondson Trust (Pty) Ltd v Wouda 1975 (2) 444 (T); Bornman en De Vos NNO. en 'n Ander v Potgietersrusse Tabakkorporasie Bpk. en 'n Ander 1976 (3) 488 (A); Protea Holdings and Another v Herzberg and Another 1982 (4) 773 (C).
64. THRHR (n 52) 1957 195 - 196
65. RW Lee: Roman Dutch Law 439
66. L Getz; Contracts for the Benefit of Third Parties 1962 Acta Juridica 38 50
67. Ibid
68. Ibid (n 66) 51
69. Ibid (n 50) 145
70. D.B. Hutchison: Responsa Meridiana 1974 8
71. Ibid (n 55) 206
72. 1914 AD 202
73. Ibid 208
74. Ibid 210
75. Ibid (n 53)
76. Ibid (n 72) 215
77. My emphasis
78. 1921 TPD 376
79. Ibid 379 - 380
80. RH Christie: The Law of Contract in South Africa - Durban Butterworths 1981 261
81. Ibid (n 78) 379 - 380
82. Ibid 381
83. 1970 (4) SA 478 (T) 481 - 482
84. 5 SC 269
85. 1908 TS 78
86. Ibid 82

87. Ibid (n 83) 481
88. Ibid (n 55)
89. 1929 TPD 21
90. 1927 TPD 364 368
91. 1966 (1) SA 21 (N)
92. Ibid 23
93. Ibid (n 90)
94. My emphasis
95. 1956 (1) SA 277 (A)
96. Ibid (n 78)
97. Ibid (n 91) 25
98. 1965 (3) SA 503 (A)
99. Ibid (n 90)
100. Ibid (n 95)
101. 1982 (4) SA 773 (C)
102. Ibid 782
103. Ibid 779
104. Ibid (n 57)
105. 1984 (3) SA 155 (A)
106. Ibid 172
107. Ibid 173
108. Ibid (n 106)
109. Ibid (n 57)
110. 1985 (2) SA 18 (N)
111. Ibid 24
112. Ibid
113. Ibid
114. 1986 (4) SA 407 (C)
115. Ibid 411
116. The Argus Friday August 12th 1988
117. Ibid (n 4)
118. P van Warmelo: Die Uitleg van Kontraktè 1960 SALJ 69 - 78
119. EL Jansen: 'Uitleg van Kontraktè en die Bedoeling van die Partye' 1981 (2) TSAR 97
120. AM Potgieter: Die reëls vir die Uitleg van 'n Kontrak' LLM dissertation - 1979 RAU
121. 1961 (1) SA 238 (A)
122. 1955 (1) SA 524 (A)

123. Ibid (n 119)

124. Ibid (n 121) In this case the court had to intepret a clause in a contract which read: "The seller makes no representation and no warranty to the purchaser inducing the sale." The Appellant had been mislead by representations of the respondent's agents into believing that property he had purchased included more land than in fact it did, as a result of the agents having incorrectly pointed out the boundaries. The court granted judgement in favour of the respondent.

125. 1935 AD 232 241 - 242

126. 1978 (1) SA 530

127. 1948 (3) SA 495 (A) 505

128. 1980 (1) SA 796 (A)

129. 1979 (1) SA 195 (A) 202

130. 1979 (3) SA 106 (A) 118

131. 1974 (1) SA 641 (A) 646

132. My emphasis

133. 1988 (3) SA 580 609

134. My emphasis

135. 1986 (2) SA 1 (A)

136. Ibid (n 129)

137. My emphasis

138. Ibid (n 114) 411

139A. 1950 (4) SA 653 (A) 664

139B. Van Rensburg v Taute 1975 (1) SA 279 (A) 303

140. Ibid 139 A

141. 1903 (20) SC 213; Christie ibid (n 80) 201

142. PL 23

143. ML 24 Sect. 33 (3) (b) of the Mining Rights Act

144. Christie (n 80) 201

145. Ibid

146. Ibid (n 125)

147. Ibid (n 127)

148. Ibid (n 119) 123

149. PL 7

150. PL 8 (1)
151. PL 8 (2) (a)
152. PL 8 (2) (b)
153. PL 9
154. PL 11 (1)
155. PL 11 (2)
156. PL 11 (4)
157. ML 15.1; 15.1.1. - 5; 15.2; 15.4; 16; 18; 19; 20
158. Ibid (n 139A)
159. Schierhout v Minister of Justice 1926 AD 99 107; Gründling v Beyers 1967 (2) SA 131
160. PL 7
161. PL 11 (1)
162. ML 15.1
163. Ibid (n 105)
164. PL 26
165. PL 7; ML 15.1
166. PL 26 (i); ML 29.1.3
167. Ibid (n 157)
168. Ibid (n 139A)
169. 1926 CPD 390
170. 1948 (1) SA 182
171. PL 30 (1); ML 26.1
172. Rule 6 (12) (a) CJM Nathan; M Barnett and A Brink: Uniform rules of Court 1984 Juta
173. LAWSA Vol. 5 236 147
174. PL 26 (b) (ii)
175. ML 29.1.2; 29.1.3
176. ML 29.2
177. PL 30 (1); ML 26.1
178. Ibid (n 55)
179. 1887 (5) SC 269
180. Ibid (n 56)
181. 1969 (1) SA 479 494
182. Buttar v Ault 1950 (4) SA 229 (T) 238
183. 1959 (2) SA 600 (A) 614 - 5
184. Ibid (n 56)

185. RG Mckerron: The Juristic Nature of contracts for the benefit of Third persons (1929) 46 SALJ 387 389
186. Ibid (n 53)
187. Ibid 563
188. Ibid 567
189. De Vos ibid (n 50) 143
190. PL 3
191. ML 4
192. Ibid (n 56)
193. 1974 (3) SA 768 (C)
194. Ibid 772
195. Ibid (n 56)
196. (1902) 19 SC 18
197. 1986 (1) SA 1 (A)
198. Ibid (n 78) 380
199. Sect. 30 Act 20/1967
200. Ibid (n 139A)
201. Ibid (n 83)
202. Ibid 483
203. PL 26 (ii); ML 29.2
204. PL 30 (1); ML 26.1
205. JS James: Strouds Judicial Dictionary of words and phrases, London Sweet and Maxwell Vol. 3 1973 1349
206. Ibid (n 114)
207. ML 28.1; PL 32 (1)
208. Sect. 1 Act 42/1965
209. Crookes NO v Watson and Others 1956 (1) SA 277 (A) 291

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BIBLIOGRAPHY

BOOYSEN H: Volkereg: 'n Inleiding Juta 1980

CATTAN H: The Law of Oil Concessions in the Middle East and North Africa 1967, Oceana Publications Inc. New York.

CAPE BUSINESS NEWS: Volume 8 No. 4 December 1987
Volume 8 No. 9 May 1988

CHRISTIE RH: The Law of Contract in South Africa Durban Butterworths 1981

DE VOS W: General Principles of the Law of Contract University of Cape Town 1984

DE WET JC en VAN WYK AH: Die Suid Afrikaanse Kontraktereg en Handelsreg. Durban Butterworths 1978

FRANKLIN BLS and KAPLAN M: The Mining and Mineral Laws of South Africa, Durban Butterworths 1982

JAMES JS: Strouds Judicial Dictionary of words and phrases, London Sweet and Maxwell, Volume 3 1973

JANSEN EL: 'Uitleg van Kontraktè en die Bedoeling van die Partye' 1981 (2) TSAR 97 - 124

JOUBERT DJ: General Principles of the Law of Contract Juta 1987

JOUBERT WA: The Law of South Africa Volume 5
The Law of South Africa Volume 18

KERR AJ: The Principles of the Law of Contract, Third Edition, Durban Butterworths 1982

LEE RW:	Roman-Dutch Law, Butterworths 1958
KHAN E:	Contract and Mercantile Law, Second Edition, Juta 1988
MANN FA:	The Law Governing State Contracts BYIL, Oxford University Press 1944
MCKERRON RG:	The juristic nature of contracts for the benefit of Third Persons 1929 SALJ 387
MITCHELL JDB:	The Contracts of Public Authorities. First Edition, G Bell and Sons Ltd. London 1954
	Mining Lease between the Minister of Mines and Suidelike Olie-Eksplorasiekorporasie (Eiendoms) Beperk.
NATHAN CJM, BARNETT M, BRINK A:	Uniform Rules of Court 1984 Juta
POTGIETER AM:	Die reëls vir die Uitleg van 'n Kontrak LLM dissertation - 1979 RAU
	Prospecting Lease between the Minister of Mines and Suidelike Olie-Eksplorasiekorporasie (Eiendoms) Beperk.
	South African Law Reports
	Statutes of The Republic of South Africa
VAN WARMELO P:	Die Uitleg van Kontraktè 1960 SALJ 69 - 78

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