REAL ESTATE

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REVOCATION OF AN INSTRUCTION TO A CONVEYANCER

In *Stupel & Berman v Rodel Financial Services,* the Supreme Court of Appeal (SCA) determined the nature of a client's instruction to a conveyancer to pay funds to a third party on the client's behalf and whether such instruction is capable of revocation.

Stupel & Berman Incorporated (Stupel & Berman) was appointed by Amber Falcon Properties 3 (Pty) Ltd (Amber Falcon) to act as conveyancer in the registration and transfer of an immovable property which was sold to Cross Atlantic Properties 186 (Pty) Ltd (Cross Atlantic). Prior to the registration and transfer of the property into the name of Cross Atlantic, Amber Falcon obtained two bridging finance loans from Rodel Financial Services (Pty) Ltd (Rodel) in the form of discounting agreements. Each of the discounting agreements comprised of two parts, namely terms and conditions, and a schedule.

In terms of the discounting agreements, Amber Falcon agreed to cede the proceeds of the sale agreement concluded with Cross Atlantic to Rodel against payment of the loans. Although the schedules to each of the discounting agreements were signed by Stupel & Berman, it was not a party to, nor was it aware of the terms and conditions agreed upon by Amber Falcon and Rodel. However, the schedules of each of the discounting agreements, which were signed by Stupel & Berman, contained an undertaking by it to "pay to Rodel from the proceeds of the above amount within 72 hours of registration of transfer/receipt of the funds, unless prevented by interdict or operation of law".

Prior to registration and transfer of the property into the name of Cross Atlantic, the sale agreement entered into between Amber Falcon and Cross Atlantic was cancelled. Amber Falcon informed Rodel that the property would be remarketed and auctioned at a higher price, and that the proceeds of the sale would secure the advances provided by it. However, Cross Atlantic obtained an interdict against the disposal of the property by Amber Falcon and in terms of a settlement agreement between Amber Falcon and Cross Atlantic, it was agreed that the sale would proceed. Upon reaching settlement with Cross Atlantic, Amber Falcon informed Rodel that the sale would not be effected in the near future and therefore offered to settle its debt to Rodel for an amount which would be substantially less than the proceeds which Rodel was owed in terms of the discounting agreements.

Rodel proceeded to cancel the discounting agreements with Amber Falcon and demanded repayment of its advance with costs and interest. Amber Falcon accepted the cancellation and on its instruction, Stupel & Berman withdrew its undertaking to Rodel. Accordingly, upon registration and transfer of the property into the name of Cross Atlantic, Stupel & Berman transferred the proceeds of the sale directly to Amber Falcon.

Rodel, after an unsuccessful attempt to execute the judgment obtained by it against Amber Falcon, pursued a claim against Stupel & Berman for the cession of the proceeds of the sale. Rodel contended that it stood in the position of an adjectus solutionis causa. According to South African law, the existence of an *adjectus solutionis causa* is created by way of an agreement between a debtor and a creditor. In terms of such agreement, the debtor will be entitled to pay a third

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party the same amount which it owes to the creditor in order to discharge its debt to the creditor. According to Rodel, the discounting agreements constituted tripartite agreements in terms of which Stupel & Berman, as debtor to Amber Falcon, was obliged to transfer the proceeds of the sale to Rodel in order to discharge its debt to Amber Falcon. Our law provides that once an *adjectus solutionis causa* is nominated to be paid, the creditor (Amber Falcon for the purposes of Rodel's argument) cannot unilaterally change or revoke the instruction given by it to the debtor (Stupel & Berman for the purposes of Rodel's argument). However, the SCA determined that no tripartite agreement existed between the parties, but rather that the undertaking given to Rodel by Stupel & Berman comprised of a stand-alone agreement to which Amber Falcon was not a party, therefore rendering Rodel's argument erroneous. Furthermore, the SCA noted that the election to render performance to an *adjectus solutionis causa* is at the discretion of the debtor and that the third party would not have a claim against the debtor as a result of his failure to perform. Accordingly, even if Rodel was an *adjectus solutionis causa* (which the SCA found it was not), its claim against Stupel & Berman would be unfounded in our law.

The SCA further stated that Stupel & Berman had not contracted with Rodel in its personal capacity but rather that it was acting in terms of its mandate as the agent of Amber Falcon. The SCA considered whether Rodel had a claim against Stupel & Berman in terms of the law of agency. The general rule in terms of our law of agency is that the principal is fully entitled to amend or revoke a mandate given to an agent. The exception to this rule applies when the agent is authorised to act for his own benefit. In such circumstances, the principal cannot revoke a mandate that is either coupled with an interest of the agent or which forms part of a security afforded to the agent. Rodel argued that Stupel & Berman stood to benefit from the mandate in the form of conveyancing fees paid to Stupel & Berman to execute the registration and transfer of the property into Cross Atlantic's name, and that Amber Falcon was therefore not entitled to revoke the mandate. However, the SCA distinguished between Stupel & Berman's mandate to execute the registration and transfer, and the firm's mandate to transfer the proceeds of the sale to Rodel, the latter of which bestowed no benefit to Stupel & Berman. The SCA further explained that even if such exception did apply, the appropriate remedy would be the payment of damages and not specific performance.

The SCA noted that Rodel's interests would have been best served had it either interdicted Stupel & Berman from giving effect to the revocation of mandate at the outset or instituted interpleader proceedings.

This decision of the SCA has provided clarity regarding the distinction between an *adjectus solutionis causa* and an agent. In addition, the judgment reiterates that the conveyancer, as agent, can only transfer funds upon the instruction of its principle.

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The article was verified by John Webber, Director, Real Estate.

PLAYING WITH FIRE: SPECIFIC PERFORMANCE AND A LESSEE'S PLIGHT

In the case of *Hennox 349 CC v SA Retail Properties Ltd 2014 JDR 2460 (GJ),* the lessee learnt a R2 million lesson. After hounding its lessor to restore the premises following a fire, the lessee eventually took the matter into its own hands, repairing the property. The lessor claimed not to be liable for the improvements and the lessee's hopes of retribution turned on whether the Court would accept the importation of a tacit term into the lease agreement.

Hennox 349 CC (Lessee) pleaded that in terms of a tacit term of the lease agreement it could claim compensation from SA Retail Properties Limited (Lessor) for necessary repairs made to the leased property. The Lessor disputed the existence of the tacit term and, in any event, claimed that it was not liable for any damages or compensation because it had sold the premises, thus all rights and obligations had been delegated to the new owner due to the doctrine *huur gaat voor koop*. The Lessor also contended that a number of exemption clauses, namely 10.1, 16.4 and 19, of the lease agreement demonstrated that the Lessor had expressly excluded itself from being liable to the Lessee.

Clause 16 of the lease agreement stated as follows:

16.1 In the event of the premises being completely destroyed or so extensively damaged by fire, storm, tempest or other unavoidable cause as to deprive the LESSEE of the use thereof during the currency of this Lease, either party may elect to terminate the Lease as from the date of such destruction, upon giving the other party notice within 14 (FOURTEEN) days after such destruction or damage, in which event the rental shall terminate and be adjusted as from the date of such destruction or damage.

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16.2 In the event of the premises being completely destroyed or damaged as in the abovementioned clause, and neither party giving notice of their intention to terminate the Lease, or in the event of the parties mutually agreeing that the Lease shall continue, the LESSOR shall rebuild or repair the building within a reasonable time, reserving the right, however, to change or vary from the form or construction of the building but granting to the LESSEE the same accommodation as regards position and space in such altered or varied construction. In such event, the LESSEE shall be entitled to a total rebate of rental for the period during which it may be deprived of whole use of the premises.

16.3 ....

16.4 In any event, the LESSOR shall not be liable to the LESSEE for any loss or damage that may be sustained by the LESSEE as a result of being deprived of partial or total occupation of the premises."

It was common cause that neither party gave the other the requisite 14 days' notice as stipulated in clause 16.1. The Lessor failed to fulfil its obligations of repairing the damage to the premises as stipulated in clause 16.2. After unsuccessfully pursuing the Lessor to meet its obligations, the Lessee eventually took the matter into its own hands, spending over R2 million on restoring the premises. The Lessee's action for damages was in respect of all amounts expended by it to repair the property and, to this end, it sought to import the following term into the lease agreement:

"In the event that the lessor failed to make the necessary repairs following a fire, the lessee would be entitled to do so and recover the amounts so spent from the lessor".

Importantly, the Lessee did not claim specific performance from the lessor as had already effected the repairs to the property, thus nullifying this remedy.

The Court pointed out that the test for a tacit term is that of the officious bystander test: if a bystander at the signing of the lease asked what would happen if the property were destroyed by fire and both parties answered that the Lessee would repair same and the Lessor would reimburse the Lessee for the cost thereof, the tacit term could be imported into the lease agreement. The Court, however, emphasised that a tacit term can only imported if it is not contrary to an express term of the lease. Turning to this determination, the Court found that several clauses, including 16.4, indicated that the intention of the Lessor was not to be liable for compensation or damages or loss to the Lessee. Even if these exemption clauses did not, in themselves, exclude the Lessor from liability, the clauses illustrated that it was highly unlikely that the Lessor would've agreed to the tacit term.

Thus, the Court concluded that no tacit term could be imported into the lease agreement and that the Lessor was therefore not liable to the Lessee. Due to this finding, it became unnecessary for the Court to deal with the intricate question as to whether the *huur gaat voor koop* principle resulted in the new owner being lumped with the obligations of the previous owner.

While the Court expressed its "greatest sympathies for the plight" of the Lessee, it went on to state that the Lessee undertook the repairs at its own risk and the Lessee would have been in a much stronger position if it had claimed specific performance. To allow the Lessee to take matters into its own hands and perform for the Lessor, would be tantamount to the introduction of a new contractual remedy - "substituted specific performance by the aggrieved part," - and no such remedy exists in our law.

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The article was verified by Nayna Parbhoo, Director, Real Estate.

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