THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 747/2012

In the matter between:

MINISTER OF AGRICULTURE AND LAND AFFAIRS	**First Appellant**
DEPUTY DIRECTOR: FINANCE IN THE OFFICE OF THE HEAD OF LAND CLAIMS COMMISSION	**Second Appellant**
and	
CAROLA MARIA DE KLERK	**First Respondent**
SECHELE INCORPORATED	**Second Respondent**
NICOLAS KOBEDI SECHELE	**Third Respondent**

Neutral citation:	*Minister of Agriculture v C M De Klerk* (747/2012) [2013] ZASCA 142 (30 September 2013)
Coram:	Navsa ADP, Cachalia and Majiedt JJA and Van der Merwe and Meyer AJJA
Heard:	**30 August 2013**
Delivered:	**30 September 2013**
Summary:	**Sale – Immovable property – whether conveyancer agent of seller or of purchaser in receiving payment of the purchase consideration from purchaser before payment thereof due to seller.**

ORDER

On appeal from: the North Gauteng High Court, Pretoria (Hiemstra AJ sitting as court of first instance):

1. The first appellant's appeal is dismissed, with costs.
2. The second appellant's appeal is upheld, with costs.
3. The order of the court a quo is set aside and there is substituted an order which reads:

   The first defendant is ordered to pay to the plaintiff:

   (a) The sum of R1 001 971.50;
   (b) Interest on the sum of R1 200 000.00 at the rate of 15,5% per annum from 22 May 2009 to 9 June 2009;
   (c) Interest on the sum of R1 850 000.00 at the rate of 15,5% per annum from 29 May 2009 to 9 June 2009;
   (d) Interest on the sum of R1 021 971.50 at the rate of 15,5% per annum from 9 June 2009 to 19 August 2009;
   (e) Interest on the sum of R1 001 971.50 at the rate of 15,5% per annum from 19 August 2009 until date of payment;
   (f) Costs of suit.

JUDGMENT

MEYER AJA (CACHALIA JA et VAN DER MERWE AJA concurring):

[1] This is an appeal with leave of the court a quo, against the judgment and order of Hiemstra AJ, sitting in the North Gauteng High Court. The first and second appellants, the Minister of Agriculture and Land Affairs and the Deputy Director: Finance in the Head Land Claims Commissioner's Office, were ordered jointly and severally to pay to the first respondent the sum of R1, 001, 971.50 plus interest and

costs. The dispute between the parties – seller and purchaser – arose from the misappropriation by the appointed conveyancer of money paid into his trust account pending the registration and transfer of immovable properties.

[2] On 22 August 2008, a written agreement of sale was entered into between the first respondent (seller) and the National Department of Land Affairs (purchaser). The sale related to the purchase of immovable properties - portions 49 and 50 of the farm Leeuwpoort 283, Mpumalanga (the properties) - which were owned by the seller. The following recordal in the preamble of the deed of sale provides the context within which it was concluded:

'A. The Seller is the registered owner of the Properties.

B. Claims have been lodged on behalf of the beneficiaries of the MANALA MGIBE CPA[1] in respect of the Properties in terms of the Restitution of Land Rights Act, 22 of 1994.

C. The Parties and the representatives of the beneficiaries of the MANALA MGIBE CPA have conducted negotiations for the settlement of the claims referred to in paragraph B above, and wish to enter into this Agreement for the settlement of the claims by way of the sale of the Properties by the Seller to the Purchaser and the registration of the transfer of the Properties into the name of the MANALA MGIBE CPA.'

[3] The undisputed evidence of the seller is that prior to the conclusion of the sale agreement she had been informed by Mr Takalani Sidakalala, who was the responsible official representing the purchaser, that the properties would be expropriated if she did not agree to sell them. He also informed her that she could not appoint her own attorney for purposes of the transfer of the properties and that the parties must make use of the attorney appointed by the government. The purchaser appointed Sechele Inc, Pretoria as the conveyancer. Mr NK Sechele was the sole director of that company. The seller signed the deed of sale at the offices of the conveyancer. Clause 1.1.2 of the deed of sale defines "the Conveyancers" as

'. . . SECHELE Attorneys appointed by the Purchaser to register the transfer of the Properties from the Seller to the MANALA MGIBE CPA'.

[4] The other relevant provisions of the deed of sale are clauses 4 and 7 which read as follows:

'4. PAYMENT OF THE PURCHASE PRICE

[1] Communal Property Association.

The purchase price for the Properties of R3 700 000.00 (Three Million Seven Hundred Thousand Rand only) shall be payable by the Purchaser to the Seller in cash as follows:

4.1 Within 30 (thirty) calendar days of the Signature Date, the Purchaser shall pay the deposit being 50% (fifty percent) of the purchase price into the Conveyancers' Trust Account.

4.2 Within 14 (fourteen) days of written request by the Conveyancers, which request shall only be made when the documents required for the transfer of the Properties are ready to be lodged with the Mpumalanga Province Deeds Registry, the Purchaser shall furnish to the Conveyancers a written undertaking from the Chief Land Claims Commissioner in the form of an undertaking to pay the balance of the purchase price, into the Conveyancers' Trust Account within 5 (five) working days of registration of transfer of the Properties into the name of the MANALAMGIBE CPA [sic] in the Mpumalanga Province Deeds Office.

4.3 The amount deposited by the Purchaser with the Conveyancers in terms of clause 4.1, shall pending the registration of transfer of the Properties be invested by the Conveyancers in an interest bearing account in terms of Section 78(2A) of the Attorneys Act 53 of 1979, as amended, and such accrued interest shall, upon registration, be paid over to the Purchaser, less bank charges into the following bank account . . .

4.4 The portion of the purchase price referred to in clause 4.1 shall be paid to the Seller by the Conveyancers against registration of transfer of the Properties into the name of the MANALAMGIBE [sic] in the Mpumalanga Province Deeds Office. The Portion of the purchase price referred to in clause 4.1 shall be paid to the Seller by the Conveyancers forthwith after receipt from the Seller.

4.4 Within 14 fourteen days [sic] of written request by the Conveyancers from the Chief Land Claims Commissioner, which request shall only be made when the documents required for the transfer of the Properties to be lodged for registration, the Purchaser shall conduct an inspection of the properties to confirm that the property is in the same condition as at date of valuation.

4.5 Upon completion of the in loco inspection, the Purchaser will instruct the Conveyancer to lodge registration papers at the Deeds Office, provided it is confirmed by the Purchaser that the Property is in the same condition as at the date of valuation.

4.6 Should the Purchaser raise issues after the in loco inspection, the Conveyancer will be informed of outstanding issues to be addressed and lodgment of the registration papers will only take place on confirmation by the Purchaser that the issues have been resolved. In the event that the parties do not agree to the valuation adjustment to be implemented within 10 (ten) working days following the in loco inspection this Agreement shall be deemed to be cancelled with immediate effect.

. . .

7. INTEREST ON AMOUNTS DUE

Should any part of the purchase price of the Property not be paid to Seller on the date on which it is due in terms of this Agreement, the Purchaser shall be liable for payment of interest to the Seller on such amount at the rate

published in terms of the Act on Prescribed Interest Rates, Act 55 of 1975 which will be calculated on a daily basis and capitalized monthly. The interest is payable on demand.'

[5] The Land Claims Commissioner furnished the written undertaking envisaged in clause 4.2 on 9 October 2008. The deposit of R1 850 000.00 was paid into the conveyancer's trust account the following day. Transfer of the properties into the name of the beneficiary was done and executed at the office of the Registrar of Deeds at Pretoria on 22 May 2009. The conveyancer only paid an amount of R650 000.00 to the seller on the day of the registration of transfer.

[6] The seller objected to Mr Sidakalala about this. He consequently arranged a meeting with the conveyancer. It was held at the beginning of June 2009 and attended by the three of them. The seller could not follow the conversation between Mr Sidakalala and the conveyancer because she did not understand the language. But Mr Sidakalala informed her that he had given the conveyancer ten days to pay the money over to her. She informed him that she was not going to move from the properties until she received all her money. Mr Sidakalala agreed to this saying that he would negotiate with the beneficiary. It is to be noted that in terms of clause 9.1 of the deed of sale all the benefits of ownership of the properties are to pass to the beneficiary, 'subject to full payment,' on the date of registration of transfer of the properties into the name of the beneficiary.

[7] The balance of the purchase price in the sum of R1 850 000.00 was paid into the conveyancer's trust account on 8 June 2009. The conveyancer paid this amount to the seller the following day. On the same day the conveyancer also paid the sum of R178 028.80 to Nedbank on behalf of the seller, whose indebtedness to the bank was secured by a mortgage bond that was registered over one of the properties.

[8] The sum of R1 021 971.20 that was already due and payable to the seller against registration of transfer remained unpaid. She again complained to Mr Sidakalala that the conveyancer had failed to pay the outstanding amount to her despite the expiry of the ten day period given to him by Mr Sidakalala. A second meeting with the conveyancer was arranged by Mr Sidakalala. The conveyancer admitted at this meeting that he had misappropriated the unpaid money. The ineluctable inference in all the circumstances is that the money was misappropriated

by him before registration of transfer of the properties into the name of the beneficiary and, accordingly, before it was due to the seller in terms of the deed of sale. The only further payment that was made to the seller was an amount of R20 000.00, which the conveyancer paid to her on 19 August 2009.

[9] The seller's combined summons cites the purchaser as the first defendant and the Deputy Director: Finance in the Chief Land Claims Commissioner's office as the second defendant. It is recorded in clause 17.4 of the deed of sale that the Deputy Director: Finance in the Chief Land Claims Commissioner's office shall be responsible for any payment to be made by the purchaser. No relief is claimed against the second defendant. Sechele Inc and Mr NK Sechele are cited as the third and fourth defendants.

[10] The seller pleaded the sale agreement, her full performance, the purchaser's breach in only paying to her via the conveyancers the amounts to which I have already made reference, and she claimed payment of the unpaid balance of the purchase price (the sum of R1 001 971.50) plus interest thereon and costs from the purchaser. She further pleaded that the conveyancer was jointly and severally liable to her with the purchaser in the event of the purchaser having paid the full purchase price to the conveyancer. The purchaser pleaded that its '…obligations in terms of the contract was [sic] fulfilled due to the fact that payment was made to [sic] the conveyancer's trust account in the amounts of R1 850 000.00 on 10 October 2008 and R1 850 000.00 on 8 June 2009 respectively' and that the seller must take her recourse in law against the conveyancer alone.

[11] The seller elected not to proceed with her action against Sechele Inc and Mr NK Sechele after being advised that she had no claim in law against them. The finding of the court *a* quo was to the effect that the terms of the deed of sale did not confer authority on the conveyancer to represent the seller in the acceptance of the purchase price. Hiemstra AJ referred to clauses 1.1.2., 4.3, 17.1 and 17.3 of the deed of sale and concluded:

'These clauses, and in particular clause 4.3, according to which the purchaser is entitled to interest earned on the money invested by the conveyancers, tilt the scales firmly in favour of the proposition that the conveyancers acted as the agents of the purchaser and not of the seller. That being the case, the money had not been paid to the plaintiff or to her agent.'

The purchaser and the Deputy Director: Finance in the Chief Land Claims Commissioner's office (second appellant) were ordered, jointly and severally, to pay the unpaid balance of the purchase price, interest thereon and costs to the seller. Hiemstra AJ obviously erred in also granting judgment against the second appellant.

[12] Before us, counsel for the purchaser submitted that the question to be decided by the court a quo, as formulated in the pleadings, was not whether the conveyancer, in whose hands the money was misappropriated, had acted as agent of the purchaser or of the seller or of both of them in receiving and holding the purchase consideration, but instead whether the purchaser had complied with the agreement between the purchaser and the seller as to how the purchase price was to be paid. The issue in counsel's submission was only one of performance and no question of agency arose. Counsel for the purchaser placed great reliance upon the decision in *Verbeek v Maher*[2] in which case Milne J said the following:[3]

'It seems to me, however, that, assuming that P.N.B. Properties in receiving the money was not acting as the agent of the seller (because if it was, the appeal must succeed), it nevertheless does not matter whether P.N.B. Properties is correctly regarded as *adjectus solutionis gratia* or as a stakeholder or as some other third party who is a stranger to the transaction since there is, in my view, an unequivocal agreement between the purchaser and seller as to how the R12 000.00 (which is nearly half the purchase price) is to be paid.'

[13] It is common cause that the full purchase price was duly lodged with the conveyancer in accordance with the terms the of the deed of sale. The submission of counsel for the purchaser, however, loses sight of the question whether payment of the purchase price to the conveyancer operated as discharge of the purchaser's obligation to pay the purchase price. In this regard I agree with the view expressed by Botha JA in *Baker v Probert*[4] that he has

'. . . difficulty in visualising a situation (save possibly for an exceptional case) in which there could be due performance of the obligation to pay the purchase price, by paying it to a third party, unless that third party was appointed and authorised by the seller to accept the payment, thus constituting him his agent for the purpose.'

[14] Botha JA described the meaning of agency within this context as follows:[5]

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[2] *Verbeek v Maher* 1978 (1) SA 61 (NPD).
[3] At 68D-E.
[4] *Baker v Probert* 1985 (3) SA 429 (AD) at 440A – C.
[5] At 439D.

'It connotes a mandate by which the seller confers authority on the agent (his mandatary) to represent him in the acceptance of the payment of the purchase price, with the consequence, in law, that payment to the agent is equivalent to payment to the seller.'

[15] It is clear from the parties' pre-trial minute and the transcript of the proceedings in the court a quo that the parties and the presiding judge were alive to the central issue in this case, viz whether the conveyancer was the agent of the seller for receiving payment of the purchase price from the purchaser. If he was not, the purchaser's defence of payment cannot succeed.

[16] Whether the conveyancer was the agent of the seller for receiving payment of the purchase price from the purchaser in this instance depends solely on the terms of the deed of sale. The conveyancer received and held the money paid over to him in terms of the sale although not as a party to the deed of sale. No other tacit or express authorisation is relied upon. I am of the view, on a proper construction of the deed of sale, that the court a quo correctly concluded that the conveyancer was not the agent of the seller in receiving payment of the purchase price.[6]

[17] The purchaser's obligation, on a plain reading of the introductory part of clause 4, is to pay to the seller the whole purchase price in cash. The sub-clauses which follow and the other relevant clauses must be construed in the light of this overriding obligation of the purchaser. Sub-clauses 4.1 – 4.4 provide for a mode of ensuring that payment will be made: 50 percent of the purchase price against registration of transfer and the balance within five working days of registration of transfer, payable only if the agreement is not 'deemed cancelled' in accordance with the provisions of clauses 4.5 – 4.6.

[18] Clause 4.3 describes the purchaser's mandate to the conveyancer in respect of the deposit which it paid into the conveyancer's trust account in terms of clause 4.1. The conveyancer must invest the deposit in an interest bearing account in terms of s 78(2A) of the Attorneys Act 53 of 1979 and pay the accrued interest over to the purchaser upon registration of transfer.

[19] Clause 4.4 describes the purchaser's mandate to the conveyancer relating to the method of payment to be followed. Half the purchase consideration becomes

[6] Compare: *Van Vliet v Adler, Kessly and Salomon* 1979 (3) SA 1156 (WLD) at 1160E – 1161E; *Holder v Rovian Trust (Estate) (Pty) Ltd* 1975 (3) SA 895 (N) at 899F-H.

payable by the purchaser to the seller against performance of the reciprocal obligation of the seller to give transfer of the properties to the beneficiary and the balance of the purchase price within five working days of registration of transfer. The seller is not to receive any part of the purchase price before registration of transfer. If any part of the purchase price is not paid to the seller on the date on which it is due, the purchaser is liable to pay interest to the seller on such amount (in terms of clause 7).

[20] The seller's right to receive payment is, in terms of the provisions of clauses 4.5 – 4.7, not an unconditional one. The purchaser has the right to conduct an inspection of the properties prior to registration of transfer to confirm that the properties are in the same condition as at the date of valuation. Lodgment in the deeds office may not take place until the issues which the purchaser may raise after the inspection have been resolved. The deed of sale 'shall be deemed to be cancelled with immediate effect' if the parties do not agree 'to the valuation adjustment to be implemented'.

[21] I am accordingly of the view that the provisions of the deed of sale do not establish an express or tacit authorisation of the conveyancer to receive payment of the purchase consideration, or any portion thereof, on behalf of the seller. Payment thereof to the conveyancer was therefore not equivalent to payment to the seller and did not operate to discharge the purchaser's obligation to pay the purchase price to the seller.

[22] The result is:

1. The first appellant's appeal is dismissed, with costs.
2. The second appellant's appeal is upheld, with costs.
3. The order of the court a quo is set aside and there is substituted an order which reads:

   'The first defendant is ordered to pay to the plaintiff:

   (a) The sum of R1 001 971.50;
   (b) Interest on the sum of R1 200 000.00 at the rate of 15,5% per annum from 22 May 2009 to 9 June 2009;
   (c) Interest on the sum of R1 850 000.00 at the rate of 15,5% per annum from 29 May 2009 to 9 June 2009;

(d) Interest on the sum of R1 021 971.50 at the rate of 15,5% per annum from 9 June 2009 to 19 August 2009;

(e) Interest on the sum of R1 001 971.50 at the rate of 15,5% per annum from 19 August 2009 until date of payment;

(f) Costs of suit.'

P A MEYER
ACTING JUDGE OF APPEAL

MAJIEDT JA (NAVSA ADP concurring):

[23] I have read the judgment of my colleague Meyer AJA, but I disagree with his conclusion and the reasoning upon which it is premised. Regrettably, I also disagree with his statement in para 15 that the parties were *ad idem* in the court below concerning the central issue in the case, namely agency. More about that later.

[24] In my view, it is necessary at the outset to deal with how the first respondent, Ms C de Klerk (de Klerk), pleaded her case and how the trial was conducted. It is also necessary to examine the only basis postulated before us on de Klerk's behalf for a finding in her favour. A full exposition of the facts is required which regrettably entails some repetition.

[25] De Klerk had sold immovable property to the National Department of Land Affairs (the Department) represented in the present litigation by the first appellant, the Minister of Agriculture and Land Affairs (the Minister). The Department had purchased the land in order to settle a land claim brought by a certain dispossessed community. A written deed of sale was signed by the parties which reflected their respective obligations. It is that deed of sale which is the subject of the present appeal. As pointed out by my colleague, the conveyancer to whom the money was paid by the Department in terms of the agreement, had misappropriated part of that

payment and de Klerk's response was to sue the Department, the conveyancer and his legal firm. In her particulars of claim de Klerk stated that she had complied with all her obligations in terms of the agreement and in this regard she was referring to all the steps she had to take to ensure registration in the name of the community. Such registration had in fact taken place on 22 May 2009. The basis of de Klerk's claim can be found in para 10 of her particulars of claim:

'Eerste verweerder het kontrakbreuk gepleeg deur slegs die onderstaande bedrae ter delging van die koopprys op die onderstaande datums aan eiser via derde verweerder te betaal, latende 'n uitstaande balans van R1 001 971.50:

10.1 R650 000.00 op 22 Mei 2009;

10.2 R178 028.50 op 9 Junie 2009;

10.3 R1 850 000.00 op 9 Junie 2009;

10.4 R20 000.00 op 19 Augustus 2009.'

Thus, in claiming the outstanding amount due plus interest, de Klerk was undoubtedly claiming payment of the purchase price on the basis that the Department had not paid the moneys still owing over to the conveyancer, who is the third defendant referred to above.

[26] In his plea, the Minister responded, *inter alia*, as follows:

'10.1 The first defendant's obligations in terms of the contract was fulfilled due to the fact that payment was made to the conveyancer's trust account in the amounts of R1 850 000 on 10 October 2008 and R1 850 000 on 8 June 2009 respectively. The defendants refer to annexure "A" hereto, being the BAS report from the first defendant's accounting system, which substantiates same.

10.2 The defendants deny that the plaintiff only received in payment the amounts specified in paragraphs 10.2 to 10.4 and that any amounts in capital and/or interest is outstanding and put plaintiff to the proof thereof.

10.3 The first defendant pleads that to the extent that the third or fourth defendant has neglected any [of] its or any of his reciprocal obligations towards the plaintiff, the plaintiff must take her recourse in law against the third and fourth defendants and against them alone.'

[27] As things stood at the close of pleadings the only issue between the parties was whether or not the Department had complied with its obligations in terms of the agreement by paying over amounts to the conveyancer by the dates stipulated in the deed of sale.

[28] At a pre-trial conference it was indicated on de Klerk's behalf, for reasons best known to her and her legal representatives, that they had decided not to proceed with the claim against the conveyancer and his legal firm.

[29] At the commencement of proceedings in the court below, de Klerk's legal representative reiterated the material parts of de Klerk's particulars of claim referred to above. He specifically referred to the Minister's plea to the effect that payment to the conveyancer constituted payment to de Klerk. In response, the Minister's legal representative stated emphatically that he stood by his plea:

'MNR LIVERSAGE: . . . U Edele, ek stem saam met die opening van my geleerde vriend in hierdie aangeleentheid. Daar mag dalk net 'n kwessie ontstaan in verband met die interpretasie van die Eiser oor wat die pleit werklik behels en of dit een is van voldoening aan die ooreenkoms en of dit een is van betaling. Die Verweerder staan by die stukke soos wat dit gepleit is. . . .'

[30] It was noted at the commencement of the proceedings that the parties were agreed that the Department bore the onus of proving that the payments had been made. This is understandable as that appears to have been the only issue between them.

[31] It is difficult to see why any witnesses testified in the court below, more particularly Mr Rudlof, the conveyancer who was called by the first appellant. As stated above, the only question to be resolved by way of evidence was whether or not payment had in fact been made to the conveyancer by the Department. That evidence was in the affirmative. All the amounts required to be paid in terms of the deed of sale by the Department had in fact been deposited with the conveyancer. The question of when the money had been misappropriated and whether it has any impact on the case is an aspect to which I will return in due course. The only time agency was raised as an issue was when de Klerk testified under cross examination that she had not appointed the conveyancer as her agent.

[32] In his judgment in the court below, Hiemstra AJ recorded what the Minister's plea contained, as noted above, and further that it was contended by the Minister that de Klerk's recourse was against the conveyancer and/or his firm. Hiemstra AJ then went on to state that de Klerk's legal representative had argued that the conveyancer and his firm were not the agents of de Klerk but rather of the

Department, and that consequently payment to the conveyancer did not discharge the Department's obligation. De Klerk's counsel further conceded that conversely, if the conveyancer and his firm were de Klerk's agents then payment to them would have discharged the Department's obligations.

[33] In the view of the court below, clause 4.3 was the operative clause which '[tilts] the scales firmly in favour of the proposition that the conveyancers acted as the agents of the [Department] and not of [de Klerk]. That being the case, the money had not been paid to [de Klerk] or to her agent'. In reaching this conclusion the court below had regard, inter alia, to the decision of this court in *Baker v Probert*.[7]

[34] It is important to note that before us, counsel for de Klerk relied *solely* on the provisions of clause 4.3 for his contention that in terms of the agreement the conveyancer was the Department's agent. The reasoning was that, by holding the money in an interest bearing account, with the interest accruing to the Department, the conclusion was compelling that in so holding the money the conveyancer and his firm had acted as the Department's agent. This argument found favour with the court below, wrongly so, as I will demonstrate in due course.

[35] *Baker v Probert supra* was relied on by Hiemstra AJ, by both parties' counsel as support for their differing contentions before us and by my colleague Meyer AJA. Significantly in *Baker v Probert* the plaintiff's (the purchaser) claim was formulated on the basis that she had paid the purchase price of R17 500.00 to an estate agency, the duly appointed agents of the defendant. In his plea in that case the defendant denied that the estate agency was his duly authorised agent for the purpose of receiving or holding the purchase price. Thus, agency was specifically pleaded and was the only issue between the parties.

[36] It is now necessary to briefly examine the facts of that case which are set out in this and the next two paragraphs. The defendant (the seller) wished to sell a shareblock in a company and gave a mandate to find a purchaser to a firm of estate agents, York Estate and Investment Co (Pty) Ltd (York Estate). York Estate found a purchaser in the form of the plaintiff who signed an offer to purchase, which was in the form of a standard contract used by York Estate. The contract expressly

[7] *Baker v Probert* 1985 (3) SA 429 (A).

recorded that York Estate is acting as agent for the seller. Clauses in the contract provided that the total purchase price to be paid by the purchaser was in the amount of R17 500.00, which was to be paid by way of a deposit, an instalment and a final payment. The crucial clause in the agreement was clause 3 which provided as follows:

'All payments made in terms of this paragraph shall be made to the agents to be held by them in trust for payment to the sellers on the effective date provided that the sellers have complied with the provisions of para 5 hereof.'

The material part of clause 5 read as follows:

'The sellers shall forthwith deliver to the agents, to be held in trust by them

(a) the share certificates in respect of the shareblocks, together with a duly completed share transfer form;

(b) . . . .'

[37] The plaintiff paid the purchase price of R17 500.00 to York Estate. The defendant, however, did not deliver the share certificates, either before the effective date or thereafter and remained in default over a protracted period. Finally, the plaintiff validly cancelled the contract on the grounds of the defendant's breach. Shortly thereafter York Estate was placed in liquidation. The plaintiff proved a claim for repayment for the purchase price but received no dividend; consequently she proceeded with a claim against the defendant. This court considered the crucial issue to be the one pleaded, namely whether or not York Estate was the agent of the defendant for receiving payment of the purchase price from the plaintiff. The parties were agreed that that issue was conclusive.

[38] The starting point in respect of the enquiry in *Baker's* case was scrutiny of the deed of sale. The heading of that contract stated that York Estate was acting as agent for the defendant. Even then, this court found that description on its own inconclusive, reasoning that it might have meant no more than that York Estate acted for the seller in procuring the sale. However, clause 3 quoted above, specifically recorded that York Estate was the defendant's agent for receiving payment of the purchase price. This court went on to reason that York Estate received the payment of the purchase price with knowledge of the provisions of clause 3 and *prima facie* accepted the mandate from the defendant to do so as his agent. Thus York Estate was obliged to pay over the money to the defendant after

he had complied with his own obligation to deliver the share certificates in terms of clause 5. Moreover the parties clearly intended that payment by the plaintiff to York Estate would operate as a complete discharge of her obligation under the contract, thus equating payment to York Estate with payment to the defendant. It was on that basis that this court allowed the plaintiff's claim against the defendant.

[39] It is trite that parties are bound by their pleadings – the object thereof being to delineate the issues to enable the other party to know what case has to be met.[8] It is impermissible to plead one particular issue and to then seek to pursue another at the trial.[9] Agency, either express or implied, should be specifically pleaded and, in accordance with the general rule that he who asserts must prove, the onus of proof rests on the party who alleges such agency. In the present instance had De Klerk pleaded agency, she bore the onus of proving that the conveyancer acted as the purchaser's agent.[10] Even though in the present matter the question of agency was not specifically pleaded, nor was the trial conducted on the basis of agency, I nevertheless now turn, as was done in *Baker v Probert*, to examine the material provisions of the deed of sale to determine whether the conclusion reached by my brother Meyer AJA is justified. For ease of reference, I repeat some of the provisions already noted by my colleague. In addition to the preamble quoted by Meyer AJA in paras 2, 3 and 4 above, clauses 2 and 3 of the deed of sale are important:

'**2. SALE**

The Seller hereby sells to the Purchaser who hereby purchases the following properties with the Proposed Subdivisions which are included in this sale:

2.1. Portions 49 and 50 of the farm Leeupoort 283 JS, in extent 8.5653 and 9.3414 ha respectively.

3. PURCHASE PRICE

The purchase price for the Properties shall be **R3 700 000.00 (Three Million Seven Hundred Thousand Rand only).**'

[40] The preamble and the above clauses in my view clearly indicate that the parties were dealing with each other at arm's length and as equals. The evidence by de Klerk referred to by Meyer AJA concerning a threatened expropriation compelling her to conclude the deed of sale does not detract from this. *Duress* was never an

[8] *Gusha v Road Accident Fund* 2012 (2) SA 371 (SCA) para 7.
[9] *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107G-H.
[10] A J Kerr,*The Law of Agency* 3rd ed (1991) at 74-75, and cases cited there.

issue during the trial. Moreover, expropriation has to follow a prescribed statutory procedure within the relevant constitutional strictures and provides for objections and fair compensation. In any event, the following part of de Klerk's evidence, under cross-examination is illuminating:

'Mevrou, as 'n mens kyk na hierdie koopkontrak en ek wil u aandag vestig op in besonder het u hierdie ooreenkoms voordat u dit geteken het verwys na 'n prokureur of het u verstaan wat hier geskryf word? --- Ek het dit verstaan.

Het u alles daarvan verstaan? --- Ja.

Is u seker oor daardie antwoord van u? --- Ek het dit verstaan.'

It is thus to the terms of the agreement that we must look and my colleague's reliance on threatened expropriation in support of a conclusion in her favour is, with respect, misplaced. Evidence *aliunde* in the interpretation of contracts is permitted in limited circumstances only as set out in *Coopers & Lybrand v Bryant.*[11] This is usually resorted to when there is ambiguity. No such ambiguity was advanced by either of the parties. One must ascertain whether the terms of the contract are such that they lead to the ineluctable conclusion that throughout the conveyancer was the Department's agent, as found by my colleague.

[41] It is so that clause 1.1.2 of the deed of sale records that the 'conveyancers' refers to the '[a]ttorneys appointed by the Purchaser to register the transfer of the Properties from the Seller to the MANALA MGIBE CPA'. However, the appointment of a conveyancer favoured by one of the parties to complete the registration is not, on its own, an indicator of agency.

[42] Clause 4.1 of the deed of sale requires that within 30 days of the date of signature, the purchaser shall pay a 50 per cent deposit into the conveyancer's trust account. Clause 4.2 requires that when documents required for the transfer of the properties are ready to be lodged at the deeds registry, the purchaser shall, within 14 days of written request from the conveyancer, furnish a written undertaking from the Chief Land Claims Commissioner to pay the balance of the purchase price into the conveyancer's trust account within five working days after registration of transfer. Clause 4.3, which it will be recalled was the principal basis on which the court below ruled in de Klerk's favour and was the only basis advanced before us on her behalf, stipulates that amounts deposited by the purchaser shall be invested by the

[11] *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-768E.

conveyancer in an interest bearing account for the purchaser's benefit. This is no more than a standard provision in contracts of sale of immovable property. The obligation to pay the full amount of the purchase price in the present case and in the normal course of events only arises upon registration. Notionally it is to ensure that payment and registration occur *pari passu.*

[43] Importantly, clause 4.4, which bears repeating, provides:

'The portion of the purchase price referred to in clause 4.1 *shall* be paid to the Seller *by the Conveyancers* against registration of transfer of the Properties into the name of the MANALAMGIBE in the Mpumalanga Province Deeds Office. The Portion of the purchase price referred to in clause 4.1 shall be paid to the Seller by the Conveyancers forthwith after receipt from the Seller.' (My emphasis)

[44] Although the conveyancer was not a signatory to the deed of sale, he and his firm undertook to perform the obligations imposed thereby.[12] I agree with the view expressed by Magid J in *Basson v Remini* [13] that a conveyancer who accepts an appointment by a seller and a purchaser becomes the agent of both parties. It is clear from the provisions referred to earlier in the context of the totality of the agreement that once the seller had met all her obligations the conveyancer was obliged to pay over all the amounts due to her. It is common cause that she had complied with all her obligations.

[45] To sum up, there is no single provision nor do the provisions of the deed of sale collectively indicate a mandate by the Department to the conveyancer to act solely as its agent to receive and hold the money only on its behalf. Whilst there might be an argument that up until the seller complies with her obligation in terms of the deed of sale the conveyancer's creditor will be the Department, there can be no doubt in terms of the clear wording of the conditions of the deed of sale referred to in para 21 above that the conveyancer is obliged after date of registration to pay the moneys to the seller, namely de Klerk. The passage from *Baker v Probert,* quoted by Meyer AJA in para 13 above, is not only *obiter* but in any event finds no application in the factual matrix of the present case. More particularly, as shown above, once the registration had been completed, de Klerk was entitled to the money and at that

[12] See *Baker v Probert op cit* at 445G-I and *Baker v Afrikaanse Nasionale Afslaers en Agentskap Maatskappy (Edms) Bpk* 1951 (3) SA 371 (A) 375G-376A.
[13] *Basson v Remini* 1992 (2) SA 322 (N) at 328A.

stage in accordance with the deed of sale the money could only have been held on her behalf. That was the conveyancer's mandate by both parties and he thus bore the expressly stipulated obligation to pay the money over to de Klerk.

[46] My colleague concludes that it is an unavoidable inference from all the circumstances that the moneys paid by the Department were misappropriated before the seller had complied with her obligations. I disagree. It is common cause that registration of transfer took place on 22 May 2009. On de Klerk's evidence, the first meeting to discuss payment of the outstanding amounts took place during the first week of June 2009. As pointed out in para 3 above, subsequent to registration de Klerk received amounts of R650 000.00 on 22 May 2009, R178 028.50 on 9 June 2009 and another payment of R1 850 000.00 on the same date. She received a further payment of R20 000.00 on 19 August 2009, leaving a balance of R1 001 971.50 which was the amount she claimed in her summons. According to de Klerk's testimony, she was informed after 9 June 2009, having received three of the amounts referred to above, that the money had been misappropriated. I fail to see how in these circumstances the compelling conclusion is that the moneys were misappropriated before the seller had complied with her obligation to pass transfer. If anything, all the indications are overwhelmingly to the contrary. In order to succeed with her claim de Klerk would have had, at the very least, to overcome the hurdle of proving that the money was misappropriated before registration, which she failed to do. De Klerk ought to have looked to the conveyancer and his firm for payment of the moneys due to her in terms of the deed of sale. In the light of the obligation undertaken by the conveyancer to pay over the money to de Klerk upon registration of transfer, I am unable to see what defence the conveyancer could possibly have had to a claim by de Klerk. She would also have had a claim against the Attorneys Fidelity Fund in terms of s 26*(a)* of the Attorneys Act 53 of 1979, on the basis of theft of moneys rightfully due to her. For all these reasons I would uphold the appeal with costs and substitute the order of the court below with the following:

‘1. The plaintiff’s claim is dismissed with costs’.

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES:

For 1st & 2nd Appellants:	A Liversage
	Instructed by:
	The State Attorney Pretoria
	The State Attorney Bloemfontein
For 1st Respondent:	GF Heyns
	Instructed by:
	Van Dyk & Theron Pretoria
	Rossouw Attorneys Bloemfontein
For 2nd & 3rd Respondents:	No appearance