THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 1075/2013

In the matter between:

STUPEL & BERMAN INCORPORATED **APPELLANT**

and

RODEL FINANCIAL SERVICES (PTY) LTD **RESPONDENT**

Neutral citation:	*Stupel & Berman v Rodel Financial Services* (1075/2013) [2015] ZASCA 1 (27 February 2015).
Coram:	Brand, Mhlantla, Willis JJA and Fourie and Gorven AJJA
Heard:	**17 February 2015**
Delivered:	**27 February 2015**

Summary: Undertaking by the appellant as conveyancer – on instructions of the seller – to pay proceeds of sale to the respondent upon transfer of immovable property – the appellant not an *adjectus solutionis causa* but an agent whose instructions to pay the respondent could and had been revoked by the seller as principal.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (C J Claassen J sitting as court of first instance):

1 The appeal is upheld with costs including the costs of two counsel.
2 Paragraphs (a) and (b) of the order of the high court are set aside and replaced with the following:
'The plaintiff's claim against the first defendant is dismissed with costs, including the costs consequent upon the employment of two counsel wherever applicable.'

JUDGMENT

Brand JA (Mhlantla, Willis JJA and Fourie and Gorven AJJA concurring):

[1] The appellant, Stupel & Berman Inc (Stupel & Berman), is a firm of attorneys. The respondent, Rodel Financial Services (Pty) Ltd (Rodel) is a financial institution. Rodel instituted action in the court a quo against Stupel & Berman, as first defendant and one of its directors, Mr Berman, as second defendant, for payment of the amount of R1 763 489 together with interest and costs. When the matter came before Claassen J, he was presented with a stated case. Consequently, no evidence was led at the trial. In the event, the court a quo upheld Rodel's claim against Stupel & Berman while the second defendant was absolved from the instance with costs. The appeal by Stupel & Berman against the first part of the order directed against it – which is embodied in paragraphs (a) and (b) of the order – is with the leave of the court a quo. Rodel's cross-appeal against the second part in favour of Mr Berman was abandoned before the hearing of the appeal.

Background

[2] The background extracted from the stated case is unfortunately somewhat complicated. Hopefully the effort to simplify what follows will not have the opposite effect. Stupel & Berman was appointed to act as conveyancer in the registration of transfer of an immovable property in Norwood, Johannesburg. The property was sold at an auction by Amber Falcon Properties 3 (Pty) Ltd (Amber Falcon) to Cross Atlantic Properties 186 (Pty) Ltd (Cross Atlantic) for a purchase price of R7.2 million. At the time the property was bonded in favour of Mercantile Bank Ltd for an amount slightly in excess of R5 million. In terms of the sale agreement the purchase price was, of course, payable upon registration of transfer. While awaiting that transfer, Amber Falcon obtained bridging finance loans from Rodel in terms of two discounting agreements. Pursuant to these two agreements, dated 31 August 2010 and 2 September 2010, Rodel advanced amounts of R850 000 and R550 000, respectively, to Amber Falcon. Both these agreements consisted of two parts: a schedule and a document entitled 'Terms and Conditions'.

[3] The schedules referred to the details of the sale of the Norwood property, including the names of the parties, the purchase price and so forth. They were signed on behalf of Amber Falcon, Rodel and Stupel & Berman, the latter in its capacity as the appointed conveyancers. It is common cause, however, that Stupel & Berman was not a party to the two discounting agreements and that they were in fact unaware of the 'Terms and Conditions' set out in the second part. In both schedules Amber Falcon confirmed that 'I hereby cede, transfer and make over to Rodel my/our right title and interest in and to the proceeds against payment of [the loan]'. 'Proceeds' is defined in the Terms and Conditions as the net amount payable to Amber Falcon in terms of the sale, after deduction of the bond, agent's commission and other expenses. Lastly, both schedules contained a section entitled 'Undertaking by Conveyancer', which was signed on behalf of Stupel & Berman. Although strictly speaking it signed two of these undertakings, there was in effect only one. As it happened, this undertaking eventually constituted the nub of Rodel's claim in this case. By the nature of things, a more detailed discussion of its terms is therefore bound to follow. For introductory purposes, I find it sufficient to say,

however, that in terms of the undertaking Stupel & Berman confirmed that it was attending to the registration of transfer of the property in terms of the sale; that it had received irrevocable instructions from the seller, Amber Falcon, to pay the amount payable to Rodel under the discounting agreement from the proceeds of the sale; and that it undertook to pay this amount within 72 hours of registration of transfer 'unless prevented by interdict or operation of law'.

[4] The next episode of relevance occurred on 22 October 2010 when Amber Falcon, through its representative, Mr Nathan Blumenthal (Blumenthal), notified Rodel that it had cancelled the sale agreement with Cross Atlantic; but, that the property was remarketed at a higher price and would be auctioned on 24 November 2010; that the advances from Rodel under the discount agreements were therefore well-secured; and that Stupel & Berman would attend to the transfer of the property to the new purchaser under the subsequent sale. On the same day Stupel & Berman conveyed essentially the same information to Rodel. The response on behalf of Rodel was that 'we are comfortable with the situation as explained by you'. However, things did not turn out as planned. On 8 November 2010 Cross Atlantic brought an urgent application for an interdict against disposal of the property by Amber Falcon, which interdict was granted on 24 November 2010. This dispute was subsequently settled on 25 January 2011. Part of the settlement was that the transfer of the property to Cross Atlantic would proceed.

[5] In the light of the settlement, Stupel & Berman informed a representative of Rodel, Ms Tammy Hall, on 3 February 2011, that the sale between Amber Falcon and Cross Atlantic was proceeding and that it was just waiting for the purchaser to pay the transfer duty. But on the very same day, 3 February 2011, Blumenthal conveyed a contradictory message to the same Ms Hall. The crux of this message was that Amber Falcon had lost the court case; that the interdict against alienation of the property was still in place; that the sale could thus be held in limbo for up to twelve months; that Amber Falcon's position was therefore 'rather precarious', and that, in consequence, he offered Rodel an amount in settlement which was substantially less than that which was owing under the discounting agreements.

[6] Rodel's immediate reaction to this message, which was plainly misleading – to say the least – was to cancel the discounting agreements. It did so through its attorneys by way of a letter dated 4 February 2011. To add to the difficulties that subsequently arose, the letter was equivocal. According to the first paragraph '[o]ur client hereby cancels the Agreement entered into between you and our client on 31 August 2010' which seemed to confine the cancellation to the first discounting agreement only. But in the second paragraph the attorney stated that '[w]e have been instructed to demand from you, as we hereby do, payment of the sums of R850 000 and R550 000 plus a discounting fee of 0,133% per day'. This only made sense if the cancellation pertained to both discounting agreements.

[7] In response Amber Falcon, through Blumenthal, informed Rodel that it accepted the cancellation of the 'Agreement' (singular) and that it had appointed another firm of attorneys, Bieldermans Inc, to 'dispose of the matter'. Further, on 21 February 2011, Amber Falcon instructed Stupel & Berman to withdraw any undertakings provided to Rodel since the discounting agreements had been cancelled. Also on 21 February 2011, Bieldermans, inter alia, wrote to Stupel & Berman on behalf of Amber Falcon:

'We enclose herewith a copy of our letter in response [to Rodel's cancellation letter of 4 February 2011] in terms of which our client [Amber Falcon] has accepted the cancellation. In the circumstances we hereby formally instruct you, on behalf of our client, not to proceed any further with any undertakings given in favour of Rodel Financial Services (Pty) Ltd. You are requested to immediately withdraw any and all undertakings given by you in terms of the aforesaid Discounting Agreement.'

[8] In compliance with these instructions, Stupel & Berman wrote to Rodel on 24 February 2011. The relevant part of this letter reads as follows:

'1. As you are aware, we are attending to the above transfer of Erf . . . Norwood from [Amber Falcon] to [Cross Atlantic].

2. We attach hereto a copy of a fax dated 21 February 2011 from Bieldermans Inc. Attorneys wherein they have instructed us to immediately withdraw any and all undertakings given by us in terms of a Discounting Agreement concluded between [Rodel] and [Amber Falcon].

3. In the circumstance we are compelled to give effect to the mandate/instruction of [Amber Falcon] and hereby withdraw from the undertakings given by us as Conveyancers in the above transaction . . ..
4. Please be advised accordingly.'

[9] Rodel did not react or respond in any way to Stupel & Berman having withdrawn its undertakings. More particularly, no attempt was made until some five months later, in July 2011, to contest the withdrawal. In the interim, registration of transfer of the property was effected by Stupel & Berman on 17 March 2011 while the net proceeds were subsequently paid by it to Amber Falcon on 30 March 2011. In the meantime Rodel pursued its claim for repayment of the amounts advanced in terms of the discounting agreements – on the basis that these agreements had been cancelled – against Amber Falcon and Mr Julius Blumenthal, who had signed a suretyship in favour of Rodel pursuant to these agreements. When this claim was opposed by both Amber Falcon and Julius Blumenthal, Rodel applied for and obtained summary judgment. Its attempts to execute on this judgment, however, proved to be unsuccessful. Only then did Rodel look to Stupel & Berman in order to recover the money advanced to Amber Falcon.

The undertaking

[10] The claim against Stupel & Berman was based on the undertaking which formed part of the schedules to the discounting agreements. The undertaking provided:

'Undertaking by Conveyancer

1. We are currently attending to the registration of the abovementioned property transfer, arising out of the sale agreement entered into between the parties referred to above.
2. The sale agreement is valid and enforceable in law and there are, to our knowledge, no attachments or interdicts registered against the Property.
3. All suspensive conditions in respect of the above transfer have been fulfilled, and we know of no further impediment or encumbrance that would delay or hinder the registration of transfer of this transaction.

4. The Client has entered into a discounting agreement with Rodel . . . whereby Rodel has agreed to purchase the proceeds arising from the above transaction on registration of transfer.
5. The balance owing to the mortgagee is as set out above.
6. No further undertakings have been/will be made or given which would reduce the Proceeds on registration of transfer.
7. We acknowledge that the Client has furnished us with an irrevocable instruction to pay to Rodel, from the Proceeds, the full amount payable in terms of the said discounting agreement . . . .
8. We hereby undertake to pay to Rodel from the Proceeds the above amount within 72 hours of registration of transfer/receipt of funds, unless prevented by interdict or operation of law.
9. We undertake to inform Rodel forthwith if the Client lodges with us a request to uplift his file, or terminates or attempts to terminate our mandate to act on its behalf, which act we understand to be a breach of your agreement with the Client.
10. In the event of a cancellation of the sale for whatsoever reason and where the funds provided by Rodel have been utilised for the payment of transfer duty or rates and taxes, we will pay to Rodel all and any monies received in respect of the refund of transfer duty or rates and taxes paid . . .
11. We undertake to keep you advised of all material and important developments in regard to the transaction.
12. . . . .'

Contentions for the parties

[11] The defences raised by Stupel & Berman were essentially threefold.

(a) First, it contended that the undertakings upon which Rodel's claim rested had been withdrawn by it on the instructions of Amber Falcon. It is not disputed that, as a fact, that is so. Rodel's response was, however, that although Stupel & Berman purported to withdraw its undertakings, it was in law not entitled to do so. Or, stated somewhat differently, that in law the undertakings were not revocable either on the instructions of Amber Falcon or by Stupel & Berman on their own accord.

(b) The second defence raised by Stupel & Berman rested on the proposition that the purported cession of the net proceeds of the sale in favour of Rodel amounted to

a partial cession of the purchase price, which was as such invalid in law (see eg *Van der Merwe v Nedcor Bank Bpk* 2003 (1) SA 169 (SCA) para 6 and 8; *Kruger v Property Lawyer Services (Edms) Bpk* 2011 JDR 0527 (SCA) para 9 fn 5). In consequence, so the contention went, the undertaking relied upon had been given pursuant to an invalid cession which rendered this undertaking likewise invalid and unenforceable.

(c) Thirdly, Stupel & Berman contended that the undertaking was given as part and parcel of discounting agreements that fell away when they were cancelled by Rodel. This defence gave rise to a rather lengthy debate – arising from the ambiguous letter of cancellation on behalf of Rodel dated 4 February 2011 – as to whether Rodel cancelled the first discounting agreement only or whether both these agreements had been cancelled. In my view the short answer to the debate is that Rodel's clear intent was to cancel both agreements and that Amber Falcon understood it in this way. I say that because logic dictates that Rodel had no reason to cancel the one and not the other. Contrary to the finding by the court a quo, I therefore find, as a fact, that both discounting agreements had been cancelled by Rodel on 4 February 2011. My further consideration will proceed on the premise of that factual finding.

[12] Since the court a quo was left unpersuaded by any one of these three defences it rejected them all. On appeal Stupel & Berman contended that it had erred in doing so. In considering the merits of this contention, I propose to deal first with the question whether Stupel & Berman were obliged to withdraw or revoke the undertaking on the instructions of Amber Falcon.

Withdrawal of the undertaking

[13] In deciding that Stupel & Berman were neither compelled nor entitled to withdraw the undertaking, which formed the basis of Rodel's case, the court a quo began from the premise that the undertaking constituted part of a tripartite agreement between Amber Falcon, Rodel and Stupel & Berman. In terms of this tripartite agreement, so the court's reasoning went, Stupel & Berman was the debtor, Amber Falcon was the creditor while Rodel was cast in the role described in Roman law as that of an *adjectus solutionis causa* (*adjectus*). An *adjectus*, according to its

generally accepted definition, is an entity, other than the creditor, to whom, by agreement between the debtor and the creditor, the debtor is entitled to pay what is due to the creditor and so discharge its obligations (see eg Susan Scott *The Law of Cession* 2 ed (1991) at 161).

[14] Based on the assumption that Rodel was an *adjectus*, the court a quo held that, as a matter of law, Amber Falcon could not withdraw its instruction to Stupel & Berman to pay Rodel. As authority for this thesis, the court referred to the following statement by Pothier *Obligations* para 489, which was quoted with approval, inter alia, in *Norman Kennedy v Norman Kennedy Ltd; Judicial Managers, Norman Kennedy Ltd NO v Reinforcing Steel Co Ltd & others* 1947 (1) SA 790 (C) at 802:

'A person to whom the creditor has indicated the payment to be made by the agreement itself, is very different from one who has merely an authority from the creditor to receive. The power of paying to a person having a simple authority ceases by revocation of the authority notified to the debtor, which the creditor may make at pleasure . . . .

On the contrary, the right of paying to the person indicated by the agreement being founded upon the agreement itself, of which it constitutes a part, and which cannot be derogated from, but by mutual consent, the creditor cannot deprive the debtor of it, and the debtor, notwithstanding any prohibition of the creditor, may according to the law of the agreement, pay to the person indicated . . . .'

[15] I accept that, as a general rule, once an *adjectus* has been contractually nominated, the creditor cannot unilaterally change its instructions to the debtor and that the debtor can insist on paying the *adjectus* (see eg also *Administrator, Natal v Magill Grant & Nell* 1969 (1) SA 660 (A) at 699H). But my problem with the court a quo's reasoning lies in its fundamental premise. As I see it, there are a number of reasons why Rodel simply cannot be regarded as an *adjectus*. First of all, the assumption that the undertaking relied upon by Rodel was part of a tripartite agreement, is unfounded. Albeit that it formed part of a larger transaction governed by a whole battery of agreements – including also the agreement of sale, the discounting agreements and the agreement of mandate between Amber Falcon and Stupel & Berman – the undertaking itself constituted a 'stand-alone' agreement

between Rodel, on the one hand, and Stupel & Berman, on the other from which certain obligations arose for Stupel & Berman. The content of those obligations depend on a construction of the stand-alone agreement. Second of all, and in any event, Stupel & Berman was never in the position of a debtor. Nor was Amber Falcon in the position of its creditor. In terms of the agreement of sale, Amber Falcon was the creditor in respect of the purchase price while the debtor was the purchaser. In terms of the agreement of mandate, Amber Falcon as principal appointed Stupel & Berman as its agent to do two things: (a) to transfer the property to the purchaser and (b) to pay the net proceeds of the purchase price to Rodel. In fact, if Rodel was truly an *adjectus*, it would have no claim against Stupel & Berman at all. This conclusion derives from the rather trite principle formulated thus in 2 *Lawsa* 2 ed para 17:

'The creditor may direct his or her debtor to render performance to a third party. The debtor is under no compulsion to do so. But if the debtor does agree, performance to the third party (the *solutionis causa adjectus*) absolves the debtor. Such an agreement is not cession. The right does not pass. It remains with the creditor. The third party obtains no right of action to enforce performance. Failure on the part of the debtor to perform to the third party would accordingly not invest the third party with an action against the debtor . . . .'

[16] I now turn to the construction of the undertaking as a stand-alone agreement. In terms of clause 8 Stupel & Berman plainly undertook to pay the net proceeds of the sale to Rodel within 72 hours of registration of transfer and receipt of the purchase price. But to me it is clear that it did not do so in its personal capacity (as happened for example in *Ridon v Van der Spuy & Partners (Wes-Kaap) Inc* 2002 (2) SA 121 (C) at 137I-138C), but in pursuance of its mandate as the agent of Amber Falcon. I say this because the undertaking made it clear that it was given on the instructions of Amber Falcon (clause 7) and that Stupel & Berman would let Rodel know if Amber Falcon terminated or tried to terminate its mandate (clause 9). It stands to reason that, if the undertakings to pay were personal, termination of the mandate would be of no consequence to Rodel.

[17] Once it is accepted that Stupel & Berman gave the undertakings in the capacity of an agent on the instructions of a principal, the law of agency provides that, as a general rule, those instructions could be terminated. The fact that these instructions are described as irrevocable in clause 7, does not detract from the principle (see eg *Consolidated Frame Cotton Corporation Ltd v Sithole* 1985 (2) SA 18 (N) at 22H). Rodel's argument, which found favour with the court a quo, was however, that the undertaking fell within the ambit of what is considered to be one of the recognised exceptions to the general rule, namely where the authority can be categorised as 'coupled with an interest' (see *Consolidated Frame Cotton supra* 22J-23B. Cf, however, *Ward v Barrett NO & another* 1962 (4) SA 732 (N) at 737D-E). The first interest relied upon by Rodel in this regard is its own obvious stake in the execution of the mandate. But the accepted principle, as I understand it, is that the interest to be protected by irrevocability under this exception, must be that of the agent as opposed to that of a third party (see *Consolidated Frame Cotton supra* 23C-D).

[18] The second interest upon which Rodel relied in support of this argument is the interest of Stupel & Berman in executing transfer in order to claim its conveyancing fees. But as I see it, there are at least two answers to this argument. First, if this is the type of interest contemplated by the exception, it stands to reason that this can only render the mandate irrevocable to the extent that revocation will constitute a breach of the mandate contract, which will expose the principal to a claim for damages by the agent. It cannot possibly afford the agent the right to insist on specific performance in the execution of its mandate. Secondly, the argument confuses Stupel & Berman's mandate to pass transfer and receive the proceeds of the sale, on the one hand, with its mandate to pay these proceeds to Rodel, on the other. Once it had executed the first of these mandates, it was entitled to its conveyancing fee. There is no indication that it would receive additional compensation for executing the second part of its mandate, ie to pay the net proceeds to Rodel. Thus understood, it would be of no consequence to Stupel & Berman if the second part of the mandate were to be withdrawn. Any possible doubt that these two parts of the mandate could be separated, is removed by what actually

happened in this case. Moreover, as I see it, the parties to the undertaking clearly appreciated that in terms of the governing legal principles, Stupel & Berman's mandate could be terminated. That appears from the express provisions of clause 9, the quotation of which I repeat for the sake of convenience. It provides:

'We undertake to inform Rodel forthwith if the Client lodges with us a request to uplift this file or terminates, or attempts to terminate our mandate to act on its behalf, which act we understand to be a breach of your agreement with the Client.'

[19] What is more, the clause leaves no room for doubt that it was within the contemplation of the parties that Amber Falcon could exercise its right to terminate the mandate of its agent. In that event the clause imposed the obligation on the agent, Stupel & Berman, to inform Rodel of that fact. The clause then proceeds to record the reason for this obligation. It is because termination of the mandate would constitute a breach of Amber Falcon's agreement with Rodel. This, in turn, echoes clause 5.14 of the discounting agreements which stipulated a commitment by Amber Falcon not to terminate the mandate of Stupel & Berman. In this light the reason for the notice obligation in clause 9 is not hard to find. It is to afford Rodel the opportunity to prevent Amber Falcon from terminating the mandate, and/or to prevent Stupel & Berman from acting on that termination. Rodel's dilemma in this case resulted from its own failure to heed Stupel & Berman's warning that, while it was proceeding with the transfer of the property to Cross Atlantic, its mandate to pay the net proceeds of the purchase price to Rodel had been terminated. Rodel's obvious remedy was to seek an interdict against Amber Falcon – joining Stupel & Berman as an interested party – to prevent the latter from giving effect to the termination of the mandate by the former. Alternatively it could have enabled Stupel & Berman to institute the interpleader proceedings provided for by Rule 58 of the Uniform Rules of Court.

[20] Stupel & Berman's further argument under the rubric that they were obliged to withdraw its promise to pay was that, in any event, Rodel's cancellation of the discounting agreements left Amber Falcon free of its contractual undertaking in terms of clause 5.14 not to terminate the mandate. Although there may be some

merit in this argument I find it unnecessary to decide whether this is so. Once I conclude, as I do, that Amber Falcon was entitled to withdraw Stupel & Berman's mandate, the latter had no option but to act upon that termination. Or in the words of clause 7 of the undertaking, it was prevented to pay Rodel 'by operation of law'. That is the end of the matter. Whether or not Amber Falcon was acting in breach of its obligation in terms of the discounting agreements, to which Stupel & Berman was not a party, is of no consequence. By the same token I find it unnecessary to embark upon a consideration of the other defences raised by Stupel & Berman. Even if the court a quo was correct in rejecting these defences, Rodel's claim is destined to fail which means that the appeal is bound to succeed.

[21] In the result:

1 The appeal is upheld with costs including the costs of two counsel.

2 Paragraphs (a) and (b) of the order of the high court are set aside and replaced with the following:

'The plaintiff's claim against the first defendant is dismissed with costs, including the costs consequent upon the employment of two counsel wherever applicable.'

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F D J BRAND

JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	B Berridge SC and B Manentsa Instructed by: Webber Wentzel Johannesburg c/o Lovius Block, Bloemfontein
For the Respondent:	R Solomon SC and E Myhill Instructed by: Norman Berger & Partners Inc Johannesburg c/o McIntyre & Van der Post, Bloemfontein