

SOUTH AFRICA / JUDGMENT

Baker v Probert (228/1983) [1985] ZASCA 22; [1985] 2 All SA 263 (A) (7 May 1985)

[1985] ZASCA 22

COURT

Supreme Court of Appeal

BEFORE

Corbett, Kotzé, Viljoen, Hoexter, Botha

CASE / FILE NUMBER

228/1983

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Case No. 228/1983

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ALBERT BLACKMORE BAKER Appellant
and HILDA MAY PROBERT Respondent
CORAM: CORBETT, KOTZÉ, VILJOEN, HOEXTER
et BOTHA JJAHEARD: 4 MARCH 1985 DELIVERED: 7 MEI
1985

JUDGMENT

/BOTHA JA ...

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BOTHA JA:-

This is an appeal against a judgment granted against the appellant in favour of the respondent in the Durban and Coast Local Division, for payment of the sum of R17 500, interest and costs. The judgment was the outcome of an action which had been instituted by the respondent against the appellant and which was heard by NIENABER J. His judgment has been reported: see Probert v Baker 1983

- (3) SA 229; and it has elicited comment from a number of authors: see D J Joubert, 1983 De Jure 373; A.J. Kerr, 1984 T H R-H R 460; J S McLennan, 1984 S A L J 39; G Lubbe, 1984 S A L J 616; and S W J van der Merwe and M F B Reinecke, 1984 T S A R 85. In what follows I shall refer to the reported judgment as "the report", and to the appellant and the respondent respectively as "the defendant" and "the plaintiff."

The facts upon which the appeal falls to be decided are common cause and lie within a narrow compass.

/The ...3. The defendant owned a so-called shareblock in a company, Rocca Marina Ltd. (The exact nature of a shareblock and the rights attaching thereto are matters of no consequence in this case and need not be discussed.) The defendant wished to sell the shareblock and gave a mandate to find a purchaser for it to a firm of estate agents, York Estate & Investment Co (Pty) Ltd, to which I shall refer as "York Estate". York Estate found a purchaser in the person of the plaintiff. She signed an offer to purchase, bearing the date 18 November 1975. The offer was in the form of a printed document, which was a standard form of offer used by York Estate, and in which, in the blank spaces provided for the purpose, an employee of York Estate had inserted, in manuscript, the details relating to this particular transaction, before it was presented by York Estate to the plaintiff for her signature. At the foot of the last page of the document, immediately below the space provided for the offeror to sign as "purchaser" (where the plaintiff had affixed her

/signature) ...

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signature), there was a printed form of acceptance of the offer by the offeree. That acceptance was duly signed by the defendant on 21 November 1975, above the printed word, "Sellers". So the document as a whole became the contract between the parties, and I shall refer to it as such.

In the top left-hand corner of the first page of the contract the name "York Estate" appears in large capital letters. Immediately to the right thereof the printed words appear: "Acting as AGENTS for:". In the document as printed there is then a blank space, underneath which the following words appear: "jointly and severally (hereinafter referred to as 'the SELLERS')". In the blank space had been filled in: "MR. A.B. BAKER"; those are the initials and the surname of the defendant. Thus, ignoring the inapposite references to a plurality of sellers, the contract records that York Estate was acting as "agents" of the defendant, being the seller.

/The ...

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The shareblock which was the subject matter of the sale is described in the heading of the contract. The body of the contract contains 18 clauses. For the purposes of this judgment it is necessary to refer only to clauses 1, 2, 3 and 5. In clause 1 the "effective date" of the sale is fixed as 1 December 1975. Clause 2 provides that the total purchase price to be paid by the purchaser is the sum of R17 500. Clause 3 deals with the payment of the purchase price. In the printed form the clause was designed, in paragraphs (a),

(b) and (c), to make provision for the payment of a cash deposit, the payment of a further instalment, and a final payment of the balance of the purchase price on the effective date. However, in this case the whole of the purchase price was inserted in paragraph (a), and expressed to be payable "on or before the effective date", with the result that the effect of clause 3 was to provide for the purchase price of R17 500 to be paid in cash on or

/before ...

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before the effective date. Clause 3 concludes with the following provision, which is of crucial importance in this appeal:

"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 paragraph 5 hereof."

Clause 5 provides 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)"

(The further provisions of clause 5 are not relevant in this case.)

The plaintiff duly paid the purchase price of R17 500 to York Estate on 25 November 1975. The defendant did not deliver the share certificates, either before the effective date or thereafter. He remained

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in default despite numerous demands for performance over a protracted period. Finally, on 3 March 1977 the plaintiff validly cancelled the contract on the ground of the defendant's breach of it. Shortly thereafter, on 11 March 1977, York Estate was placed in liquidation. The plaintiff proved a claim for repayment of R17 500 against York Estate, but received no dividend.

In her particulars of claim the plaintiff originally put forward a main claim and two alternative claims. The latter claims were both founded upon alleged misrepresentations and they were expressly stated to be claims for damages. Both of them were abandoned in the course of the proceedings in the Court a quo and nothing further need be said about them. The main claim, by contrast, did not purport to be a claim for damages. It was plainly a claim for repayment of the purchase price, i e for restitution of the plaintiff's performance, pursuant to the cancellation of the contract. It was solely on that

/basis ...

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basis that the case was conducted and argued by counsel" on both sides in the Court a quo. In his judgment NIENABER J discussed the arguments of counsel at some length (see the report at 231 E to 233 D), but declined to decide the case on the arguments presented to him (see the report at 233 D). Instead, he found that the claim was capable of being construed as a claim for damages for breach of contract (at 233 F - G and 236 F - G), and decided the case on that footing, holding that the plaintiff was entitled to payment of R17 500 by way of damages computed on the basis of her so-called negative interesse (at 233 G to 236 F).

I propose to consider the plaintiff's claim in accordance with the manner in which it had been formulated in her pleadings. She alleged, in brief, that in terms of the contract between the parties, the purchase price of R17 500 was to be paid by her to York Estate, "the duly appointed and authorised agents of the

/defendant ...

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defendant"; that the defendant was to deliver to the said agents inter alia the share certificates in respect of the shareblock; that in terms of her obligations she paid to the agents the amount of R17 500; that the defendant, in breach of the contract, failed to deliver the share certificates to the agents or to the plaintiff; that on 3 March 1977 she cancelled the contract and demanded repayment of the amount of R17 500 and interest thereon; and that in the premises the defendant was liable to pay to the plaintiff R17 500 together with interest thereon from 3 March 1977.

In his plea, the defendant denied that York Estate was "the duly appointed and authorised agent of the defendant for the purpose of receiving or holding the purchase price". He alleged further that in terms of clause 3 of the contract York Estate was to hold "the said funds" in trust for payment to the defendant on the effective date, provided that the defendant had complied

/with ...

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with the provisions of clause 5 of the contract; that "accordingly" the sum of R17 500, when paid to York Estate, was a "species of deposition sequestrarium" and that YorkEstate "was in the position of a sequester or stakeholder";

that York Estate held the said amount "subject to an implied agreement" that in the event of the contract being cancelled, it would repay the amount to the plaintiff; and that "in fact and in law", once the plaintiff had legally cancelled the contract as she did, the only person upon whom she could properly make demand for repayment of the said sum was York Estate.

The crucial issue raised by the pleadings is whether or not York Estate was the agent of the defendant for receiving payment of the purchase price from the plaintiff. In argument before this Court counsel for the defendant readily conceded that if this issue were decided in favour of the plaintiff, the appeal had to be dismissed. The concession was unavoidable. It is not open to doubt /that ...

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that a purchaser who has validly cancelled a contract of sale on the ground of the seller's breach of it, is entitled in principle to claim repayment of the purchase price, paid to the seller in terms of the contract prior to its cancellation. The purchaser's right to claim repayment obviously exists also where payment of the purchase price was made, not to the seller in person, but to his duly authorised agent, since payment to an agent is equivalent in law to payment to the principal. In this situation the purchaser's right to claim repayment from the seller is unaffected by the failure or inability of the agent to pay over the purchase price to the seller. Although statements can be found in cases and in textbooks suggesting that the seller's liability is based on enrichment, I agree with the view, and the reasons for it, expressed by De Vos, *Verrykingsaanspreklikheid in die Suid-Afrikaanse Reg* (2nd ed) at 141 - 143, that a claim for restitution of performance following upon

/cancellation ...

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cancellation of a contract for breach is not a *condictio* (cf *Landau v City Auction Mart* 1940 AD 284 at 292-4 and *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) at 198 C - D), and I agree with NIENABER J (at 233 C of the report) that the claim is to be regarded as a distinct contractual remedy (cf S W J van der Merwe and M F B Reinecke in 1984 T S A R 85 at 86). Whether or not the remedy can aptly be described as a claim for *restitutio in integrum* (see the report at 233 B and A J Kerr in 1984 T H R-H R 460) need not be discussed in this judgment, although it might be noted in passing that it would seem to be advisable to distinguish between the non-technical concept of restitution in the sense of "restoration" or "return" and the technical concept of *restitutio in integrum* as dealt with in the common law authorities (see De Vos *op cit* at 143-4).

In considering whether York Estate was the agent of the defendant for receiving payment of the purchase

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price, it is important at the outset to bear in mind what the expression "agent of the defendant" means in the present context. It means no more than the person authorised by the defendant to accept payment of the purchase price by the plaintiff. 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.

Viewed in this light, the contract between the parties itself shows prima facie that York Estate was the agent of the defendant for receiving the purchase price. The statement in the heading of the contract that York Estate was "acting as agents for" the defendant is inconclusive in this regard, since it may mean no more than that York Estate was the estate agent acting for the seller in procuring the sale, and an estate agent as

/such ...

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such is not without more clothed with authority to receive the purchase price on the seller's behalf. But the provisions of clause 3, quoted earlier, go further and point to York Estate as being the defendant's agent for receiving the purchase price. In clause 3 it is expressly stipulated that all payments made in terms of it, (including, on the facts here, the payment of the full purchase price) shall be made to the "agents", being York Estate. It is clearly implicit that York Estate is authorised by the defendant to receive the purchase price, for, were it not so, the purchaser would have been obliged to pay it to the defendant. York Estate, when it received the payment with knowledge of the provisions of clause 3, prima facie accepted the mandate from the defendant to do so as the agent of the defendant, to whom it was obliged to pay over the money when he had complied with his own obligation to deliver the share certificates in terms of clause 5. Moreover, the parties clearly intended

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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. If, instead of cancelling the contract, the plaintiff had claimed delivery of the share certificates from the defendant, the latter would have had no answer to the claim. In this respect I agree with the actual decision arrived at in relation to a similar situation in the case of *Verbeek v Maher* 1978 (1) SA 61 (N) (as opposed to some of the dicta in the judgment in that case, on which I shall comment presently). I agree also with the remarks of NIENABER J at 231 F of the report, subject to one qualification. With reference to the fact that the *exceptio non adimpleti contractus*

would not have been available to the defendant as a defence to a claim for specific performance, the learned Judge observed that the question of agency would not arise at all, adding that it was all a matter of performance. I

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do not share that view, to the extent that I have 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. This is probably the idea underlying the statement in Wessels, Law of Contract in South Africa Vol II para 2195 -quoted in Verbeek's case, supra, at 67 E - that an *ad-jec-tus solutionis gratia* is in a sense the agent of the creditor. However that may be, in the circumstances of the present case the fact that payment to York Estate operated as a discharge of the plaintiff's obligation to my mind carries with it, prima facie at least, the notion that York Estate was the defendant's agent for receiving the price.

The views expressed above are based primarily

/on ...

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on the first part of the relevant provisions of clause 3:

"All payments made in terms of this paragraph shall be made to the AGENTS ..."

If the clause had stopped there, the views expressed above would, I consider, have operated conclusively against the defendant on the issue under consideration. The question to be investigated now is whether those views are affected by the remainder of the clause, which I quote again for ease of reference:

"... 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 paragraph 5 hereof."

At first sight there does not appear to me to be any reason why the second part of the clause should be regarded as detracting from the effect of the first part of it. By accepting the payment of the purchase price from the plaintiff with knowledge of the contents

/of ...

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of the clause, York Estate no doubt assumed an obligation vis-a-vis the plaintiff, arising from an agreement entered into by conduct, not to part with the money unless and until the defendant had complied with his obligation to deliver the share certificates; while the defendant, as part of the tripartite arrangement, no doubt had no right to claim payment over of the money by York

Estate to himself unless and until he had delivered the share certificates. But this was all part of the mechanism used by the parties to ensure *pari passu* payment against delivery, which was superimposed on the fundamental provision that payment was to be made to York Estate, and on the face of it I do not consider this mechanism to be in any way inconsistent with the notion that York Estate was authorised by the defendant to accept payment on his behalf, i.e. as his agent.

The defendant's denial in his plea that York Estate was his agent for receiving the purchase price /was ...

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was coupled with an allegation (as shown earlier) that the payment was a species of *depositum sequestrarium* and that York Estate was in the position of a sequester or stakeholder. Much of the argument of counsel who appeared for the defendant in this Court was devoted to the contention that York Estate, being a stakeholder, was for that reason not the agent of the defendant. It is necessary now to examine that contention.

The concept of a stakeholder is best known in our law in the context of a person who holds a *res litigiosa* pending the outcome of litigation between two rival claimants (see e.g. Voet 16.3.12 - 15; *Corrans v Transvaal Government and Coull's Trustee* 1909 TS 605 at 621-2, 631-2; and *Kelly v Lombard* 1927 AD 182 at 187-8). It is known also in the context of a person who holds money which is the subject of a wager, to be paid over to the party who turns out to be the winner of the bet (see e.g. Voet 11.5.9; *Sloman v Berkovitz* 1891 NLR 216; and *Clarke v Bruning*

/1905 ...

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1905 TS 295). In both instances it is of the essence of the stakeholding that at its inception it is uncertain which of the two parties involved will ultimately become entitled to receive what the stakeholder is holding. The identity of the creditor will only be established on the happening of an uncertain future event - the outcome of the litigation or of the wager. That being so, it can be said in these instances that the stakeholder holds the money or the thing on behalf of that one of the two parties involved who will eventually become entitled to it, but it cannot be said that the stakeholder, when he receives the money or the thing, or while he is holding it pending the happening of the future event, is acting as the agent of specifically the one or the other of the two parties.

In the present case the position is substantially different. As between the plaintiff and the defendant, there can be no doubt but that the defendant, in terms

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of the contract of sale, was the plaintiff's creditor in respect of the payment of the purchase price. Moreover, his right in respect of the plaintiff's payment of the price to York Estate on or before the effective date was an unconditional one. When the plaintiff paid the price to York Estate, the

defendant, and the defendant alone, was the creditor in respect of the money received and held by York Estate, notwithstanding the fact that he was not entitled to obtain the money from York Estate unless and until he had complied with his own obligations under the contract. In these circumstances I can perceive no difficulty at all in postulating that York Estate received the purchase price as the agent of the defendant. There is accordingly a fundamental difference between the position of York Estate in this case and the position of the stakeholder in the two contexts referred to above. It is true, of course, that if (as happened in this case) the contract were cancelled because of the defendant's

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breach, the defendant would cease to be a creditor vis-a-vis both the plaintiff and York Estate, and the plaintiff would possibly become a creditor as against York Estate for repayment to her of the purchase price, but I do not consider that such a possibility can serve to equate York Estate with the stakeholder in the instances referred to above. In agreeing on the mechanism for ensuring payment against delivery the parties contemplated the performance of the contract, not a breach of it, and it would be highly artificial and unrealistic to regard York Estate from the outset as a person receiving and holding the purchase price for the benefit of either the plaintiff or the defendant, depending upon whether the contract were to be carried to completion or breached and cancelled. In any event, the mere possibility of the plaintiff becoming the creditor of York Estate in the future does not affect the position that the defendant was the only creditor in the picture at the time when

/the ...

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the money was paid to York Estate, and while it was being held by York Estate prior to the cancellation of the contract, with the result that there is no obstacle in the way of finding that York Estate received and held the money as the agent of the defendant.

It follows from what I have said that I am in respectful disagreement with the view expressed by MILNE J in Verbeek's case *supra* at the top of page 68, that there did not appear to be any reason in principle for differentiating the legal position of a stakeholder in the circumstances of that case (which were for present purposes in all material respects the same as in the present case) from the circumstances where a person acts as a stakeholder with regard to a *res litigiosa*. As far as I am aware Verbeek's case was the first in this country in which a person in the position of York Estate in this case was referred to as a stakeholder. MILNE J quoted two passages from Voet, at 67 G and H of the

/judgment ...

24.

judgment. In the first, 16.3.12 Voet cites Paul's definition of depositum sequestrarium, but he does so as a prelude to a discussion that is devoted exclusively to that legal concept as it appears in the context of entrusting a res litigiosa to a third party, the sequester. In the second, 19.1.23, Voet uses the expressions "sequestratio fiat" and "sequester" (translated by Gane as "to be lodged with a stakeholder" and "stakeholder") in a context similar to that of the present case, i.e. where in relation to a contract of sale both the purchase price and the thing sold are entrusted to a third party for payment and delivery respectively to the seller and the purchaser. It is to be noted, however, that Voet does not enlarge on the rights and duties of the parties to such an arrangement or the legal position of a stakeholder in this particular context. From the mere fact that he uses the same terminology here as in relation to a res litigiosa I do not consider that it is justified to deduce that he was

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equating the two situations in all respects. In particular, I do not consider Voet to be an authority for the proposition that the "stakeholder" who receives the purchase price in the second situation can never be regarded as doing so as the agent of the seller, irrespective of the contractual setting in which the arrangement appears.

In Verbeek's case *supra* reference was made to the decision of the House of Lords in *Sorrell and Another v Finch* (1976) 2 All ER 371 (HL). In that case a potential purchaser had paid a deposit to an estate agent employed by the owner of a property, "subject to contract". No contract of sale was entered into and the estate agent disappeared with the money. The House of Lords, overruling a number of previous decisions by English courts, held that the would-be purchaser could not claim a refund of his deposit from the owner. The ratio decidendi, in brief, was that on the facts it had not been shown that the owner had either expressly or impliedly authorised

26.

the estate agent to receive a deposit on his behalf; in taking the deposit the estate agent was not acting as the agent of the owner. It is obvious that the facts *Sorrell's* case do not bear comparison with the facts in the present case. Counsel for the defendant in this Court nevertheless relied strongly on two passages in the speech of Lord EDMUND-DAVIES in support of his contention. The first (quoted in Verbeek's case *supra* at 69 E) was a quotation from an earlier unreported decision of Lord EDMUND-DAVIES in which he said, *inter alia*, that the essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into. The second (quoted in Verbeek's case *supra* at 69 F) was a quotation from a dissenting judgment of Lord DENNING MR in *Burt v Claude Cousins & Co* (1971) 2 All ER 611 (where the material facts were on all fours with those in *Sorrell's* case) in which Lord DENNING MR said, *inter alia*, that the estate agent, as stakeholder, does

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not hold the deposit as agent for the vendor, nor as agent for the purchaser; he holds it as trustee for both to await the event; and the purchaser cannot sue the vendor for the return of the deposit, because the vendor has never received it or become entitled to receive it. In a further passage Lord DENNING MR also said (see Sorrell's case supra at 377

- d) that the proper inference is that the estate agent receives the money as stakeholder and not as agent for the vendor. Counsel for the defendant conjoined these passages and argued that they showed that York Estate in the present case was a stakeholder and not the agent of the defendant. I do not agree with this attempt to apply the passages in question to the facts of the present case. What was said in those passages cannot be plucked from the context in which it was said and then be grafted onto a wholly different set of facts. It is true that the statements in the passages were couched in very wide terms, but that does not mean,

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of course, that they are of universal application in any situation bearing no more than a remotely superficial resemblance to that in relation to which they were made. In my view, therefore, Sorrell's case supra is of no assistance to the defendant in the present case.

The foregoing discussion of authorities relating to stakeholding leads me to the conclusion that nothing is to be found in them that militates against my view, expressed earlier, that the prima facie effect of clause 3 of the contract between the plaintiff and the defendant was to constitute York Estate the defendant's agent for receiving payment of the purchase price. I accordingly reject the contention on behalf of the defendant that York Estate was a stakeholder and not the agent of the defendant, to the extent that I hold that the second part of the contention is wrong. As to the first part, it seems to me that whether or not York Estate can aptly be described as a stakeholder is perhaps more a question

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of semantics than a matter of principle. If the word stakeholder is used in a narrow sense, as being confined to a third party who receives and holds something not as the agent of either one of the two persons who have an interest in it, then it would be wrong to categorise York Estate in the present case as a stakeholder. On the other hand, if the word stakeholder is used in a loose sense, without excluding the notion of agency, there would be no objection to calling York Estate a stakeholder. My personal preference is not to call a person in the position of York Estate in this case a stakeholder, but there is no need to pronounce a final judgment on the point.

It is to be observed that in Verbeek's case supra MILNE J did not decide that the third party in the position of York Estate here was not the agent of the seller (that was merely assumed), nor that it was a stakeholder (see at 68 D - E). However, in a subsequent case,

/Sadie ...

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Sadie v Carrie's City (Pty) Ltd and Others 1979 (1) SA 363 (T), MARGO J said (at 365 H), with reference to the cases of Verbeek, Sorrell and Burt supra:

"In recent decisions, both in this country and in England, it has been pointed out that a stakeholder is not the agent of either of the parties, and it seems that his position is sui generis ."

The contract in that case contained a clause similar in tenor to that in Verbeek's case and clause 3 in the present case. To the extent that MARGO J held that the "stakeholder" receiving the purchase price in terms of such a clause is not the agent of the seller, I respectfully disagree, for the reasons already given. (It may be noted in passing that in the present case, while York Estate was the defendant's agent for receiving the purchase price, it was also, by the same token, the plaintiff's agent for receiving delivery of the share certificates.) It follows also that I do not agree with those authors who, in commenting on the judgment of NIENABER J in the

/Court ...

31. Court a quo, have expressed the view that York Estate had not been authorised by the defendant to receive payment of the purchase price on his behalf (see D J Joubert in 1983 De Jure at 373-4 and 375, and S W J van der Merwe and M F B Reinecke in 1984 T S A R at 86). It remains to deal with one further allegation in the defendant's plea, as summarised earlier. It is that York Estate held the purchase price subject to an implied agreement that in the event of the contract being cancelled, it would repay the amount to the plaintiff. I take it that the implied agreement alleged is one between the plaintiff and York Estate. For the purposes of argument the allegation may be accepted as correct (cf Sorrell's case supra at 380 e/f - g). But it does not assist the defendant; it does not go far enough. From the fact that the plaintiff had a claim against York Estate, it does not follow that she has no claim against the defendant. In the realm of implied agreements or implied terms, if the defendant

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sought to rule out a claim against him, he would have had to allege an implied term in the contract between him and the plaintiff that the latter would have no claim for a refund of the purchase price against him, in the event of the sale being cancelled by reason of his breach of contract. Applying the well-known tests in regard to implied terms, I have no doubt that there is no room at all for implying such a term in the contract. Counsel who appeared for the defendant in this Court (he was not the author of the plea and did not appear in the Court a quo) disavowed reliance on the implied agreement pleaded. Instead, he submitted that the plaintiff's claim for repayment against York Estate was a *condictio causa data causa non secuta*. I need not pause to consider whether or not this submission is sound, for, assuming it to be correct, it once again does not assist the defendant, because it does not follow that the plaintiff has no claim against the defendant.

/NIENABER ...

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NIENABER J, following a dictum of MILNE J in *Verbeek's case supra* (at 69 A - C), held that after the cancellation of the sale the risk of insolvency of York Estate fell squarely on the plaintiff (see the report at 232 from C to the foot of the page). With respect, I do not think that an approach based on a shifting risk of insolvency of York Estate, resting at first on the defendant and then passing to the plaintiff, is helpful in considering the question of the plaintiff's claim against the defendant. It tends to suggest that, the plaintiff having failed in her claim against York Estate, there may be difficulty in finding a basis for allowing her a claim against the defendant (compare the remarks of the learned Judge at the top of page 233 of the report). In my opinion there is no such difficulty. The plaintiff's assumed claim against York Estate arises out of her contractual relationship with York Estate and its fate can in no way affect her claim against the defendant, which is based on

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an entirely independent cause of action. In my view the plaintiff could have sued the defendant without first pursuing her claim against York Estate, even if the latter had not gone insolvent. (On payment to the plaintiff, the defendant would, of course, have been entitled to recoupment from York Estate, for the latter would have had no title to retain the money as against the defendant, seeing that the contract had been dissolved and the plaintiff reimbursed.) As I have shown earlier, the plaintiff by paying the purchase price to York Estate fully discharged her contractual obligation vis-a-vis the defendant. The discharge of her obligation cannot cease to be such upon the cancellation of the contract by reason of the defendant's breach. In the contractual relationship between the plaintiff and the defendant the cancellation of the contract resulted in the defendant becoming obliged to make restitution to the plaintiff of her performance. That obligation of the defendant is his own and has nothing

/to ...

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to do with the fact that the plaintiff's claim against York Estate turned out to be abortive (cf_ G Lubbe in 1984 S A L J at 616 note 5).

In my judgment, therefore, the plaintiff's claim against the defendant ought to have been allowed in the Court a_ quo on the grounds set out above. There is accordingly no need to consider whether or not the trial Judge was justified either in regarding her claim as one for damages or in allowing it on that basis.

The appeal is dismissed, with costs.

A.S. BOTHA JACORBETT JAKOTZé JA CONCUR

HOEXTER JA

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

ALBERT BLACKMORE BAKER , APPELLANT

and

HILDA MAY PROBERT RESPONDENT

Coram: CORBETT, KOTZé, VILJOEN, HOEXTER, BOTHA JJA

Heard: 4 MARCH 1985

Delivered:

VILJOEN, JASave in one small respect I agree with the reasoning of my Brother Botha. I agree that the

parties/

2. 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. Although York Estate was not a signatory, the contract was clearly a tripartite one: Baker v Afrikaanse Nasionale Afslaaers en Agentskap Maatskappy (Eien-doms) Beperk 1951 (3) SA 371 (A). As a party to the contract York Estate assumed an obligation not to part with the money unless and until the defendant had

performed his obligation to deliver the share

certificates and the completed share transfer form.

This/

3. This was, as my Brother Botha has pointed out, all part of the mechanism used by the parties to ensure pari passu payment against delivery, which was superimposed on the fundamental provision that payment was made to York Estate. I do not, however, even though Botha JA proposes it as a tentative view only, agree that if (as happened in this case) the contract were cancelled because of the defendant's breach, the defendant would cease to be a creditor of York Estate and

that the plaintiff would possibly become a

creditor as against York Estate.

As I construe the contract York Estate's only

obligations to the plaintiff were:'

(a) not to

(a) not to pay over the purchase price, or so much of it as might be due to the defendant, before the certificates and duly completed

transfer form were delivered to it and

(b) the purchase price having been paid, to hand over to the plaintiff, upon delivery to it thereof, the share certificates together with the duly completed transfer form.

I point out, in this respect, that because the purchase price had been fully paid, there was no further cause for York Estate to hold these items in trust. They could very well have been delivered by the defendant to the plaintiff direct provided York Estate were notified thereof for purposes of paying over the purchase price, or so much thereof as was due, to the defendant.

In so far as the allegation in the defendant's plea is concerned that York Estate held the purchase price subject to an implied agreement/

agreement that, in the event of the contract being cancelled, it would repay the amount to plaintiff, one cannot, I consider, separate the obligations as against the plaintiff of York

Estate from those of the defendant. The main agreement was one of sale between the plaintiff and the defendant and any implied agreement as

to when or under what circumstances the purchase price would be repayable to the purchaser would of necessity have to embrace the defendant. That, upon the defendant defaulting, he would have to repay the purchase price to the plaintiff, is a consequence which would follow as a matter of law and is not something to which the defendant needed

to/

to agree. I think counsel for the appellant in this Court wisely did not press that proposition. Save for the obligations referred to above there was, in my view, no privity of contract between the plaintiff and York Estate. In the event of a breach by York Estate of obligation (a) above the plaintiff would have a claim for damages against York Estate if she in fact suffered any. Were York Estate to be in breach of obligation

(b) above, the plaintiff could institute a claim

for specific performance against it.

Upon a breach by the defendant of his

obligation to deliver the share certificates and

completed/

7. completed transfer form to either York Estate or to the plaintiff, the plaintiff would, in my view, have the ordinary remedies available to any purchaser, who has performed, against a seller who has breached the contract. If whatever judgment sounding in money the plaintiff obtained against the defendant were not satisfied by the defendant, the plaintiff would be entitled to execute upon such amount as might be due to the defendant of the sum paid over by the purchaser

to York Estate because that would be the defendant's

money in the hands of his agent. I do not consider

that the fact that the defendant has not performed

reverses the roles, as between the plaintiff and

the/

8. the defendant, of being the creditor of York Estate. Assuming York Estate had not gone insolvent, a judgment against the defendant for restitution of the purchase price could have been satisfied either by the defendant authorising York Estate to pay the money, or so much of it as would have been due to the defendant upon due performance by him, or by the defendant himself paying back the amount of the purchase price to the plaintiff and recouping himself from the money

paid over to York Estate by the plaintiff or so much as

would be due to him. The defendant would be

entitled to recoupment because the cause for York

Estate's/

9. Estate's keeping the money in trust would have lapsed. I added the qualification above "or so much as may be due to the defendant" because the matter is further complicated by the fact that, in terms of the contract, York Estate acted as agent for yet another party for receipt of whatever amounts might be due to it. I refer to the bondholder. The pro forma contract makes provision

for the purchaser to take over the obligations of

the seller under the bond which attaches to the particular share block which he has purchased and to pay the instalments under the bond to York Estate. In such a case York Estate would have had to keep the certificates and transfer form in trust until payment of the

final/

10. final instalment. In the present case the plaintiff paid in cash. Consequently the indebtedness of the seller under the bond had to be redeemed out of the purchase price before transfer could be effected. It appears from the contract that at the effective date there was still an amount of R6 282,00 owing by the defendant to the bond holder, Rocca Marina (Pty) Ltd, referred to in the contract as "The Company." Furthermore, in terms of clause 6, the agent's commission is payable by the seller. I am not suggesting that because the defendant owed the company and York Estate money, that that would per se defeat any claim the plaintiff might otherwise

have/

have had against York Estate. I am proceeding from the premiss that the plaintiff has no claim, save in the restricted sense as stated above, against York Estate and that any request or authorisation by the defendant to York Estate, his agent for receipt of the money, to repay the plaintiff would be subject to any debts owed by him (the defendant) under the contract to other parties. I agree with the order made by my Brother Botha.

JUDGE OF APPEAL

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