The right of an attorney to claim payment of costs from a third party

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1. Introduction

Parties to a contract sometimes agree that one party will pay certain costs to the other party's attorney. A typical clause to this effect, which featured in *Barnett v Abe Swersky & Associates* ("*Barnett*"), [1] reads as follows:

> "The purchaser undertakes and agrees to effect payment to Abe Swersky & Associates of all their costs as between attorney and client relating to the drafting and drawing of these presents and the implementation of the terms and conditions thereof … ." [2]

It is especially common for agreements of sale of land, where the seller is obliged to effect transfer, [3] to determine that the purchaser undertakes to pay to the seller's attorney the costs of transfer. These costs usually include the attorney's fee for his services, as well as transfer duty (or VAT) and deeds office fees payable to the state. [4]

If all goes well in the examples above, effect is given to the clause. The party who is not the attorney's client, i.e. the third party, pays the attorney his own fee or other further costs. But, what are the consequences if the third party does not honour this undertaking? Moreover, to what extent may the attorney play a more active role in collecting payment of his fees and the other costs from the third party? Even if the attorney may play such a role, is it desirable to do so? Furthermore, whom does the attorney really act for when paying over costs to other parties, such as transfer duty received from the purchaser for payment to the state? [5]

This article explores various answers to these and related questions. It starts with the normal consequence, whereby there is a distinct and clear separation of the contractual relationships between the attorney and the client on the one hand, and between the client and the third party on the other hand.

2. The normal consequence: failure of the third party to pay the attorney amounts to breach of the contract with the client, which entitles the client, and not the attorney, to proceed against the third party

2.1 The legal relationships: two contracts, one transfer, two performances

South African law generally adheres to a principle rooted in Roman law and in common sense. It is the principle of privity of contract, which essentially means that a contract can only bind those who are party to it. [6] When applied to the examples discussed above, the principle requires that a distinction has to be drawn between two contracts.

The first is the contract between the attorney and the client. Its content is that the attorney will perform certain services for the client and that the client will pay the costs of these services. These will be called the "attorney's costs", for which the attorney is entitled to keep payment, to distinguish them from costs, such as transfer duty and deeds office fees, which the attorney must pay over to the state.

The second contract is between the client and the third party. Its content, *inter alia*, is that the third party is obligated towards the client to pay certain costs. This obligation is met when the third party "factually" or physically transfers money directly to the attorney. However, "legally" the third party has performed an obligation he undertook towards the client. This position is illustrated by the recent judgment of the Constitutional Court in *Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd.* Here the purchaser of property was contractually obliged to pay a deposit, as well as costs such as transfer duty. It was held that the transfer of funds which the purchaser (i.e. the third party) made to the seller's attorney constituted a payment to the *seller* (i.e. to the client), and not to the attorney. [8]

Where the parties agree that making such a transfer to the attorney constitutes performance to the client, the attorney is in effect only a "collection bowl" for the third party's transfer; [9] in technical terms, he is a person *adjectus solutionis causa.* This is an additional person, other than the creditor (i.e. other than the client) to whom the debtor by agreement between the parties

may validly perform. [10] Crucially, and this is a position that apparently has not always been appreciated in practice, [11] the attorney who acts as mere *adjectus* has no right to claim payment of the costs from the third party, that right vests with the client. [12] All the attorney can say to the third party is: "Here are the documents setting out costs you have to pay; you undertook towards my client to effect payment of these costs to me. If you do not do so, my client could sue you."

In the absence of an agreement between client and third party to appoint the attorney as *adjectus*, the client may in any event unilaterally authorise the attorney to receive a payment from the third party on the client's behalf. [13] Payment to such an agent constitutes payment to the seller. [14] Appointing the attorney as agent does not, however, give the attorney the capacity to sue the third party in its own name. [15]

The mechanism set out above has distinct practical advantages. It prevents wastefully making separate transfers to fulfil obligations. As far as payment of the attorney's own costs or fee is concerned, one transfer, made by the third party to the attorney, could fulfil two obligations: the obligation of the client to pay the attorney, and the obligation of the third party to reimburse the client.

As far as other costs are concerned, it may also be convenient to oblige the third party to make a transfer to the attorney. For example, to ensure the transfer of land, certain costs, such as transfer duty (or VAT) [16] and deeds office fees [17] have to be paid. These costs may be the liability of the purchaser (whether by law [18] or by agreement [19]), but the person who is effectively in charge of the transfer process would often be the seller's conveyancer, and the most sensible course of action would be to use him to collect payment of these costs and ensure they are in turn paid over to the state. [20] In all these situations it is convenient to follow the route of having the third party make one transfer to the attorney, rather than to the client, who in any event will pass it on to the attorney.

2.2 The implications of breach by the third party of the obligation to make the transfer to the attorney

What are the implications if the third party does not pay the costs as undertaken in the agreement? Let us first consider the undertaking to pay the attorney's own costs. The client may proceed against the third party for breach of the contractual undertaking towards the client. [21] The client may of course give the attorney a separate mandate to assist in collecting payment, but the attorney would then merely render a

professional debt collection service, and the action would be brought in the client's name. [22] The attorney could institute action on the client's behalf as the client's agent, but this action also has to be brought in the client's name. [23]

Faced with such a claim from the client, it is now up to the third party to decide whether he wants to dispute liability. The third party could for example, allege that in terms of the reciprocal contract of mandate concluded between a client and an attorney, the right to payment only arises once the work has been performed fully and on time. If the attorney did not perform

the work properly, the obligation to pay his fee would not be enforceable. [24] Or, the third party could allege that the attorney's own costs exceed permissible rates. Even though the third party is not the party entitled to performance, since the attorney owes that obligation to the client, [25] the third party can still validly maintain that he may only be obliged to fulfil an obligation which is due and owing. It is therefore up to the client to revert to the attorney to establish whether these allegations are founded.

If the third party's allegations are unfounded, the client could proceed to claim payment from the third party, if necessary, with the attorney's assistance in providing proof that the costs are recoverable. However, if the third party's allegations are correct, the client would first have to establish how much it has to pay the attorney, if anything at all. If the allegation is that of overcharging, the client could have the costs assessed. If the allegation is one of not providing a professional service, the client may avail itself of a variety of contractual remedies. These include raising the *exceptio non adimpleti contractus*, which allows it to refuse any payment to the attorney until the work is performed in full. [26] The attorney may then succeed in proving that it is entitled to a reduced contract price. But whatever the outcome of these disputes, the third party cannot be liable towards the client for more than the attorney could validly have charged the client.

Thus far, the focus was on the consequences when the third party does not pay the attorney's own costs. But what is the position if the third party fails to pay other costs, more specifically the costs of transferring property, such as transfer duty? Here a failure of the purchaser to pay the duty would amount to a failure to provide the necessary co-operation to ensure that the seller can effect transfer, and hence constitute breach of contract by the purchaser. It is therefore the seller, and not the conveyancer, who should be able to compel compliance with this duty, if necessary by way of a claim for specific performance to pay over the transfer duty to the conveyancer, who would in turn pay it over to the state. Bobbert has argued that the conveyancer would be entitled to claim transfer duty from the purchaser unless the parties agreed otherwise. [27] It is not apparent, though, why the fact that the purchaser is liable for transfer duty means that the conveyancer would be entitled to claim payment.

Ultimately, though, in the conveyancing context a tool exists that could act as a strong incentive to a third party who is interested in obtaining transfer to comply with the obligation to pay the necessary fees and costs (as well as, at times, a deposit on the purchase price). Typically, the conveyancer would require payment of these amounts prior to transfer. As long as these payments

are not made, the transfer will simply not proceed: due to the reciprocal nature of the duties to provide the funds and to effect transfer, the seller and conveyancer may withhold performance until the third party pays in full.

We have considered the normal consequences of the standard clause, whereby a third party undertakes to a client to pay an attorney's costs, and we have seen that the attorney generally does not enjoy any right to claim payment in his own name. Due to the principle of privity of contract, the attorney may only seek payment of his fee from his own client. And neither does the attorney enjoy any right to claim other costs. It will now be considered whether alternative mechanisms exist that would enable the attorney to take a more active role in obtaining a transfer from a third party. The first of these mechanisms is cession, and the second the *stipulatio alteri* or agreement for the benefit of the third party.

3. Cession to the attorney of the client's rights against the third party

A cession is essentially a method of transferring a right to recover a debt from a debtor. [28] The possibility has been raised that a client could cede to his attorney the contractual rights of the client against the third party to pay certain costs to the attorney. [29] The consequences of such a cession, and especially the implications that the attorney would now be able to proceed against the third party in his own name, will be now be considered. The focus will be first on a cession aimed at enabling the attorney to claim payment from the third party of the costs of his own services. Thereafter it will shift to a cession aimed at enabling the attorney to claim payment of other costs, such as transfer duty, from the third party.

3.1 Cession and the liability of the third party to pay the attorney's own costs

Normally the debt that the creditor intends to cede is fulfilled if the debtor makes a transfer to the creditor. For example, if B owes R10 000 to A, the obligation is fulfilled when B makes a transfer of R10 000 to A. But the present situation, where a client intends to cede his right against the third party to the attorney, is rather unusual. The obligation owed by the debtor is not fulfilled by the debtor making a transfer to the creditor (the client). It is fulfilled by the debtor making a transfer to another person (the attorney). Furthermore, the cessionary, i.e. the person to whom this obligation is ceded, happens to be the other person to whom the transfer is to be made. The rather complicated result of all of this is that the attorney after the cession holds the right to claim

that the debtor makes a transfer to him, and that this transfer would result in payment of an underlying debt which the client happens to owe the attorney. [30]

Unusual as it may be, it is not readily apparent what objections there could be in principle to this cession. It is especially not clear why the party who undertook to the client to make the transfer to the attorney would have to consent thereto. [31] Since the transfer to the attorney automatically releases the client, this is not a situation where the attorney and the client contractually "qualify" the cession, by requiring that the cessionary (the attorney) must use the proceeds for a specific purpose, namely to pay the client's debt to the attorney. Some uncertainty exists as to the validity of such a "qualified cession", used for purposes of collecting payment (*Inkassozession* or "*sessie ter invordering*"). [32] However, it seems that there is only cause for concern if such a cession is not genuine. This would be the case, for example, if it involved a simulated agreement of mandate, or if the cession violates public policy, for example if it was aimed at circumventing requirements for establishing jurisdiction or *locus standi*. [33] There is no legitimate cause for concern where the "qualified" cession is used, as in the present case, to enable an attorney to obtain funds to pay for expenses necessary to effect the transfer of property. Allowing such a cession would also be in line with basic policy considerations underlying the law of cession. As Gerhard Lubbe has reminded us, a balance needs to be drawn between the twin goals of ensuring that rights are freely disposable and of not rendering the debtor's position more burdensome. [34] Here the creditor (the client) disposes of a right to the attorney, but without the debtor's position being worsened: the debtor knew from the outset that he would have to make a transfer to the attorney; the only difference is that by virtue of the cession it is the attorney, rather than the client, who may compel him to do so.

Whether cession is possible is one question. Whether it is desirable is another. What practical considerations could motivate an attorney and client to cede the client's rights against the third party to the attorney? According to Bobbert, cession could actually be a "solution" to the problem that a conveyancer cannot proceed against a purchaser to obtain payment of what he calls the "transport costs", which presumably at least means the conveyancer's own fee. [35] Unfortunately, Bobbert does not explain why it would be desirable (especially from the perspective of the attorney or conveyancer) to implement such a solution, as opposed to following the conventional route of having the conveyancer assist the client to claim in the client's own name. But some possibilities present themselves.

First, the attorney could value the relationship with the client so highly that he would be willing to seek payment directly from the third party in the attorney's own name, rather than to expect of the client to engage in legal action to compel the third party to pay the bill. But it would have to be a special client that warrants such treatment. Any legal steps necessary to obtain payment from the third party would be for the attorney's account, unless the parties agree otherwise.

Secondly, it may be that the client is not in a financial position to enforce the right, or that there is some practical problem with the client enforcing such a right, such as extended absence, which may leave the attorney with no choice but to proceed against the third party in his own name.

Whatever these motivations may be, the cession would not leave the client (the cedent) out of the picture. The client would only be released from his duty to pay the attorney to the extent that the attorney is successful in obtaining payment from the third party. It is of course possible for the attorney to obtain the cession as well as waive the right to hold the client liable for whatever costs the third party fails to pay. However, attorneys would presumably rarely go so far to please their clients.

Furthermore, an attorney willing to take a cession must also take into account the general principle that a debtor (i.e. the third party) may raise against the cessionary (i.e. the attorney) all the defences which he has against the cedent (i.e. the client). [36] The third party would only be liable for costs that are due and payable. Thus, if the attorney had not performed the work properly, or overcharged the client, the third party could raise the defence that he is not contractually liable for these costs.

The type of cession referred to above has to be distinguished from a mechanism known in some foreign systems whereby a person obtains a right to collect payment of a debt in his *own name*, but the underlying debt

still remains with the original creditor. [37] Under the so-called "collection authorisation" or *Einziehungsermächtigung* of German law, the client would retain the contractual right against the third party to claim that he makes a transfer to the attorney, but the client would further authorise the attorney to enforce this right in the attorney's name. [38]

The "collection authorisation" mechanism occupies a position somewhere between the two mechanisms we have already encountered. It is not the typical situation (encountered in 2 above) where the client enforces his rights in his own name, and the attorney merely assists as legal representative. But it is also not a cession for collection purposes (dealt with earlier in this section), where the client's rights are ceded in full to the attorney, who then claims enforcement in his own name. [39]

It remains unclear, though, to what extent the "collection authorisation" is recognised in South African law. [40] The formal objection has been raised that it subverts the doctrine that performance requires a debt-extinguishing agreement between creditor and debtor. [41] But this objection does not carry much weight. Leaving aside the problems with the doctrine itself, [42] it is in any event well-established that performance can be rendered by a third party without the participation or even knowledge of the creditor. [43]

Finally, there is the possibility that a result similar to the "collection authorisation" could be obtained if the client were to retain the right against a third party to demand payment of the attorney's fee, but then only cede to the attorney the capacity to enforce this right. It would be by way of cession of this capacity, rather than by way of some contractual authorisation (as in the case of the "collection authorisation"), that the attorney can proceed against the third party if he does not pay. As Lubbe has argued, the notion that it is possible to separate certain components of the cedent's interests, for example the capacity to enforce the right, and then cede them separately, draws some strength from the unequivocal support for the pledge construction of the cession *in securitatem debiti*, whereby a personal right is ceded to

secure an indebtedness. [44] Under this construction, "the effect of the cession *in securitatem debiti* is that the principal debt is 'pledged' to the cessionary while the cedent retains what has variously been described as the 'bare dominium' or a 'reversionary interest' in the claim against the principal debtor". [45]

3.2 Cession and the liability of the third party to pay other costs

Thus far the focus has been on the role that a cession could play when seeking to ensure that the attorney's own costs are paid. We can now turn to the position when the contract between the client and the third party requires of the third party to pay certain other costs (i.e. not the attorney's own costs). The most prominent example would be costs for transfer duty and deeds office fees. As we have seen, these costs are payable to the state. [46] To complicate matters somewhat, in the case of transfer duty, it is actually the acquirer of property (i.e. the third party in our example), and not the seller (i.e. the client in our example) who has to pay the state. However, in the fact pattern considered here the acquirer does not pay these costs directly to the state. He rather contractually undertakes to the seller that he would provide the necessary funds to the seller's attorney, who will then ensure that they are used to fulfil the acquirer's obligations to the state.

The question now arises what the consequences would be if the seller were to cede to his attorney the right against the purchaser (i.e. third party) to claim that the purchaser provides the attorney with these funds. Such a cession would in effect enable the attorney to demand that a transfer be made to him as cessionary, but it would not be intended that the attorney could keep the collected funds in fulfilment of a debt owed to him.

If the third party makes the transfer to the attorney, he would be fulfilling his obligations under the contract. However, certain obligations would remain unfulfilled. First, the state is only paid once the attorney transfers the money to it. Secondly, it is to be expected that the agreement of mandate existing between the attorney and client would require that the attorney pay over these funds to the state.

Again, it may be asked how such a cession would benefit the attorney. Unlike the situation in 3 1 above, he is not even acting in his own interests to ensure that his own fees are paid. It is hard to believe that the attorney would be willing to engage in litigation in his own name, and at his own expense as

cessionary, unless a further agreement exists between the attorney and client that these expenses will be reimbursed by the client.

Ultimately, it would therefore appear that a cession by the client to the attorney of his rights against the third party has limited appeal as a mechanism to ensure that the attorney is paid his own fee (as indicated in 3 1 above) or to ensure that the attorney obtains the necessary funds from the third party for paying costs such as transfer duty and deeds office fees (as indicated above in this section). We now proceed to consider another mechanism that could potentially allow the attorney to play a more active role in collecting payment of all these costs.

4. A *stipulatio alteri* aimed at enabling the attorney to claim payment of costs from the third party

The *stipulatio alteri* or contract for the benefit of a third party has often been described, rather vaguely, as a contract between two parties that is designed to enable a third person to "come in as a party to a contract with one of them". [47] These two parties to the initial contract are traditionally called respectively the *promittens* i.e. the one who "promises" or undertakes to confer a benefit on the third party, and the *stipulans*, i.e. the one who "stipulates" or requires that this undertaking be given. According to the prevailing view, the intended beneficiary [48] does not immediately acquire a right to performance as a result of such a contract, but first has to accept the benefit, [49] by way of some "outward act". [50] Once the intended beneficiary has done so, he may seek to enforce his right in his own name against the *promittens* who undertook to provide him with the benefit.

Against the background of this brief overview of general principles, we may now consider to what extent an attorney could rely on a *stipulatio alteri* to proceed against a third party who undertook towards the attorney's client to pay certain costs, and more specifically the

attorney's fees. In this regard, Van Heerden J in *Barnett* held that the intention that an attorney should "come in as a party to a contract" under a *stipulatio alteri* cannot be inferred from the mere fact that the client and the third party agree, for their own convenience, that the third party will render performance to the attorney, without the

intention to create a claim for the attorney. [52] As indicated earlier in part 2, the inference is rather that they intend that the attorney is added as an *adjectus solutionis causa*, who merely is entitled to receive the transfer from the third party on the client's behalf. This type of thinking is also reflected in other contexts. For example, a local authority cannot sue a purchaser of land in its own name for arrear rates, merely because one of the conditions of an agreement for the sale of land was that the purchaser would be liable for such rates. [53]

The reluctance of the courts to apply the *stipulatio alteri* in the situations above is understandable. This mechanism is essentially aimed at creating a new obligation between the *promittens* and the intended beneficiary. For example, in the case of the life insurance contract, the policy holder (the *stipulans*) contracts with the insurer (the *promittens*) that the insurer would make an offer to an intended beneficiary with the intention that the latter's acceptance of the offer would create a new contract between the beneficiary and the insurer. [54] There is no prior contract whereby the insurer first is obliged to render this performance to the insured, and then later promises to render it to the beneficiary. Yet, it is precisely such a prior contract which exists when a client has already agreed to pay the attorney's fee. [55]

If the parties were now to create a *stipulatio alteri*, whereby the attorney would "come in as a party to a contract" with the third party, a further obligation would be created between the third party (*promittens*) and the attorney (the intended beneficiary), which would enable the attorney to claim payment from the third party in his own name. [56] But, where does this leave the existing obligation of the client to pay the attorney? It is rather unlikely that it was intended that the attorney could after acceptance have two claims – a new claim against the third party *promittens*, as well as the existing claim against the client. The more probable inference is that it is intended that the client should exit the scene once the attorney has accepted the third party's

offer to pay under the *stipulatio alteri*. This can be done by stipulating that if the attorney accepts the right to claim against the third party, the attorney at the same time has to relinquish his claim against the client. [57]

But this is a very convoluted way of achieving what in effect amounts to a novation between multiple parties, whereby a debt existing between a creditor and one debtor (i.e. between the attorney and the client) is replaced by a new debt between the same creditor and another party (i.e. between the attorney and the third party). The parties may just as well create a tripartite agreement to this effect from the outset.

Furthermore, in *Baikie v Pretoria Municipality*, [58] the court pointed to a problem with using the *stipulatio alteri* in these situations. The argument, adapted to the present context, is essentially that such a mechanism could prejudice the client. Until it is certain that the attorney accepts the benefit, the client would be able to hold the third party to the undertaking to pay the attorney, but the client would presumably not be able to sue the third party for payment in his own name. And if the attorney does not accept the benefit, the *stipulatio alteri* fails. According to the court, this could mean that the third party no longer has to pay the costs, leaving the client still liable to pay the attorney. Apparently, this conclusion is based on the idea that once the client and third party agree that the third party is to pay the attorney directly, the third party could no longer be liable towards the client.

Thus far, it was assumed that a prior agreement exists between the attorney and client, whereby the client has to pay the attorney, and a third party subsequently undertakes to the client to pay the attorney's fee. But could two parties to a contract, such as an agreement of sale of land, agree that one party undertakes to the other to engage the services of a particular attorney? Thus, could a purchaser and seller agree that the seller would appoint the attorney nominated by the purchaser as conveyancer? Or, as in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* ("*Joel Melamed and Hurwitz*"), [59] could a managing company agree with the seller that the seller would only use a conveyancer nominated by the company? In *Joel Melamed and Hurwitz* it was not proven on the facts that an intention existed to conclude such a *stipulatio alteri*, but this does not rule out the possibility in principle. [60] The parties could negotiate this benefit for the conveyancer, and if he accepts the benefit, he would be appointed as the conveyancer. Unlike the scenarios considered above, an entirely new agreement is now created between third party and conveyancer.

This is not a situation where the third party agrees to pay a fee which the attorney or conveyancer has already earned under a contract with the seller.

Under such a *stipulatio alteri*, the third party has to engage the services of a particular legal practitioner when concluding the sale. In this regard, Otto has raised the possibility that using the *stipulatio alteri* in this way might be problematical from a policy perspective, and that it could potentially be contrary to rules of professional ethical conduct. [61] However, Otto leaves it somewhat unclear what the basis of these objections could be. His remarks are made in the context of the *Joel Melamed* case, where, as we have seen, the conveyancer unsuccessfully tried to establish that the seller and a management firm client created a *stipulatio alteri* in favour of the conveyancer. [62] Perhaps Otto was concerned about conveyancers abusing this mechanism to lock in prospective sellers in property transactions. The agreement of mandate, which has to be created between the conveyancer and the client, involves more than a mere duty to pay an amount of money, it requires trust and mutual reliance. However, as far as could be established, the ethical rules governing conveyancing do not rule out as a matter of principle that a conveyancer could be appointed as a result of a contractual duty to do so. [63] Nonetheless, any risk of potential unethical appointment is avoided when the safer, conventional route (set out in part 2 above) is followed, whereby the seller contracts with the conveyancer to perform the work on its behalf, and the seller merely obtains an undertaking from the purchaser to pay the conveyancer.

5. Possible enrichment claims against a third party

Thus far, the focus was on liability that could arise from various consensual mechanisms aimed at creating and transferring obligations to determine when an attorney could claim payment for costs from third parties. The focus now shifts to a non-contractual potential source of liability, namely the law of unjustified enrichment. In this regard, two potential claims are worth investigating.

5.1 An enrichment claim based on paying the third party's debt

The first claim concerns payment of another's debt. As we have seen, to ensure transfer of land, certain costs, such as transfer duty, have to be paid to the state. Legally, the third party purchaser is obliged to pay these costs. If the third party fails to do so, the process of transfer could be frustrated to the detriment of the seller. It may therefore be in the interests of the seller to pay these fees on the third party's behalf. Naturally, the seller who does so would want to be reimbursed by the purchaser. Such a claim could be based

on contract, if the contract does indeed provide that the purchaser undertakes toward the seller to pay these costs. [64]

However, in the absence of such a provision, the seller would have to seek reimbursement on an alternative basis. In this regard, Bobbert has stated that:

> "*Wetlik is die koper aanspreeklik vir die betaling van hereregte by 'n transaksie van vaste eiendom … Dit kan egter kragtens ooreenkoms gewysig word. Die transportbesorger sal hierdie bedrae dus van die koper kan vorder indien so ooreengekom word, vermoedelik ook indien die transportbesorger as negotiorum gestor opgetree het*." [65]

This statement requires some qualification. First, it is not apparent why the *conveyancer* would be able to claim that the purchaser complies with the contractual obligation to provide the funds to pay the transfer duty; as we have seen, this obligation is owed to the conveyancer's

client, that is the seller, and not to the conveyancer. [66] Bobbert must have meant that the conveyancer could claim payment on the client's behalf.

Secondly, and more importantly for present purposes, Bobbert seems to suggest that the conveyancer may also claim payment from the purchaser where the conveyancer acted as *negotiorum gestor.* A *negotiorum gestor* is essentially someone who manages another's affairs in the latter's interests and without his authorisation; the gestor is then entitled to reimbursement of reasonable expenses. [67] It seems rather unlikely, though, that *negotiorum gestio* is involved when a conveyancer, faced with a purchaser who does not want to pay, decides to further his client's interests by paying the costs of transfer. The more probable scenario is that the client would pay these costs, irrespective of the purchaser's wishes, to ensure that the conveyancer can proceed with the transfer. But we would then not be dealing with a claim for reimbursement based on *negotiorum gestio* by the conveyancer. It would rather be a claim for reimbursement by the client, based on payment of another's debt in one's own interests. [68] Traditionally, an enrichment action, the "quasi" action based on managing another's affairs (*quasi negotiorum gestio*), is used towards this purpose. The essence of the claim is that the payer has been impoverished by making the payment, the third party purchaser has been enriched at the payer's expense by being saved this expense, and no legal ground exists for retaining the enrichment.

5.2 An enrichment claim based on the client's inability to pay

Where an attorney performs legal services for a client, such as drafting a contract, it could benefit the client as well as a third party. However, as we have seen, the general position is that the attorney's right to payment for the services derives from the contract with the client. But is there any possibility that the attorney might be able to proceed against the third party on some

other basis, and more specifically, on the basis of unjustified enrichment? There are formidable obstacles in the way of such a claim.

The main obstacle is that if the attorney performs the work in fulfilment of a valid contract with his own client, the contract provides a valid legal ground for the work done. This means that any claim based on unjustified enrichment fails, because the plaintiff has not met the general requirement that the enrichment must be without legal ground or *sine causa*. Furthermore, since *the client* is primarily liable to pay for the services, the attorney has a valid claim in his estate. He therefore cannot meet a further general requirement for enrichment liability, namely that the plaintiff has to be impoverished. Finally, the attorney may also fail to meet the general requirement that the enrichment was at his expense, in the sense that there is a sufficient causal link between the attorney and any enrichment of the third party. [69] This is because any enrichment of the third party could be regarded as a causally-irrelevant consequence of the agreement between the attorney and the client that the former would perform services for which the latter would be liable.

However, the possibility cannot be excluded that the courts may in exceptional cases deviate from these general principles on policy grounds. Where the client is insolvent or absconded, the attorney's right to claim payment under the contract may for all intents and purpose become "academic" [70] or worthless. In such circumstances the courts have at times been willing to grant the person performing a service an enrichment claim against a third party who benefitted as a consequence thereof, rather than to leave him with the cold comfort of a contractual claim against a client who will never pay. The so-called "garage cases" illustrate this proposition. In these cases a person who is not owner of a vehicle contracts with the garage to effect repairs to a damaged vehicle and absconds. The owner of the vehicle is then enriched through being saved the expenses of repairing the vehicle. The garage has then been awarded an enrichment claim against the owner. [71]

It remains to be seen, however, whether the courts would award an attorney an enrichment claim against a third party if the client absconds or becomes insolvent. In the garage cases, the owner is generally unaware of the enriching act; he can have no expectation or reliance that a benefit is conferred pursuant to a valid contract, and that he would never be called upon to account for any resulting enrichment. However, where an attorney performs a service for the client, such as drafting an agreement, the third party generally would be aware of this from the outset. Unless the agreement determines otherwise, the third party would expect the client to pay the attorney.

6. Conclusions

The conclusion of an agreement that obliges a party to make a payment to an attorney may at first glance appear to be a relatively simple, if not mundane

fact pattern. However, it can give rise to problems of some complexity. On a purely technical level, the fact pattern requires an analysis of the key features and operation of a number of sophisticated private-law doctrines that deal with various types of agreements giving rise to obligations, as well as with various modes of fulfilment. But on a more fundamental level, the fact pattern illustrates how various mechanisms interact to give effect to principles, policies and values, such as privity of contract, personal autonomy, freedom of contract, protecting reliance and public morality.

It has been a hallmark of Gerhard Lubbe's scholarship that it does not only display his mastery of the technicalities of private law doctrine, but also constantly challenges us to consider their underlying function. The value of such a methodology is also illustrated by exploring the consequences of the agreement that obliges a third party to make a payment to an attorney. It confirms the wisdom of the courts' general insistence that the attorney is confined to a claim against his client for payment of his fee. And it also shows the limited value of mechanisms, such as cession, the *stipulatio alteri* and claims based on unjustified enrichment, which are aimed at enabling the attorney to proceed directly in his own name against the third party.

Summary

Parties to a contract sometimes agree that one party will pay certain costs to the other party's attorney. For example, it is common for agreements of sale of land, where the seller is obliged to effect transfer, to determine that the purchaser undertakes to pay the costs of transfer to the seller's attorney. If all goes well, effect is given to the clause: the party who is not the attorney's client, i.e. the third party, pays the attorney his own fee or other further costs. This article considers the consequences if the third party does not honour this undertaking, and to what extent the attorney could play a more active role in collecting payment of his fees and other costs from the third party. It is concluded that the courts rightly adopt the general position that an attorney whose fee is not paid should claim payment from his client. Mechanisms such as cession, the stipulatio alteri and claims based on unjustified enrichment may in turn only be of limited value in enabling the attorney to proceed directly in his own name against the third party.

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1 1986 (4) SA 407 (C).

2 409B.

3 See *Sweet v Ragerguhara* 1978 (1) SA 131 (D) 134.

4 See eg *Blundell v McCawley* 1948 (4) SA 473 (W); *Whaley (Law Society of Zimbabwe Intervening) v Cone Textiles (Pvt) Ltd* 1989 (3) SA 574 (ZSC) 578-582; *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) 172G (where the relevant clause provided that "[t]he purchaser shall pay the costs of this deed of sale and all costs of and incidental to transfer of the property including stamp and transfer duty").

5 See *Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd* 2015 (2) SA 539 (CC) para [26], overruling *Royal Anthem Investments 129 (Pty) Ltd v Lau* 2014 (3) SA 626 (SCA).

6 See *Aussenkehr Farms (Pty) Ltd v Trio Transport CC* 2002 (4) SA 483 (SCA); *Manousakis v Renpal Entertainment CC* 1997 (4) SA 552 (C); RH Christie & GB Bradfield *Christie's Law of Contract* 6 ed (2011) 269-270.

7 2015 (2) SA 539 (CC).

8 2015 (2) SA 539 (CC). The implication, when the contract failed, was that the seller had to be ordered to repay these funds; the attorney merely held the funds as fiduciary.

9 See *Barnett v Abe Swersky & Associates* 1986 (4) SA 407 (C) 411J-412A; *Whaley (Law Society of Zimbabwe Intervening) v Cone Textiles (Pvt) Ltd* 1989 (3) SA 574 (ZSC) 580.

10 *Mpakathi v Kghotso Development CC* 2003 (3) SA 429 (W) para 14:
"The conveyancer is *solutionis causa adjectus* for the obligation owed by the purchaser to the sheriff and as such neither he nor the execution creditor (who merely nominated him) becomes a party to the contract between the sheriff and the purchaser …"*Blaikie v Pretoria Municipality* 1921 TPD 376 380; *Malelane Suikerkorporasie (Edms) Bpk v Streak* 1970 (4) SA 478 (T) 482; *Stupel & Berman Inc v Rodel Financial Services* 2015 (3) SA 36 (SCA) para [15]; D Joubert *General Principles of the Law of Contract* (1987) 276-277. See *Mahomed v Lockhat Brothers & Co Ltd* 1944 AD 230 237 on the origins of appointing a person *adjectus solutionis causa*.

Blaikie v Pretoria Municipality 1921 TPD 376 380; *Malelane Suikerkorporasie (Edms) Bpk v Streak* 1970 (4) SA 478 (T) 482; *Stupel & Berman Inc v Rodel Financial Services* 2015 (3) SA 36 (SCA) para [15]; D Joubert *General Principles of the Law of Contract* (1987) 276-277. See *Mahomed v Lockhat Brothers & Co Ltd* 1944 AD 230 237 on the origins of appointing a person *adjectus solutionis causa*.

11 See MCJ Bobbert "Die transportbesorger en die partye tot 'n koopbrief" *De Rebus* (February 1990) 125 commenting on the *Whaley* case:
"*Wat egter wel gevestigde sienings geskud het, is die standpunt dat die koper nie teenoor die prokureursfirma verantwoordelik is vir die betaling van hul transportkoste nie, maar wel teenoor die verkoper*".

12
See *Blundell v McCawley* 1948 (4) SA 473 (W) 478
"The nomination of the seller's attorneys does not pass to those attorneys a right in their own behalf to claim the fees. The matter is, I think, covered by a decision in the case of *James v Liquidators of the Amsterdam Township Co.* (1903, T.S. 653 at p. 656). Innes CJ., said, firstly, that both by Common Law and by Statute the seller is bound to pass transfer, and, dealing with the clause which provided that the buyer was to pay the costs of transfer, he said: 'The condition merely amounts to a promise on the part of the purchaser to recoup the seller the expenses of transfer"'.
Further see *Stupel & Berman Inc v Rodel Financial Services* 2015 (3) SA 36 (SCA) para [15] on the inability of the *adjectus* to claim performance.

13 An authorisation, unlike the appointment of an *adjectus*, is revocable – see *Stupel & Berman Inc v Rodel Financial Services* 2015 (3) SA 36 (SCA).

14 See *Minister of Agriculture & Land Affairs v De Klerk* 2014 (1) SA 212 (SCA) (but there the majority held that the conveyancer was not the seller's agent for purposes of receiving payment of the purchase price); *Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd* 2015 (2) SA 539 (CC) para [30] (there the transfer was in payment of the purchase price, not costs, but this does not affect the principle that a transfer to an agent authorised to receive performance amounts to performance). Depending on the circumstances, an attorney could also act as the *purchaser*'s agent when receiving a deposit – see *Basson v Remini* 1992 (2) SA 322 (N) 328; *Laniyan v Negota SSH (Gauteng) Inc* [2013] 2 All SA 309 (GSJ). Ultimately, it will depend on the agreements between the parties whether the attorney acts as agent of the seller, purchaser or both (see *Minister of Agriculture & Land Affairs v De Klerk* 2014 (1) SA 212 (SCA) above). However, if the attorney acts for both parties it is essential to withdraw if there is a conflict of interests (see *Ebersohn v Prokureursorde* 1996 (1) SA 661 (T) esp 667; there the attorney was supposed to withdraw after the purchaser failed to pay).

15 See *Myburgh v Walters NO* 2001 (2) SA 127 (C) 130.

16 See s 19(5) of the Transfer Duty Act 40 of 1949 ("Transfer Duty Act"); *Doug Parsons Property Investments (Pty) Ltd v Erasmus De Klerk Inc* 2015 (5) SA 344 (GJ) para [8].

17 See Regulations 84 and 86 of the regulations issued in terms of the Deeds Registries Act 47 of 1937, published in GN R 4747 *GG* 466 of 29-03-1963.

18 By law, the acquirer of property (the third party in our scenario) is obliged to pay transfer duty to the state. Section 3(1) of the Transfer Duty Act determines that "the duty shall within six months of the date of acquisition be payable by the person who has acquired the property …".

19 See eg *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) 172G (the wording of the clause is quoted in n 4 above).

20 Incorrect demands or a failure to pay over the amount to the lawfully-intended recipient could result in the practitioner incurring delictual liability – see *Doug Parsons Property Investments (Pty) Ltd v Erasmus De Klerk Inc* 2015 (5) SA 344 (GJ).

21 The third party's breach could also entitle the client to claim contractual damages. These damages, measured according to the normal contractual measure, would be the amount necessary to place the client in the same position he would have been in had there been performance of the duty to pay the attorney (see eg *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) 687). However, all things being equal, this would be the same amount as the client could have obtained by a claim for specific performance of the obligation to make a transfer to the attorney.

22 See rule 7(1) of the Uniform Rules of Court; *Eskom v Soweto City Council* 1992 (2) SA 703 (W) 705; *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) paras [14] – [16]. Further see DR Harms & LTC Harms "Civil Procedure: Superior Courts" in WA Joubert, JA Faris & LTC Harms (eds) *The Law of South Africa IV* 3 ed (2011) para 60 and more generally FR Malan *Collective Securities Depositories and the Transfer of Securities* (1984) 205.

23 See *Sentrakoop Handelaars Bpk v Lourens* 1991 (3) SA 540 (W).

24 See *Goodricke & Son v Auto Protection Insurance Co Ltd (in Liquidation)* 1968 (1) SA 717 (A) 723A; Bobbert *De Rebus* (February 1990) 126 and 129. On the separate question whether a third party could enjoy a delictual claim against the attorney based on negligently failing to perform the service properly, see *Margalit v Standard Bank of SA Ltd* 2013 (2) SA 466 (SCA).

25 See Bobbert *De Rebus* (February 1990) 125 and 129 conclusion 11.

26 See *Goodricke & Son v Auto Protection Ins Co Ltd (in Liq)* 1968 (1) SA 717 (A) 723A, read with *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A).

27 Bobbert *De Rebus* (February 1990) 127. At 129 he in any event seems to suggest that the conveyancer can only do so if the parties agreed that he is entitled to do so. Bobbert does not expand on this view.

28 See eg *Lynn & Main Inc v Brits Community Sandworks CC* 2009 (1) SA 308 (SCA) para [6].

29 Bobbert *De Rebus* (February 1990) 129.

30 On the principle that one person (here the third party) may fulfil another's obligation (here the duty of the client to pay the attorney), see *Commissioner for Inland Revenue v Visser* 1959 (1) SA 452 (A) 457-458; *Jones & Druker NNO v Durban City Council* 1964 (2) SA 354 (D) 371; *Froman v Robertson* 1971 (1) SA 115 (A) 124; *Pienaar v Boland Bank* 1986 (4) SA 102 (O) 110; JE du Plessis *Unjustified Enrichment* (2012) ch 10.

31 Bobbert seems to regard it as necessary that the party who undertakes to the client to make the transfer would have to "recognise" the cession and undertake to pay the costs to the attorney as cessionary (Bobbert *De Rebus* (February 1990) 125 and 129). But, such a third-party debtor does not have to recognise a cession, at least not in the sense that he has to approve or agree to it. However, the third party's consent would have to be obtained if a tripartite agreement were to be concluded, whereby the third party in effect fully takes the place of the client. See generally SWJ van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract – General Principles* 4 ed (2012) 387; *V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 (1) SA 252 (SCA) para [18]. The attorney would agree to accept the third party as the new debtor who is obliged to pay his fee, but he would at the same time be liable towards the third party, who is now his new client.

32 See *Skjelbreds Rederi A/S v Hartless (Pty) Ltd* 1982 (2) SA 710 (A).

33 See the discussion of *Skjelbreds Rederi A/S v Hartless (Pty) Ltd* 1982 (2) SA 710 (A) in N Joubert "*Skjelbreds Rederi A/S v Hartless (Pty) Ltd* 1982 (2) SA 710 (A)" (1983) *TSAR* 78 80; D Dyzenhaus "Peregrines go home" (1982) 99 *SALJ* 538; Malan *Collective Securities Depositories and the Transfer of Securities* 204-205. On the *procuratio in rem suam*, which involved giving a mandate to another to sue a third party, in order to overcome the lack of recognition of cession in earlier civil law, see D J Joubert "Die Onherroeplike Volmag" (1969) 32 *THRHR* 263; *Mardin Agency (Pty) Ltd v Rand Townships Registrar* 1978 (3) SA 947 (W) 954.

34 G Lubbe "Assignment" in H MacQueen & R Zimmermann (eds) *European Contract Law – Scots and South African Perspectives* (2006) 307-308.

35 Bobbert *De Rebus* (February 1990) 129 conclusion 8. It is not quite clear what Bobbert means by "transport costs". It will be assumed that he meant all costs, but it may be that he only intended to refer to the attorney's own costs. If Bobbert intended that the expression "transport costs" should cover *all* costs, the expression could also cover transfer duty. But then it is not clear why he states that the agreement of sale must "relocate" the duty to pay transport costs to the purchaser. The purchaser is in any event liable by statute to pay the transfer duty.

36 See eg *Maharaj v Sanlam* 2011 (6) SA 17 (KZD) para [10]; *Brand House (Pty) Ltd v Sasfin Bank Ltd* [2009] 1 All SA 22 (SCA).

37 On this distinction see W Henckel "Einziehungsermächtigung und Inkassozession" in K Larenz, G Paulus, CW Canaris & U Diederichsen (eds) *Festschrift für Karl Larenz zum 70. Geburtstag* (1973) 643; Malan *Collective Securities Depositories and the Transfer of Securities* 204.

38 See the explanation of the expert witness in *Nahrungsmittel GmbH v Otto* 1991 (4) SA 414 (C) 424F:
"Dr Von Schlabrendorff says in his affidavit in support of the applicant's contentions that an *Einziehungsermächtigung* (another name for *Einzugsermächtigung*) under German law is not the legal equivalent of a cession under South African law. An *Abtretung* which is like a South African cession is entirely different, he says, to an *Einzugsermächtigung* which is nothing but a collection authorisation: 'In an *Abtretung* (assignment) the assignor disposes of the assigned claim in favour of the assignee for good, while in an *Einziehüngsermächtigung* all he does is transfer the right to collect the claim - not the claim itself - retaining all his proprietary rights. The intention behind the legal possibility of transferring the right to collect while retaining the actual claim is mere convenience: the *Einziehüngsermächtigung* is supposed to give the claimant a chance of employing someone else's better opportunities of collecting vis-à-vis the debtor without having to give up his claim'".

39 On the distinction between the "collection authorisation" or *Einziehungsermächtigung* and the "cession for collection purposes" or *Inkassozession* further see P Bassenge et al *Palandt – Bürgerliches Gesetzbuch* 74 ed (2015) Einl zu §§ 398 *ff* marginal note 118 (Jan Busche).

40 See *Nahrungsmittel GmbH v Otto* 1991 (4) SA 414 (C) 424; Malan *Collective Securities Depositories and the Transfer of Securities* 206.

41 See Malan *Collective Securities Depositories and the Transfer of Securities* 206.

42 See JE du Plessis "Die regsaard van prestasie" (2002) 65 *THRHR* 59.

43 See J du Plessis *The South African Law of Unjustified Enrichment* (2012) ch 10.

44 See Van der Merwe et al *Contract – General Principles* 424-435.

45 *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para [15] (Brand JA).

46 See part 2 above. Two brief remarks may be called for on transfers to attorneys intended to facilitate payment of debts owed to other parties. First, money paid into an attorney's trust account is not necessarily "trust money". In *Industrial & Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control* 1997 (1) SA 136 (A) 143I-144A, Grosskopf JA held that:
"If money is simply handed over to an attorney by a debtor who thereby wishes to discharge a debt, and the attorney has a mandate to receive it on behalf of the creditor, it may be difficult to establish an entrustment".
Secondly, whether the transfer to the attorney automatically constitutes payment to the creditor depends on the facts. In some cases payment to the attorney constituted immediate payment to another (see *Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Pty) Ltd* 2012 (3) SA 611 (SCA) paras [15]-[16]). But this is clearly not so in other cases, eg when the purchaser of property makes a transfer to the seller's attorney aimed at discharging the purchaser's obligation to the state to pay transfer duty.

47 See *Crookes v Watson* 1956 (1) SA 277 (A) 291; *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) 172D-F; *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) 625E-F; *Mpakathi v Kghotso Development CC* 2003 (3) SA 429 (W) para [15].

48 Sometimes the intended beneficiary is referred to as the "third party", but to do so here would invite confusion, since the party agreeing or promising towards the client to pay the costs to the attorney is already being called the 'third party', and the party who makes such a "promise" in the context of the *stipulatio alteri* is actually the *promittens*.

49 See *Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA) para [18]; *Pascoal v Wurdeman* 2012 (3) SA 422 (GSJ) para [25].

50 See *Buttar v Ault* 1950 (4) SA 229 (T) 239.

51 1986 (4) SA 407 (C). Also see *Whaley (Law Society of Zimbabwe Intervening) v Cone Textiles (Pvt) Ltd* 1989 (3) SA 574 (ZSC).

52 411G where Van Heerden J held that:
"The mere fact that a third party may gain an advantage from an agreement does not necessarily point to the existence of a stipulation in his favour because there is a material difference between the case where the parties to an agreement intend that an obligation be created in favour of a third person and to that where the parties agree, purely for their own convenience, that one of them will render performance to a third party, without the intention to create a claim for the third party".
Further see *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) esp 172-173; for comment see the case note by JM Otto "Oorsig van regspraak" *De Rebus* (October 1984) 488 490-491. Further see *Whaley (Law Society of Zimbabwe Intervening) v Cone Textiles (Pvt) Ltd* 1989 (3) SA 574 (ZSC) 578-582. The mere fact that the third party has to make this transfer to the attorney also does not imply that the third party may nominate which attorney is to be used (see *James v Liquidators of the Amsterdam Township Co* 1903 TS 653 656).

53 *Baikie v Pretoria Municipality* 1921 TPD 376.

54 See *Pieterse v Shrosbree NO; Shrosbree NO v Love* 2005 (1) SA 309 (SCA) para [9].

55 It may be possible to conclude a tripartite agreement, where the attorney from the outset is party to the contract determining that the third party would be liable to pay the attorney's costs. See *Golding Properties (Pty) Ltd v Nkosi* ZAGPJHC 04-10-2013 case no 2013/08585 para [10]. But this is not a *stipulatio alteri.*

56 It would not make much sense for the parties (ie the client/seller and the purchaser) to agree that the attorney should have the "benefit" to claim payment in the client's name. The client may in any event unilaterally authorise the attorney to collect payment on his behalf. In these circumstances, there is neither the need nor the room for a *stipulatio alteri*, which is aimed at creating a binding obligation between the *promittens* (the purchaser) and the attorney.

57 On the possibility of qualifying the *stipulatio alteri* in this way see *McCullogh v Fernwood Estate Ltd* 1920 AD 204 206. There Innes CJ stated that:
"It may happen that the benefit carries with it a corresponding obligation. And in such a case it follows that the two would go together. The third person could not take advantage of one term of the contract and reject the other. The acceptance of the benefit would involve the undertaking of the consequent obligation. The third person having once notified his acceptance and thus established a *vinculum juris* between himself and the promisor would be liable to be sued, as well as entitled to sue."
Further see *Malelane Suikerkorporasie (Edms) Bpk v Streak* 1970 (4) SA 478 (T) 481-482.

58 1921 TPD 376 380.

59 *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A).

60 See Otto *De Rebus* (October 1984) 490.

61 490.

62 See the wording of cl 10, quoted in n 4 above.

63 See eg the Kwazulu-Natal Law Society "Guidelines for Conduct of Property Law Matters" (30-03-2016) *Kwazulu-Natal Law Society* <https://www.lawsoc.co.za/upload/files/guidelines_ propertylaw.pdf> (accessed 07-07-2016). An attorney might obtain cession of a client's potential claim for costs against the opponent in litigation to secure the client's liability to the attorney (see GF Lubbe & CM Murray *Farlam & Hathaway Contract - Cases, Materials, Commentary* 3 ed (1988) 662.

64 See *Blundell v McCawley* 1948 (4) SA 473 (W) 478.

65 See Bobbert (February 1990) *De Rebus* 125 129.

66 See part 2 above.

67 See *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd* 1979 (2) SA 383 (C) 387H–388A; *McEwen NO v Khader* 1969 (4) SA 559 (N).

68 See generally Du Plessis *Unjustified Enrichment* ch 10.

69 See *Glenrand MIB Financial Services (Pty) Ltd v Van den Heever NO* [2013] 1 All SA 511 (SCA) paras [16] *sqq*.

70 See *ABSA Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers* 1998 (1) SA 939 (C) 953.

71 See 1998 (1) SA 939 (C).
