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

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”), 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 ...".

It is especially common for agreements of sale of land, where the seller is obliged to effect transfer, 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.

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?

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. 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 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 Swanepeol & Brevis 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.

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; 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. Crucially, and this is a position that apparently has not always been appreciated in practice, 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. 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. Payment to such an agent constitutes payment to the seller. Appointing the attorney as agent does not, however, give the attorney the capacity to sue the third party in its own name.

The mechanism set out above has distinct practical advantages. It prevents wastefully making separate transfers to fulfill 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 fulfill two obligations: the obligation of the client to pay the attorney, and the obligation of the third party to reimburse the client.

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. The client may of course give the attorney a separate mandate to assist in collecting payment, but the attorney would then merely render a
the work properly, the obligation to pay his fee would not be enforceable. 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, the third party can validly maintain that he may only be obliged to fulfill an obligation which is due and owing. It is therefore up to the court 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 proving 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. 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 the third party. As payment 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. 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. 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. 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.

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. 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 inwering").

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. 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.

Here the creditor (the client) disposes of a right to a attorney, but without the debtor's position being worsened: the debtor knew from the outset that he would receive 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.
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). 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. 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.

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.

It remains unclear, though, to what extent the "collection authorisation" is recognised in South African law. The formal objection has been raised that it subverts the doctrine that performance requires a debt-extinguishing agreement between creditor and debtor. But this objection does not carry much weight. Leaving aside the problems with the doctrine itself, 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.

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. 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."

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. 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 will 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". These two parties to the initial contract are traditionally described as "the beneficiaries" or undertakes to confer a benefit on the third party, and the stipulians, i.e. the one who "stipulates" or requires that this undertaking be given. According to the prevailing view, the intended beneficiary does not immediately acquire a right to performance as a result of such a contract, but first has to accept the benefit, by way of some "outward act". Once the intended beneficiary has done so, he may seek to enforce his right in his own name against the promitentes 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. 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.

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 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. 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 where client has already agreed to pay the attorney’s fee.

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. 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.

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*, 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 attorney 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*”), 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. 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.

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 whether 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 costs 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. 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 herergete by 'n transaksie van vaste eiendom ... Dit kan egter kragtens ooreenkoms gewysig word. Die transportbesorger sal hierdie bedrage dus van die koper koper vorder indien so ooreengekom word, vermoedelik ook indien die transportbesorger as negotiorum gestor opgetree het."*  

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. 22 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. 23 It seems rather unlikely, though, that negotiorum gestor 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 gesto 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. 24 Traditionally, an enrichment action, the “quasi” action based on managing another’s affairs (quasi negotiorum gesto), 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. 25 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 enrichment is caused in some way by the client’s insolvency, or is caused by the client’s refusal to pay a debt, the attorney’s right to claim payment under the contract may for all intents and purpose become “academic” 26 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. 27

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 an 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 Ragerpura 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 Vroner 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 Swanepeel & 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).
It is not apparent, though, why the fact that the purchaser is liable for transfer duty means that the conveyancer would be liable for the 'transport costs'. This is because the conveyancer is not the owner of the property; rather, he is the agent of the purchaser who is liable for the duty. The conveyancer is merely the person who is appointed by the purchaser to effect the transfer of the property to the attorney. The conveyancer's responsibility is to assist the purchaser in fulfilling his legal obligations, including paying the transfer duty.

Since the transfer to the attorney is a matter of law, it is not within the purview of the conveyancer to determine whether the purchaser has paid the duty. The conveyancer is merely required to perform the duties outlined in the agreement of sale. If the purchaser does not pay the duty, it is the purchaser's responsibility to rectify the situation. The conveyancer's role is to facilitate the transfer of the property, not to take on the responsibilities of the purchaser.

The argument that the conveyancer is liable for the 'transport costs' is flawed because the conveyancer is not the owner of the property. The duty is the responsibility of the purchaser, not the conveyancer. The conveyancer's role is to assist the purchaser in fulfilling his legal obligations, not to assume those obligations himself.

This is a clear example of the principle of 'stipulatio alteri', where the parties agree to certain obligations, and these obligations are binding on the parties who enter into the agreement. The conveyancer is not bound by these obligations because he is not a party to the agreement.

In conclusion, the fact that the purchaser is liable for transfer duty does not mean that the conveyancer is also liable for the 'transport costs'. The conveyancer's role is to assist the purchaser in fulfilling his legal obligations, not to assume those obligations himself. The 'transport costs' are the responsibility of the purchaser, not the conveyancer.
The implication, when the contract failed, was that the seller had to be ordered to repay these funds; the attorney merely held the promittens and deeds office fees or by agreement. Aussenkehr Farms (Pty) Ltd v Trio Transport CC (2003) 3 SA 36 (SCA) para 130.

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 Mettie 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.

It seems rather that the attorney at the same time has to relinquish his claim against the client. The parties may just as well create a tripartite agreement to this effect from the outset. In the absence of an agreement between client and third party to appoint the attorney as agent, the third party is obligated towards the client 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 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 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? It is especially common for agreements of sale of land, where the seller is obliged to effect transfer, to the acquirer does not pay these costs directly to the state. He rather contractually undertakes to the seller that he would provide 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 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. 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, rather than to the attorney, rather than to the intended beneficiary. For example, in the case of the life insurance contract, the insurer need nor the room for a form of assignment or sale of insurance policies as a contract, the insurer need nor the room for a form of assignment or sale of insurance policies as a contract. If the third party's allegations are unfounded, the client could proceed to claim payment from the third party, if necessary, with the client being entitled to claim payment.

It remains to be seen, however, whether the courts would award an attorney an enrichment claim against a third party if the client absconds and the client does not provide the attorney with a remedy.

Further see Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd, 1984 (3) SA 155 (A) 172D-F. See also Skjelbreds Rederi A/S v Hartless (Pty) Ltd 1970 (4) SA 478 (T)

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 stipulatio alteri for the client 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 these factors is that the third party is entitled to payment from the third party.

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