

A SERIES OF FOUR TREATISES PERTAINING BROADLY TO CONTRACTS FOR THE SALE
OF LAND AND ESTATE AGENCY

SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF CAPE TOWN FOR THE
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PREFACE

Shortly after Treatise I was published in Volume 102 of the South African Law Journal (1985), page 60, the case of Mekwa Nominees v. Roberts 1985 (2) SA 498 (W) was reported. It required a comment which was noted in Volume 102 of the South African Law Journal (1985) at page 382. I have included that comment as an addendum to Treatise I.

Treatise III has been accepted for publication by the editor of the *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, but no date has yet been set for publication. Here, too, I have included an addendum.

I acknowledge, with many thanks, the inspiration, ideas and constructive criticism of my supervisor, Professor D Hutchison. I wish to thank my wife for the patience she has shown whilst I worked on this thesis.

The law is stated as at 31 May 1987.

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SUMMARY

TREATISE I: WAIVER OF CONDITIONS FOR THE SOLE BENEFIT OF THE PURCHASER

The typical 'Offer to Purchase and Deed of Sale' standard form contract used in South Africa often incorporates a clause with a suspensive condition to the effect that the sale is subject to the purchaser obtaining by a certain date, a loan on security of a first mortgage bond. Is there a legal rule that, because the condition has been inserted for the sole benefit of the purchaser, he may waive it, even after the time limit for obtaining the bond has expired? Or is the rule that, upon expiry of the time limit, the suspensive condition has failed, which causes the sale to fall away? It is submitted that the legal effect of non-fulfilment of the suspensive condition in this case depends upon the intention of the parties, and, therefore, there is no legal rule precluding the purchaser from waiving the condition after the time limit has expired.

TREATISE II: THE LEGAL NATURE OF ESTATE AGENCY

The standard form 'Offer to Purchase and Deed of Sale' often contains a clause regulating payment of the estate agent's commission. As the legal basis of estate agency is most unclear, there have been attempts to cast the estate agent as the beneficiary of a contract for the benefit of a third party. Another contention has been that the deed of sale contains a contract not only between the purchaser and the seller, but also directly between the seller and the estate agent, as well as between the purchaser and the estate agent in many cases.

The true legal nature of the estate agent is considered, and it is concluded that, whilst he resembles a mandatary, his contract with his principal is sui generis. The attempt to cast the estate agent as a beneficiary of a contract for the benefit of a third party is deprecated. The idea that the deed of sale embodies a contract between the estate agent and the seller and/or purchaser has more merit, but is not entirely free of difficulty.

TREATISE III: CONDUCT BY THE SELLER WHICH PREVENTS THE ESTATE AGENT FROM EARNING HIS COMMISSION

The seller's promise to pay the estate agent is usually suspended by a condition that, for example, a valid and binding sale eventuates as a result of the agent's efforts. However, the seller's conduct may later intercede in various ways with the effect of preventing the condition from being fulfilled. For example, the seller may change his mind and refuse to sell to the proposed purchaser; he may revoke the agent's mandate; he may wish to sell his property through another agent, or to a purchaser he has himself

found. In general, such conduct is lawful. However, a specific term of the mandate may limit the seller's right so to conduct himself, eg the conferment of a sole agency. Where the seller's actions are unlawful, the agent may normally claim damages for breach of mandate, but not his commission. However, in limited circumstances (usually where something more than the conclusion of a binding contract between seller and purchaser is required) the agent may be able to rely on the doctrine of fictional fulfilment to claim his full commission.

TREATISE IV: THE EFFECT OF SUSPENSIVE CONDITIONS IN CONTRACTS OF SALE

It has long been the view, in academic circles, that the effect of the insertion of a suspensive condition in a contract of sale is merely to suspend the operation of the obligations under the contract. It has been contended that, in spite of the presence of the condition, there is, from the outset, always an extant contract of sale. For the first time in the recent decision of Tuckers Land and Development Corporation (Pty) Ltd v Strydom 1984 (1) SA 1 (A), the Appellate Division has declared itself favourably disposed to such a view. It has turned away from its own consistently followed decision of Corondimas & another v Badat 1946 AD 548, which suggested that although the parties were bound to each other from the outset, a contract of sale came into existence only upon fulfilment of the suspensive condition. Yet, despite its shift in viewpoint, the Appellate Division has declined to depart from Corondimas.

What then is the present state of the law? It is submitted that the academic view is the correct prima facie approach, although it remains open for the parties to entertain a contrary common intention. It is submitted that legislative reform is unnecessary.

TREATISE I

WAIVER OF CONDITIONS FOR THE SOLE BENEFIT OF THE PURCHASER

The typical 'Offer to Purchase and Deed of Sale' standard-form contract used by estate agents in South Africa often incorporates a clause to the following effect:

'This sale is subject to the buyer obtaining, by not later than [date], a loan on security of a first mortgage bond [etc].'

This clause involves a suspensive condition.¹ Normally, when a contract is subject to a suspensive condition, the duty to perform of both parties is contingent upon fulfilment of the condition, with the result that, on non-fulfilment, the contract terminates automatically and is regarded as null and void.² Particularly in recent years, however, there have been a number of cases, all decided in the Transvaal, which suggest that since the above suspensive condition is inserted purely for the benefit of the purchaser, the failure to fulfil the condition timeously does not necessarily cause the contract to lapse automatically. Instead, upon non-fulfilment of the condition the purchaser will have an election either to waive the benefit of the condition, in which case he can hold the seller to the sale, or to allow the contract to lapse in the ordinary fashion.

This theory seems fairly equitable, but it immediately gives rise to several logical and juridical problems, namely:

- (a) The juridical basis for the proposition, implicitly espoused by the Transvaal cases, that a contract may remain in existence even after non-fulfilment of a suspensive condition, bears further examination.

It is an unorthodox viewpoint, but in fact there does exist Appellate Division authority to this effect in the case of Van Jaarsveld v Coetzee.³

- (b) The conclusion that the purchaser may elect to 'waive the benefit of the condition' even after the time for its fulfilment has expired, and so keep the contract in existence, has hitherto been founded on the premiss that the condition is for the sole benefit of the purchaser. Quite apart from the fact that the premiss, as stated, may not compel such a conclusion, is the premiss itself valid? Is it true that such a condition is in fact inserted for the sole benefit of the purchaser? Does not the fact that a limit is placed on the time for fulfilment of the condition introduce a benefit for the seller? If so, does this not preclude the purchaser from effecting a waiver?
- (c) Finally, what right is the buyer abandoning when he purports to 'waive the benefit of the condition' and stand by the contract? What is the source of this right? The theoretical basis of such a waiver has not yet been addressed by the courts.

It is evident, then, that a number of difficulties surround the 'mortgage-bond clause' referred to above. Perhaps it is not surprising that in the past two years there have been three cases⁴ which, in circumstances similar to the original line of Transvaal cases, have precluded the purchaser from waiving the benefit of the condition after the time for fulfilment has expired. In other words, these more recent cases have held that the contract lapses automatically on the failure of the purchaser to obtain the loan in time. The danger exists that these decisions might leave the

mistaken impression that such a waiver may never take place after the time for fulfilment of the condition. Fortunately, the most recent case on this point, Meyer v Barnardo & another,⁵ extinguishes such an impression. It is an important decision, which bears close analysis.

The twofold purpose of this article is to demonstrate that the decisions on the question are reconcilable, and to elucidate the juridical basis which underlies the decision either to permit or to preclude the purchaser's waiver of a condition ostensibly inserted for his benefit alone.

1. CASE LAW

1.1 The Original Transvaal Approach

In the leading case, Wacks v Goldman,⁶ the relevant clause reads as follows:

'This sale is conditional upon [the estate agent] being able to raise a first mortgage bond on behalf of the purchaser... [within] 30 days... '

The purchaser was obliged to pay a deposit immediately, and the balance of the purchase price was to be secured by banker's guarantee within sixty days of conclusion of the contract. The building society agreed to grant the loan on the thirty-first day, but on the same day the seller purported to cancel the sale. The court rejected the seller's contention that because the clause was a suspensive condition, which

had not been fulfilled, the contractual relationship between the parties had terminated. Vieyra J held:⁷

'This submission can be acceptable only if the interpretation to be placed upon the clause is such as to lead to the inference that, whether or not it was inserted for the buyer's benefit, it also enures for that of the seller ...'

The court observed that the seller was interested only in receiving a guarantee for payment of the balance of the purchase price within the stipulated sixty days. Moreover, the source of the finance was of no moment to the seller, nor were the terms on which the buyer obtained the finance of any moment.⁸ The court concluded that the clause was inserted solely for the benefit of the purchaser and accordingly held that the sale was binding upon the seller.

Counsel's argument that the purchaser would have to inform the seller of his intention not to rely on the failure of the condition before the time limit for its fulfilment expired was rejected as 'an untenable proposition ... [which] carries its own refutation. At most it could be argued that [that] intimation should be made within a reasonable time of the end of the time limit ...'⁹

This dictum was approved in Laskey v Steadmet,¹⁰ which had similar facts, but where, in addition, the relevant clause also provided that if the bond were not obtained by the purchaser within the stipulated time period the sale 'as nietig beskou word en verval'. The court

held that the clause had been inserted solely for the benefit of the purchaser. Furthermore, it concluded that where the relevant clause contains a provision that on non-fulfilment the contract will be null and void, nevertheless on non-fulfilment nullity will not necessarily be automatic. If the condition was for the exclusive benefit of one party, he can elect whether to keep the contract in existence or not. If he wishes to keep it in existence, he must notify the other party of his decision within a reasonable time after the end of the time limit for fulfilment of the condition. If he does not wish to keep it in existence, notice is not required to terminate the contract; mere silence will suffice and the contract will lapse after the expiry of such reasonable time.

No juridical basis was offered for these propositions.¹¹ In the judgment of neither case was there mention of waiver, but in the judgments in subsequent cases, starting with Margo v Seegers,¹² in the application of the principle laid down in Wacks's case there was mention of the purchaser's waiving the benefit of the condition.¹³

Margo v Seegers has been strongly criticized. One pertinent criticism¹⁴ is as follows: Even if the principle is correct that the purchaser may waive a condition which is purely for his own benefit, the fact that a time limit is placed on the period within which fulfilment is to take place introduces a benefit for the seller. This benefit may be relied on by the seller, and it precludes the purchaser from waiving the condition after the time period has elapsed. The purchaser may

effect a waiver only before the time period has elapsed. This argument was employed by counsel for the seller in the case of Allessandrello v Hewitt.¹⁵ Counsel for the purchaser countered by remarking that if this were so, then the following date, the date by which the bank guarantee had to be provided, would be meaningless. It was contended that this later date, the time for performance, was the only date in which the seller could be interested. This line of reasoning was upheld by the court, and the purchaser was permitted to waive the condition and hold the seller to the contract.

The reasoning does contain one flaw. The fact that there is a later time for performance does not mean in principle that that is the only time in which the seller is interested. The intention of the parties must be closely scrutinized. It may well be that, on the facts, a seller is interested only in the time for performance, but, on the other hand, it may equally be clear that an (anxious) seller is keen to know when he has a 'firm' sale, and thus has a great interest in whether or not the condition is timeously fulfilled.

1.2 The More Recent Approach

It was precisely this fact - that the seller was keen to know whether she had a 'firm' sale - which swayed the court in Phillips v Townsend.¹⁶ There was direct evidence in this case that it was the seller who had insisted on the time limit, and suggested seven days. The purchaser had asked for fourteen days, and the parties had compromised on ten days.

Accordingly, the court held that it would have been most unreasonable and contrary to the manifest intentions of the parties to allow the purchaser to waive the condition after the ten-day time period had expired, and thereby hold the seller to the contract.¹⁷

There is no doubt, with respect, that this decision is correct on the facts. Phillips v Townsend is authority for the proposition that where it is clearly the intention of the parties that the contract will lapse automatically on non-fulfilment of the condition, then the court is obliged to give effect to that intention (despite the fact that ostensibly the condition is inserted for the benefit of the purchaser). That is putting the proposition at its widest. It must be borne in mind that in this case the seller was able to counter the prima facie appearance that the condition was inserted for the sole benefit of the purchaser by adducing evidence to show that she was materially interested in timeous fulfilment of the condition. That evidence was crucial to her success.

Recall the dictum above¹⁸ of Viera J in Wacks v Goldman, and it is clear that his lordship would also have precluded the purchaser from effecting a waiver if the seller had been able to demonstrate that he had obtained a benefit by the insertion of the condition.

It is therefore submitted that the rationes decidendi in Wacks v Goldman and Phillips v Townsend do not conflict. They are perfectly reconcilable: the benefit or lack of it accruing to the seller as a result of the insertion of the condition is a guide to the common intention of the parties to which effect must be given.

In the case of Roberto v Bandeiro & another¹⁹ a Transvaal court, unaware of the earlier, but at that stage unreported,²⁰ Cape decision, reached a similar conclusion. The clause in Roberto v Bandeiro specifically stated that it was for the sole benefit of the purchaser, but the court found that, on an interpretation of the clause as a whole, it was common intention of the parties that the sale should lapse on failure to obtain the loan within the time limit.²¹ Therefore the purchaser could not effect a waiver. This case did not disapprove the line of Transvaal cases, but the Cape court in Phillips v Townsend went further. Schock J disagreed with the line of Transvaal cases in so far as they suggest that, in casu, waiver by the purchaser can take place after the time for fulfilment of the condition has elapsed.²² Certain obiter remarks by his lordship could have been misinterpreted as lending weight to the belief that a purchaser may never waive the condition after the time for fulfilment has elapsed.²³ This danger has been dispelled by Meyer v Barnardo & another,²⁴ despite the fact that in that case, as well, the purchaser was precluded from effecting a waiver.

The relevant clause in Meyer's case read as follows:

'The agreement is conditional upon ... the purchaser obtaining a loan ... of R30 000 ... within ... 21 days ... Should the loan not be granted within the aforesaid period then this agreement shall be null and void and of no force or effect without notice by either party to the other.'²⁵

The loan was granted one day late, but the purchaser wished to hold the seller to the sale. The purchaser failed. The court held that on an interpretation of the above clause in the context of the contract as a whole, the common intention of the parties was that the contract should terminate automatically at the end of the time limit should the purchaser not obtain the loan by then.

It might be remarked that this clause does not differ materially from that in Laskey's case. However, there is ample authority for the proposition that when an agreement states that it shall be null and void on the happening of a certain event, the words 'null and void' should not always be read literally. They are frequently interpreted to mean that only the person entitled to rely on the failure by the other party to comply with an obligation will be entitled to withdraw from the contract.²⁶ So in Laskey's case it was simply stated that the sale should be regarded as a nullity and should fall away on non-fulfilment of the condition, without its being specified that both parties would be entitled to rely on that fact. In Meyer's case, however, the underlined part of the clause referred to above made it clear that both parties were entitled to rely on non-fulfilment. With respect, there is no doubt that Meyer's case was correctly decided.²⁷

However, there is one fallacy, propounded in Phillip's case, and compounded in Meyer's case, which needs to be addressed. In Phillip's case Schock J²⁸ cited the following passage from Halsbury's Laws of England,²⁹ remarking that he had no doubt at all that it also reflected the correct position in South African law:

'Even where a condition precedent to formation of the contract is inserted solely for the benefit of one party, so that he might waive it, he may not do so after the expiry of the time limited for fulfilment of the condition.'

This quotation was repeated in Meyer's case,³⁰ and, in addition, Kumleben J quoted extensively from the New Zealand case of Scott v Rania,³¹ which is the only authority cited by Halsbury for the above proposition. In Halsbury itself doubt is expressed about the validity of the proposition enunciated in this case, on the grounds that it is questionable whether a condition precedent can ever be waived by a party even where it is for his benefit alone.³²

It is submitted, with the greatest respect, that in failing to note the distinction that English law makes between conditions which merely suspend the duty to perform and conditions precedent,³³ their lordships were misled by the above quotation from Halsbury, which is not at all a correct reflection of South African law.³⁴

In fact, in the Meyer judgment itself³⁵ the quotation from Scott v Rania refutes quite plainly the idea that the ratio in that case in any way represents South African law.

2. JURIDICAL EXPLANATION

It is submitted that the various decisions have been made compatible with one another.³⁶ In focusing on the intention of the parties,

Meyer's case has to some extent explained the juridical basis that underlies the decision either to permit or to preclude the purchaser's waiver of a condition ostensibly inserted for his benefit alone. What follows is a closer examination of the issues.

2.1 The Consequences on a Contract of Non-Fulfilment of a Suspensive Condition

The standard theory of the effect of a suspensive condition on a contract is that, upon non-fulfilment of the condition, the contract terminates automatically and, by a legal fiction, with retroactive effect. It is as if there never was a contract between the parties.³⁷

This creates a problem for the purchaser under discussion in this article. If the time for raising a loan on security of a mortgage bond has expired, how can the purchaser purport to waive what has already become null and void? The following example should illustrate the fallacy behind rigid insistence on the standard theory. X agrees to buy Y's house but insists that the sale will be subject to a favourable surveyor's report.

- a) Suppose the surveyor writes an unfavourable report, but X decides he wants to buy the house anyway.
- b) Suppose a surveyor cannot be found, and again X decides he wants to buy the house anyway.

It is submitted that in both cases X would be able to hold Y to the sale.³⁸ Yet the suspensive condition has failed. The 'nullity' argument would have it that X cannot hold Y to the sale because there is no sale. This is clearly wrong, as is borne out by the case of Van Jaarsveld v Coetzee.³⁹ In this case it was a suspensive condition of the sale that the purchaser of a farm should be able to raise a loan from the Land Bank. The purchaser was unable to do so. Hence the suspensive condition had failed. The purchaser tendered a bank guarantee instead, but the seller refused to give transfer on the ground that the contract had lapsed by reason of non-fulfilment of the suspensive condition. It was held that the seller's attitude was not justified in law.

The Appellate Division pointed out that it would be an absurdity if the seller were put in a position where he could refuse a cash payment by the buyer and so cause the contract to lapse. The court observed that, in general, the seller can have no interest in the source from which the purchaser obtains the money. Furthermore, in this case there was no indication from the contract itself that the seller had such an interest, and if it had been the common intention of the parties that the seller could rely on the fact that the money had not come from the Land Bank, then surely clearer language would have been employed in the contract to reflect such an intention.⁴⁰ In this manner the court came to the conclusion that the condition had been inserted solely for the benefit of the purchaser, who was entitled to waive compliance with it.

As a general principle, then, it is clear that where a contract is subject to a suspensive condition, the non-fulfilment of the condition does not necessarily cause the contract to lapse automatically. Even after non-fulfilment of the condition, the contract may still be in existence.⁴¹ It is also clear from the reasoning in Van Jaarsveld's case that the reason why the contract did not lapse automatically is that it was not the common intention of the parties that it should so lapse.

The Meyer judgment also makes it clear that whether or not a contract lapses automatically on non-fulfilment of a suspensive condition depends entirely on the intention of the parties.⁴² However, Kumleben J did not cite Van Jaarsveld's case as authority for this proposition, and it is submitted respectfully that the true import of Van Jaarsveld's case was not fully appreciated.⁴³ The key point of Van Jaarsveld's case is that a stipulation relating to the source of the purchaser's ability to pay the purchase price is a manifest indication that the intention of the parties was that the purchaser alone should be entitled to rely on the failure to obtain the money from that source. Of course, this manifest indication can be negated by the surrounding circumstances (as in Phillip's case) or by the express terms of the contract (as in Meyer's case and in Roberto v Bandeiro).

Most frequently, parties who contract subject to a suspensive condition do not expressly state what effect non-fulfilment of the condition will have on the contract. How do the courts then approach this matter? The position is well elucidated by Botha J (as he then was)

in the case of Design and Planning Service v Kruger.⁴⁴ His lordship stated that when the ordinary suspensive condition is unfulfilled and the contract is discharged automatically, it does so 'by virtue of an implied term to that effect, unless there is something in the contract negating the implication of such a term ...'⁴⁵

It is submitted that Botha J was not referring to a term implied by law, but to a tacit term which by necessary inference from the surrounding circumstances arises ex consensu.⁴⁶ In other words, when parties contract subject to the ordinary suspensive condition which benefits both of them, and qualifies both their duties to perform, their common intention will ordinarily be that their duties to perform will be discharged by a failure of the condition.

However, as the Appellate Division has observed, the means by which the buyer procures the ability to perform are generally of no moment to the seller.⁴⁷ Hence the inference is strong that when, in casu, the parties contract subject to the mortgage-bond clause, the term to be implied in giving effect to the supposed consensus reached by them is different. It is submitted that the tacit term is that the contract will be automatically discharged unless the purchaser elects to perform unconditionally.⁴⁸ He must exercise this election within a reasonable time after non-fulfilment of the condition. If he fails to volunteer to perform unconditionally the contract will lapse automatically within a reasonable time,⁴⁹ which will probably be relatively short, after non-fulfilment. Of course, the proof of this tacit term

will depend upon its successfully negotiating the 'officious bystander' test.⁵⁰

The 'officious bystander' test was applied in Meyer's case, even though, as Kumleben J pointed out, it was unnecessary to do so, because it appeared quite plainly from the deed of sale that the parties had expressly provided for the consequence which failure of the condition was to have on the contract.

In sum, therefore, the following submission is made: Where it appears expressly from the contract itself that the parties intended the contract to lapse automatically on non-fulfilment of the condition, that intention will be enforced. However, it will not be often that the parties state in the contract that they will both be entitled to rely on the contract's lapsing automatically as a result of non-fulfilment of the condition. Where they do not expressly so state, the court will enquire as to what the parties tacitly agreed, and in this inquiry the court will be aided by the surrounding circumstances.

2.2 Condition for the Sole Benefit of the Purchaser

However trite it may be that non-fulfilment of a suspensive condition does not necessarily cause a contract to terminate automatically, it should be noted that the Appellate Division in Van Jaarsveld's case did not have to deal with a time factor. Does the introduction of

a time limit within which the condition is to be fulfilled perforce preclude the purchaser from effecting a waiver after the time limit has expired? Phillips v Townsend could be misunderstood as supporting such an idea. In effect, the argument is as follows: the condition is divisible in two parts - the substantive part (that is, the raising of the loan) is irrefutably for the sole benefit of the purchaser, and may be waived by him; but the time for fulfilment enures to the benefit of both parties, which precludes the purchaser from effecting a waiver after the time limit has expired.

If X promises to buy Y's house subject to a favourable surveyor's report within ten days, does this time limit really alter the complexion of the consensus reached by the parties? The proper answer, it is submitted, is that it may do, depending on the surrounding circumstances, but the existence of a time limit is not conclusive in itself that the parties intended the contract to lapse automatically on non-fulfilment of the condition. In Van Jaarsveld's case the legal consequence of the non-fulfilment of the condition was determined by reference to the common intention of the parties, and the reasoning in that case is of equal force even where a time limit has been set for fulfilment of the condition.

It must not be forgotten that there is no magic in the phrase 'for the sole benefit of the purchaser'. The decision whether or not the contract terminates automatically does not turn on whether the condition 'benefits' the purchaser only. For whose benefit the

condition was inserted is merely a pointer as to what the common intention of the parties must have been, at the time of contracting, in regard to termination of their relationship.⁵¹

A refreshing way of looking at the problem is to view it according to the American approach to conditions. American text-books⁵² focus not so much on whether the contract is subject to a condition but on whether the duties of the parties are conditional. This is not unlike the approach of the Appellate Division in the most recent case on suspensive conditions.⁵³ A condition may qualify the purchaser's duty to perform, or the seller's duty to perform, or, most frequently, both of their duties to perform.

The ordinary suspensive condition, which enures to the benefit of both parties, is, in reality, a condition that qualifies the duty to perform of both parties. In this case the inference is strong that the parties intended that neither of them should be able to waive the condition, as both of them would be relying on its fulfilment to determine whether they would have an outright duty to perform. Where, however, a condition enures to the sole benefit of one of the parties, he alone has a conditional duty, he alone has a qualified duty to perform. Ordinarily that party should be able to waive the condition of his duty and to volunteer to perform unconditionally.

This ties in with a statement, which at first blush seems open to question, by Vieyra J in Wacks v Goldman.⁵⁴ In arriving at the

conclusion that the mortgage-bond clause was for the sole benefit of the purchaser, Vieyra J remarked that the duties of the seller were in no way dependent on the fulfilment, whether timeously or at all, of the condition.⁵⁵ This may be an overstatement, but it is clear that in these cases it is only the duty to perform of the purchaser which is truly qualified: the purchaser has a suspended duty to pay the purchase price. He has, however, the unqualified right to make payment of the price. The condition also suspends his duty to accept transfer. On the other hand, the seller's principal duty, to make transfer of the property, is not suspended at all by the condition. It is merely a reciprocal duty and is contingent on the purchaser's own performance. It is a synallagmatic duty, not a conditional duty. The seller also has an unqualified duty to accept payment from the purchaser. It is clear that the condition does not qualify the seller's duty to perform. In effect the seller has contracted to perform if the purchaser performs, and the purchaser has contracted to perform if the necessary mortgage finance can be raised.

If the condition qualifies only the purchaser's duty to perform, it is difficult to see how the seller can rely on it in order to avoid his obligations. That is not to say that the point made in Phillips v Townsend is not without some validity, that is, that, objectively, the seller does benefit by knowing, with certainty, when the conditionality of the contract is to come to an end. But it smacks of opportunism to allow him, as a general rule, to aver that his hitherto unqualified duty to perform has been discharged as a result of non-timeous fulfilment, when it is clear from Van Jaarsveld's case

that he could not generally do so if the condition simply failed, that is, if the mortgage bond was refused.

To summarize: where it appears in the deed of sale that a time limit has been set for fulfilment of the condition, this will be one of the factors taken into consideration by the court in determining the intention of the parties. Ordinarily, it will be an indication that the parties intended the contract to terminate automatically on expiry of the time limit, but, by itself, it will not suffice to compel the drawing of such an inference. If, in addition, the remainder of the express terms of the contract, or the surrounding circumstances, or both, fortify this indication, then the contract will terminate automatically on expiry of the time limit. Without this fortification, the purchaser will be permitted to effect a waiver after the time for fulfilment of the condition has expired.

2.3 Future Approach to the 'Mortgage-Bond Clause'

There remains the question whether the purchaser should generally be permitted to effect a waiver after the expiry of the time limit or whether he should only exceptionally be able to do so.

In other words, when a court considers the simple clause adverted to at the start of this article, a clause that merely contains the condition (including the time limit), and there is no other indication of the intention of the parties, what will be the prima facie inference drawn by the court?

One could argue that the clause's dominating feature is that it is ostensibly for the sole benefit of the purchaser alone. Therefore the prima facie inference is that the parties did not intend the contract to lapse automatically on non-fulfilment of the condition. It will still, however, be open to the seller to show that this inference is not a necessary one by adducing evidence of the surrounding circumstances to show that when the parties were reaching agreement on the matter of the mortgage-bond clause, he, the seller, made it clear that he regarded timeous fulfilment of the condition as material. That being the case, the seller must be held to be entitled to rely on non-timeous fulfilment.

Alternatively, one could adopt the approach that the dominant feature of the clause is that it is a suspensive condition with a time limit for fulfilment, and as the ordinary effect of a suspensive condition is that non-fulfilment will cause the contract to terminate automatically, the correct prima facie inference is that it will so terminate. The purchaser will then be obliged to adduce evidence to show that the timeous fulfilment of the condition was not material to the seller and that it was the common intention of the parties that he, the purchaser, should have an election on non-fulfilment of the condition whether or not to perform unconditionally.

This is not to be confused with the onus of proof. Of course, whoever is plaintiff will have to prove his version of the common intention of the parties. But it is important to decide what prima facie inference the clause gives rise to, for the party against whom such

an inference is drawn will bear the evidentiary burden ('weerleggings-las'). The court in Meyer's case seemed to prefer the latter approach. Kumleben J remarked that 'though it may well be that the benefit of a condition can be waived, a suspensive condition is... prima facie agreed upon because both parties intend that the operation of the terms of the agreement should depend upon the fulfilment of the condition'.⁵⁶ However, sight should not be lost of the fact that in these cases the condition qualifies the duty to perform of the purchaser only. His lordship went on to speculate that in an agreement of this kind the seller might regard certainty as to the fate of the sale at the end of the time limit as important; or he might well wish to negotiate with another purchaser a more profitable sale of the same property, which sale he could make dependent upon the non-fulfilment of the condition in the first agreement; or he might wish to acquire an option to purchase another house, with an expiry date just after the final day for fulfilment of the condition. Because one or more of these considerations might have weighed with the seller in casu, she had to be regarded as having a material interest in the timeous fulfilment of the condition.⁵⁷ What is important is that it seems that Kumleben J would not have required the seller to adduce evidence of such reliance on timeous fulfilment.⁵⁸ In short, even though the seller may not actually have placed any importance on timeous fulfilment of the condition at the time that the parties concluded their agreement, the fact that it was possible that she might have relied on timeous fulfilment was enough to draw the inference that it was the common intention of the parties that the contract should terminate automatically at the end of the time limit. This would seem to be a little harsh on the purchaser.

A further interesting observation by Kumleben J was that had the parties intended that the purchaser should have the right to waive the condition after non-fulfilment, words to that effect could quite easily have been inserted in the contract.⁵⁹ That illustrates his lordship's approach pertinently. Compare the approach in Van Jaarsveld v Coetzee. In that case the Appellate Division stated that if the seller wished to rely on non-fulfilment of the condition then clearer language should have been used. Of course, the clauses and the circumstances in the two cases are entirely different, but the nuances in approach should not be ignored.

Whichever is the correct prima facie inference from the bare facts of the mortgage-bond clause as contained in the deed of sale is a policy decision. There is no compelling logic which sustains one approach at the expense of the other. I prefer the former approach, that is, the purchaser may generally effect a waiver unless the contract itself is explicitly against this or the seller adduces evidence indicating that such was not the intention of the parties. However, the main point espoused, happily, in Meyer's case is that the test is the intention of the parties, and there is not an inflexible rule that the purchaser may always or may never waive the condition under scrutiny in this article, after the time for its fulfilment has expired.⁶⁰

2.4 Waiver

One nice problem remains. What is taking place juridically when the purchaser 'waives the benefit of the condition'?

Halsbury states⁶¹ that waiver is a vague term used in many senses, and Corbin remarks⁶² that there is no one 'correct' definition. A waiver is defined in the South African Judicial Dictionary⁶³ as 'the passing by or declining to take advantage of a legal right, whereby such legal right becomes lost'. Similarly, Lord Hailsham of St Marylebone has stated⁶⁴ that '[w]aiver is the abandonment of a right. What... [a party] waives is the right to rely on the term... '

What right is the purchaser in casu abandoning? When one looks at breach of contract, the right which the breach gives rise to and the right which the 'innocent' party may either rely upon or waive is the right to cancel. What right accrues upon non-fulfilment of the condition? Hardie Boys J, in his minority judgment in Scott v Rania,⁶⁵ suggests that at the time of non-fulfilment of the condition there accrues to the purchaser 'a right to be exempted from his obligations'. One hesitates to put forward so nebulous a notion as a 'right not to be bound', yet clearly it is something of this nature.

As a condition concerning mortgage finance is a mixed condition,⁶⁶ the purchaser cannot elect not to be bound before the time period expires. He is under a duty to try to secure fulfilment of the condition upon pain of the doctrine of fictional fulfilment. The right

not to be bound, or the right to rely on automatic discharge of the contract, thus accrues on expiry of the time limit for fulfilment.⁶⁷

This right is not the same as a right to cancel. Both rights give the ability to withdraw from a contract, but the right to cancel must be actively exercised in order to be effective. The right not to be bound, on the other hand, generally flows from the tacit term that the contract will terminate automatically (after the expiry of a further reasonable time after the time for fulfilment) unless the buyer elects to perform unconditionally. Mere passivity will result in automatic termination; hence the right need not be actively exercised. This is something of an oddity. Often silence is taken as an indication that a party is prepared to waive or abandon a right which has accrued to him.⁶⁸ Here the purchaser must actually make a positive act in order to effect a waiver.

3. CONCLUSION

Where the deed of sale states explicitly what the consequence of failure to raise a loan on security of a mortgage bond is to be, then such language will generally be conclusive as to such consequence. Where the deed of sale is not explicit on this point, the common intention of the parties at the time of contracting must be enquired into in order to discover what they tacitly agreed on. In this respect, the surrounding circumstances will lend assistance. The fact that there is a time limit for fulfilment of the condition does not by itself compel the conclusion that the common intention of the

parties was that the contract should terminate automatically on expiry of the time limit.

The decisions on this point are, on the whole, reconcilable.

There is no inflexible rule that the purchaser may always or may never waive the suspensive condition here under consideration.

FOOTNOTES

1. The requirements of futurity and uncertainty are clearly satisfied. However, it has been said that the clause is not a 'true' suspensive condition. See counsel for the applicant in Margo v Seegers 1980 (3) SA 708 (W) at 711E, and Louise Tager 1980 Annual Survey of South African Law 103. D G Williams in 1981 De Rebus 273 suggests that the clause is not a suspensive condition in the strict sense, because non-fulfilment of it does not have a final effect on the contract. This may be true, but it begs the question why it does not have a final effect on the contract. The answer lies in the common intention of the parties, and the fact that this type of condition qualifies the duty to perform of the purchaser only. See discussion in text to notes 42 and 55 in particular.
2. Tuckers Land and Development Corporation (Pty) Ltd v Strydom 1984 (1) SA 1 (A) at 23H-24C.
3. 1973 (3) SA 241 (A).
4. Roberto v Bandeiro & another 1982 (1) SA 880 (W), Phillips v Townsend 1983 (3) SA 403 (C) and Meyer v Barnardo & another 1984 (2) SA 580 (N).
5. Note 4 supra.
6. 1965 (4) SA 386 (W); see at 387pr.
7. At 388E-F.
8. The view that the seller could not avoid his obligations by relying on the source or the terms of the finance differing from what is stated in the condition is unassailable - see Van Jaarsveld's case supra note 3 (aliter, where it is the seller himself who is providing the bond. See Jamine v Lowrie 1958 (2) SA 430 (T) and Rutstein v Elandsheuwel Farming (Pty) Ltd & another 1971 (1) SA 268 (T) at 272). Naturally, the seller might regard the mortgage bond as a good investment, but the clause is capable of waiver if the purchaser is not obliged to pass a bond in favour of the seller, but simple may do so if he wishes. See Ebrahim NO v Hendricks 1975 (2) SA 78 (C) and Vogel NO v Volkersz 1977 (1) SA 537 (T).

As to fulfilment of conditions in forma specifica or per aequipollens, see, for example, R H Christie The Law of Contract in South Africa (1981) 130-2. It is trite law that the question must be settled according to the intention of the parties as evidenced by the surrounding circumstances: Hanomag SA (Pty) Ltd v Otto 1940 CPD 437 at 443.

9. Note 6 supra at 389D. Williams op cit note 1 at 273 remarks that this is obviously correct, for if the purchaser were obliged to make his election whether or not to waive before the expiry of the time limit, he would not have the full time period within which to raise the loan.
10. Laskey v Steadmet (Edms) Bpk h/a Wessel de Villiers Agentskappe 1976 (3) SA 696 (T) at 698-9.
11. See at 699. Obviously, the bland statement that a failure to obtain the loan would result in the contract's being regarded as null and void could not be supported. A cash tender would obviate the need for a bond, and of course the contract would then not lapse. See Corbin on Contracts 111A (1960 and updated supplement) S 761 re 'null and void'. See also Associated Manganese Mines of SA Ltd v Claassens 1954 (3) SA 768 (A) and the authorities referred to at 774. See also Christie op cit note 8 at 481-2.
12. 1980 (3) SA 708 (W).
13. See Struwig v Kjellqvist & another 1981 (1) SA 613 (W), where the condition related to the sale by the purchaser of his own house within two weeks. The court felt itself bound by Wacks supra note 6 and Laskey supra note 10. See Allessandrello v Hewitt 1981 (4) SA 97 (W).
14. A J Kerr in (1981) 98 SALJ 32 at 33-4.
15. 1981 (4) SA 97 (W).
16. 1983 (3) SA 403 (C) at 408G.
17. At 408H-409A.
18. Text to note 7.
19. 1982 (1) SA 880 (W).
20. Phillips v Townsend, although reported in 1983 (3) SA 403 (C), was decided on 27 November 1980, whereas Roberto v Bandeiro supra note 4 was decided on 14 October 1981.

21. The clause stated that, inter alia, '[s]hould such loan not be procured by 10 March 1981 or such other date as the parties may agree in writing, this sale shall be automatically cancelled and of no force and effect ... Notwithstanding the foregoing, the purchaser shall be entitled by notice in writing to the seller at any time before the said date or the agreed later date ... to declare this sale unconditional' (my emphasis). It was apparently not argued that it was significant that the clause did not read that the purchaser was obliged to give written notice by an aforesaid date. He was always entitled to.
22. Note 16 supra at 409C-F.
23. For example, his lordship remarked that if the contract remained in force despite the effluxion of time for fulfilment of the condition, it would render the time limitation without content or purpose. The seller would then be in no different position had there been no time limitation. This is a good point, but, with respect, it does not focus on the real issues. The time limit gives the buyer an opportunity to raise the loan. Once it has expired, the buyer is, in effect, put to terms. He must give the seller additional consideration, that is, an unconditional promise, loan or no loan, to buy the house. Surely the ultimate test is whether the parties intended the contract to terminate automatically on non-fulfilment of the condition.
24. Note 4 supra.
25. At 582E-H. My emphasis.
26. Note 11 supra. Of course, when the words are used in the context of an enforceable contractual obligation, they should not be read literally, as the 'guilty' party could then take advantage of his own breach. There is a stronger argument for a more literal reading in the case of conditions, for, as Kumleben J pointed out at 584B-G, no action will lie to compel the performance of a condition (quotation from Design and Planning Service v Kruger 1974 (1) SA 689 (T)).
27. On the basis of the doctrine of stare decisis, the courts in the Transvaal are still bound by the full-court decision in Laskey's case, but it is highly probable that, like Goldstone J in Roberto v Bandeiro, supra note 19, they will find that it is inapplicable. There is yet to be an Appellate Division decision on this point.
28. At 409A-B.
29. 4 ed IX (1974) § 484.

30. Note 4 supra at 584pr.
31. [1966] NZLR 527 (NZCA).
32. Op cit note 29 S 264 and note 23 to S 264.
33. Michael Mendelowitz in (1978) 95 SALJ 32 pleads for a similar treatment of suspensive conditions in South African law. He contends, correctly it is submitted, that the true test is the intention of the parties, and that sometimes they will intend to suspend the operation of the entire contract, in which event an innominate contract will come into being. In other words, one need not choose between the different approaches of Corindimas v Badat 1946 AD 548 and Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd 1948 (2) SA 656 (O) at 666-7. Either interpretation may, depending on the intention of the parties, be correct. See also Thiart v Kraukamp 1967 (3) SA 219 (T) at 225-6.
34. In English law, where a condition precedent is involved, there is no bilateral contract at all until the condition is fulfilled. The reasoning is, therefore, that where a contract is subject to a condition precedent, the parties have not completed the process of reaching agreement. (Since the Tuckers Land case supra note 2, at the very latest, such an approach would be anathema to South African law.) Hence, one party cannot by waiving a condition precedent create an agreement which was never reached. (See Halsbury op cit note 29 S 264 and Cheshire and Fifoot's Law of Contract 10 ed (1981) by M P Furmston 128-31.) So, in Scott v Rania supra note 31 the majority judgment was to the effect that no contract ever existed between the parties, and a waiver was not possible (North P at 532 and McCarthy J at 534). On the other hand, a condition that merely suspends the duty to perform is capable of waiver where it is for the benefit of one party alone (see Bennett v Fowler (1840) 2 Beav 302 (48 ER 1197); Hawksley v Outram [1892] 2 Ch 359 (CA); Wood Preservation Ltd v Prior [1969] 1 All ER 364; Heron Garage Properties Ltd v Moss [1974] 1 All ER 421. See Halsbury op cit S 511n5 as to classification of conditions precedent to contract and merely precedent to performance.) Whether this is so even where the time for its fulfilment has passed seems not to have arisen for crisp decision in English law.
35. Note 4 supra at 587F.

36. There is only one case which seems to have been wrongly decided. In Margo v Seegers 1980 (3) SA 708 (W) the clause read that the sale was subject to the loan being raised within 60 days, 'which time may be extended by the seller at the seller's sole option for a further period of 15 days'. It is submitted, with respect, that the inference is that the seller was materially interested in timeous fulfilment of the condition, and that therefore the contract should have terminated automatically after the expiry of the 60 days. See P R Owens in (1981) 44 THRHR 96 at 97-8.
37. See Tuckers Lane v Strydom supra not 2 at 23H-24C and the authorities cited there. See also De Wet en Yeats Die Suid-Afrikaanse Kontrakereg en Handelsreg 4 ed (1978) 137-8. The learned authors take issue with, inter alia, the idea that the termination need necessarily have a retroactive effect.
38. See, for example, Bennett v Fowler (1840) 2 Beav 302 (48 ER 1197).
39. Note 3 supra.
40. At 244C-G. The position is analogous to a non-material breach of contract. A party cannot rely on non-compliance with a contractual term which is of trivial importance to him, in order to avoid his obligations.
41. There is further, indirect, authority for this proposition. In Florida Road Shopping Centre (Pty) Ltd v Caine 1968 (4) SA 587 (N) an offer to purchase property was made subject to three special conditions, but the case was treated as if it were the sale that was subject to the conditions. On an interpretation of the contract Milne JP found that whilst such a contract would ordinarily terminate automatically on non-fulfilment of the conditions, it was the common intention of the parties in this case that it should not do so, and the purchaser would have an election to abide by the contract if the conditions were not timeously fulfilled (at 593H-594D). The majority of the court accepted this as a possible result (597H-598A and 603A-B), but as the common intention of the parties was not clear, the contra proferentem rule was employed in finding that the common intention of the parties was not that contended for by the purchaser.
41. Note 4 supra at 584G-H.
43. See 586G-H. Kumleben J seemed to think that it had something to do with waiver of a condition before the condition had failed.

44. 1974 (1) SA 689 (T).
45. At 697G-H. My emphasis.
46. See Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 532-2.
47. Van Jaarsveld v Coetzee supra note 3 at 244C-D.
48. This would certainly accord with the decision in Van Jaarsveld's case. Clearly if the buyer in that case had chosen not to proceed with the bargain once she had failed to obtain the loan from the Land Bank, the sale would have lapsed.
49. Laskey's case supra note 10.
50. See Van den Berg v Tenner 1975 (2) SA 268 (A); Reigate v Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592 (CA) at 605; Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206 (CA) at 227; and see Christie op cit note 8 at 157-62. If the parties who contracted for a sale of a house subject to a favourable surveyor's report within ten days were asked whether, if the condition were not fulfilled, it was intended that the buyer would still have the opportunity to perform unconditionally, I suggest that, ordinarily, they would reply 'Oh, of course'.
51. See Meyer v Barnardo supra note 4 at 586F-G.
52. See Corbin on Contracts 111A S 761. The case reported in the text (at pages 519, 520 and 522) of Corbin seems to be in favour of the proposition that the party for whose benefit the condition exists may waive it even after time for its fulfilment has passed, but, interestingly, the case of Nikora v Mayer 257 F2d 246 (CA 2d 1958), cited at 521n56, which concerned the raising of a mortgage bond within 45 days, is against the proposition. See also, generally, Williston on Contracts 3 ed V (1961) SS 666, 678ff.

There is a similar conflict in Canada - see Brooks v Alker (1975) 60 DLR (3d) 577 (Ont HCJ), which is in favour of waiver after the time limit, and Gaywood-Hall Developments Ltd v Wilkes (1972) 23 DLR (3d) 505 (Ont HCJ). See also S M Waddams The Law of Contracts (1977) 379-82. The learned author's approach is similar to that of mine. Waddams thinks it would be unconscionable to allow the seller to rely on something that was not material to him, in order to evade his obligations. He would allow the buyer to waive after the time period had expired, subject to the following test: the reasonable expectations of the purchaser (apropos the reliance of the seller); taking into account all of the circumstances surrounding the agreement.

53. Tuckers Land v Strydom supra note 2 at 20D-24E.
54. Note 6 supra.
55. At 389B-C.
56. Meyer v Barnardo supra note 4 at 584F-G.
57. At 585G-586B.
58. The question did not arise for decision. The dispute was concluded comprehensively by the explicit language of the deed of sale.
59. At 586B-C.
60. R Sharrock, in noting the decision in Phillips v Townsend ((1984) 101 SALJ 227 at 231), contends that no other conclusion can be justified either in equity or in strict law than that the sale must be regarded as void if waiver does not take place before the expiry of the time limit. This dogma does not square with Sharrock's own view (at 229) that the effect of a condition on a contract depend upon the intention of the parties.
- The important point in all these cases is that the seller's reliance at the time of contracting must be closely examined. Obviously, when the time limit expires and the seller is uncertain as to whether or not he has a 'firm' sale, this uncertainty is not convenient for him. But the true question is: at the time the parties contracted, was it a material part of the seller's promise that the condition should be timeously fulfilled?
61. 4 ed IX (1974) S 571.
62. Corbin on Contracts 111A S 752 p 478. See also Louise Tager in (1976) 93 SALJ 423 at 435-9, and the authorities cited there, and Spencer Bower and Turner The Law Relating to Estoppel by Representation 3 ed (1977) 319-20.
63. Compiled by J J L Sisson (1960) 851.
64. Banning v Wright (Inspector of Taxes) [1972] 2 All ER 987 (HL) at 999.

65. 1966 NZLR 527 (NZCA).
66. It is not a purely potestative condition. It does not depend upon the will of the purchaser alone. This very point was successfully made by O'Donovan SC (now Donovan J) in Deetlefs v Wright 1977 (2) SA 560 (A). The court went so far as to say (at 567E-F): 'Dit het die partye natuurlik vrygestaan om ooreen te kom dat die vervulling van die voorwaarde van die willekeur van die verweerder sal afhang, dat laasgenoemde dus eensydig die ooreenkoms kragteloos kan maak ...' Cited in the judgment in Van der Walt v Stassen 1979 (3) SA 810 (C) at 814F-G.
67. It is submitted that, when the purchaser performs unconditionally before the condition has failed, he is not effecting a waiver. There is no accrued right which he is abandoning. He is simply making use of an unqualified right which he has always had - to pay the purchase price. Where he elects to perform unconditionally before the time limit expires, but does not actually perform until after the time limit, it seems that there is some form of waiver involved - probably an advance notice of waiver.
68. See Potgieter & another v Van der Merwe 1949 (1) SA 361 (A) at 372, where Centlivres JA cites Frederick Pollock Principles of Contract 8 ed (1911) 618, 629 with approval. See Professor Ellison Kahn's comment on this quotation in Contract and Mercantile Law Through the Cases (1971) 262.

ADDENDUM

The mortgage-bond clause in a deed of sale which makes the sale subject to a suspensive condition that the purchaser is able to raise the necessary finance on security of a mortgage bond has been the subject of much litigation. Mekwa Nominees v Roberts 1985 (2) SA 498 (W) becomes the fourth consecutive case (after Roberto v Bandeiro & another 1982 (1) SA 880 (W), Phillips v Townsend 1983 (3) SA 403 (C) and Meyer v Barnardo & another 1984 (2) SA 580 (N) to preclude the purchaser from holding the seller to the sale after the time for fulfilment of the condition has elapsed.

The facts of Mekwa's case were as follows. The purchaser and seller had agreed in the deed of sale that the sale was subject to a mortgage bond being raised by 15 August. The time for performance of the contract was 23 September. By that date the purchaser had to have secured the purchase price by a banker's or building society's guarantee. On 5 September the purchaser wrote to the seller's attorneys advising them that he would not be seeking a mortgage bond, but that he would supply the necessary guarantees on the due date. The seller refused to proceed with the sale. The purchaser sought to enforce it. He failed.

In dismissing the purchaser's application, the court disapproved earlier cases decided in its own division: Wacks v Goldman 1965 (4) SA 386 (W) and Laskey v Steadmet (edms) Bpk h/a Wessel de Villiers Agentskappe 1976 (3) SA 696 (T). Coetzee J wholeheartedly endorsed the approaches of Phillips's and Meyer's cases. This is not surprising. The judgments in

those two cases are, in the main, well reasoned. However, the disturbing part of Mekwa's case is that, with respect, it contains little reasoning of its own.

A minor point is the absence in the judgment of any reference to the Appellate Division decision in Van Jaarsveld v Coetzee 1973 (3) SA 241 (A). This is perhaps explicable on the basis that Coetzee J seemed to assume that the clause under consideration was capable of waiver by the purchaser. The issue his lordship addressed was whether it was capable of such a waiver after 15 August. However, the approach in Van Jaarsveld's case is instructive. There was no question of a time limit in that case. The suspensive condition had failed, and the purchaser had, as in Mekwa's case, simply tendered a banker's guarantee in lieu of obtaining the mortgage. She succeeded in holding the seller to the sale. The Appellate Division observed that, in general, the seller can have no interest in the source from which the purchaser obtains the money, and there was no indication from that particular contract that the seller had had such an interest. Moreover, if it had been the common intention of the parties that the seller too could rely on failure of the suspensive condition, then surely clearer language would have been employed in the contract (at 244B-F).

The essence of the issue in Mekwa's case, however, was whether the purchaser should be permitted to waive the condition after the time for its fulfilment had elapsed. Coetzee J quoted from the judgment in Phillips' case (at 408F-G):

'If the contract remained valid despite the lapse of the time ... without a bond having been obtained and without the plaintiff having waived it during that time, it would render the time limitation entirely without content or purpose. Defendant would then be in no different position than she would have been had there been no time limitation.'

Coetzee J himself echoed this observation (at 501-2).

It is respectfully submitted, however, that there is a purpose to the insertion of the time limit. In Treatise I at page 18 the point is made that the seller has given an unconditional promise to perform. The condition does not qualify his duty to perform, which is merely synallagmatic. On the other hand, the purchaser has given only a conditional promise to perform. The purpose of the time limit is to put the purchaser on terms with some certainty. When the period during which his duty to perform is qualified elapses, then, in order to hold the seller to the sale, he must offer the seller the additional consideration of an unconditional promise to perform. If there were no time limit, the position as to the length of time for which the purchaser's duty to perform was qualified would be vague and uncertain. Of course, this is only one explanation of the reason for the insertion of the time limit. It may well be on the facts of a particular case that the seller, at the time of contracting, was indeed materially interested in timeous fulfilment of the condition. But that is a matter to be enquired into, and not simply to be assumed by reference to the insertion of a time limit.

With respect, Coetzee J was correct in endorsing Meyer's case and Phillips's case, but see how different the facts there are when they are compared with those in Mekwa's case. In Meyer's case Kumleben J observed that the effect of the condition depended on the common intention of the parties, and if the deed of sale was conclusive as to intention, then that intention had to be given effect to (at 584G and 585E). An examination of the relevant mortgage-bond clauses in Meyer's case and Roberto v Bandeiro makes it clear that the seller did place material reliance on timeous fulfilment of the condition. In Phillips's case the deed of sale was not conclusive, and the court had to enquire what the parties had tacitly agreed on. Crucial evidence was led by the seller that she had insisted on a seven-day limit, the purchaser had asked for fourteen days, and the parties had compromised and settled for a ten-day time limit. By contrast, in Mekwa's case the mortgage-bond clause was in its barest form, and there was no suggestion either from the document or, apparently, from any affidavits from the seller that it was a material part of his promise at the time of contracting that the condition should be timeously fulfilled. In the result, the decision seems a little harsh on the purchaser in this case.

With respect, Coetzee J would have been on firmer ground if he had drawn the prima facie inference that the insertion of the time limit suggested that the parties did not intend that the purchaser should be able to waive the condition of his duty after the expiry of the time limit. Such a viewpoint is a policy decision (see Treatise I at 19-22). What is wrong with Mekwa, with respect, is that his lordship has found that the insertion of a time limit is conclusive of the parties' intention. Thus, a virtual legal

rule emerges. Whether or not one agrees with the result of Mekwa's case, the judgment leaves the impression that there is an irrefrangible rule that, in cases of this kind, waiver by the purchaser after the expiry of the time limit is not possible. No such rule exists, it is submitted. The common intention of the parties must be ascertained, and the mere insertion of a time limit for fulfilment of the condition, a condition which has been ostensibly inserted for the purchaser's benefit, cannot by itself be conclusive as to that common intention.

TREATISE II

THE LEGAL NATURE OF ESTATE AGENCY

1. INTRODUCTION

In the modern commercial world, there are many kinds of specialised intermediaries whose activities are crucial to a more efficient commercial cycle. There are factors, representatives, agents and brokers of all sorts, independent contractors, and there is the estate agent. The commercial function of an estate agent is quite clear and quite simple. By reason of his specialised knowledge of potential purchasers and sellers of property, he seeks to expedite the purchase and sale of property.

The legal basis of the estate agent's commercial activities is less clear. In fact, the whole of the law of agency is so loosely defined that De Wet has remarked that 'agency' cannot be regarded as a term of art denoting a specific branch of the law.¹ If that were not complication enough, the estate agent himself occupies a somewhat unique position within the morass of so-called agents, so much so, that he has been described by an eminent jurist as a 'legal oddity'.²

The purpose of this paper is to examine the legal position of the estate agent in the tripartite arrangement of purchaser, seller and agent.

A determination of the true legal nature of estate agency should disclose, inter alia, the proper basis on which the estate agent's claim for commission is founded. The enquiry will therefore focus on the legal elements of the relationship between the seller and the estate agent. Is the estate agent an agent, in the strict legal sense? If not, what is the proper nature of estate agency. However, such an enquiry into the elements and principles of agency does not go far enough. These days, it seems that the estate agent seeks to recover his commission on plural bases. By placing reliance on an undertaking by the seller in the deed of sale to pay the agent's commission, there have been attempts to cast the estate agent as the beneficiary of a contract for the benefit of a third party, with the seller as promittens and the purchaser as stipulans. Another contention is that the deed of sale contains a contract not only between purchaser and seller, but also between seller and estate agent, as well as between purchaser and estate agent, in many cases. These further bases for the recovery by the agent of his commission will also be considered.

2. DESCRIPTION OF ESTATE AGENCY

What follows is a broad generalisation of the commercial aspect of estate agency. A property-owner, desirous of selling his property will contact one or more estate agents.³ He will inform the estate agent that his property is for sale, and he will request the estate agent to find a suitable purchaser. It is unusual for the estate agent to demur.

It is important to note that the estate agent is not employed by the seller. He receives no wage for his efforts. He is commissioned to produce a result, and it is only upon attainment of such result that he earns any remuneration. In other words, if he does not find a suitable purchaser, he earns nothing, however great his exertions may have been. Conversely, should he find a suitable purchaser with whom the seller concludes a contract, then he will receive his commission however great or small his exertions. This fact, that the degree of the agent's exertions in no way influences whether or how much the seller will pay him, bears the logical extension that the seller cannot control the agent's efforts, or even require him to expend any effort at all.

Should the estate agent find a potential purchaser (by hard work, luck or whatever means), he will introduce the purchaser to the seller. The seller and purchaser may wish to negotiate the price, and sometimes, these negotiations may be conducted through the medium of the estate agent, although he will frequently do no more than convey information from one party to the other. If the seller and the purchaser can reach agreement, they will conclude a written contract. Often this contract is a standard form contract, printed on the estate agent's stationery (usually there will be minor alterations to suit the parties concerned). Almost always the estate agent does not conclude the sale of the property on behalf of the seller. And this is the nub of the matter - if the estate agent is merely an intermediary who attempts to bring the seller and purchaser together in order that they themselves might conclude a contract, is he an agent properly so called? The above-

mentioned activities and functions may well correspond with the layman's idea of agency, but do they amount to agency in the legal sense?

3. THE LEGAL RELATIONSHIP BETWEEN ESTATE AGENT AND SELLER

3.1 The Concept of Agency

The South African law of agency has a mixed heritage, being based partly on the under-developed concepts of the old Roman-Dutch authorities and partly on English law; moreover, if De Wet's analysis is accepted, it appears to be now aligning itself fairly closely to certain European concepts of agency.

Part of the difficulty in discovering the quintessence of agency is the fact that the term is often used in different senses.⁴ In the most obvious sense, agency is the performance of a task by one person on behalf of another.⁵ Although the term is sometimes used in this sense, even by the courts, it is too broad and loose a definition to be useful. However, to compose a strict, legal definition is not easy.⁶ The difficulty is compounded by the fact that, in defining agency, Anglo-American jurisprudence makes no clear distinction between on the one hand, the power of the agent to alter his principal's legal position, and on the other hand, the relationship that exists between principal and agent. For instance, Fridman describes⁷ agency as:

'the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts, or the disposition of property'.

This definition clearly amalgamates the two concepts of the agency power,⁸ and the relationship between principal and agent.⁹ The reason for this amalgamation is presumably the belief that the contractual relationship that frequently exists between principal and agent is responsible for the creation of the agency power. Certainly, it is this belief which represents the traditional approach in South African law.¹⁰ It is also this belief which marks the schism between the traditional approach and the approach of Professor De Wet.¹¹ The most important point that De Wet makes is that the act of authorisation, which creates the agency power, is a unilateral juristic act by the principal. There is no question of consensus being necessary in order for the agent to acquire the power to create, alter or discharge legal relationships between his principal and third parties. The contractual relationship which often (but not always) exists between principal and agent is an entirely separate matter, and merely regulates the rights and duties of the agent and principal inter se.¹²

However, leaving aside De Wet's view for the moment, consider the fact that, for most commentators, both in South Africa and England, the hallmark of agency in the legal sense, is the authority conferred on the agent to make binding contracts on behalf of his principal.¹³

So much so, that it is contended¹⁴ that a person who merely has authority to act for another, and not authority to create, alter or extinguish legal obligations between his principal and third parties, is not legally an agent. In fact, De Villiers and Macintosh state¹⁵ that, to the extent to which an 'agent' is required to perform non-juristic acts, he ceases to be an agent, and becomes a servant or independent contractor. For example, it is contended, an agent who travels to another town to sign a contract on behalf of his principal is an agent only insofar as the actual contracting (the signing of the agreement and the negotiations which precede the signing) is concerned. On his journey to the town and back, he is a servant or independent contractor. Therefore, as De Villiers and Macintosh conclude, an agent may be defined as a servant or independent contractor, who brings his principal into binding legal relations with third parties. It also follows that on this definition, it is not only persons who merely act for another in a purely commercial sense, but even persons who have the agency power, but do not use it, who are not agents in the legal sense.¹⁶ If this view is accepted, there is no unique legal persona called an agent. There is only a function, called agency, which certain properly endowed legal personae may perform, such as servants, independent contractors or partners.

Recourse to De Wet's views does not alter this conclusion. De Wet speaks of representation, rather than agency. He defines¹⁷ a representative as a person who concludes a juristic act with the intention to create, alter or extinguish legal relationships for another and not

for himself. It is plain on both approaches, that if the touchstone of agency is the power of the agent to enter into juristic acts on behalf of his principal, then the basis of the underlying relationship between the principal and the agent is irrelevant.¹⁸ There is no special contract of agency common to all the types of legal personae who may be invested with the agency power.

3.2 Estate Agent as an Agent in the Strict Sense

In South African law, it is accepted that the estate agent generally acts on a mandate to 'find a buyer'.¹⁹ He therefore has a contractual relationship with his principal, but as has been demonstrated, this is neither necessary nor sufficient to categorise him legally as an agent. Furthermore, although he clearly acts in a representative capacity, he usually does not possess the power to conclude juristic acts for the seller.²⁰ Therefore, in the strict legal sense, the estate agent is ordinarily not an agent.²¹ This conclusion has already been bemoaned by a leading English writer,²² but the only way to escape such a conclusion is to challenge the notion that the agent's power to conclude juristic acts is the very essence of agency. True, it is central to the whole concept, but need it be the touchstone?

It is submitted that it is unsatisfactory that a person who is manifestly acting in a representative capacity, in the sense that he acts for another and that his efforts are ultimately directed at an alteration in his principal's legal situation, cannot be classified as an agent, merely for want of the authority actually to conclude juristic acts, or for want of the exercise of that authority. It would be an improvement to have

a wider category of agents. So, for instance, one could classify as an agent any person who performs a task for another in connection with the conclusion of a juristic act by or for the principal.²³ Estate agents, travel agents, employment agents and all sorts of other commission agents who are presently virtually unclassifiable legally, and who ought to fall within the legal niche of agency, would then do so under this broad definition. One could have sub-categories, as Kerr suggests,²⁴ of empowered agents and unempowered agents. Obviously, empowered agents would be those possessed of the requisite authority to conclude juristic acts on behalf of their principals and unempowered agents would be that large group of commercial intermediaries, including estate agents, whose activities are aimed at bringing about a change in their principal's legal position, but who are not possessed of the power to do so personally.

A criticism of such an approach is that it relies on semantics. The legal essence remains unaltered. That may be so, but in the first place, semantical exactitude is something upon which the law is founded, and the present, unsatisfactory treatment of commission agents does it no credit. In the second place, the suggested approach would import more certainty into the law because such issues as the scope of the fiduciary duties and the delictual liability of such commission agents could then be dealt with under the general rules of agency. The struggle to define accurately the legal nature of estate agency is no mere academic exercise in punctiliousness. It is an attempt to provide a basis on which the manifold rights and duties of the estate agent can consistently be

explained. Naturally, a wider definition, with or without sub-categories, might well have attendant difficulties, but it would, at least, reduce the cleavage between legal theory and commercial reality.²⁵

3.3 Estate Agent as 'Agent' in the Wider Sense

In South African law, it is said that agents form a distinct class within a large group of persons who perform acts for others.²⁶ Having concluded that the estate agent is not an agent properly so-called, is he an 'unempowered' servant, or independent contractor, or in fact, any other classifiable type of legal persona?

a) Servant

Whichever test²⁷ is employed to determine the master-servant relationship, it is quite clear that an estate agent is not a servant.²⁸ The seller of property has no right to direct the manner or time in which the estate agent should fulfil his mandate.

b) Independent Contractor

Like the estate agent, the independent contractor (conductor operis) is distinguishable from a servant principally by the fact that he is not subject to the supervision of the locator operis. The conductor operis need not suffer any orders as regards the manner in which he performs his task.²⁹ It is fair to say that the locator operis is concerned not so much with the labour of the conductor operis, but with the result or product of his labour.³⁰ The estate agent enjoys much the same relationship with the seller of property.

However, there are some differences between the estate agent and the conductor operis. A small point is that it is said that the normal object of contracts of locatio conductio operis is work on a physical subject-matter whilst the rendition of services of a professional nature is usually governed by the contract of mandate.³¹ A more significant difference relates to the duty to complete the task. The independent contractor is obliged to make performance in terms of the contract, and can be compelled to do so by the locator operis. The estate agent obviously cannot be compelled to 'find a buyer', but more importantly he cannot be compelled to attempt to do so. The estate agent has no duty even to begin to undertake the task entrusted to him.³² So, whilst it is fair to say that an estate agent is somewhat akin to an independent contractor, the distinguishing factors place him quite outside that category of legal persona.

c) Mandatory

It is an unchallenged notion that the contract which governs the relationship between estate agent and his principal is one of mandate. It might therefore seem an obvious conclusion that an estate agent must be a mandatory. One might even wonder at the need to enquire whether or not the estate agent is an agent proper or independent contractor or servant. Yet the fit is not all that snug. For, like the conductor operis, the mandatory has an exigible duty to execute the task mandated,³³ whereas the estate agent merely has an opportunity, not a duty, to perform. On this basis, the estate agent, strictly speaking, cannot be a mandatory.³⁴ However, as will be seen later, it is probable that the estate agent is a variant of the mandatory.

d) Broker

In the United States of America, estate agents are referred to as 'real estate brokers'. Could the estate agent be regarded as a broker in South African law? Many of the early cases on estate agency refer to the commission agent as a broker.

In case law, a broker has been defined as a 'middleman or intermediary whose office it is to negotiate between two parties until they are at one as regards the terms upon which they are prepared to buy and sell'.³⁵ He is an 'intermediary rather than a business plenipotentiary'.³⁶ Voet describes a broker as a 'go-between' or 'intermediary', who 'bestows his services with a view to putting through some business between two or more persons'.³⁷ These descriptions apply perfectly to an estate agent. Moreover, a broker is usually remunerated by commission, which he earns if he was the efficient cause of the conclusion of the contract. If no contract is concluded, the broker will generally not earn any commission. So he will usually have no claim, despite his efforts, if his principal refuses to sell, sells privately, or sells through another broker.³⁸ In all of these respects, the broker is identical to the estate agent.³⁹ The broker and the estate agent also have this in common: they have a fairly similar independence from their so-called principals, quite unlike the usual agent or mandatary who has an exigible duty to complete the task mandated and the concomitant right to demand payment for his efforts.

Of course, there is one real difference between a broker and an estate agent, namely, that, in practice brokers such as woolbrokers and stock-

brokers frequently conclude contracts themselves on behalf of their principals. However, it should be noted that, in legal terms, it seems that it is not necessary that a broker be possessed of, or use, a power to conclude juristic acts on behalf of his principal. A broker can be a mere 'unempowered' intermediary, although admittedly this is rare in practice.

It is submitted that a number of advantages would be realised in treating the estate agent as a broker.⁴⁰ However, the law is so steeped in its current attitude towards estate agents that this notion is unlikely to gain any acceptance whatever.

e) Unempowered Independent Agents

This category is a proposal of Professor Kerr.⁴¹ It is not yet a recognised category in South African law. The distinguishing feature of such agents is that they do not have a duty, but merely an opportunity to perform the task entrusted to them. This would seem to be an ideal niche for the estate agent. Kerr cites as support for this new category the case of Colonial Mutual Life Assurance Society Ltd v Macdonald.⁴² This case concerned the delictual liability of an insurance agent, whose task was to obtain proposals for assurance for the society, collect the premiums, and have the proponents medically examined. Both De Villiers CJ⁴³ and Wessels JA⁴⁴ remarked that the insurance agent had no duty at all to obtain or even to attempt to obtain any proposals. He merely had an opportunity to earn his commission by executing the task, if he wished. Kerr suggests that the insurance agent in this case should

be known as an unempowered independent agent. One strongly suspects that this is an 'other' category which has been invented to group together otherwise unclassifiable legal personae. However, it is true that the estate agent would fit perfectly well into this category, as would any other commission agents who earn their commission upon completion of a task which they were under no duty to undertake. It is submitted, though, that this category is unlikely to find general acceptance in South African law. It conveys too little information about its constituent members, whereas South African law already has well developed categories, such as the independent contractor, the mandatary, or the broker to which this type of commission agent could and should belong, because of the extensive community of characteristics that he shares with members of these categories. The one striking dissimilarity, the lack of a duty to complete the task mandated, is insufficient reason for casting commission agents into a kind of legal limbo.⁴⁵

Summary

In South African law, there is theoretically no overlap between the three categories of mandatary, independent contractor and servant. However, at times, as Kahn remarks,⁴⁶ the distinction may be difficult to draw, particularly as regards the mandatary vis-a-vis the independent contractor.

Although the estate agent, strictly speaking, falls into neither of these two categories, he is akin to both, and despite some of the attractions of regarding him as a broker he will almost certainly continue to be

regarded in South African law either as an odd type of mandatary or as an independent contractor. But of which category is he a mutation?⁴⁷

Whilst the estate agent enjoys an independence similar to that of the conductor operis as to the manner and time within which he is to perform his task, this similarity flows purely from the quirk that the estate agent is under no obligation to do anything at all, and it is submitted that this is insufficient to categorise the estate agent as a conductor operis. There are some pointers which, it is submitted, firmly distinguish the estate agent as a mandatary rather than a conductor operis. First, there is the small point that the type of task usually undertaken by the mandatary is more of a professional nature.⁴⁸

The fact that the estate agent is paid by commission is also an indicium that he is a mandatary.⁴⁹ Finally, there is a distinction in the quality of the relationship that the mandatary enjoys a propos the mandator, when compared to the conductor and locator operis. The latter relationship is clearly on a more 'arms-length' basis than the former.⁵⁰ Although there is little authority on the subject, there can be little doubt that the fiduciary duties of the mandatary, most of which apply to the estate agent, are significantly greater than those of the conductor operis.⁵¹

To conclude on this point: The estate agent's contract with his principal is sui generis.⁵² The estate agent is not, legally, an agent; in all respects but one, he resembles a mandatary, and should be treated as such.

4. DOES THE STANDARD FORM DEED OF SALE CREATE RIGHTS FOR THE ESTATE AGENT?

Having eliminated what the estate agent is not, and having, in this manner, arrived at the conclusion that he most closely resembles a mandatary, one might have expected the estate agent's cause of action in a claim for commission to be founded squarely on the fulfilment of his mandate. However, difficulties that have sometimes been experienced in proving the mandate (especially when oral) have led estate agents to try to establish other legal bases for the recovery of their commissions. The deed of sale, memorialising the contract between the seller and the purchaser, usually contains a clause to the following effect:

'The seller undertakes to pay ABC Estate Agency commission at the rate of ...'

Such a promise has provided a convenient platform for the contentions that:

- i) The promise embodied in the clause is a contract for the benefit of a third person - the estate agent - whose acceptance of this benefit founds his right to sue the seller for commission; or
- ii) The deed of sale, whilst it principally embodies a contract between purchaser and seller, also contains, by virtue of the seller's promise to pay the estate agent, a contract directly between the seller and the estate agent.

Furthermore, these days, the deed of sale often contains another clause in terms of which the purchaser promises to pay the agent's commission (or liquidated damages), should he fail to fulfil his obligations under the contract with the seller. Arguably such a promise may also constitute a contract, on this occasion between the purchaser and the agent.

These contentions have received a certain degree of sanction by the courts. That being the case they bear closer examination.

4.1 Estate Agent as a Third Party Beneficiary Under a Stipulatio Alteri

The original source of the idea that the deed of sale embodies a stipulatio alteri is obscure, but it may possibly be one of the very early decisions on the auctioneer's right to commission.⁵³ Although no court has ever crisply decided the issue,⁵⁴ several cases obliquely suggest that the seller's promise to pay the estate agent's commission is a contract for the benefit of a third party, namely the estate agent.⁵⁵ Moreover, counsel frequently plead such cases as stipulationes alteri,⁵⁶ and, in fact, the idea has taken such a firm hold that, these days, several estate agents have actually taken the precaution of having a clause inserted at the end of the deed of sale, in terms of which they purport to accept the benefits conferred on them by the agreement.

Is this development sound? Consider the stipulatio alteri. Very briefly, it has the following salient features: It is a contract between A (the promittens) and B (the stipulans) in terms of which A promises B that he will confer a benefit on T (a third party). A and B bind themselves

as principals, and not as agents, or representatives of T. According to judicial precedent, until T accepts the benefit of the stipulation made in his favour, he acquires no rights under the contract, and B may release A, or B and A acting together may cancel the contract.⁵⁷ On acceptance of the benefit by T, he becomes a party to the contract, and may thenceforth sue in his own name for performance.⁵⁸ B then falls out of the contract.⁵⁹

So, in casu, the contention is that the purchaser is a stipulans, who is stipulating for the benefit of a third party, the estate agent, by obliging the seller, the promittens, to promise to pay the estate agent his commission. This may seem fanciful, but it is certainly true that the legal nature of a stipulatio alteri is sufficiently elastic to accommodate disparate commercial transactions. Indeed this is its main attraction. Although there is a good deal of academic controversy regarding the proper legal nature of a stipulatio alteri,⁶⁰ the courts have adopted a tranquil approach. They have simply developed the law along the lines of the contractual concept of offer and acceptance.⁶¹ Although there are some logical inconsistencies in such an approach⁶² the judicial precedents are now so well entrenched, that it is a reasonably safe assumption that the existing rules will, by and large, remain unaltered.

One of these rules provides the principal objection to the idea that the seller's promises to pay the estate agent can be properly construed as a stipulatio alteri. That rule concerns the intention of the principals to the transaction, A and B. It is settled law that the fact that a

third party would derive certain benefits from the carrying out of a contract does not necessarily mean that it was intended that the third party could, by adoption, become a party to the contract.⁶³ It is essential that the stipulans and promittens should have contracted with each other with the intention of conferring an enforceable right of action on the third party.⁶⁴

The rule is well illustrated by Robert Baikie v Pretoria Municipality.⁶⁵ In this case, land was sold by public auction. One of the terms of the sale was that the purchaser should pay auctioneer's commission, plus arrear rates and taxes. Pretoria municipality sued B, the purchaser, for arrear rates, alleging that the contract of sale contained a stipulation for the benefit of a third party which had been accepted by the municipality. This argument failed. The Court observed that there was no motive for the seller to stipulate for the benefit of the municipality, but every motive to stipulate in his own interest for the discharge of a debt which he was under a legal obligation to pay.⁶⁶ Stratford J held that the municipality was a mere adjectus solutionis causa.⁶⁷

In the case of the deed of sale, it is surely clear that what the purchaser and seller truly intend is to conclude a bargain between themselves. It is risible to suggest that the purchaser, who usually has merely the slightest commercial acquaintance with the estate agent, has the intention, when he signs the deed of sale, of stipulating for the benefit of the agent. In conclusion, therefore, it is submitted that the superficial appearance that the deed of sale contains a stipulatio alteri is

misleading. An attempt to accommodate the estate agent by stretching the concept of the stipulatio alteri in this fashion is artificial and inelegant; moreover, it is quite unnecessary, since the agent's 'mandate' provides a perfectly sound and logically clear foundation for the recovery of his commission.

4.2 Estate Agent as a Direct Party to Other Contracts Embodied in the Deed of Sale

4.2.1 Contract Between Estate Agent and Seller

The idea that the deed of sale also contains a contract directly between the seller and the estate agent originated from the Appellate Division decision in Baker v Afrikaanse Nasionale Afslaaers en Agentskap Maatskappy (Edms) Bpk.⁶⁸ In this case, the estate agent had prepared a written offer to purchase, which had been signed by the purchaser. On the back of this document, there was a separate clause which read:

'Ek neem die aanbod deur die koper ... aan en beskou aldus hierdie as 'n bindende koop waarby die ... Maatskappy hulle opdrag om te verkoop uitgevoer het en hulle geregtig is op verkoopskommissie van £115, en ek verleen hulle hiermee die reg om dit te neem uit die eerste betaling deur koper gemaak.'

The seller appended his signature under this clause. Was the seller merely accepting the purchaser's offer, the reference to estate agent's commission being a determination of their rights and duties inter se by the purchaser and seller, or was the seller making a contract directly

with the estate agent as well as with the purchaser? The small difficulty that the document had not been signed by the estate agent who was thus apparently not a party to the written agreement was easily overcome.⁶⁹ The Court held that the particular wording of the clause indicated that the seller was not reaching agreement with the buyer as to which of them should pay the estate agent's commission, but rather that the seller was binding himself to the estate agent.⁷⁰

The next case on the point was Van Heerden v Hermann.⁷¹ Again, in this case, the deed of sale had been signed by the purchaser and by the seller, but not by the estate agent. The reference to the payment by the seller of the estate agent's commission was contained, not in the acceptance, but in the written offer by the purchaser. It was held that this could make no difference⁷² and the decision in Baker's case was followed.

In each of these cases there were two contracts in one document. Baker's case has, unsurprisingly, been re-affirmed in the Appellate Division⁷³ and there has been a number of cases which have followed these two decisions.⁷⁴

In none of these cases has there arisen the issue of the estate agent's mandate or the issue whether or not he was the efficient cause of the sale. It is the seller's promise to pay which has founded the estate agent's cause of action.⁷⁵ Moreover, it is clear that such a promise creates a new cause of action for the agent,⁷⁶ in addition to any rights that he may have in terms of a contract of mandate with the seller.⁷⁷

However, the creation of a new obligation in this way postulates a new agreement. Is there consensus in this regard between the seller and the estate agent? The fact that the estate agent has not signed the deed of sale is, as we have seen in Baker's case,⁷⁸ not a problem, but does the seller have the necessary animus contrahendi? Does he ordinarily intend to create additional rights for the estate agent?

The answer naturally depends on the facts of each case, but the presence of such animus would seem to be doubtful in the instance of the typical standard form deed of sale. This document is usually printed on the estate agent's stationery, and is headed 'Offer to Purchase and Deed of Sale'. As we have seen, the Court in Van Heerden v Hermann⁷⁹ decided that it could make no difference that the clause providing for payment of the agent's commission was contained in the written offer made by the purchaser, rather than in a specially formulated acceptance clause signed by the seller. With respect, it is submitted that in many cases this fact does make a difference. The written offer records the terms on which the purchaser is prepared to purchase the property. When it is stipulated in that offer that the seller undertakes to pay the agent, surely the inference is strong that it is the purchaser who is stipulating, as a term of any future contract, that he, the purchaser, should not have to pay the estate agent? When the seller accepts the purchaser's offer by signing the self-same document, is it not inherently more probable that he is accepting this obligation vis-a-vis the purchaser only, and not vis-a-vis the estate agent, with whom he usually has a separate contractual relationship, established some time previously?

Indeed, it would be a little surprising if the estate agent's commission were not mentioned in the deed of sale. It is an important clause. It is common sense that the seller and purchaser should regulate this matter between themselves.⁸⁰

Caveat subscriptor may provide a swift rejoinder to the above argument. In other words, whatever the seller's subjective intentions, by appending his signature to a clearly worded undertaking to pay the agent, he must be taken to have intended to contract with the agent, and so to have created a new obligation. Can the seller avoid the application of the caveat subscriptor maxim?⁸¹ The scope for a defence of unilateral mistake used to be extremely narrow,⁸² but two recent decisions⁸³ have made it clear that, in appropriate circumstances, a party who presents a document for signature may be under a duty to draw the signatory's attention to unusual or unexpected terms contained therein, so as to prevent the signatory from contracting on a mistaken basis. Failure to fulfil such a duty may amount to a passive misrepresentation. If the signatory's resultant error is material and reasonable, he will have a defence.⁸⁴

One may employ the reasoning of the Appellate Division in Spindrifter⁸⁵ as follows: In many cases it is submitted, the estate agent has no 'reason to believe'⁸⁶ that the seller has the intention, when he signs the deed of sale, to create a new obligation in the agent's favour. Accordingly, in such cases, it is the agent's duty to point out that the document bears that potential. Failure to do so should allow the seller

to plead that he had no 'reason to believe' that the document would create a new (and more potent)⁸⁷ cause of action for the agent and that he signed the document under the reasonably mistaken belief that it dealt merely with his relationship with the purchaser, or that it merely confirmed a prior arrangement with the agent.⁸⁸

Therefore, although there can scarcely be any quarrel with a case such as Baker, it is submitted that it should not be too readily assumed that the common undertaking to pay commission found in the standard form 'Offer to Purchase and Deed of Sale' constitutes a binding contract between the seller and the estate agent. Of course, such a written undertaking is not valueless. It will usually afford the agent strong evidence of a prior contract (of 'mandate') between himself and the seller.⁸⁹

4.2.2 Contract Between Estate Agent and Purchaser

There are good reasons for the insertion in the deed of sale of a clause requiring the purchaser to pay the estate agent should the purchaser fail to fulfil his obligations under his contract with the seller. It is convenient for the seller since there are circumstances where, even if it is the purchaser who unlawfully resiles from a binding contract of sale, the seller remains liable for the agent's commission.⁹⁰ To obviate the vexation of the seller's having to sue the purchaser to recover this expense, it is clearly more convenient for the estate agent to have the right to claim his commission directly from the purchaser. More

importantly, the clause benefits the estate agent as it closes a loophole through which his right to commission might otherwise slip: Where the event which entitles the estate agent to commission is the conclusion of a binding and enforceable sale⁹¹ and the purchaser unlawfully resiles after the conclusion of a sale which is binding, but not yet enforceable,⁹² then the agent obviously cannot sue the seller. His only hope of recovering his commission, therefore, is to sue the purchaser. However in the absence of a vinculum iuris a contractual action is out of the question. This loophole is closed by the 'penalty' clause, which is an attempt by the estate agent to create a cause of action in contract against the purchaser. The question is: Does the 'penalty' clause succeed in constituting an enforceable contract between the agent and the purchaser?

In Phillips v Aida Real Estate,⁹³ the standard form document used by Aida Real Estate contained the abovementioned 'penalty' clause, and in addition, a clause which stated that should the purchaser withdraw his offer before acceptance by the seller, he agreed to pay the estate agent liquidated damages in the amount of the commission. As matters transpired, the purchaser did withdraw his offer. The issue was whether his promise to pay liquidated damages, as contained in the document, constituted a separate contract with the agent. The Court held that unlike Baker's case and George Ruggier's case, this was not a case in which it had been intended by all concerned that, in addition to the contract between the seller and the purchaser, the signer of the document was also contracting with the estate agent.⁹⁴

It has been remarked by Professor Tager⁹⁵ that the Court took an extremely subjective view of the matter, which was fortunate for the purchaser because in the past, the courts have frequently held parties to be bound by a contract purely because there was an objective appearance of their having had an intention to be bound.⁹⁶ Moreover, it is clear that the decision was based on certain extraordinary facts.⁹⁷ The Appellate Division was clearly of the opinion that, in principle, a purchaser, who signs a deed of sale incorporating such a promise to pay the estate agent, will generally be bound to the estate agent as a result.⁹⁸

It seems therefore, that despite the actual outcome of the case in Aida, a purchaser who signs a deed which contains such a 'penalty' clause will generally be held to have contracted with the estate agent. Certainly there is less scope for avoiding the application of the caveat subscriptor maxim. The standard form 'Offer to Purchase and Deed of Sale' purports to be a document stating the purchaser's own terms of purchase. Moreover, the purchaser cannot contend that he mistakenly thought that he was merely confirming a prior arrangement with the agent, for there is usually no prior legal relationship between the parties. Provided he reads the 'penalty' clause, it is submitted that there is little room for the purchaser to argue that he had no 'reason to believe' that he had agreed to the creation of a binding (contingent) obligation in favour of the estate agent.⁹⁹

5. CONCLUSION

The estate agent is normally not an agent, in the strict sense of that term, because he usually lacks the power to create, alter or extinguish legal relationships for his principal. Since he has no exigible duty to complete the task entrusted to him, he is also, strictly speaking not a mandatary. Although he closely resembles a mandatary, his contract with his principal is in fact sui generis.

The estate agent may be able, in appropriate cases, to recover his commission by relying, not on his 'mandate', but on an explicit undertaking in the deed of sale by the seller to pay the commission. However, it is submitted that the analysis of such an undertaking as a contract for the benefit of the estate agent is ill-founded. The purchaser can hardly be accurately cast as a stipulans whose intention it is, when signing the document, to stipulate for the benefit of the agent. The better view, that the undertaking is a direct contract between the agent and the seller, is also contestable in certain circumstances. Frequently, the seller will lack the necessary animus contrahendi, especially as regards the creation of a new obligation. He will often regard his promise to pay the agent as merely confirming a prior agreement, or, bearing in mind that the promise first appears in a document stating the terms of the purchaser's offer, he may reasonably believe that he and the purchaser are simply regulating the matter of agent's commission inter se.

By contrast, the purchaser, who usually has no previous legal relationship with the agent, will generally struggle to overcome the prima facie impression that his promise to pay the agent, in the event of his default, creates a binding legal obligation.

1. J C de Wet 'Agency and Representation' in W A Joubert (ed) The Law of South Africa ('LAWSA') (Vol 1 1976) 74.
2. Ellison Kahn (1980) 97 SALJ 342.
3. There is of course nothing to prevent the estate agent from working on behalf of a would-be purchaser. It is simply more usual for him to contract with the seller of the property.
4. See De Wet loc cit note 1 supra and D J Joubert Die Suid-Afrikaanse Verteenwoordigingsreg (1979) 5-7. D R Stuart 1966 Annual Survey of South African Law 99-100 remarks that the courts have been extremely reluctant to commit themselves to an authoritative definition of the term agency. See Strydom v Protea Eiendomsagente 1979 (2) SA 206 (T) at 208H - 209A, and Mason v Vacuum Oil Co of SA Ltd 1936 CPD 219 at 223.
5. F M B Reynolds 'Agency: Theory and Practice' (1978) 94 LOR 224.
6. 'The law of agency does not allow of a brief definition, simply because we cannot compress the whole law into a sentence that is both short and significant' (S J Stoljar The Law of Agency, Its History and Present Principles (1961) 1) - a remark with which G H L Fridman The Law of Agency (5 ed 1983) 9 agrees.
7. Loc cit note 6.
8. This term is advisedly used. See the distinction between authority and agency power made by W A Seavey 'The Rationale of Agency' (1920) 29 Yale LJ 859 at 861.
9. Different authors lay different emphasis on the two concepts in their definitions of agency. Halsbury's Laws of England (Hailsham (ed) 4 ed 1973 Vol 1 para 701) lays slightly greater emphasis on the agency power - "... in law, the word 'agency' is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties". In Bowstead on Agency (14 ed 1976 Article 1) the element of consent is introduced, and there is very little stress on the agency power. Bowstead says agency is the relationship which exists between two persons, one of whom expressly or impliedly consents that the other should represent him or act on his behalf, and the other of whom similarly consents, to represent the former or so to act. The Restatement of the Law of Agency (American Law Institute 2 ed 1958 para 1) lays similar

stress on the aspect of consent. De Villiers and Macintosh The Law of Agency in South Africa (3 ed 1981 by J M Silke) forbear to define the concept of agency. Wisely they separately define an agent (at 38) and the contract of agency (at 42). It is clear, even from the text, that the latter is a misnomer. What is being defined is clearly a contract of mandate.

10. See J T R Gibson South African Mercantile and Company Law (5 ed 1983) chapter 7; Wille's Principles of South African Law (7 ed by J T R Gibson 1977) chapter 34; Lee and Honore Law of Obligations (2 ed edited by E Newman and D J McQuoid-Mason 1978) chapter 14; Wille and Millin's Mercantile Law of South Africa (18 ed by J F Coaker and D T Zeffertt 1984) chapter 8; A J Kerr The Law of Agency (2 ed 1979) chapter 1; De Villiers and Macintosh op cit note 9 articles 1 and 2. Of course, it is recognised that not all acts of agency arise out of appointment by contract (eg agency of necessity, agency by estoppel, and agency by ratification. See F E Dowrick 'The Relationship of Principal and Agent' (1954) 17 MLR 24) but it is felt that this is the most common occurrence.
11. See De Wet en Yeats Kontraktereg en Handelsreg (4 ed 1978 by J C de Wet en A H van Wyk) 85, and De Wet loc cit. De Wet observes that the term agency is used in a wide variety of senses and when it is used to embrace both the contract between principal and agent, and the act of one person concluding a juristic act on behalf of another, the result is a compression into one juristic concept of two things which belong to two juristic concepts, distinct from each other.
12. De Wet says that as a matter of fact, it frequently happens that the act of authorisation coincides with the establishment of a contractual relationship between principal and agent, and it may even be inferred from the existence of this contractual relationship, but this is a mere practical matter. In principle, the mechanism for the creation of the agency power is a juristic act distinct from the contract between principal and agent. De Wet's views, whilst somewhat revolutionary in the South African context are certainly not new. The clear distinction between the act of authorisation and the mandate or contract between principal and agent was demonstrated by Paul Laband in 1866, and it has been hailed as one of the major achievements of nineteenth century European legal science.

Ihering was an early pioneer when he wrote:

'In the case of agency based on mandate, the contract between mandatary and mandator determines the respective relation between these two persons, the internal side of respective relation; whereas principal and agent determines its quality towards third persons, the exterior side of the relation. The one side is completely without influence on the other one; their coincidence is purely accidental.' (Yearbook 1 (1857) 273 et seq, quotation translated by Müller-Freienfels infra).

Paul Laband ('Die Stellvertretung bei dem abschluss von Rechtsgeschäften nach dem Allgemeinen Deutschen Handelsgesetzbuch') went further. He contended that mandate and authority are not two sides of one and the same relation, but two independent and distinct relations which simply frequently overlap in many factual cases. See generally W Müller-Freienfels 'Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty' (1964) 13 American Journal of Comparative Law 193. Laband's distinction has been described as one of the most impressive examples of 'legal discovery' (H Dolle, quoted by Müller-Freienfels op cit at 199).

Note however, that for all its juridical purity and, by inference, superiority to the common law analysis of agency, the practical results reached by the two different approaches in fact do not differ to any great extent (see Muller-Freienfels op cit at 202, n46; K Grönfors 'Powers of Position in the Swedish Law of Agency' (1962) 6 Scandinavian Studies in Law 95 at 127.

13. See, for example, De Villiers and Macintosh op cit note 9 at 38; Joubert op cit note 4 at 3-4; Fridman op cit note 6 at 9-10, and in particular, at 10 n4.
14. By De Villiers and Macintosh op cit note 9 at 39-40.
15. Ibid.
16. This principle has been derived by De Villiers and Macintosh from the fact that a principal is only delictually liable for the acts of his agent, qua agent, when the agent is performing an act of agency. Considering the philosophical basis of vicarious liability, this limitation on the principal's liability is unsurprising. One wonders, however, how sound it is to extract a general principle from this source. See De Villiers and Macintosh op cit note 9 at 537-543.
17. Op cit note 1 at 81.
18. For the present author, Stoljar's comment (op cit note 6 at 267) that the most obvious characteristic of agency is that it must begin with some agreement or consent, since without such initial consent, the parties would be but strangers to each other, is unanswerable. Nevertheless, this does not refute De Wet's point that such agreement or consent and the authorisation creating the agency power are two distinct juridical concepts. See Seavey op cit note 8 at 863. In this context, the term 'consent' may have an artificial meaning. See Garvac Grain Co Inc v HMF Faure and Fairclough Ltd [1967] 2 All ER 353 at 358.

19. See for example, Froman v Robertson 1971 (1) SA 115 (A) at 118; Van Jaarsveld v Ackerman 1975 (2) SA 753 (A) at 758.
20. There is authority for this going back over 100 years. See Hamer v Sharp (1874) LR 19 Eq 108, and for example, Tuckers Land and Development Corporation (Pty) Ltd v Strydom 1984 (1) SA 1 (A).
21. A weak attempt to rationalise the legal position of the estate agent can be made on the basis that he does have the power to affect his principal's legal relations by making a misrepresentation (see Fridman op cit note 6 at 10n4).
22. F M B Reynolds, joint author of the thirteenth and fourteenth editions of Bowstead on Agency, op cit note 5 at 230. See also D R Stuart loc cit note 4.
23. This is a definition that De Wet loc cit note 1 uses at the start of his chapter on Agency and Representation. It is thought unlikely that the learned author was wittingly supplying a solution to the problem of estate agents and other commission agents.
24. Op cit note 10 at 6 - 12.
25. Professor Schmittoff remarks that -

"In no branch of the law of international trade is the cleavage between legal theory and commercial reality greater than in the law of agency". ('Agency in International Trade' 1970 I Hague Recueil des Cours 116). A remark, as Reynolds (op cit note 5 at 238), points out, that need not be confined to international trade.

26. De Villiers and Macintosh op cit note 9 at 3. The principal classification of such persons is a threefold one - there are agents, servants and independent contractors (of course, there do exist other legal personae who perform acts for others, such as trustees, messengers and mandataries). However, if one proceeds on the basis of the above conclusion that agency is simply a function performed by a properly endowed legal personae, it is doubtful whether agents should occupy a separate category. Interestingly, the American Restatement (op cit note 9 para 220 (1)) classifies all agents as either servants or independent contractors. Powell (The Law of Agency (1961) 9) is now of the same view, although English law in general does seem to support a threefold classification (Fridman op cit note 6 at 19).

27. Either the 'control' test or the 'organisation' test or a composite of the two which is the most popular approach nowadays. See De Villiers and Macintosh op cit note 9 at 16-26.
28. Despite the fact that it is sometimes loosely remarked that in order to earn his commission, an estate agent must prove that he was employed as such.
29. Colonial Mutual Life Assurance Society Ltd v Macdonald 1931 AD 412 at 433.
30. Sifris and Another NNO v Vermeulen Broers 1974 (2) SA 218 (T) at 221H. See also D 50 16 5 1.
31. Kerr ('Mandataries and Conductores Operis' (1979) 96 SALJ 323 at 325) cites Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A) at 56H and 59A-B as authority for this proposition, but it would seem to be based on the historical exception afforded to operae liberates, and is therefore not a strong point. Contra Sifris' case supra note 30. See W W Buckland A Textbook of Roman Law (3 ed 1963) 505.
32. John H Pritchard and Associates (Pty) Ltd v Thorny Park Estates (Pty) Ltd 1967 (2) SA 511 (D) at 517A-D. Kerr op cit note 31 at 326 is quite wrong in his assumption that an estate agent has a duty to obtain offers.
33. Bloom's Woollens (Pty) Ltd v Taylor 1962 (2) SA 532 (A). See also LAWSA op cit note 1 (Vol 17, 1983) 7 and M de Villiers 'Some Remarks on the Contract of Mandate' (1922) 39 SALJ 22 at 24.
34. E Kahn Contract and Mercantile Law through the Cases (1971) 331, remarks that '(i)t would be straining language to call him a mandatory'.
35. Per Wessels J in Benoni Produce & Coal Co v Gundelfinger 1918 TPD 453 at 458.
36. Per MacGregor J in Jacobs Levitatz & Braude v Kroonstad Roller Mills 1921 OPD 38.
37. D 50 14 1. See also Voet 17 1 4.
38. See De Villiers & Macintosh op cit note 9 at 224-238.

39. In S v Vanmali 1975 (1) SA 17 (N) Fannin J, in distinguishing an agent proper, spoke of an estate agent and broker in the same breath. See also Wessels J in Bird v Sumerville 1960 (4) SA 395 (N) at 410 - 'where an estate agent negotiates with a prospective purchaser in the sense of bringing his powers of persuasion to bear so as to convert him to a willing buyer, he is not really acting as an agent on behalf of his principal (the seller), but merely performing those services which he is required to perform in order to earn his commission'. See also Glass v A G Hendrie and Co (Pvt) Ltd 1957 (1) PH A6 (SR) where the intermediary in a sale of land was considered as a broker who was the agent of both buyer and seller. See also De Villiers and Macintosh op cit note 9 at 242-3.
40. Such an approach would help to solve at least one vexed problem in the law of estate agency, namely, the vinculum iuris between the estate agent and the purchaser. It is said that the broker acts, as it were, for both parties. See Benoni Produce supra note 35 at 459 - 'It is no doubt true that a broker who approaches a buyer or seller acts in the first instance as the agent of the person who employs him, but directly the other party is aware of the fact that he is a broker, he becomes the agent of both parties not with a plenary power to bind both parties as he chooses, but to communicate between them until they are ad idem'. See also J Story Commentaries on the Law of Agency (1882 9 ed) section 30. The estate agent, too, often acts as much for the purchaser as for the seller (Bird v Sumerville supra note 39). If, in law, he were considered to be the broker/agent of both parties, the problems concerning his right to claim commission or damages from a defaulting purchaser would be solved. Consider if, by statute, estate agents were granted a monopoly similar to that enjoyed by the stockbroker over the transfer of publicly quoted shares. In other words, suppose all transfers of land were required to be transacted through a 'real estate broker'. In return for this monopoly, maximum commission rates, a good deal lower than current normal rates, would be imposed. As the agent of both parties, the estate agent/real estate broker would recover half of his commission from each the seller and the purchaser. Should either of them default, he would remain liable for his portion of the commission, whereas the innocent party would be absolved. The only persons who would be worse off as a result of such a statute would be those sellers who would have sold their property without the aid of an estate agent. However, a seller who has himself found a buyer would have a very strong negotiating position vis-a-vis the estate agent. He would surely be able to negotiate a very low commission. No doubt there are many difficulties that this statute would cause, which I have not foreseen.
41. Op cit note 10 at 9-10.
42. Note 29 supra.
43. At 437.

44. At 442. However, once the agent sets out on a course to earn his commission by executing the mandate he then owes various duties (eg of good faith and of care) to his principal.
45. One can appreciate the difficulty of finding a proper niche for the estate agent when one considers that a leading commentator on English law has concluded that because of the absence of mutuality of promises, the contractual relationship between seller and estate agent is based not on a bilateral contract, but a unilateral contract closely akin to the offeror/offeree relationship in 'reward' cases (J R Murdoch 'The Nature of Estate Agency' (1975) 91 LOR 357; see also G H Treitel The Law of Contract (1983 6 ed) 33), ie the estate agent is the offeree of an offer made by the seller to pay a sum of money in return for the agent's bringing about of a specified event. This explains how the agent qualifies for his commission by performing an act which he is at no time legally obliged to carry out, or, if commenced, to complete. In the Canadian case of Bradley-Wilson (1954) Ltd and Oke v Canyon Gardens Ltd and Heal (1965) 53 WWR 413 at 415, Sheppard JA was firmly of the view that estate agency was based on a unilateral contract and in fact, the learned judge equated it with the locus classicus of reward cases, Carlill v Carbolic Smoke Ball Co (1893) 1 QB 256. However, it is submitted that whilst such an analysis may describe the estate agent's right to commission, it hardly provides a foundation for his fiduciary duties towards the seller, or the basis for his liability for misrepresentation, amongst other things. C R McConnell attacks the theory ((1983) 265 Estates Gazette 547) and Murdoch in the new edition of his book (2 ed 1984) seems less sure.
46. Op cit note 34 at 316. The learned professor remarks that the distinction must be in the effects of the two types of contract, how the obligations under them are discharged, and how the two contracts can be terminated.
47. One cannot use the circular reasoning that because it has hitherto been held that the estate agent receives a mandate from the seller of property to 'find a purchaser' that he must, therefore, be a mandatary.
48. See note 31 supra and S R Van Jaarsveld and W N Coetzee Arbeidsreg (1977) 13-16. The learned authors are of the opinion that this is the only distinction between a mandatary and an independent contractor (at 16). They conclude that the estate agent is a mandatary.
49. Ongevalle Kommissaris v Onderlinge Versekerings-Genootskap AVBOB 1976 (4) SA 447 (A) at 463. Contra, perhaps, Smit v Workmen's Compensation Commissioner supra note 31 at 68, although the Court was distinguishing between a conductor operis and a conductor operarum.
50. Colonial Mutual case supra note 29 at 433.

51. Kerr op cit note 31 and Smit's case supra note 31 at 61G. See also Stoljar op cit note 6 at 268.
52. E Kahn op cit note 34 at 332. In MacKenzie v Flight 1922 TPD 407 at 409 Mason J referred to estate agency as a contract for a special service. The phrase often refers to locatio conductio operis faciendi, which is not an appropriate description of estate agency, but is thought that the learned judge was not using the phrase in that sense.
53. See Taylor and Gibson v Behr and Co (1904) 21 SC 277, approved in Hyams v Wolf and Simpson 1908 TS 78. Certainly Milne JP seemed to place some reliance on these decisions in George Ruggier & Co v Brook 1966 (1) SA 17 (N) at 24.
54. In Cowley and Another v Hahn 1987 (1) SA 440 (E), the estate agent recovered his commission from the purchaser, seemingly on the basis of a stipulatio alteri, although the issue was clearly not fully ventilated. A similar result obtained in George Ruggier's case supra note 53, although the facts in that case were extraordinary.
55. See Minnaar v Judgeow 1964 (1) SA 770 (D) at 771G and 776A; John H Pritchard's case supra note 32 at 513D-E; Raven Estates v Miller 1984 (1) SA 251 (W) at 252H; and in particular Tony Morgan Estates v Pinto 1982 (4) SA 171(W); Pace Real Estate (Pty) Ltd v Wilson 1983 (3) SA 753 (W) at 754E.
56. See counsel's heads of argument in Phillips v Aida Real Estate (Pty) Ltd 1975 (3) SA 198 (A).
57. Mutual Life Insurance Co of New York v Hotz 1911 AD 556 at 567; CIR v Estate Crewe 1943 AD 656 at 674. Acceptance may be tacit - see Tony Morgan Estates v Pinto supra note 55.
58. Tradesmen's Benefit Society v Du Preez (1887) 5 SC 269.
59. Nine Hundred Umgeni Road (Pty) Ltd v Bali 1986 (1) SA 1 (A).
60. Most of the controversy centres on whether or not the third party acquires a right immediately the promittens and stipulans reach agreement, and what the content of such a right is. J C de Wet 'Die Ontwikkeling van die Ooreenkoms ten behoeve van 'n Derde' (Leiden 1940) savages most of the commonly-held notions about the stipulatio alteri. See also J Kerr Wylie 'Contracts in Favour of Third Parties' (1943) 7 THRHR 94; L Getz 'Contracts for the Benefit of Third Parties' 1962 Acta Juridica 38; G W Dold Stipulations for a Third Party (1948) and De Wet en Yeats op cit note 11 at 92 - 99.

61. See D B Hutchison 'Unravelling the Stipulatio Alteri' 1974 (3) Responsa Meridiana 1 at 1-2.
62. See, for example, Hutchison op cit note 61 at 6-7.
63. Jankelow v Binder Gering and Co 1927 TPD 364 at 371.
64. In Crookes NO and Another v Watson and Others 1956 (1) SA 277 (A) at 291 Schreiner JA said that 'a contract for the benefit of a third person is not simply a contract designed to benefit a third person - it is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two'; see also Salisbury Bottling Co (Pvt) Ltd v Lomagundi Distributors (Pvt) Ltd 1965 (3) SA 503 (R); George Ruggier's case supra note 53 at 23H; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd 1984 (3) SA 155 (A) at 172; Consolidated Frame Cotton Corporation Ltd v Sithole and Others 1985 (2) SA 18 (N) at 24; and particularly Barnett and Another v Abe Swersky & Associates 1986 (4) SA 407 (C) at 411F.
65. 1921 TPD 376.
66. Counsel for the municipality relied strongly on the case of Taylor & Gibson v Behr and Co supra note 53 in which it was held that a stipulation that the purchaser of land would pay the auctioneer's commission, was for the benefit of the auctioneer, who recovered his commission. Stratford J distinguished it on the grounds that at the time when the conditions of sale were drawn up and signed, there was no pre-existing liability of the sellers to the auctioneer, so, whilst it was true that the sellers had an interest in exacting the stipulation, they were to derive no benefit from its performance. However, in Baikie's case it was to the material benefit of the seller to have a pre-existing liability discharged, which gave rise to the inference that his intention was to benefit himself and no one else. If this test is applied in casu, the purchaser has no pre-existing liability to the estate agent which the seller is discharging for him and he obtains no direct benefit from the performance of the stipulation that the seller shall pay the estate agent's commission. Therefore, in terms of Stratford J's distinction, one could indeed contrive to analyse the deed of sale as a stipulatio alteri. However, the learned judge put a gloss on the distinction by pointing out that to ascertain where the benefit of the performance lies is of great and sometimes decisive importance in ascertaining the intention of the alleged stipulans, but it was not always decisive and could never override the clear intention of the parties.

67. In reaching this conclusion the learned judge relied on the following passage from Pothier (A Treatise on the Law of Obligations or Contracts, a translation of Traité des Obligations (1821) sec 58):
- 'It is not stipulating for another but for myself when I stipulate that something shall be done for a third person, if I have a personal and appreciable interest in its being done.'
68. 1951 (3) SA 371 (A).
69. 'Maar een of beide partye mag op ander maniere as deur hul handtekening te kenne gee dat hul ooreenkom op terme wat in 'n geskrif vervat is; en as hul weersydse instemming met die skriftelike terme dan bewys word, is hul net soseer daaraan gebonde asof hul dit onderteken het' (per Fagan JA at 375H).
70. At 376D-H.
71. 1953 (3) SA 180 (T).
72. At 185.
73. See Phillips v Aida Real Estate supra note 56 at 206.
74. In Wann v Dollie 1954 (2) SA 616 (C) it was held: 'These two cases indicate clearly that in a contract between A and B, where B undertakes to pay commission to C, this undertaking amounts to an offer to C, on the acceptance of which, he is entitled to sue B'. . In Bird v Sumerville and Another 1960 (4) SA 395 (N) at 403 the relevant part of Baker's case was approved en passant by Milne J, and in George Ruggier's case supra note 53 Milne JP, although basing his decision on a stipulatio alteri, observed that he thought that in any event there was a direct offer made to the estate agent which was capable of acceptance by him. The seller in Roux v Schreuder 1968 (3) SA 616 (O) was held to have contracted directly with the estate agent, but the court held that this did not alter the general rule that to be entitled to his commission, the agent had to introduce a willing and able purchaser, which he had not done.
75. It is trite that a promise to pay made seriously and deliberately and with the intention that a lawful obligation should be established, is binding and founds a good cause of action: Conradie v Rossouw 1919 AD 279 at 288-9.

76. The issue of novation of an obligation does not arise. An undertaking to pay is equivalent to an acknowledgement of debt (Western Bank v Pretorius 1976 (2) SA 481 (T) at 484B; Inglestone v Pereira 1939 WLD 55 at 65) and it is clear that an acknowledgement of debt may create a new, additional cause of action: Adams v SA Motor Industry Employers Association 1981 (3) SA 1189 (A); Chemfos Ltd v Plaasfosfaat (Pty) Ltd 1985 (3) SA 106 (A).
77. The new, acknowledged obligation co-exists with any old obligation that may or may not exist.
78. Supra note 68.
79. Supra note 71.
80. In Meyer v Kirner 1974 (4) SA 90 (N) it was held that on the facts, a clause regulating payment of commission was a material one, the omission of which offended against the statute requiring all material terms of a contract of sale of land to be in writing.
81. The maxim usually arises in cases where a party, although he possesses animus contrahendi in the broad sense of intending to enter into a contractual agreement with his cocontractant, disputes the content of a term to which allegedly he has agreed - see Burger v Central South African Railway 1903 TS 571; Du Toit v Atkinson's Motors Bpk 1985 (2) SA 893 (A). However, the issue here is whether the seller intends to contract at all with the estate agent. The seller's mistake, if any, relates to the legal effect of his signature to the deed of sale. In George v Fairmead (Pty) Ltd 1958 (2) SA 455 (A), part of the appellant's case was that he had not meant to sign a contractual document. Fagan CJ held that in order to avoid the application of the maxim, the appellant would have to prove that he was misled as to the purport of the words to which he was signifying his assent. It is now clear that he does not have to be actively misled (see text to note 84).
82. National & Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A).
83. Du Toit's case supra note 81 and in particular Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd 1986 (1) SA 303 (A).
84. Spindrifter's case supra note 83 at 316D-317B and 319B.

85. Supra note 83.
86. This formulation appears in Spindrifter supra note 83 at 316.
87. Ordinarily, an estate agent who claims his commission bears the onus of proving the existence of a mandate (Martin v Currie 1921 TPD 50), the terms of the mandate, including the event upon the occurrence of which it was agreed that he would be entitled to his commission, and that he was the efficient cause of that event's occurrence. The agent who sues on the promise contained in the deed of sale presumably has to prove none of these elements. At best, the absence of any of these elements might afford the seller a defence. See D C Wylde & Co v Sparg 1977 (2) SA 75 (E) and in particular Lieb and Another NNO v I Kuper & Co (Pty) Ltd 1982 (3) SA 708 (T).
88. If an opportunistic estate agent who has not been given a mandate, helps to arrange a sale between seller and purchaser, and obtains the seller's signature to a standard form deed of sale which contains a promise by the seller to pay the agent, the seller's ability to rely on iustus error will be considerably reduced. He will still be able to plead that he thought the document merely regulated his relationship with the purchaser, but he will not be able to contend that, by reason of a prior relationship with the agent, he reasonably did not realise that a new obligation was being created.
89. The conclusion that the deed of sale contains a contract between the estate agent and the seller may have a further drawback. It seems that the parol evidence rule may come into play. In Baker's case supra note 68, it was held that evidence by the seller that his written promise to pay the estate agent should be modified by a verbal condition ('no payment, no commission') was inadmissible as such a prior oral agreement conflicted with the written memorial of the parties' transaction. Similarly, in Wann v Dollie supra note 74, the agent's counsel contended that evidence of a prior oral agreement and of a subsequent oral agreement, varying the terms of the initial oral agreement should not be admitted as it offended against the parol evidence rule. The Court did not have to decide this point. See also Jeffrey v Andries Zietsman (Edms) Bpk 1976 (2) SA 870 (T) at 873.

It is submitted that the parol evidence rule is not a serious obstacle for the seller. It is settled law that the seller may lead evidence to show that the document is not a contract between himself and the estate agent: Beaton v Balachin Bros 1920 AD 312 at 315. This is, after all, his main object in these cases. If the seller fails in this respect it is submitted that he will usually still be able to lead evidence modifying the terms of his promise because it is also settled law that the rule only applies to documents which the parties have agreed are intended to embody all of the terms of their contract. The estate agent would be hard put, it is submitted, to contend that one brief sentence in a deed of sale

encapsulated his entire commercial relationship with the seller. There is nothing to stop parties recording a part of their contract in writing and leaving the rest oral. See L H Hoffmann and D T Zeffertt The South African Law of Evidence (3 ed 1981) 231-236.

90. Where the event which entitles the estate agent to his commission is the conclusion of a binding sale (this is the norm - Brayshaw v Schoeman en Andere 1960 (1) SA 625 (A)), then once such a sale has been concluded, the estate agent may recover his commission from the seller, even if the purchaser later resiles (provided he does not do so through an inability to pay which existed at the time the contract was concluded). See Levy v Phillips 1915 AD 139; Gluckman v Landau & Co 1944 TPD 261.
91. Many contracts for the sale of land are made subject to the fulfilment of a suspensive condition that the purchaser is able to raise the necessary mortgage finance. It is open to the parties to specify that the agent shall not be entitled to his commission until the sale becomes enforceable.
92. That is, before the time for the fulfilment of the condition has elapsed.
93. Supra note 56.
94. At 206F.
95. L Tager 'The Estate Agent's Commission: Let the Purchaser Beware' (1976) 93 SALJ 271 at 272.
96. Nominally, the Court's decision was based on two grounds, but Tager supra note 95, believes that the second ground was the real basis on which the decision rested. This second ground concerned the omission by parties to insert the date of expiry of the offer which meant that the purchaser was entitled to withdraw his offer with impunity.
97. Inter alia the estate agent presented the document to the purchaser for his signature whilst the purchaser was sitting in a barber's chair having his hair cut(!) The purchaser had no time to read the whole document.
98. See the judgment at 207 in particular, and Tager's comments op cit note 95 at 273. See also Jeffrey v Andries Zietsman supra note 89 at 872H and 873H. In Commercial Business Brokers v Hassen 1985 (3) SA 583 (N), the purchaser failed in an action against an estate agent who was held to be entitled to retain the commission he had deducted from the purchaser's deposit in terms of a clause in the deed of sale between the purchaser and the seller, even though that contract ultimately fell away because of the failure of a suspensive condition.

99. Of course, it is factually possible that the purchaser might mistakenly believe that the 'penalty' clause merely regulates matters between himself and the seller. However, the test in regard to iustus error is the objective test of a reasonable man: Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd 1984 (3) SA 537 (W). It is submitted that, generally, a purchaser who has read the 'penalty' clause will struggle to satisfy such a test in relation to his mistaken belief.

TREATISE III

CONDUCT BY THE SELLER WHICH PREVENTS THE ESTATE AGENT FROM
EARNING HIS COMMISSION

1. INTRODUCTION

An estate agent is usually instructed by the seller of a property. This paper deals with the right of action of the estate agent when the conduct of the seller deprives the agent of the opportunity to earn his commission. Such conduct may occur before or after the agent has found a suitable purchaser. In either case, it prevents the occurrence of the event which would have entitled the agent to claim his commission. Such prevention may in fact be lawful. Where it is unlawful, the estate agent's usual remedy is a claim, not for commission, but for damages for breach of mandate. However, exceptionally, in appropriate circumstances, the agent may have an action for his full commission on the basis of the doctrine of fictional fulfilment. The question whether the seller's conduct amounts to a breach of his promise to the agent can be addressed more lucidly after a prior examination of the nature of the seller's promise.

2. THE NATURE OF THE SELLER'S PROMISE TO THE AGENT

The common mandate of the estate agent is to 'find a purchaser'. Obviously, the estate agent is under no obligation to fulfil this mandate. It may prove impossible to do so. Moreover, it is settled law that, in general, the agent has no duty even to begin to 'find a purchaser'.¹

His contract with the seller is therefore not one involving mutual promises to perform. It has been held that the contract between the seller and the estate agent is merely a promise binding on the seller to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent.² A number of observations may be made.

First, it has been noted that the seller pays not for a service, but for a result.³ The courts have consistently held that the mere introduction of a person who is willing and able to purchase, whilst it may be all that the agent can effectively achieve, is normally insufficient to entitle him to commission.⁴ It is said that the common intention of the parties generally envisages that the agent will be entitled to his commission only when a further event occurs - usually the conclusion of a binding sale.⁵ Clearly then, the seller's promise to pay is subject to the suspensive condition that such further event occurs. Note that the occurrence of the agreed event is utterly outside the control of the agent, as he usually plays no material part in the actual conclusion of the contract between purchaser and seller.⁶ It would seem, therefore, that a juridical distinction exists between an agent's performance of his mandate and his right to commission.⁷

Secondly, it is clear that the agent need not actually 'introduce' a purchaser in the ordinary sense of that word.⁸ What is required is that the efforts of the agent should be the 'efficient cause' of the conclusion of the sale.⁹ Of course, often¹⁰ (but not

always¹¹) it is precisely the initial introduction of a suitable purchaser by the agent which is held to be the 'efficient cause' of the sale.

One concludes that, as a general proposition,¹² the seller's promise is to pay the estate agent a commission if the efforts of the agent are the efficient cause of the seller's concluding a binding sale.¹³ Clearly, however, the parties may, in a particular case, agree otherwise.¹⁴ For example, they may agree that the agent's right to commission should depend on the sale's being not merely binding, but also enforceable.¹⁵ Or they may agree that it should depend on payment by the purchaser of the purchase price,¹⁶ or even that it should not depend on any further event, eg the estate agent should be entitled to his commission upon the mere introduction of a person willing and able to purchase.¹⁷ A wide variety of agreements as to when the agent's right to commission should accrue, are factually possible.¹⁸

3. THE LAWFULNESS OF CONDUCT BY THE SELLER WHICH INTERVENES TO PREVENT THE AGENT FROM EARNING HIS COMMISSION

Whatever event the parties agree upon as the event which entitles the estate agent to commission, that is the event which suspends the seller's promise to pay. It is only upon the suspensive condition being fulfilled as a result of the agent's efforts that his right to commission accrues.

However, the seller's conduct may intercede in various ways with the effect of preventing the suspensive condition from being fulfilled. For example, the seller may change his mind and refuse to sell to the proposed purchaser found by the agent, or, if the agent has not yet found a purchaser, the seller may change his mind, and refuse to sell at all. To this end, he may seek to revoke the agent's mandate. The seller may wish to sell his property through another agent, or to a purchaser he has himself found. It will be shown that, in general, such conduct is lawful. However, a specific term of the mandate may limit the seller's right so to conduct himself, eg the conferment of a sole agency. Where the seller's conduct is unlawful, the agent may normally claim damages for breach of mandate, but not his commission.¹⁹ However, in limited circumstances, the agent may be able to claim his full commission on the basis of the doctrine of fictional fulfilment.

3.1 Fictional Fulfilment

The Appellate Division has stated the doctrine of fictional fulfilment as follows:

'... a condition is deemed to have been fulfilled as against a person who would, subject to its fulfilment, be bound by an obligation, and who has designedly²⁰ prevented its fulfilment, unless the nature of the contract or the circumstances show the absence of dolus on his part.'²¹

The meaning of dolus in this context is somewhat obscure.²² However, it is at least clear that the term is not confined to the narrow sense of fraud or want of good faith. It is used in its 'widest sense'.²³ It is submitted, though, that even allowing for usage in such a sense, the term dolus is not a particularly useful guide, at least in cases of estate agency. For example, where the event which suspends the seller's promise to pay is the usual one, namely the conclusion of a binding contract of sale, the doctrine of fictional fulfilment has little role to play.²⁴ So, it is clear from the case law that even if an entirely suitable purchaser has been introduced, and the seller designedly (and even in bad faith towards the estate agent) prevents fulfilment of the condition by refusing to sell, the estate agent will generally not be able to invoke the doctrine of fictional fulfilment.²⁵

On the other hand, where the agreement between the agent and the seller requires more²⁶ than the mere conclusion of a binding contract, the agent may rely on fictional fulfilment in two typical instances²⁷:

- a) Suppose that the event which entitles the agent to his commission is the conclusion of a binding and enforceable sale. Further, suppose that a binding contract has been concluded between the seller and the purchaser which is not yet enforceable because it is subject to an unfulfilled suspensive condition. The seller unlawfully resiles from the binding contract before the time for fulfilment of this condition has elapsed.

- b) Suppose that the event which entitles the agent to his commission is the payment of the full purchase price by the purchaser. Suppose a binding contract has been concluded between purchaser and seller. The seller unlawfully resiles before payment of the purchaser price.

It is submitted that in both of these instances, the agent will normally be able to recover his full commission.²⁸

What then determines the success of a claim based on fictional fulfilment? De Wet and Yeats offer a convincing alternative to the concept of dolus,²⁹ which, it is submitted, is not truly the differentiating factor. The learned authors explain that the mere fact that the conduct of one of the parties intentionally prevents fulfilment of the condition does not necessarily bring the doctrine into operation. Sometimes the parties expect that one of them may so conduct himself. A condition should be regarded as fictionally fulfilled only if the debtor prevents fulfilment in a manner contrary to the parties' intentions.³⁰ So, as is mentioned above, although the seller may well act dolo in refusing to sell his property, a claim against him based on fictional fulfilment will fail because it is usually the common intention of the parties that the seller has the right to refuse to sell for whatever reason. Where, however, the seller has, as it were, sanctioned the efforts of the agent by concluding a binding sale, it is usually commonly envisaged that, from that moment, the seller should do nothing to cause the condition (of his promise to pay) to fail. If he does so by unlawfully

resiling from the binding sale, or even by reaching an agreement with the purchaser to rescind the contract,³¹ the estate agent will be able to claim his full commission. Of course, if it is the purchaser who unlawfully resiles,³² or if the condition to which the sale is subject fails naturally, no question of fictional fulfilment arises.

3.2 Seller's Refusal to Sell

The point has already been made that it is usually the intention of the parties that the seller shall have an unfettered choice whether or not to sell.³³ In fact, it is arguable that the seller's right in this respect is a naturalium of many contracts between estate agents and sellers of property.³⁴

Of course, the parties may agree, tacitly or expressly, that the seller is not entitled to be capricious in this regard; that his refusal to sell will be unlawful, and will justify invocation of the doctrine of fictional fulfilment, unless the refusal is made with just or reasonable excuse. The difficulties of persuading a court that such an agreement has been reached are evident in the seminal English case of Luxor (Eastbourne) Ltd v Cooper.³⁵

Theoretically, the parties may go further, and agree that any refusal to sell by the seller shall be unlawful. In substance, such an agreement has the same effect as one where the parties have agreed that the mere introduction of a suitable purchaser is the event

which entitles the estate agent to commission. In such a case, once the agent has introduced such a purchaser, his right to commission accrues. The issue of the lawfulness of any refusal by the seller to sell does not arise.

Note that the grant of a sole agency or sole selling rights does not, as a rule, affect the seller's right to refuse to sell.³⁶

3.3 Seller Himself Finds a Purchaser

It is settled law that, as a general rule, a seller who employs an estate agent to find a purchaser is none the less entitled to sell his property directly to a purchaser found by himself. He may do so even after a proper offer has been submitted to him by the purchaser introduced by the agent,³⁷ unless of course it has been specifically agreed otherwise, eg where the parties have agreed that the mere introduction of a suitable purchaser will entitle the agent to his commission.

The only difficulty in this regard relates to the issue of sole agency. In such a case, the exact wording of the mandate is crucial. It is settled that the mere conferment of a 'sole agency' does not per se preclude the seller from finding a purchaser himself. In general, sole agency simply means that no other agent will be employed.³⁸

However, there is an argument by certain writers³⁹ that if the seller gives to the estate agent the 'sole right to sell' or 'sole selling rights', he relinquishes the right to sell to a purchaser that he has himself found in the sense that if he does so, he commits a breach of mandate, and will be liable in damages to the agent. The limited case law that exists tends to support this conclusion. In Nel v Grobbelaar & Viljoen Agentskappe (Edms) Bpk⁴⁰ the relevant part of the agent's mandate was -

'Hierdie opdrag (om die eiendom te verkoop) ... verleen beslis die alleenreg aan die ... eiendomsagentskap om die eiendom te verkoop.'

By the time the agent had found a purchaser, the seller had himself already sold the property. It is submitted that the seller, having given the sole right to sell to the agent, had committed a breach of mandate. However the estate agent failed to recover. Brink J was unpersuaded that the parties intended that the seller would be liable to the agent should he sell his property himself. It was Lichtenberg J who crisply considered the difference between the terms alleenreg ('sole right (to sell)') and alleenagentskap ('sole agency'). The learned judge held that, while the seller could not be compelled to sell his property, if he did sell it to a purchaser he himself had found, he might well be liable in damages for breach of mandate.⁴¹ However, as the estate agent had claimed his commission, not damages, he was not entitled to succeed.

Further support for the academic view is found indirectly in a recent Appellate Division decision,⁴² so there would appear to be little doubt that the seller's conduct, in these circumstances, is unlawful.

3.4 Seller Sells Through Another Agent

Although it is true that, in terms of the ordinary contract between the estate agent and the seller, the agent has no duty even to begin to undertake the task of finding a purchaser,⁴³ there exists a counterweight in that the seller is not constrained to rely on one agent - he may employ as many agents as he likes, and yet, generally, he will pay just one commission to the agent who was the efficient cause of the agreed event, such as the conclusion of a binding sale. The other agents will not recover their expenses (if any), and their mandates will, at this stage, terminate automatically, probably by reason of an implied term to that effect.

Contrast the position of sole agency. It is regarded as trite that if during the currency of a sole agency, the seller employs, and sells his property through, another estate agent, he commits a breach of mandate vis-a-vis the sole agent, and will be liable in damages.⁴⁴ However, it is frequently the case that the seller embarks on such a course out of frustration or dissatisfaction with the sole agent. The normal rule that the estate agent has no duty to begin to undertake the task entrusted to him, seems out of place, given the fetter of sole agency. Is there any scope for the contention that the sole agent has an exigible obligation to take 'reasonable steps'

or to use his 'best endeavours' to find a purchaser?⁴⁵ There is no South African precedent on this point but in England, Goddard CJ has remarked⁴⁶ that when the seller employs a sole agent, it must be on the understanding that the agent will do his best to find a purchaser, and will be committing a breach of his contract if he does not do his best, even though his search might prove unsuccessful.⁴⁷ Otherwise the seller obtains no benefit by the appointment of the sole agent.⁴⁸

Were such an obligation to be recognised in South African law, its source would almost invariably be an implied term of the contract. It is arguable that such a term would be implied ex consensu. In other words, the seller would have to establish, in accordance with the normal 'officious bystander' test,⁴⁹ that the parties tacitly varied the naturalium of the ordinary estate agency contract that the agent has no duty even to begin to find a purchaser. However, it would seem preferable to regard the term in question as being implied ex lege. On that construction, the mere conclusion of a sole agency agreement per se gives rise to the implication of a different naturalium, namely: The agent has a binding obligation to take reasonable steps to find a purchaser (unless it is otherwise agreed).⁵⁰ However, this is the bolder view, and it would not be surprising if, ex abundanti cautela, the courts were to prefer the former view in this untraversed field of the law.

Whatever the source of such an obligation, assume for the moment that it does exist. Assume further that the sole agent breaches it. The disgruntled seller, who may wish to cancel the sole agency and appoint other agents, or may wish to sell his property forthwith through another agent,⁵¹ must nevertheless tread with some caution. If he does sell his property through another agent, and the sole agent sues him for damages, it may not be sufficient for the seller to assert that it is the sole agent who is the culpable party owing to his breach of his obligation to use his best endeavours to find a purchaser. At the least, the law requires the seller to establish that such a breach gave him a right to cancel the contract.⁵² In addition, he ought to notify the sole agent, in clear and unequivocal terms, that he is cancelling the contract,⁵³ before he sells his property through another agent. However, his failure to do so will usually not seriously prejudice him.⁵⁴ If the sole agent brings a suit, cancellation of the contract will presumably occur in the pleadings, or even earlier. As a result, the delinquent sole agent will not be able to recover damages for the loss of opportunity to earn his commission.⁵⁵

It is obvious, therefore, that the crucial issue is whether, and in what circumstances, the seller will have the right to cancel the sole agency. There are two factually possible, but unlikely circumstances - the sole agency agreement may have reserved to the seller the right to cancel upon breach, or the agent's conduct may amount to repudiation.⁵⁶ More probably, the seller will have to establish that the agent's conduct amounts to defective or

inadequate performance (ie positive malperformance), and that the breach is sufficiently serious to justify cancellation.⁵⁷ If he can do this, no further problem arises. The seller's sale of his property through another agent will not amount to an unlawful repudiation on his part. But there is one significant danger: If the agent has been thoroughly idle, his conduct might be construed as negative malperformance, ie failure to perform timeously.⁵⁸ In such a case, the seller will have the right to cancel immediately⁵⁹ only in the unlikely event that, expressly or impliedly, time is of the essence of the contract and the agent is in mora. However, in most cases, neither of these prerequisites will have been met,⁶⁰ so the seller will have to serve on the agent a combined demand for performance and notice of rescission.⁶¹ The agent will still have a reasonable time thereafter to use his best endeavours to find a purchaser. It must be emphasized, therefore, that if the sole agent's indolence is construed as negative malperformance, precipitate behaviour by the seller, such as a hasty sale through another agent, or the purported cancellation of the sole agency, followed by the appointment of other agents, will in all probability, amount to actionable repudiation.⁶²

In practice, given that most sole agency agreements are of a fixed duration of between two and four months, the seller may be better advised to pressurise the estate agent into more valiant efforts whilst simply waiting for the agreement to expire. In fact, sellers of property might be best advised not to make sole agency agreements at all. Where the sole agency is not one of fixed duration, the

seller will normally have the right in any event to terminate the sole agency upon reasonable notice.⁶³ Of course, the above discussion is purely hypothetical. No South African court has decided that a sole agent is under any exigible obligation. It may be that when the matter next arises for decision, the court will treat termination of a sole agency on much the same basis as termination of an ordinary estate agency contract,⁶⁴ as discussed below.

3.5 Revocation of the Estate Agent's Mandate

By revoking the estate agent's mandate, the seller can deny the agent the opportunity of earning his commission. Sometimes such a revocation occurs because the seller is merely dissatisfied with the agent (but an equally good course of action in this event is simply to appoint further agents). More frequently the seller wishes to terminate his relationship with the agent because he has changed his mind and no longer wishes to sell, or because, in the case of a sole agency, he wishes to sell through another agent, or, where he has granted an agent 'sole selling rights', because he wishes to sell to a purchaser that he has himself found.

What latitude does the seller possess unilaterally to revoke the agent's mandate? The revocation of an agent's mandate is very often confused with the revocation of an agent's authority to bind his principal.⁶⁵ Although it is fairly well settled that, with some possible exceptions, a principal may unilaterally revoke his agent's

authority, even if it is stated to have been given irrevocably,⁶⁶ the idea of unilateral revocation of an agent's mandate faces a serious difficulty. The formation of a mandate is a bilateral juristic act. It would seem that, like any other bilateral contract, the agent's mandate should not be unilaterally terminable, with impunity. However, there are arguments in favour of the possibility of unilateral termination.

While an estate agent is searching for a suitable purchaser, his contract of mandate is executory. De Wet notes⁶⁷ that there are clear statements by the old authorities to the effect that an executory contract of mandate can be terminated unilaterally by either party. That might seem to conclude this issue, but De Wet is less than enthusiastic about this view of the old authorities. The learned author believes that it stems from the idea that mandate was a gratuitous contract. This is no longer the case in modern times when people make a profession out of carrying out tasks for others for remuneration. He feels that one should be less ready to recognise the revocability of mandates these days, always bearing in mind that it is the intention of the parties which is paramount.⁶⁸ However, that intention is infrequently clearly expressed in the seller-estate agent relationship. Many mandates are entered into without a time being fixed for their duration, and without provisions relating to their termination. Sometimes mandates are stated to be irrevocable. On the face of it, then, these agreements might endure in perpetuity, as a suitable purchaser may never be found.

However, there has been recent case law on the termination of agreements which appear ex facie to be of indefinite duration.⁶⁹ As one might expect the basis of these decisions involves the implied common intention of the parties. In the most recent case,⁷⁰ the Appellate Division stated that where an agreement is silent as to its duration, it is terminable on reasonable notice in the absence of a conclusion that it was intended to continue indefinitely. Moreover, when parties bind themselves to an agreement which requires them to work closely together and to have mutual trust and confidence in each other, it is reasonable to infer that they did not intend to bind themselves indefinitely.

The Appellate Division was, it is submitted, generalising about agreements containing mutual obligations. Provided one accepts that a sole agent will usually have an exigible obligation to take reasonable steps to find a purchaser, it seems clear that a sole agency of no fixed duration may be terminated upon reasonable notice. However, it is submitted that the requirement of reasonable notice may not be necessary in ordinary cases of estate agency, which do not involve mutual obligations to perform.⁷¹ A number of reasons may be advanced in support of this submission. First, one of the reasons for requiring reasonable notice is the assumption that the parties intended to avoid the possibility of wasted expenditure in performing or preparing to perform their obligations.⁷² However, the conventional estate agent has no obligation to perform, no indemnity for his expenses,⁷³ and in fact, no obligation to incur any expenses. It has already been noted that he is paid not for

a service, but for a result.⁷⁴ Secondly, the agent for his part, ordinarily has the right summarily to terminate the mandate.⁷⁵ Thirdly, as the seller has both the right to refuse, summarily, to sell his property to a purchaser introduced by the agent, and the right to sell the property, at any time, through another agent, the prima facie inference must surely be against a requirement of reasonable notice.

Therefore, generally, apart from cases of sole agency, it is submitted that the seller need not give reasonable notice to the estate agent - he may summarily revoke the mandate quite lawfully.⁷⁶ The foregoing discussion is based on the implication as to the parties' intentions. A shorter route to the same conclusion may be found in the assertion that, because of its peculiar nature, the estate agent's mandate bears the naturalium that unless the parties agree otherwise, the seller may summarily revoke it with impunity.

Of course, the seller cannot deprive an agent of his commission by revoking the agent's mandate just prior to concluding a sale with a purchaser introduced by the agent. Provided the agent's efforts during the currency of the mandate are the efficient cause of the sale, he is entitled to his commission even if the sale takes place after the termination of his mandate (whether or not such termination was inspired by an improper motive).⁷⁷

Finally, if a time has been fixed for the expiry of the estate agent's mandate, it would seem that unilateral revocation of the mandate

by the seller before that time, will probably expose him to a claim for damages.⁷⁸

4. ASSESSMENT OF DAMAGES

In a claim for damages by the estate agent, the court compensates the estate agent for the loss of the opportunity to perform.⁷⁹

It is possible that even if the seller had not committed an unlawful act, the agent may not have been able to find a suitable purchaser. Even if he had been able to do so, another agent may have found a purchaser already, or for one reason or another, a sale may not have eventuated. What has to be valued is the agent's chance of earning his commission.⁸⁰ As a result, it will be rare for the agent to recover his full commission as damages, although each case will, of course, turn on its own facts.⁸¹

5. CONCLUSIONS

In general, an agent will seldom have a successful claim for damages against the seller who prevents him from earning his commission. The seller does commit a breach of his contract of mandate if:

- 1) he sells his property through another agent during the currency of a sole agency agreement. However, it is submitted that the sole agent will usually have an exigible obligation to take reasonable steps to fulfil his mandate, failing which,

the seller will be justified in cancelling the sole agency, and in selling his property through another agent.

- 2) he himself sells his property when he has agreed not to do so. Such an agreement is not necessarily to be inferred from a sole agency agreement. The seller, at the very least, must confer 'sole selling rights' on the agent.
- 3) he revokes the agent's mandate before the agreed date of expiry, or where there is no agreed date of expiry, he revokes a sole agent's mandate without affording him reasonable notice.⁸²

Where the agent does find a suitable purchaser, there are limited circumstances in which the seller's conduct may prevent the earning by the estate agent of his commission, in a manner inconsistent with the parties' original intentions. In these circumstances, which do not include the seller's refusal to contract with the would-be purchaser, the agent may employ the doctrine of fictional fulfilment to recover his full commission.

FOOTNOTES

1. Bird v Sumerville and Another 1960 (4) SA 395 (N) at 410; John H Pritchard and Associates (Pty) Ltd v Thorny Park Estates (Pty) Ltd 1967 (2) SA 511 (D) at 517A-D.
2. Luxor (Eastbourne) Ltd v Cooper [1941] AC 108 at 124; accepted and approved by Murray J in Gluckman v Landau & Co 1944 TPD 261 at 267.
3. John H Pritchard's case supra note 1 at 517C. See also S J Stoljar The Law of Agency, its History and Present Principles (1961) 318.
4. Gluckman v Landau supra note 2 at 282, affirmed in Brayshaw v Schoeman en Andere 1960 (1) SA 625 (A) at 630.
5. Brayshaw v Schoeman supra note 4.
6. Moreover, the seller is in any event not obliged to sell his property.
7. Alternatively, one may view the situation as English law seems to do: The estate agent's entitlement to his commission and the completion of performance of his mandate do coincide; but a mandate to 'find a purchaser' is only performed when the agent 'finds' a person who, not only is willing and able to purchase, but also actually becomes a 'purchaser' by concluding a binding sale with the seller. See Boots v E Christopher & Co [1951] 2 All ER 1045.
8. See Vanarthdoy (Edms) Bpk v Roos 1979 (4) SA 1 (A).
9. There are many cases, especially where competing agents are involved, where it cannot be said that the second agent 'introduced' the ultimate purchaser, and yet it is implicit that he is the agent who is entitled to commission because he has been the efficient cause of the sale: Eschini v Jones 1929 CPD 18; Mostert v Goodwood Land & Property Agency 1940 (2) PH A61; Herbert Penny (Pty) Ltd v Jackson 1973 (2) PH A101 (D).

10. See for example Abel v Perks 1923 EDL 285; Webranchek v L K Jacobs & Co (Pty) Ltd 1948 (4) SA 671 (A); Van Aswegen v De Clerq 1960 (4) SA 875 (A); Wakefield and Sons (Pty) Ltd v Anderson 1965 (4) SA 453 (N); Volkwyn v Aida Real Estate (Pty) Ltd 1966 (2) PH A61 (T); Howard & Decker Witkoppes Agencies and Fourways Estates (Pty) Ltd v De Sousa 1971 (3) SA 937 (T); Roy Barrier & Co (Pvt) Ltd v Wakefield 1971 (2) PH A57.
11. See the cases cited in note 9 supra, and Peckover v Goldschmidt and Co (1881) 1 HCG 59; Mackie v Whyte & Turpin Ltd 1923 TPD 347; Barnard & Parry Ltd v Strydom 1946 AD 931; Gordon v Slotar 1973 (3) SA 765 (A); MLP Slabbert & Kie v Daubern 1975 (1) PH A20 (T); Alfred County Estate Agency (Pty) Ltd v Ebner 1979 (2) PH A38.
12. In Brayshaw v Schoeman supra note 4 it was held that, as a general proposition, a mandate to find a purchaser envisages the conclusion of a valid sale ('geldige koop') as the event which entitles the estate agent to commission, unless additional considerations or indiciae favour another construction. It is clear from the text (at 630) that Van Blerk JA was referring to a binding sale. Subsequent cases have interpreted Brayshaw in this fashion. See Reyneke v Botha 1977 (3) SA 20 (T) at 23G where a distinction is drawn between a valid and a binding contract.
13. In Gluckman v Landau supra note 2 at 273, it was stated:
- "[The agent need do no] more than introduce the eventual purchaser to the principal ... then if a sale to such person results ... and if the facts are that such introduction is the efficient cause of the conclusion of the sale (even though the agent may not have been the first introducer of the eventual purchaser ...) the commission has been earned."
- See too Aida Real Estate Ltd v Lipschitz 1971 (3) SA 871 (W) at 873F; Webranchek v L K Jacobs supra note 10.
14. In Luxor's case supra note 2 at 119-120, the Lord Chancellor made the following appropriate remarks:
- 'There is ... considerable difficulty, and no little danger, in trying to formulate general propositions on such a subject, for contracts with commission agents do not follow a single pattern and the primary necessity in each instance is to ascertain with precision what are the ... terms of the particular contract under discussion ... Each case turns on its own facts and the phrase "finding a purchaser" is itself not without ambiguity.'
- See also The Firs Investment Ltd v Levy Bros Estates (Pty) Ltd 1984 (2) SA 881 (A) at 885.

15. Brayshaw v Schoeman supra note 4 did not contemplate a sale which is subject to a suspensive condition, so it remains an open question whether, when a sale is subject to a suspensive condition, the agent's right to commission accrues, as a general proposition, when the binding sale is concluded or only when it becomes enforceable. Although there are cogent reasons to support the former proposition, the latter is more expedient and, in practice, many estate agents are content to agree that their rights to commission should accrue only when the sale becomes enforceable by fulfilment of any suspensive condition. At first glance, Naidu v Naidoo 1967 (2) SA 223 (N) appears to support the latter proposition, and thus to put a gloss on Brayshaw. In fact, however, Naidu v Naidoo can be safely ignored. In that case, it was held that the agent's right to commission depended upon a valid sale being entered into between seller and purchaser. Relying on Corondimas v Badat 1946 AD 548, the Court held that as the contract was subject to a suspensive condition, no valid binding agreement of sale had been concluded, hence the estate agent was not entitled to recover his commission. This form of reasoning has been seriously discredited: Tuckers Land and Development Corporation (Pty) Ltd v Strydom 1984 (1) SA 1 (A). In Commercial Business Brokers v Hassen 1985 (3) SA 583 (N) the parties had agreed that the agent's commission would become payable upon signature of the contract of sale. The agent was held to be entitled to his commission despite the fact that the sale fell away as a result of non-fulfilment of a suspensive condition to which it was subject.

16. Oliver v Diamond and Another 1955 (1) PH A22. D J Joubert Die Suid Afrikaanse Verteenwoordigingsreg (1979) 250, 258-9 curiously enough seems to think that such agreements are the norm. He cites no authority and one can only assume that he may have been misled by certain dicta in Brayshaw's case supra note 3 at 630. See also P H Havenga 'Die Reg Van 'N Eiendomsagent Op Betaling Van Kommissie' (1986) 49 THRHR 105.

As a general proposition, such a construction of the parties' agreement is the norm in English law: Boots v E Christopher & Co supra note 7. Such a construction makes the estate agent a virtual guarantor of the performance of the purchaser's obligations. It would require the clearest language to persuade a South African court that such an agreement had been reached: Badenhorst v Van Rensburg 1985 (2) SA 321 (T) at 330; De Villiers and Macintosh The Law of Agency in South Africa (3 ed 1981 by J M Silke) 380-382.

17. The probabilities are against a seller making such a disadvantageous agreement. It exerts unfair pressure on the seller's proper freedom of contract, for if he does not wish to sell to that particular purchaser or if he wishes to accept a better later offer made to him by another purchaser, he may do so only upon pain of paying the estate agent his commission for what has turned out to be a

fruitless introduction. He may thus end up paying two commissions on the sale of his property. In Christie Owen & Davies Ltd v Rapacioli [1974] 2 All ER 311 it appears that such an agreement was upheld.

18. In Midgley Estates Ltd v Hand [1952] 1 All ER 1394 it was held that an agreement that commission was to be paid 'as soon as our purchaser shall have signed a legally binding contract' meant that the agent was entitled to his commission upon the occurrence of that event, even though that purchaser was unable to pay. In general, this particular result would not obtain in South Africa: Roux v Schreuder 1968 (3) SA 616 (0).
19. Nel v Grobbelaar & Viljoen Agentskappe (Edms) Bpk 1983 (4) SA 436 (0).
20. In Preller v Jordaan 1956 (1) SA 483 (A) it was held that 'designedly' means with an intention to act inequitably.
21. MacDuff & Co Ltd v Johannesburg Consolidated Investment Co Ltd 1924 AD 573.
22. In Whyte v Da Costa Couto 1985 (4) SA 672 (A) at 680, it was remarked that the meaning of dolus in this regard has not yet been precisely delineated.
23. Koenig v Johnson & Co Ltd 1935 AD 262 at 271 per Wessels CJ. See also De Villiers and Macintosh op cit note 16 at 413 and R H Christie The Law of Contract in South Africa (1981) 136-9.
24. If the seller fails to conclude a binding contract because a purchaser cannot be found, or because he cannot reach agreement with the proposed purchaser, then the suspensive condition fails naturally. On the other hand, once a binding sale is concluded, the agent's right to commission accrues. If the seller or the purchaser later resiles, the seller remains liable to the agent: Levy v Phillips 1915 AD 139; Consolidated Estates & Trusts Ltd v Turnbull 1924 TPD 1; Gluckman v Landau supra note 2. In neither case does any question of fictional fulfilment arise.
25. Bird v Sumerville and Another 1961 (3) SA 194 (A) at 202. See also Gluckman v Landau supra note 2 at 273-280 where the authority to the contrary in Ismail v Prentice 1929 TPD 539 and in particular Boose v Zeederberg and Duncan 1918 CPD 283 is criticised. See also De Villiers & Macintosh op cit note 16 at 409-412, and particularly at 414.

26. Where, however, the event entitling the agent to commission is the mere introduction of a person willing and able to purchase who makes an adequate offer, it is difficult to see how the seller can act to designedly prevent this from happening. Even if such circumstances arose, it may be more properly a case of mora creditoris than fictional fulfilment.
27. The two instances will usually amount to bad faith by the seller towards the purchaser, rather than towards the estate agent. However, even as regards the estate agent, such conduct probably falls within the term dolus in its 'widest sense'.
28. Unless it was the common intention of the parties that the seller's repudiation would not make him liable for the agent's commission. See Oliver v Diamond supra note 16.
29. De Wet en Yeats Kontraktereg en Handelsreg (4 ed 1978 by J C de Wet and A H van Wyk) 136-7. The learned authors also make the reasonable suggestion that a condition should be regarded as fictionally not fulfilled if it is in fact fulfilled, but in a manner contrary to the parties' intentions.
30. This formulation clearly overlaps but is not coincident with the term dolus in its widest sense.
31. Gowan v Bown 1924 AD 550 at 565. On the peculiar facts of this case, the 'agent's' claim failed.
32. The purchaser is not 'a person who would subject to ... fulfilment (of the condition suspending the seller's promise to pay) be bound by an obligation' to the agent. In the second example, performance by the purchaser of his obligations is the very fact upon which the agent's right to commission is predicated, so his failure to recover his commission seems fair. Not so in the first example where the lack of vinculum iuris with the purchaser will operate rather harshly to deprive the agent of his commission. 'Acceptance' of the purchaser's repudiation will not constitute dolus on the part of the seller, it is submitted.
33. In this sense unfettered refers to lawfulness vis-a-vis the agent not to the seller's right actually to retain his property. Obviously no one can compel the seller to contract and to transfer his property.

34. It is submitted that the seller ought not to have to establish an implied term that it was the common intention of the parties that he should have an unqualified right to refuse to sell his property. Such a term ought to arise ex lege. It would then be for the agent to show that the parties expressly or impliedly agreed to vary such a term.
35. Note 2 supra at 53-4 and 61-2, approved in Gluckman v Landau note 2 supra at 274.
36. Bundshuh v Finnegan 1975 (1) SA 376 (C). It is only a sale of the property by himself or by another agent that may be unlawful in that event.
37. Gluckman v Landau supra note 2 at 275.
38. Michael James (Pty) Ltd v Trafford 1983 (2) PH A68 (C). See also Bentall, Horsley & Baldry v Vicary [1931] 1 KB 253; De Villiers & Macintosh op cit note 16 at 411; J R Murdoch The Law of Estate Agency and Auctions (2 ed 1984) 272-3.
39. De Villiers and Macintosh ibid, Murdoch ibid.
40. Supra note 19.
41. At 444.
42. The Firs case supra note 14.
43. Note 1 supra.
44. De Coning v Monror Estate & Investment Co (Pty) Ltd 1974 (3) SA 72 (E); Gazonis v Randland Trust 1971 (2) PH A56 (T).
45. See Murdoch op cit note 38 at 217-220.
46. His Lordship's judgment in Mendoza & Co v Bell (1952) 159 Estates Gazette 372 is summarised, not fully reported. See too E Christopher & Co v Essig (1948) Weekly Notes 461, also not fully reported.

47. Since the issue in both of these English cases was whether there was any consideration moving from the promisee, they are not strictly pertinent to South African law.
48. Murdoch remarks (op cit note 38 at 219) that since the vendor in Mendoza's case (supra note 46) had claimed that it was precisely because he was getting no benefit from the appointment of a sole agent that he should not be liable for breach of the sole agency agreement, his Lordship's reasoning assumes the very thing it sets out to prove. Murdoch raises two objections to the idea of an implied obligation to 'take reasonable steps' to find a purchaser. His first objection is that the content of the obligation is difficult to delineate. In the recent English case of Glentree Estates Ltd v Gee (1981) 259 EG 332 the client of a sole agent suggested that the agent was under a duty to advise him as to price and sale, to give him regular progress reports and to negotiate with the applicants in an effort to raise the price, but the Court expressed strong doubts as to whether any such duties were owed. However, in principle, mere difficulty in delineating the content of the obligation need not cast doubt on its existence, it is submitted. The second objection is that it would be extremely difficult for the seller to prove that a breach of such an obligation had caused any loss. With respect to the learned author, this is hardly relevant. The seller will seldom wish to sue the sole agent for damages. He will wish to cancel the sole agency agreement. To do so, he needs to prove breach, not loss.
49. Reigate v Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592 at 605; Van den Berg v Tenner 1975 (2) SA 268 (A).
50. There is a third possibility viz the ordinary naturalium of estate agency that the agent has no exigible obligation exists, but the fact of a sole agency gives rise to a prima facie inference that the parties have tacitly varied the naturalium. The sole agent would thus bear the duty of rebuttal even though the seller would bear the overall onus of proving the implied term concerning the exigible obligation.
51. There are other possible courses of action. It is possible, but unlikely, that the seller would wish to claim damages. He will have to show loss and that the agent's failure merely to take reasonable steps to find a purchaser was the cause of that loss. The seller might also seek a decree of specific performance. It is submitted that his prospect of success would, in general, be remote. In any event, few sellers would actually wish to have an indolent estate agent working on their behalf.

52. If the seller's conduct were to amount to a denial of his contractual liabilities, he would still be guilty of repudiation even if he honestly believed that he was entitled so to act: Dennill v Atkins & Co 1905 TS 282.
53. Stewart Wrightson (Pty) Ltd v Thorpe 1977 (2) SA 943 (A); Jaffer v Falante 1959 (4) SA 360 (C) at 362F, approved in Swart v Vosloo 1965 (1) SA 100 (A). See also A J Kerr The Principles of the Law of Contract (3 ed 1980) 391-3.
54. Although the sole agent generally has no indemnity for his expenses, as it is postulated that he is bound to take reasonable steps to find a purchaser, it must surely be envisaged by both parties that he will be expending both time and money. As a result, it is submitted that, if the seller fails to notify the estate agent of the cancellation, the estate agent may well have a claim for wasted expenditure occasioned by such failure, despite the fact that he was originally in breach of his obligations to take reasonable steps/ use his best endeavours to find a purchaser.
55. But he may have the claim described in note 54 supra.
56. Repudiation consists in words or conduct exhibiting a deliberate and unequivocal intention no longer to be bound by the contract: see eg Inrybelange (Edms) Bpk v Pretorius 1966 (2) SA 416 (A); Nash v Golden Dumps (Pty) Ltd 1985 (3) SA 1 (A) at 22. However, the injured party may cancel only if the breach which the repudiation portends is sufficiently serious.
57. Spies v Lombard 1950 (3) SA 469 (A) at 486ff. De Wet en Yeats op cit note 29 at 162-3.
58. See, generally, Sweet v Rageruhara 1978 (1) SA 131 (D) and W A Joubert (ed) The Law of South Africa ('LAWSA') (Vol 5 1978) paras 201-208.
59. It is the right to take immediate steps which is at issue. Most sole agencies are of a very short fixed duration, so any remedy which involves the giving of notice of a reasonable time would not be worth much.
60. There is hardly ever a time fixed for performance in estate agency contracts. Where the sole agency is one of fixed duration, the date fixed pertains to the limit of the exclusivity of the sole agent's right to find a purchaser. It is not the due date for the performance of his obligation to use his best endeavours to find a purchaser.

61. Nel v Cloete 1972 (2) SA 150 (A) at 163E.
62. This gives rise to the curious result that the agent is better off being utterly indolent, rather than merely relatively so. See Sweet's case supra note 58 at 138F.
63. Where an agreement is silent as to its duration, it is terminable on reasonable notice in the absence of a conclusion that it was intended to continue indefinitely. Moreover, when parties bind themselves to an agreement which requires them to have mutual trust and confidence in each other, it is reasonable to infer that they did not intend to bind themselves indefinitely: Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd 1985 (4) SA 809 (A).
64. That is, indolence by the sole agent does not amount to breach and is not per se a ground for termination of the contract. The sole agency will usually terminate on the agreed date, or, if no date has been agreed, it is revocable at least upon reasonable notice. It is submitted in the text (at 16) that ordinary estate agency mandates are terminable summarily, but the same is unlikely to be true of sole agencies, as it would seldom reflect the common intentions of the parties.
65. J C de Wet in LAWSA (Vol 1 1976) par 125.
66. Ibid. It is utterly clear that, frequently, an authority which is conferred 'irrevocably' is nevertheless unilaterally revocable by the principal. Where the dispute exists is whether there are situations where the principal may not do so. De Wet loc cit note 65 seems doubtful. See also Consolidated Frame Cotton Corporation Ltd v Sithole 1985 (2) SA 18 (N) at 22; The Firs supra note 14 at 886.
67. Ibid. The learned author also cites cases (par 125n4) for this proposition, but they hardly bear it out. See too LAWSA (Vol 5 1978) par 226.
68. De Wet en Yeats op cit note 29 at 343.
69. Trident Sales (Pty) Ltd v A H Pillman and Sons (Pty) Ltd 1984 (1) SA 433 (W); Putco supra note 63. See too, P R Owens 'Contracts for an Indefinite Period' (1982) 45 THRHR 23.
70. Putco supra note 63 at 827.

71. There is no proper South African authority on the subject of the unilateral revocation of an estate agent's mandate. The cases which do deal with estate agents and revocation, are concerned with estate agents who do not have mere mandates to 'find a purchaser' but full authority from the seller to sell his property. See Van Der Merwe v Ras 1912 TPD 97; Botha v Schultz 1966 (2) SA 615 (O); Pretorius v Erasmus 1975 (2) SA 765 (T) and The Firs supra note 14.
72. See the reasoning in Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd 1984 (1) SA 443 (W) at 451.
73. L C B Gower 'Estate Agents' Commission' (1950) 13 Modern Law Review 491.
74. Note 3 supra.
75. Unless, of course, it is clear that the parties have agreed otherwise. See De Villiers & Macintosh op cit note 16 at 626 and LAWSA (Vol 5 1978) par 226.
76. See De Villiers & Macintosh op cit note 16 at 616. Tony Morgan Estates v Pinto 1982 (4) SA 171 (W) deals with the issue of revocation by the seller of an agent's mandate. However, the question of reasonable notice did not arise for consideration. It seems that in English law the courts are reluctant to hold that an agent is entitled to notice when he is employed upon a commission basis: Murdoch op cit note 38 at 154-5.
77. Woolley v Hunt and Birkley (1894) 7 HCG 99; Steyn v Joubert 1923 TPD 275; De Jongh v Owen Wiggins Trust Maatskappy Bpk 1977 (2) PH A43 (A).
78. This is an academic point as regards ordinary estate agency. In practice, the seller may, lawfully, refuse to sell to any purchaser introduced by the agent, and, he may appoint other agents to find a purchaser.
79. Hampton & Sons Ltd v George [1939] 3 All ER 627 at 630.
80. Tony Morgan's case supra note 76 at 177, affirming Hampton & Sons supra note 79.

81. See De Villiers & Macintosh op cit note 16 at 411 and 623, and Murdoch op cit note 38 at 273. These general principles were accepted by the court in Tony Morgan's case supra note 76, although the agent in that case was successful in recovering as damages his full commission. It was held that the fact that the mandate was revocable was a factor to be taken into account in assessing the agent's damages.

The following English cases are illustrative: Hampton & Sons Ltd supra note 79 damages of £80 awarded. Commission would have been £104. In Newton v Erikson (1951) 157 EG 414 damages of £75 against commission of £115 and H M Rendall v Lammas 1967 CLY 36, £87 damages against £97 commission.

82. Summary cancellation of the sole agent's mandate would be possible where the sole agent is guilty of positive malperformance of the proposed binding obligation to take reasonable steps to find a purchaser.

ADDENDUM

Watson v Fintrust Properties (Pty) Ltd was reported in the June edition of the South African Law Reports at 1987 (2) SA 739 (C). It was an application by the defendant, the seller, to compel the plaintiff, estate agent, to disclose whether the purchaser had been willing and able to purchase. As it was an interlocutory matter, there are no decided facts on which to rely. It seems that the estate agent's case was that his mandate was to 'bring about a sale' and that the seller and purchaser had indeed concluded a valid, binding sale. The purchaser did not fulfil her obligations and the sale was later cancelled.

It is clear law that in these circumstances, even if it is the purchaser who unlawfully resiles from the contract, the seller remains liable to the estate agent (see note 24 at page 102 supra). The ratio of the case was that it was for the seller to raise and prove the allegation that the purchaser was not, at the time of contracting, willing and able to purchase.

However, the Court did make reference to the doctrine of fictional fulfilment (although it is clear that the agent's case rested on actual fulfilment). It is submitted that if the agent's right to commission had depended on payment of the purchase price, and the seller had agreed to release the purchaser before such payment, then it would indeed have been a case of fictional fulfilment of the condition of the seller's promise to pay (see page 85 supra). But the Court was of the opinion, correctly it is submitted, with respect, that the stipulation that the agent was to receive his commission out of the deposit to be paid by the purchaser, was only a time

clause. It seems that it was the time clause that the Court regarded as fictionally fulfilled (as in Ferndale Investments (Pty) Ltd v DICK Trust Ltd 1968 (1) SA 392 (A)).

CONCLUSION

Inasmuch as the ratio of this case dealt with an interlocutory matter, and as the principal obiter dicta were in accord with Levy v Phillips 1915 AD 139, and Ferndale's case supra, it is an uncontroversial case. If I had had this case at my disposal before the completion of Treatise III, I would have mentioned it in the footnotes.

TREATISE IV

THE EFFECT OF SUSPENSIVE CONDITIONS IN CONTRACTS OF SALE1. INTRODUCTION

Academic writers have long championed the view expressed in the Odendaalsrust Municipality¹ case as to the effect of a suspensive condition on a contract of sale - namely, that the condition operates merely to suspend the operation of the obligations under the contract, or more accurately, their exigible content.² The writers have contended that in spite of the presence of the condition, there is, from the very outset, an extant contract of sale.³ For the first time in the recent decision of Tuckers Land and Development Corporation (Pty) Ltd v Strydom,⁴ the Appellate Division has declared itself favourably disposed to such a view. It has turned away from its own consistently followed decision of Corondimas & Another v Badat,⁵ which suggested that although the parties were bound to each other from the outset, a contract of sale came into existence only upon fulfilment of the suspensive condition. Yet, despite its shift in viewpoint, the Appellate Division has declined to depart from Corondimas.

It is the purpose of this paper to re-examine the issue of the legal effect of suspensive conditions,⁷ principally as regards contracts of sale.

2. THE LAW PRIOR TO TUCKERS LAND V STRYDOM⁸

In the nineteenth-century case of Quirk's Trustees v Assignees of Liddle & Co,⁹ the parties purported to conclude a contract of sale in terms of which ownership in the res was reserved to the seller until the purchaser had paid the purchase price in full. De Villiers CJ held that a contract incorporating such a 'condition' was 'quite inconsistent with the very essence of a contract of sale'.¹⁰ Lest it should be thought that Quirk's case was authority for the proposition that pending fulfilment of the condition there was no contract at all, Innes CJ explained, in Leo v Loots,¹¹ that although the effect of a suspensive condition is to suspend the entire sale, there is from the outset 'a very real and definite contractual relationship between the parties'. The above two cases were followed on many occasions.¹² The law was more fully elucidated in the leading case of Corondimas v Badat,¹³ in which Watermeyer CJ stated:

'Until (fulfilment of the condition)... it is entirely uncertain whether or not a contract of sale will come into existence at some future time. Until that moment there is certainly a legal relationship... existing between the parties, which may ripen into a contract of sale';¹⁴

and Feetham AJA further explained:

'Where an agreement of purchase and sale is entered into subject to a suspensive condition, no contract of sale is there and then established, but there is nevertheless created "a very real and definite contractual relationship" which, on fulfilment of the condition, develops into a relationship of seller and purchaser.'¹⁵

The alternative viewpoint is embodied in the judgment of Van den Heever J (as he then was) in the Odendaalsrust¹⁶ case:

'The contract... is binding immediately upon its conclusion; what may be suspended by a condition is the resultant obligation or its exigible content.'

Most academics have adopted this dictum as support for their view that a sale subject to a suspensive condition is nevertheless a sale from the outset.¹⁷ They trenchantly criticise the concept that the agreement is, in modern parlance, an innominate contract at the outset which, only upon fulfilment of the condition, ripens into a contract of sale. Such an idea is treated as having no logical basis. It is said that the so-called innominate contract bears all the elements of a sale, namely, the parties have agreed on the goods to be sold (merx), the price to be paid (pretium) and they have the intention that one shall be exchanged for the other.¹⁸

With respect, however true that may be, it hardly advances matters much.¹⁹

It has also been pointed out, correctly, that the fons et origo of the innominate contract theory, Quirk's case,¹⁹ was dealing not with a suspensive condition, but with a pactum adjectum.²⁰ Moreover, the reasoning in that case was based upon a demonstrable misinterpretation of the old authorities.²¹ However, as the Appellate Division in Tuckers Land v Strydom²² pointed out as it overruled Quirk's case, the fact that Quirk's case is wrong does not mean that the principle enunciated in Corondimas is also wrong.²³

Whatever the respective merits of the two views, there might well have been little controversy. After all, there is no dispute whatever about the substantive legal effect of a suspensive condition on an agreement in these circumstances. Three of the main effects may be mentioned:²⁴

- (i) Each party's obligation to perform is suspended, ie it is not enforceable by the other party until and unless the future, uncertain event occurs.
- (ii) Normally the parties make their conditional promises with the common intention that each of them is bound to await the outcome of the condition.²⁵ A unilateral attempt to withdraw from the agreement pendente condicione²⁶ will amount to actionable repudiation.²⁷ The injured party will be able to recover damages, or, in appropriate circumstances, to invoke the doctrine of fictional fulfilment, or even to obtain an interdict restraining the unlawful conduct.²⁸

(iii) Pendente condicione there is vested in each party a conditional right to the promised performance, which right is capable of being alienated by the conditional creditor,²⁹ and, on his death, is transmissible to his heirs.³⁰

Given that these consequences are beyond dispute, it would seem ordinarily not to matter much what name, if any, is given to the initial agreement. Indeed, it would seem to be a matter of semantics. However, following the collapse of the property market in the mid-1970's, the seller, in a number of township development cases,³¹ was forced to argue that the 'sale' which it had concluded subject to a suspensive condition was not truly a contract of sale, but an innominate contract. It was important to establish this in order to circumvent a statutory prohibition against the sale of township erven prior to due proclamation of the township as such by the appropriate authorities. On the whole, the courts were favourably disposed to such an argument, and after the Appellate Division affirmed the Corondimas stance in Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd,³² the innominate contract theory held sway. However, Tuckers Land v Strydom now signals a shift in the view of the Appellate Division.

3. TUCKERS LAND V STRYDOM

Tuckers Land v Strydom was yet another township development case in which the developer attempted to establish that an agreement was not a contract of sale at the time it was concluded, because

the agreement was subject to a suspensive condition. The developer succeeded, despite the fact that the Appellate Division was unanimously critical of the principle enunciated in Corondimas. Van Heerden JA, who delivered the majority judgment, observed that it was difficult to see, on logical grounds, how the simple insertion of a suspensive condition in an agreement could per se preclude such agreement from being a sale properly so-called. He clearly preferred the Odendaalsrust view that a suspensive condition operates merely to suspend the exigible content of the obligations arising under the contract, and does not operate to affect the existence of the contract, or to qualify its nature.³³ However, even on the assumption that Corondimas was clearly wrong, the learned judge of appeal declined to depart from it on the ground that many legal rights and duties would doubtless have been created in reliance on it, especially since the Appellate Division itself had confirmed the principle in the Palm Fifteen case.

Joubert JA delivered a separate judgment which contained a close examination of the old authorities. He was more critical of Corondimas. He stated that it was at odds with the common law, was wrong, and ought not to be followed. He approved³⁴ the view of De Wet & Yeats that a suspensive condition does not bear on the existence of the contract or the category into which it falls.³⁵ In the view of Joubert JA, a sale subject to a suspensive condition was nevertheless an extant contract of sale, albeit a conditional one, pending fulfilment of the condition. However, he too upheld the appeal, on the basis that, as a matter of interpretation, such

a conditional sale did not fall within the ambit of the relevant statutory prohibition.³⁶

The decision not to depart from Corondimas, whilst at the same time being highly critical of it, makes the present position of South African law a little uncertain. The Appellate Division will probably be constrained to follow the approach of Tuckers Land v Strydom should another, similar township development case come before it in the near future,³⁷ although it seems that Van Heerden JA was anticipating legislation which would preclude such an eventuality.³⁸

In any event, it is not the purpose of this paper to dwell on this narrow point. It is submitted that it is a clear inference from the sharp criticism of Corondimas that, apart from township development cases, the innominate contract theory is wrong and no longer represents the law. As regards all other sales and other contracts generally, the courts are now not constrained to follow Corondimas. Generally, it is not arguable, it is submitted, that the mere insertion of suspensive condition per se gives rise to an innominate contract, and precludes the existence of a contract of sale until the condition is fulfilled.

4. EVALUATION

I do not intend to re-examine the old authorities or the substantial body of case law in order to delineate the true nature of a legal rule pertaining to the effect of a suspensive condition on a contract of sale. It is beyond question that the Odendaalsrust formula as

interpreted by the academics and Tuckers Land v Strydom is logical and correct, and it is submitted, now represents the law - I predict that the courts will now rule that the usual effect of a suspensive condition is purely to suspend the exigibility of the obligations under a contract, and not to qualify the existence or the nature of the contract. However, there is danger in regarding the Odendaalsrust formula as determinative of every case. It may well be the proper prima facie approach when adjudging the legal effect of a suspensive condition, but it is inappropriate to deal with all suspensive conditions. There is no inflexible rule that a suspensive condition may never qualify the existence or the nature of a contract. In truth, the legal effect of a suspensive condition depends upon the intention of the parties.³⁹

To illustrate this point, consider that there do exist, albeit rarely, suspensive conditions which qualify the existence of a contract. In such cases, the parties have essentially not completed the process of reaching agreement. So, where parties reach an agreement 'subject to contract', it is submitted that the proper inference may be that they do not intend to be bound until a formal contractual document is executed.⁴⁰ The parties may intend that the agreement that they have reached should be regarded as provisional. Either of them is free to negotiate a variation in the terms of the agreement or to withdraw from the agreement with impunity before the suspensive condition is fulfilled, ie before the execution of the formal document. Such a result is well known in English law,⁴¹ but it is not a usual practice of South African commerce.

Secondly, it is submitted that there do exist suspensive conditions which qualify the nature of the contract. The contracting parties may, for their own reasons, intend such a result. An example is afforded by the case of Provident Land Trust Ltd v Union Government (Minister of Mines).⁴² In that case, the parties expressly stipulated that a contract of sale should only arise in the future, uncertain event that the would-be buyer paid a certain sum of money. Until and unless that occurred he was to be regarded as a tenant of the property. Therefore, in this exceptional case, the contract was not from the outset a contract of sale. Its nature was qualified by the suspensive condition because the parties so intended.⁴³ The facts of Corondimas⁴⁴ are also instructive. In that case, a European wished to sell land to an Asiatic provided that the requisite Ministerial consent could be obtained. The parties would have broken the law had they entered into a contract of sale without such consent. Mindful of this, they clearly intended, it is submitted, to enter into an agreement which was not yet a sale but which would bind them both to await the outcome of the Minister's decision. Neither party could withdraw pending such a decision. If the Minister gave his consent, the suspensive condition would be fulfilled, and the agreement would ripen into a valid and immediately binding contract of sale. A third example is suggested by Mendelowitz:⁴⁵ A and B agree that if A gets a rise in salary, he will buy B's house at a determined price. Mendelowitz asserts that whilst this is a binding contract it 'is manifestly not yet a contract of sale'. Closer to the truth would be an assertion that it may not be a contract of sale, depending on the parties'

intentions. Happily, Mendelowitz's central thesis revolves around a call for less dogmatism about the juristic nature of suspensive conditions and their effect upon contracts. He is, with respect, correct in suggesting that the effect of a suspensive condition in a contract is not governed by a fixed rule of law.⁴⁶

A parallel may be drawn with the recent development in the law pertaining to the effect on a contract of non-fulfilment of a suspensive condition. It was formerly believed that there was a fixed legal rule that, in the event of non-fulfilment the contract fell away automatically. However, the recent decision of Meyer v Barnardo & Another⁴⁷ makes it quite⁴⁸ clear that no such legal rule exists: The effect of non-fulfilment of a suspensive condition depends upon the intention of the parties.⁴⁹

5. LEGISLATIVE REFORM

Even before the decision in Tuckers Land v Strydom, a draft bill⁵⁰ was disseminated by the Law Commission 'with a view to eliminating the uncertainty and impurity which exists in our case law with regard to suspensive conditions in contracts of sale. The draft bill elicited support as well as opposition... On the question as to whether the matter should at this stage be regulated statutorily there does not seem to exist consensus of opinion'.⁵¹ I shall return to the draft bill shortly.

In Strydom's case Van Heerden JA made several remarks on the subject of statutory regulation of the position.⁵² He noted that the particular statutory prohibitions under consideration in Tuckers Land v Strydom had been amended before the case reached the Appellate Division in an attempt to prevent township developers from circumventing the prohibition. However, not all the relevant prohibitions in all the previous township development cases had been subsequently amended. The point was also made that even the use of unamended wording in the statutes did not necessarily mean that a court was bound to reach a conclusion in line with Corondimas. Yet the learned judge of appeal was, it is submitted, anticipating some sort of legislative reform, although one surmises that he may not have had in mind the all-embracing type of enactment now proposed as an amendment to the Interpretation Act 33 of 1957:

"Whenever it falls to be determined whether an agreement constitutes a contract of sale, the fact that the agreement or the operation of any part thereof is suspended or that passing of ownership from one party to the other is deferred, shall not prevent the agreement from constituting a contract of sale unless a contrary intention appears."⁵³

There would be little profit in quibbling with the particular wording of this amendment. More important is the question whether there should be legislative reform along these lines at all. It is submitted there should not be, for the following reasons:

- 1) Statutes require interpretation. Rules and canons are often invoked as a guide to interpretation. Yet their use often leads to rigidification of the law when, what in fact is needed is the flexibility of a simple common law proposition that the legal effect of a suspensive condition depends upon the intention of the parties. If their intention is not clear, as is often the case in practice, the prima facie approach of the common law will prevail, namely: The suspensive condition does not qualify the existence or the nature of the agreement of which it is a part.⁵⁴

- 2) The emphasized words will almost certainly lead to controversy about the onus of proof. The amendment effects a rebuttable presumption of law. Some rebuttable presumptions of law shift the legal burden, others shift merely the evidential burden.⁵⁵ In this case, the emphasized words point to the conclusion that it is the legal burden which is shifted.⁵⁶ In other words, the plaintiff is not put to proof where the defendant contends that a particular suspensive condition has qualified the nature of the contract. The defendant bears the onus of proving on a balance of probabilities that the parties intended as much. Presumably, it is believed that policy demands such a result, but it is respectfully submitted that the law would be better served if any presumption in this regard affected the evidential burden only, ie where the plaintiff contends that the nature of the sale has been qualified by the condition, he will naturally

bear both the legal and the evidential burdens. Where the defendant makes this contention, there will exist a prima facie inference against him that the condition does not qualify the nature of the contract, which inference the defendant will be under a duty to rebut by leading some evidence of a contrary common intention held by the parties, but the overall onus of proving what is the effect of the suspensive condition should still rest on the plaintiff. Such an approach would approximate that of the common law.⁵⁷

- 3) Tuckers Land v Strydom leaves one in little doubt as to the proper general principles of law relating to the effect of suspensive conditions. It is submitted that, with a probable exception in favour of future township development cases,⁵⁸ the Appellate Division was not seeking to perpetuate the old law, despite its faults, as it has done before, notably in the instance of the undisclosed principal in agency.⁵⁹ It must be clear that, in contracts of sale generally, no reliance at all can be placed on the Corondimas stance. Therefore, in this regard the Law Commission's proposal is unnecessary as it does no more than attempt to declare the law as it already stands, with the addition of a possible contentious rebuttable presumption. The dangers of trying to compress all the law on a particular point into one significant sentence is a matter of rueful legal experience.

In summary, it may be that there is nothing seriously wrong with the type of legislation that has been proposed. It is simply that it is largely unnecessary.⁶⁰ The common law can cope perfectly well. Whilst there is at the moment doctrinal impurity as regards township development cases, that is not so much the fault of the common law as the price that has been paid as a result of the highest court in the land admitting that its earlier declarations of the law on this point were faulty. To seek to eliminate the impurity by such broad legislation is overkill, it is submitted.

6. CONCLUSION

The initiative in Tuckers Land v Strydom to move away from the rigid rule in Corondimas is to be applauded. It would, however, be a poor solution to embrace another fixed rule in the form of the Odendaalsrust formula - any suggestion that a suspensive condition never qualifies the existence or the nature of a contract is not to be commended. The true position must surely be that the presence of a suspensive condition in a contract gives rise to the prima facie inference that merely the exigible content of some or all of the obligations under the contract are suspended, and that neither the existence nor the nature of the agreement is qualified by the condition. However, such an inference may be rebutted by evidence of a contrary common intention held by the contracting parties.

FOOTNOTES

1. Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd 1948 (2) SA 656 (O).
2. At 666-667. See De Wet en Yeats Kontraktereg en Handelsreg (4 ed by J C de Wet and A H van Wyk 1978) 135-6; M A Diemont and P J Aronstam The Law of Credit Agreements and Hire Purchase in South Africa (5 ed 1982) 14-19; D F Mostert, D J Joubert en G Viljoen Die Koopkontrak (1972) 101; H C J Flemming Huurkoopreg (2 ed 1974) 6; Mackeurtan Sale of Goods in South Africa (5 ed G R J Hackwill 1984) 35; Ellison Kahn Contract and Mercantile Law Through the Cases (2 ed by E Kahn, D Zeffertt, J T Pretorius and C Visser 1985) 246-7; P M Nienaber 'Opskortende of Ontbindende Voorwaarde?' (1967) 30 THRHR 353; D S P Cronje and J G Lotz 'Die Koopkontrak en 'n Opskortende Voorwaarde' (1977) 40 THRHR 276; P J J Olivier 'Opskortende Voorwaarde en Koopkontrak' (1980) 13 De Jure 238. D P de Villiers ('Die Betekenis van die Opskortende Voorwaarde by 'n Byeenkoms' (1943) 7 THRHR 13) traversed this issue before the Odendaalsrust decision supra note 1.
3. See for example De Wet en Yeats loc cit supra note 2.
4. 1984 (1) SA 1 (A).
5. 1946 AD 548.
6. At 16-18.
7. This paper deals with suspensive conditions which satisfy both requirements of contingency and futurity. No account is taken of conditions which relate to present or past time: see Fourie v CDMO Home (Pty) Ltd 1982 (1) SA 21 (A).
8. Supra note 4.
9. (1885) 3 SC 322.
10. At 329.

11. 1909 TS 366 at 370-371. Ellison Kahn has commented (1977 6 Businessman's Law 174): 'One observes in what semantic difficulties the Court found itself, speaking of seller and buyer while denying that there was a contract of sale'.
12. Since Quirk has now been overruled there is no profit in repeating all the cases which followed it, but see, for reference purposes, the Strydom judgment supra note 4 at 11.
13. Supra note 5.
14. At 551.
15. At 558-9.
16. Notes 1 and 2 supra.
17. It is doubtful whether Odendaalsrust is quite the forceful authority for the proposition favoured by the academics. Van Den Heever J did not address the question of a contractual relationship ripening into a contract of sale, and it seems that Corondimas which was decided just two years earlier, was not even drawn to the attention of the learned judge. Certainly it is unlikely that the learned judge intended to alter the law on this point. However, this is immaterial now in view of Joubert JA's approval in Tuckers Land v Strydom supra note 4 at 24 of the academic stance.
18. Diemont and Aronstam, Cronje and Lotz supra note 2.
19. Note 9 supra.
20. Diemont and Aronstam, Mackeurtan, and Cronje and Lotz supra note 2.
21. D P de Villiers, Diemont and Aronstam supra note 2.
22. Note 4 supra.
23. At 12C and 16C.

24. See De Wet en Yeats loc cit note 2 supra.
25. Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd 1978 (2) SA 872 (A) at 887D.
26. That is, before the point when the condition has either failed or been fulfilled.
27. Despite the fact that the contractual obligations which are being denied are, at that point, not enforceable.
28. De Villiers op cit note 2 at 161.
29. J Voet Commentarius ad Pandectas (1698-1704 translated by P Gane) 18.4.9.
30. Voet 45.1.19.
31. See for example Cotton Tail Homes (Pty) Ltd v Palm Fifteen (Pty) Ltd 1977 (1) SA 264 (W); Le Roux v Sentraalwes Personeel Ondernemings (Edms) Bpk 1977 (2) SA 510 (C) at 512D; Sentraalwes Personeel etc v Wallis 1978 (3) SA 80 (T) at 86-7; Sentraalwes Personeel etc v Niewoudt 1979 (2) SA 537 (C) at 542-544; Tuckers Land and Development Corporation (Pty) Ltd v Soja (Pty) Ltd 1979 (3) SA 477 (W); De Freitas v Tuckers Land etc 1980 (3) SA 699 (W) at 701; Tuckers Land etc v Somerville 1981 (2) SA 17 (C) at 19-20; and Cardoso v Tuckers Land etc 1981 (3) SA 54 (W) at 63F.
32. Note 25 supra. In' Soja (Pty) Ltd v Tuckers Land etc 1981 (3) SA 314 (A) Corondimas was simply assumed to be correct.
33. At 16D.
34. At 24C-25B.
35. Note 2 supra.
36. Art 57A of Ordinance 25 of 1965 (T), which was later amended. Viljoen JA delivered a separate judgment, also allowing the appeal. Although he agreed with Joubert JA's criticism of Corondimas, he espoused the approach of Trollip JA who delivered the majority judgment in Soja supra note 32.

37. Would it be going too far to read Tuckers Land v Strydom as a warning shot? It is my impression that both legislators and future contracting parties have been put on notice. If a similar township development case were to arise in say ten years time, I predict Corondimas might well be departed from.
38. At 18.
39. See G F Lubbe 1984 Annual Survey of South African Law 164.
40. Halsbury's Laws of England 4 ed IX (1974) S264. An agreement that is entered into without the intention of creating a binding legal obligation is not a contract: Conradie v Rossouw 1919 AD 279.
41. Ibid. The celebrated case of Pym v Campbell (1856) 6 E & B 370 (119 ER 903) is often interpreted in this fashion.
42. 1911 AD 615.
43. The tenor of Van Heerden JA's judgment (at 12G) in Tuckers Land v Strydom supra note 4 supports such a view.
44. Note 5 supra.
45. M Mendelowitz "The 'Parol Evidence Rule' and Suspensive Conditions in Contracts" (1978) 95 SALJ 32 at 42.
46. Note 45 supra at 32 and 47. Diemont and Aronstam supra note 2 at 19 who are, in principle, against the 'innominate contract theory', also concede that the parties can agree to suspend the whole contract and if that is their intention, no sale will come immediately into existence.
47. 1984 (2) SA 580 (N).
48. In the earlier case of Florida Road Shopping Centre (Pty) Ltd v Caine 1968 (4) SA 587 (N), all three judges accepted that a contract would not terminate automatically on non-fulfilment of a suspensive condition if it was the common intention of the parties that it should not do so, but, on the facts, a majority found that such a common intention of the parties had not been proven. This case has never been judicially referred to as authority for the proposition of non-automatic termination.

49. See M E Rivalland 'Waiver of Conditions for the Sole Benefit of the Purchaser' (1985) 102 SALJ 60.
50. Published in GN 383 GG 9256 of 15 June 1984.
51. South African Law Commission 'Memorandum and Draft Bill on Suspensive Conditions in Contracts of Sale'.
52. At 18.
53. Notes 50 and 51 supra.
54. In Tuckers Land v Strydom supra note 4 at 19-25, Joubert JA had no doubt that this represented the common law, at least regards cases other than township development cases. The majority judgment of Van Heerden JA appears to approve Joubert JA's viewpoint (at 16E).
55. L H Hoffmann and D T Zeffertt The South African Law of Evidence (3 ed 1981) 417-419.
56. See Hoffmann and Zeffertt op cit note 55 at 440-443. The words 'unless the contrary is proved' obviously shift the legal burden: Ex parte Minister of Justice: in re R v Jacobson and Levy 1931 AD 466. 'Unless a contrary intention appears' is less clear.
57. See the conclusion to this article and note 54 supra.
58. See note 37 supra.
59. See Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöp Bpk 1972 (1) SA 761 (A).
60. The relevant local ordinances could be amended to meet the problem of township development cases. Even that may not be considered vital. See Van Heerden JA's comment in Tuckers Land v Strydom supra note 4 at 18E-H.

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