40/84

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matters between:

JOEL MELAMED AND HURWITZ ............ appellant

and

CLEVELAND ESTATES (PROPRIETARY)
LIMITED ................................ respondent

and

JOEL MELAMED AND HURWITZ ............ appellant

and

VORNER INVESTMENTS (PROPRIETARY)
LIMITED ................................ respondent

CORAM: CORBETT, KOTZÉ, TRENGOVE, JJA, SMUTS et GROSSKOPF, AJJA

DATE OF HEARING: 21 November 1983

DATE OF JUDGMENT: 28 Feb. 1984

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J U D G M E N T

CORBETT JA

The appellant in each of these appeals is the

/Johannesburg........

Johannesburg firm of attorneys, Messrs Joel Melamed and Hurwitz ("Melamed and Hurwitz"). At all material times the senior partner in the firm was Mr Joel Melamed. As at the time of the trial (ie August 1981) he had been practising as an attorney in Johannesburg for some 34 years. For some time prior to the events with which these appeals are concerned Melamed and his partner, Mr S Hurwitz, had been interested in township development. They held financial interests in certain townships which were in the process of being established and exploited; and in addition they, together with one Simmons, formed and operated a company, Township Management Consultants (Pty) Ltd ("TMC"), which, as its name indicates, was incorporated to carry on the business of establishing and managing townships and marketing the erven therein on behalf of the township owners. Melamed, Hurwitz and Simmons had equal shareholdings in TMC and Melamed was its managing director.

In approximately 1961 Melamed met Mr Harry Galaun.

Galaun became a client of Melamed's. Together, they went into a small business venture, the details of which are unimportant. In due course they became personal friends. Through two companies, Cleveland Estates (Pty) Ltd ("Cleveland"), respondent in the first appeal, and Vorner Investments (Pty) Ltd ("Vorner"), respondent in the second appeal, Galaun was interested in certain land, which in Melamed's opinion was suitable for township development. Cleveland had owned a property near Halfway House for many years. Galaun had tried to establish an agricultural holdings township on the property, but without success. Galaun sought Melamed's advice as to what could be done with the land. After investigating the position, Melamed advised Galaun that the property would make an excellent residential dormitory township. Melamed suggested that a township, to be known as Vorna Valley Township, be established and that TMC be appointed the township manager. This was agreed to and in December 1968 Cleveland and TMC entered into a written agreement in terms whereof TMC

/undertook.........

undertook, for a fee, to establish and manage the township on Cleveland's behalf. In the meanwhile a similar arrangement had been reached between Vorner and TMC in regard to a property at Vereeniging, owned by Vorner and known as Unitas Park, and a written agreement had been entered into by the parties in August 1968. Save for the differences in contracting parties and subject-matter, this agreement and the Cleveland/TMC agreement are in identical terms. For convenience, I shall speak, for the most part, as if there were only one such contract and I shall refer to it as "the management contract".

In terms of the management contract TMC (referred to therein as "the Management Company") undertakes to do all such things as may be necessary to procure the establishment of a township on the property owned by Cleveland (or Vorner, as the case may be), which is called "the Township Owner"; and, to this end, the management company further undertakes to engage surveyors, to submit all necessary applications to the

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appropriate local authority, to collect all monies in respect of sales, to draw up endowment schedules, to call for necessary tenders and to make all necessary arrangements for the reticulation of the township. The township owner, on the other hand, undertakes to sign all documents needed for the establishment of the township and authorises the management company to act as its agent to enter into contracts necessary for the reticulation of the township. The contract further provides that the township owner appoints the management company as its sole agent for the sale of all stands in the township. In return for its services the management company is to be paid a commission of six per centum on gross sales in respect of all sales effected and a management fee of five per centum of the gross amount received from the sales of all stands in the township. Clause 8(a) of the contract reads as follows:

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> "The Township Owner agrees that the Management Company shall have the right to appoint Attorneys, Auditors, Surveyors, Agents and Auctioneers to act on behalf of the Township Owner in all matters relating to the establishment of the Township, transfer of stands in the Township, any application to court, or any matters in connection with or appertaining to the establishment of the township;...."

Thereafter TMC proceeded to take the necessary steps to have the two townships established. At that time erven in a township could be sold to the public before the proclamation of the township, provided that the township owner had furnished certain guarantees. This was done, and an advertising and selling programme was prepared. In May 1971 the stage had been reached when the erven in the two townships were ready for sale. TMC arranged for the printing of the necessary pro forma deeds of sale. Several thousand such pro forma deeds were printed. The deeds for the two townships differ somewhat in form, but each contains, in the relative clause governing the passing of transfer, a provision to the effect that transfer shall

be passed to the purchaser by the seller's conveyancers, who in the one instance (the Cleveland contract) are stated to be Jóel Melamed and Hurwitz and in the other (the Vorner contract) as Joel Melamed, Hurwitz and Seligson. It is common cause that, despite the difference in the name, the appellant is the conveyancer nominated in each of the contracts.

For the next ten years the establishment and management of the townships and the sale of erven therein proceeded in accordance with the management contract. After the townships had been proclaimed (in the case of Unitas Park this was in 1973 and 1977 in the case of Vorna Valley) the erven which had been sold and paid for were transferred to the purchasers thereof. Galaun, on behalf of either Cleveland or Vorner, as the case may be, signed each deed of sale. His practice was to visit TMC's offices four days a week in order to attend to this business. According to Melamed, he and Galaun would discuss each sale

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and the business of the townships in general on the occasion of these visits. When the time came for an erf to be transferred, TMC would instruct Melamed and Hurwitz to pass transfer.

Suddenly, in mid-1979, both Cleveland and Vorner terminated TMC's appointment as management company. Melamed attributed this to "progressive senility" on the part of Galaun, who in May 1979 "suddenly decided that he didn't like me (Melamed) because he said I was doing too much work for another client by the name of Hymie Tucker and I was not attending to his work". Early in June a dispute arose between Cleveland and Vorner, on the one hand, and TMC, on the other, in regard to the latter's claims in respect of management fees and commissions; and on 29 June 1979 the auditors to Cleveland and Vorner, Messrs Goldstuck Herscovitz and Company ("the auditors"), addressed a letter to TMC, the concluding paragraphs of which read as follows:

/ "Our...............

> "Our clients, in any event, wish to terminate your appointment as management company with effect from the 31st day of July 1979, and on that date we shall be pleased if you will kindly have all books, records and documents available for collection by our clients or their representatives.
>
> Our clients similarly terminate your employment as the sole selling agent with effect from the same date."

This letter came as something of a bombshell. It elicited replies from both Melamed and Hurwitz and TMC. On 4 July 1979 Melamed and Hurwitz addressed to the auditors two letters, one in respect of the management contract with Cleveland and one in respect of the management contract with Vorner. They are substantially in identical terms. The one to Cleveland reads as follows:

> "In terms of a management contract entered into by Cleveland Estates (Pty) Limited and Township Management Consultants (Pty) Limited we were appointed as the Attorneys to attend to all transfers in the township of Vorner Valley. The benefits flowing from the said contract were accepted by us and we have been attending to the transfers of erven under this contract."

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The auditors responded to these letters by a letter dated 10 July 1979 asking for information in regard to Melamed and Hurwitz's appointment as attorneys: whether it was in writing and, if so, a copy thereof; if verbal, then various details of the appointment. Melamed and Hurwitz replied on 24 July 1979 stating –

> "Our appointment was in terms of Clause 8 of the management contract. The appointment was confirmed on numerous occasions by Mr H Galaun acting on behalf of Cleveland Estates (Pty) Limited and Vorner Investments (Pty) Limited."

and refusing further details.

Melamed and Hurwitz addressed a further letter to the auditors on 23 July 1979, but here they were evidently acting on behalf of TMC. The letter recounts the history of the management contracts and states, inter alia, that "in regard to the purported cancellation of the management contracts we would point out that our appointment is an irrevocable appointment....". The letter also

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purports to terminate the appointment of Goldstuck Herscoviz & Co as auditors to the companies.

On 29 August 1979 attorneys acting on behalf of Cleveland and Vorner addressed a long letter to Melamed and Hurwitz dealing with the management fees and sales commissions claimed by TMC and "the appointment of yourselves as the conveyancers to attend to the transfer of the stands". In the letter the view is expressed that TMC's appointment under the management contract is not irrevocable and that, if the companies acted incorrectly in cancelling the appointment, the only remedy is one in damages. In regard to the appointment of Melamed and Hurwitz as conveyancers, claimed also to be irrevocable, the letter says that such an irrevocable appointment is for certain (stated) reasons not enforceable and that consequently the companies were entitled to cancel "the purported irrevocable appointment". The letter also contains a demand that Melamed & Hurwitz hand over the books and documents relating to the management of the companies, which this firm was apparently refusing to do.

Melamed and Hurwitz replied to this letter on 6 September 1979 stating, *inter alia* –

> "We again note your advice in regard to our irrevocable appointment as Conveyancers. Your advice is not based on the correct facts. Mr Galaun was a party to our irrevocable appointment as Conveyancers. In any event only our client has the right to terminate our mandate".

These various disputes between the parties led to Cleveland and Vorner on 9 October 1979 instituting motion proceedings in the Witwatersrand Local Division, citing TMC and Melamed and Hurwitz as respondents and claiming an order declaring TMC's appointment under the management contracts and Melamed and Hurwitz's appointment as conveyancers to have been effectively terminated, directing TMC to return to the companies their books, documents and records and making certain declarations in regard to management fees and commissions. The matter came before

LE GRANGE J on 3 March 1980. The learned Judge concluded that Cleveland and Vorner were entitled to revoke the appointments contained in the management contracts; and that, as it was common cause that the fate of the appointment of Melamed and Hurwitz as conveyancers followed the fate of the management contracts, the companies were entitled to terminate the appointment of Melamed and Hurwitz. An appeal against this judgment was noted but not prosecuted.

In August 1980 Melamed and Hurwitz instituted separate actions against Cleveland and Vorner in the Witwatersrand Local Division, claiming in each case damages for the unlawful cancellation of the appointment of the firm as conveyancer. The pleadings in each case are substantially identical, the only differences relating to the number of erven still to be transferred in the township and the amount of damages claimed, which in Cleveland's case was R99 645,00

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(alternatively R59 160,00) and in Vorner's case R27 790,00 (alternatively R10 645,00). Again, to avoid unnecessary repetition I shall refer, in the main, only to the action against Cleveland.

For purposes of trial the two actions were consolidated. The matter came before DE VILLIERS J. By agreement between the parties (reached during the trial), it was ordered in terms of Rule of Court 33(4) that the question of liability be decided first and that the further proceedings, ie as to the quantum of damages, be stayed until the question of liability had been disposed of. At the conclusion of the trial the learned trial Judge came to the conclusion that Melamed and Hurwitz had failed to establish a liability for damages on the part of the two companies and in each case the plaintiff's claims were dismissed with costs. On appeal to this Court it is contended on behalf of Melamed and Hurwitz that the trial Judge's finding on the question of liability was erroneous.

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In judging the merits of the appeal it is important, in the first place, to see how the partnership, Melamed and Hurwitz, pleaded its cause of action. The particulars of claim refer to the conclusion of the management contract and to the provisions of the contract in terms whereof TMC was appointed as the sole agent of the company (Cleveland) for the sale of all stands in the township which was to be established on Cleveland's property and was given the right (in clause 8) to, inter alia, appoint attorneys to act on behalf of Cleveland in all matters relating to the transfer of stands in the township. It is alleged that on a proper construction of the contract TMC was entitled to appoint conveyancers on the basis that such conveyancers "were retained to effect the transfer of all stands in the said township"; and (in par 4 of the particulars of claim) that in pursuance of clause 8 TMC duly appointed Melamed and Hurwitz as the attorneys to act on behalf of Cleveland, that Melamed and Hurwitz duly accepted the

and that the appointment was, inter alia, to act as conveyancers for the transfer of all stands in the proposed township. As an alternative to par 4, plaintiff (in par 5) repeats the contents of par 4 and then proceeds to allege that in or about February/March 1971 and at Johannesburg Cleveland, acting through its director, Harry Galaun, "orally adopted and/or confirmed and/or ratified the said appointment" and that in the premises an oral contract came into being between the parties in terms whereof Melamed and Hurwitz were appointed to act as conveyancers for the transfer of all stands in the township. The particulars of claim further aver the unlawful cancellation of plaintiff's appointment and the damages sustained as a result of such unlawful cancellation. The claim for damages is based upon the fees that plaintiff would have earned from the conveyancing work involved in transferring stands in

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the townships had its appointment as conveyancer not been cancelled. It should be noted that the case is not concerned with those instances where prior to the termination of its appointment Melamed and Hurwitz had received specific instructions to pass transfer. It relates only to those stands in the townships which were to be transferred at some undefined time in the future. In addition, a further alternative cause of action, based upon an alleged stipulation for the benefit of a third party, is set forth in the particulars of claim (as amended). In this regard it is alleged that in terms of the various deeds of sale entered into with purchasers of erven in the township the firm of Melamed and Hurwitz was appointed as conveyancer to attend to transfer of the property, that this appointment was a stipulation for the benefit of Melamed and Hurwitz and that the latter accepted this benefit. There then

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follows an allegation that as a result of the unlawful cancellation of plaintiff's appointment damages (in a lesser sum than in terms of the main claim) were suffered by plaintiff.

In a request for further particulars to plaintiff's particulars of claim, defendant asked a number of questions regarding the appointment of Melamed and Hurwitz as conveyancers by TMC, as alleged in par 4. From the answers furnished it appears that plaintiff alleges that TMC appointed Melamed and Hurwitz "in and during June 1971"; that the appointment was made at the offices of Melamed and Hurwitz; that the appointment was tacit; that Joel Melamed acted both on behalf of TMC, ie in making the appointment, and on behalf of Melamed and Hurwitz, ie in accepting the appointment; and that Joel Melamed, on behalf of Melamed and Hurwitz, conveyed such acceptance

to himself, on behalf of TMC. The request also asked what was unlawful about the cancellation of plaintiff's appointment, to which plaintiff replied that it was unlawful in that it constituted a breach of contract.

The cause of action on the main claim is thus an unusual one: it is based upon the allegation that in June 1971 Joel Melamed concluded a tacit contract with himself, he having acted therein in two different representative capacities, viz. as managing director of TMC, on behalf of TMC, on the one hand and as partner in the firm of Melamed and Hurwitz, on behalf of Melamed and Hurwitz, on the other hand. I shall later have some observations to make about such a cause of action. At this stage I would merely add that the plea puts in issue, inter alia, the making of such a tacit appointment, as also the two alternative claims.

At the trial the only witness to give evidence

was Joel Melamed. It appears that the other person vitally interested, Harry Galaun, had died on 7 September 1980, not long after the institution of these proceedings and about a year before the commencement of the trial. He was, therefore, not available to give evidence.

In evidence-in-chief Melamed described his relationship with Galaun and the events leading up to the conclusion of the management contract. He stated that prior to the signing of this contract he had a discussion with Galaun. He pointed out to Galaun that other township management companies were charging an establishment fee of between 10 and 15 per centum, but that he (meaning TMC) was prepared to agree to a fee of only 5 per centum since he anticipated that there would be "additional perks" to come from the establishment of the township, viz. the transfer costs which would be paid by various purchasers to Melamed and Hurwitz as conveyancers; and that "one of

the conditions" for charging a reduced fee was that "all the transfers in the townships had to come to my firm". Galaun readily agreed to this. When the deeds of sale came to be prepared and printed, Melamed advised Galaun that, pursuant to their original arrangements, Melamed and Hurwitz was to be nominated therein as conveyancer for stands in the township. From the time that the management contract was signed Galaun's attitude was that Melamed was in charge of the townships and was to do everything he thought fit in the interests of the townships. Said Melamed in evidence: "He (Galaun) relied upon me implicitly". He, Melamed, caused the relative clauses in the deeds of sale to contain a provision nominating Melamed and Hurwitz as conveyancer. In so nominating he acted on behalf of TMC and in accepting he acted on behalf of his firm. At all times Galaun knew that Melamed and Hurwitz was nominated to attend to the transfer of stands in the townships,

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firstly because of the initial discussions between Melamed and himself, secondly because of the discussion regarding the drawing up of the deeds of sale and thirdly because he accepted and signed each deed of sale.

Melamed then proceeded in evidence-in-chief to describe the termination of the management contract, the subsequent disputes and correspondence between the parties and the basis of the damages claim. (At that stage the agreement to limit the issues to that of liability had not been reached.) I shall refer later to some of the evidence given by Melamed under cross-examination.

In his judgment, the trial Judge focused attention on Melamed's evidence to the effect that prior to the conclusion of the management contract he arrived at an express oral agreement with Galaun that Melamed and Hurwitz would attend tc the transfer of all the stands in the townships.

He held that this was an aspect of Melamed's evidence which did not impress him, particularly as there had been no prior mention of such an agreement, either in the motion proceedings or in the pleadings in the instant case. He felt constrained to find that Melamed did not enter into such an express agreement with Galaun prior to the signing of the management contract. The learned Judge pointed to certain probabilities "which may be argued in favour of Melamed's version", but concluded that they were "equally consistent" with an approach on Melamed's part that the management contract was not revocable. He referred to certain other grounds upon which Melamed's evidence could be criticized (I shall elaborate upon these later) and in the end found that "very little, if any weight" could be attached to Melamed's evidence. The learned Judge concluded:

> "He (Melamed) has not satisfied me as to the existence of any express agreement which Galaun entered into prior to the signing of Annexure "A".
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> In the light of the aforegoing it also follows that the plaintiff has not

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> made out a case in respect of the alternative claim.
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> In the result the plaintiff's claim and counter-claim (meaning alternative claim) in each case are dismissed with costs."

It seems to me, with respect, that in regard to the main claim the trial Judge failed to address himself to the real issues in the case, viz. (i) whether it had been established that Melamed, in his capacity as managing director of TMC, had concluded a tacit agreement with himself, in his capacity as partner in the firm of Melamed and Hurwitz, in terms whereof the firm was appointed to act as conveyancers for the transfer of all stands in the townships in question; and (ii) whether the cancellation of this appointment constituted a breach of contract in respect of which the firm of Melamed and Hurwitz was entitled to claim damages. I proceed now to consider these issues.

At the outset it is necessary to say something of the legal principles involved. The question whether a person can, as representative of another, contract with

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himself, either in his personal capacity or as representative of a third person, is discussed in the title in LAWSA treating of Agency and Representation, written by Prof J C de Wet (see LAWSA, vol 1, par 107 and 108). Despite the contrary view expressed by Prof De Wet, I shall assume in favour of Melamed and Hurwitz that it was legally competent for Melamed, in his capacity as Managing Director of TMC, to make a contract with himself, in his other capacity as partner in the firm of Melamed and Hurwitz, in terms whereof the latter was appointed as conveyancer for all the erven in the townships.

A novel feature of appellant's main cause of action is that Melamed is not only alleged to have contracted with himself in two different capacities, but also to have done so tacitly. I know of no case — and certainly none was quoted to us — where such a cause of action has been considered by our courts.

As to tacit contracts in general, in Standard Bank

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of SA Ltd v Ocean Commodities Inc, 1983 (1) SA 276 (AD) it was stated (at p 292 B - C):

> "In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem. (See generally Festus v Worcester Municipality, 1945 CPD 186 at 192-3; City of Cape Town v Abelsohn's Estate, 1947 (3) SA 315 (C) at 327-8; Parsons v Langemann and Others, 1948 (4) SA 258 (C) at 263; Bremer Meulens (Edms) Bpk v Floros and Another, a decision of this Court reported only in Prentice Hall, 1966 (1) A36; Blaikie-Johnstone v Holliman, 1971 (4) SA 108 (D) at 119 B-E; Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd, 1979 (3) SA 267 (W) at 281 E-F; Muhlmann v Muhlmann, 1981 (4) SA 632 (W) at 635 B-D.)"

This is the traditional statement of the principle, as is borne out by the cases cited; and it was accepted as being correct by appellant's counsel. The correctness of this general formulation has nevertheless been questioned

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on the ground that it would appear to indicate a higher standard of proof than that of preponderance of probability as regard the drawing of inferences from proven facts (see Christie, The Law of Contract in South Africa, pp 58-61; cf also Fiat SA v Kolbe Motors, 1975 (2) SA 129 (O), at p 140; Plum v Mazista Ltd, 1981 (3) SA 152 (AD), at pp 163-4; Spes Bona Bank v Portals Water Treatment, 1983 (1) SA 978 (AD), at p 981 A-D). In this connection it is stated that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence (see Plum's case, supra, at pp 163-4). It may be that in the light of this the principle as quoted above from Standard Bank of SA Ltd v Ocean Commodities Inc (supra) requires reformulation. In this regard, however, there is this point to be borne in mind. While

it is perfectly true that in finding facts or making inferences of fact in a civil case the court may, by balancing probabilities, select a conclusion which seems to be the more natural or plausible one from several conceivable ones, even though that conclusion is not the only reasonable one, nevertheless it may be argued that the inference as to the conclusion of a tacit contract is partly, at any rate, a matter of law, involving questions of legal policy. It appears to be generally accepted that a term may not be tacitly imported into a contract unless the implication is a necessary one in the business sense to give efficacy to the contract (see Van den Berg v Tenner, 1975 (2) SA 268 (AD), at pp 276 H - 277 B and the cases there cited). By analogy it could be said that a tacit contract should not be inferred unless there was proved unequivocal conduct capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. Be that as

it may, this is not the occasion to resolve these problems. The point was not argued and, on the view I take of the facts, it is not necessary to decide what real difference, if any, there is between the viewpoints outlined above or to express a preference for one or the other.

In the cases concerning tacit contracts which have hitherto come before our courts, there have always been at least two persons involved; and in order to decide whether a tacit contract arose the court has had regard to the conduct of both parties and the circumstances of the case generally. The general approach is an objective one. The subjective views of one or other of the persons involved as to the effect of his actions would not normally be relevant (cf. Spes Bona Bank case (surpa), at p 985 B-H). I shall assume, in appellant's favour, that where there is only one person involved (as in this case) a tacit

contract may be inferred from his conduct and the general circumstances, but in such a case the court should, in my view, carefully scrutinize his evidence in order to distinguish between statements of fact capable of objective assessment and subjective views as to the matter in issue.

Next I turn to the nature of the tacit contract alleged by Melamed and Hurwitz. According to the pleadings it consisted of an appointment of Melamed and Hurwitz by TMC (acting, as agent of the township owners, under the management contract) to act as conveyancers for the transfer of all stands in the proposed townships. The conveyance of title to land involves the preparation of a deed of transfer, which must be done by a practising conveyancer (see sec 15 of the Deeds Registries Act, 47 of 1937), and, after due scrutiny of the deed by a Deeds Office examiner, the execution thereof in the presence

of the Registrar by the owner of the land, or by a conveyancer authorized by power of attorney to act on behalf of the owner, and the attestation thereof by the Registrar (sec 20). The conveyancer appointed to prepare the necessary deed of transfer and to attend to the execution of the deed before the Registrar performs a juristic act on behalf of his client, viz. the passing of transfer. This is, therefore, an instance of representation in the technical sense of the term (see LAWSA, vol 1, par 101 *et seq*.). An act of representation needs to be authorized by the principal. Such authorization is usually contained in a contract. In the present case the contract is the tacit one alleged by Melamed and Hurwitz. The first question which must now be considered is: did Melamed and Hurwitz succeed in proving the tacit appointment, or grant to it of an authority, to act as conveyancers for the transfer of all stands in the proposed townships?

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I have already outlined the evidence given by Melamed in chief. In it he did not refer directly to the tacit appointment alleged in the pleadings. In cross-examination, however, he was asked about this. He agreed that he did not, in his capacity as managing director of TMC, sit on one side of the desk and speak to himself, as partner in Melamed and Hurwitz, on the other side of the desk and formally appoint himself. He stated that it was a "tacit arrangement". When asked during his cross-examination on what conduct he relied to establish the tacit appointment, his evidence was somewhat confused. Initially he said that he relied on —

> ".... the discussions with Galaun initially, on the time when the deed of sale was drawn and the discussions that I had with Galaun that Melamed and Hurwitz were to be nominated in all Deeds of Sale for the purpose of transfer."

It was pointed out to him by counsel that these discussions amounted to express, not tacit, arrangements. To which he replied that the discussions with Galaun were express, "but the acceptance by Melamed and Hurwitz was tacit with myself". Shortly thereafter he conceded that the agreement with Galaun was wholly an express one. When taxed with the question as to why he had not relied on this express agreement with Galaun in his pleadings, Melamed stated -

> "But I'm saying that the second stage was when the deeds of Sale were drawn, that was when TMC appointed Melamed and Hurwitz, that was the tacit contract which was to the knowledge and approval of Galaun".

Asked whether he relied simply on conduct for this appointment, Melamed stated -

> "No, I don't rely on conduct. I rely on the arrangements between myself representing TMC and myself representing Melamed & Hurwitz".

Reminded that it had been pleaded that the appointment was made tacitly and that this meant reliance on some form of conduct, Melamed eventually stated —

> "What happened was I instructed that all the Deeds of Sale had to be prepared on the basis that Melamed and Hurwitz were nominated as the conveyancers for the entire township."

He stated further that the tacit agreement was entered into at the time the deeds of sale were drawn. This occurred in or about May 1971. His evidence proceeded —

> "All right, then what took place on the date in May when you say the contract was entered into?-- The Deeds of Sale were drawn and my firm was nominated

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as the conveyancer on all the Deeds of Sale and I tacitly accepted the appointment.

So all that you rely on is the Deed of Sale?-- And the discussion with Galaun at the time."

Later this version of the tacit appointment was further elaborated as follows:

"But let me put it to you then, we have the position that as far as TMC is concerned we have no formal document, no formal appointment, it's simply one by conduct?-- That is correct.

And the only conduct you rely on is the fact that you as Joel Melamed & Hurwitz or you as TMC, I'm not sure which, had forms printed?-- No, the conduct was when I had the forms printed for the purposes of the sale, I nominated my firm with the intention that my firm should do the totality of transfers in the townships.

The only issue is the totality, and that's the only bit we're quibbling about, where's the totality come from?--

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> The totality comes from the basis that I never sat down with myself, Mr Plewman, and had a meeting with myself to draw a contract in which I said 'I, TMC, am appointing Melamed & Hurwitz to do all the transfers in the township'. I do the Deeds of Sale on the understanding with myself that Melamed & Hurwitz were nominated as the conveyancers for the entire township."

Here, for the first time, Melamed mentioned "the understanding with myself that Melamed and Hurwitz were nominated as the conveyancers for the entire township". Thereafter, in his evidence, Melamed referred several times to this understanding or intention on his part that Melamed and Hurwitz would do all the transfers in the townships. He agreed that there was no external manifestation of this understanding or intention.

It is thus evident that in order to establish the alleged tacit contract Melamed relied (a) partly on overt conduct and circumstances and (b) partly on an "understanding" with himself, which consisted merely of the thoughts which passed through his mind and had no outward manifestation. I shall assume in appellant's favour that (b) above can form the basis of a tacit contract.

In assessing the cogency of this evidence as to a tacit contract, there are a number of factors to be taken into account. Firstly, there are the probabilities. I have no doubt that Melamed did, at some stage, discuss with Galaun the conveyancing work to be done in connection with the transfer of erven in the townships and that Galaun was then satisfied to have the work done by Melamed and Hurwitz.

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It seems probable, too, that Galaun was aware of the fact that in the pro forma deeds of sale Melamed and Hurwitz had been nominated as conveyancer and that until the termination of the firm's appointment in mid-1979 it was in fact doing the conveyancing work relating to the townships. I also accept that it was at all times Melamed's intention that his firm should do all the conveyancing work in the townships; that this work was important to his firm; and that, because of the peculiar relationship between TMC and Melamed and Hurwitz, TMC, in the anticipation that Melamed and Hurwitz would do the conveyancing work, accepted a lower-than-usual establishment fee. But for two important factors, these circumstances might be regarded as probabilities favouring the conclusion of the tacit agreement alleged by Melamed and Hurwitz.

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The first factor is Melamed's belief, at all times until the delivery of judgment in the application proceedings, that the appointment of TMC as agent under the management contract was an appointment _in rem suam_ and irrevocable at the instance of the township owners. Melamed deposed to this belief on a number of occasions during his evidence. In his mind this meant that for the entire life of each of the townships TMC's appointment could not be revoked and that, inasmuch as TMC had the right (under clause 8) to appoint attorneys to attend, _inter alia_, to the transfer of stands in the townships, Melamed and Hurwitz would do the totality of transfers in the townships. In the circumstances, from Melamed's viewpoint, it would not have been necessary for him to conclude, with himself, a tacit agreement appointing Melamed and Hurwitz

/ conveyancers.....

conveyancers for all the erven in the townships. Because of the assumed irrevocability of the management contract, there was no need to secure the future position of Melamed and Hurwitz as conveyancers. Nor was there any reason why the future position of Melamed and Hurwitz as conveyancers should, at the time of the preparation of the deeds of sale or at any other relevant time, have engaged the thoughts or aroused the concerns of Melamed. As far as he was concerned, the management contract was irrevocable and, therefore, the position of Melamed and Hurwitz unassailable; and that was the end of the matter. That this in fact was Melamed's general thinking is borne out by the fact that no formal document appointing Melamed and Hurwitz as conveyancers was ever drawn up. Melamed was cross-examined about this. He said that a formal document would have been

/ "totally.....

"totally unnecessary". He had the management contract which he considered to be irrevocable, and under that management contract he could make the appointment, as he stated, "during the life of the management contract".

The second factor is the fact that Melamed and Galaun, who directed the affairs of Cleveland and Vorner, were very close personal friends and had been such for some years prior to the alleged tacit appointment in May 1971. Because of this close personal relationship, it was, to use Melamed's own words, "unthinkable" that Galaun would appoint any attorneys other than Melamed and Hurwitz to do the conveyancing work relating to the townships. In fact, in reply to certain questions by the Court about this use of the word "unthinkable" Melamed said –

/"... There......

> "... There was no question that we have been awarded the contract, there was no question of that, there was no question in the ongoing scene as existed that Galaun would have appointed anybody else.
>
> It never crossed your mind?-- Correct M'lord."

This, therefore, constitutes another reason why it would have been unnecessary for Melamed to have concluded the alleged tacit contract with himself and why it is unlikely that Melamed would have given thought to doing so.

In my view, these two factors favour the probability that Melamed, secure in the knowledge that the management contract was irrevocable and that, in any event, it was unthinkable that his good friend Galaun would want any firm other than

/ Melamed and....

Melamed and Hurwitz to do the conveyancing work, would not have given any thought to a general appointment of Melamed and Hurwitz as conveyancers, but would merely have proceeded on an ad hoc basis to deal with each transfer and in each case to give the necessary instructions to, and sign the required power of attorney in favour of, Melamed and Hurwitz. And, moreover, this was why no formal document was executed appointing Melamed and Hurwitz as conveyancers to attend to the transfer of all stands in the townships. Had Melamed adverted to the need for such an appointment it seems likely, in view of the importance of the matter, that there would have been some written record thereof

/ or..........

or some other outward and unequivocal manifestation of his intentions. After all, he himself might die and with his death all proof of this appointment would be obliterated.

As I have indicated, Melamed relied very much upon the nomination of Melamed and Hurwitz in the pro forma deeds of sale as constituting conduct from which a tacit contract in the terms alleged should be inferred. To my mind, this conduct is equivocal. It is at least equally consistent with a mere intention or general expectation on Melamed's part, founded on the irrevocability of the management contract, that Melamed and Hurwitz would do all the conveyancing in connection with the townships. Here a sharp distinction must be drawn between a general intention that the firm should do all this conveyancing and an intention to conclude a contract whereby the firm was appointed to do such conveyancing.

/ Turning.............

Turning more specifically to the merits of Melamed's evidence, the trial Judge, as I have recounted, held that very little, if any, weight could be attached thereto. This adverse credibility finding was based (i) on Melamed's evidence of an express agreement with Galaun prior to the signing of the management contract, which evidence DE VILLIERS J rejected, mainly for the reasons that I have already indicated; (ii) on Melamed's "uncertainty" under cross-examination as to whether he ever had such an express agreement with Galaun; and (iii) inconsistency in Melamed's evidence as to the warmth of his friendship with Galaun. I do not propose to discuss these grounds of criticism in detail. As to (i), I think that it is somewhat strange that Melamed should not have mentioned this express agreement in the motion proceedings and should not have relied thereon, as an alternative cause of action, in the present case, but I am not disposed to give as much weight to this factor as the trial Judge did. Melamed

evidently took the view that after the conclusion of the management contract only TMC had the right to make an appointment of conveyancers. And, in any event, as I have already indicated, it seems probable that Melamed would at least have told Galaun at some stage that the conveyancing work was to be done by Melamed and Hurwitz and that Galaun would have acquiesced therein. As to (ii) above, the trial Judge quoted in his judgment the relevant passage from the cross-examination of Melamed. In the course of this Melamed did say: "I did not have an express agreement with Mr Galaun, I advised Mr Galaun of what was taking place". This is contradictory of his earlier evidence and is confusing, but the answer may be that Melamed was endeavouring to explain at this stage that only TMC had the right under the management contract to make an appointment. As to (iii) above, this criticism seems to be fully justified: there is a contradiction in Melamed's evidence on this point.

/ To ................

To these criticisms I would add the following. Melamed's evidence on the tacit contract (I have earlier referred to this in more detail) is, in my opinion, confused and unconvincing. I gain the impression that he was to a large extent reconstructing. He partly conceded this:

> "So what has happened throughout, is that you have gone back and looked at the events and said now what events would it have been that would have provided this particular piece of the jig-saw puzzle?-- Correct. It is partially a reconstruction, I concede that."

Indeed, faulty reconstruction seems to have been the cause of the incorrect date initially pleaded for the conclusion of the tacit contract, viz June 1971 (instead of May 1971). When cross-examined about this Melamed explained that two dates had been "transposed" by counsel. Seeing that the other date referred to was February/March 1971 (not May 1971), that it appears in the plaintiff's particulars of claim (drawn on 18 July 1980), whereas the other date (June 1971) appears

/ in....................

in the further particulars thereto (drawn on 17 October 1980) and that Melamed, an experienced attorney, approved the pleadings, I have some difficulty in accepting this explanation.

The trial Judge made no express finding on demeanour. A reading of the recorded evidence indicates, to my mind, a tendency on Melamed's part to evade questions and to fence with counsel. I quote one of several examples. Melamed was asked whether there had been any oral acceptance by him of the alleged stipulatio alteri when each deed of sale was signed by Galaun. It had been originally alleged in the pleadings that such acceptance had been "oral, alternatively, in writing". During the course of a lengthy cross-examination on this point, he agreed that he did not say to Galaun "I'm accepting the stipulatio" each time a deed was signed. The evidence continues:

"We agree to that - that didn't happen.--- Right, no that couldn't happen.

Right, so there wasn't an oral acceptance?-- No, there was not an oral acceptance in that form, but I regarded my.....

There wasn't an oral acceptance in any form, Mr Melamed.-- Right, in that form there was - there was the acceptance in my mind when Galaun signed the Deed of Sale, that I accepted.

Mr Melamed, with due respect, I'm asking about an oral acceptance. Are we agreed there was no oral acceptance?-- No, there was no oral acceptance in that form.

But there was no oral acceptance at all, agreed?-- I did not say to myself 'I accept the stipulatio', right.

Is the answer there was no oral acceptance at all?-- In that form, no.

Leave out the words 'in that form', was there no oral acceptance?-- There was no oral acceptance, I'll acknowledge that."

Having considered all the evidence in the light of the aforegoing, I am not satisfied, despite the absence of countervailing evidence, that a tacit contract on the terms alleged by Melamed and Hurwitz came into being. In brief my reasons are that the objective conduct relied upon, viz. the printing of the pro forma deed of

sale in which Melamed and Hurwitz is nominated as conveyancer, is, in all the circumstances, equivocal. Melamed's statement that he -

> "nominated (his) firm with the intention that (his) firm should do the totality of transfers in the townships"

(and similar statements elsewhere in his evidence) is, in my view, not sufficient to carry the day. Having regard to the evidence of Melamed as a whole, the statement smacks of reconstruction; and, moreover, it is not clear that in giving this evidence Melamed was distinguishing in his own mind a general intention that his firm should do the "totality of the transfers" and an intention to conclude a contract whereby his firm was appointed to do this work. The probabilities do not support the alleged tacit contract. On the contrary, if anything, the probabilities are adverse to the appellant's case.

/ This..........

This conclusion renders unnecessary a consideration of the second main issue, viz. whether the cancellation of the alleged tacit appointment amounted to a breach of contract entitling Melamed and Hurwitz to claim damages. This would depend on whether or not the appointment was irrevocable, in the sense that the premature revocation or cancellation thereof constituted a breach of contract and exposed the principal to a claim for damages at the suit of Melamed and Hurwitz. This appears to be a controversial branch of the law (see e.g. Price Bros and Barnes Ltd v Snyman, 1936 TPD 332, at p 338; Cape Dairy and General Livestock Auctioneers v Badenhorst, 1937 TPD 282, at p 287; De Villiers and Macintosh, The Law of Agency in South Africa, 3rd ed., pp 405 et seq, 614 et seq; compare Kerr, The Law of Agency, 2nd ed., p 194; De Wet and Yeats, Kontraktereg en Handelsreg, 4th ed., p 343; LAWSA, vol 17, par. 16(g); and as to the revocation of a

/ general..........

general retainer given to an attorney, see the English case of J H Milner and Son v Percy Bilton Ltd, [1966] 2 All ER 894). The point was not argued before us. In all the circumstances I do not propose to do more than say that it is by no means clear to me that, even if plaintiff had established the tacit contract alleged, it would have been entitled to damages by reason of the termination of its appointment as conveyancer.

For these reasons, I have come to the conclusion that the appellant did not establish the tacit contract pleaded by it and that appellant's main claim was, therefore, correctly dismissed by the Court a quo.

The two alternative claims were not strenuously pressed before us. The first alternative pleaded refers

to the oral adoption, confirmation or ratification by Galaun of the tacit appointment of Melamed and Hurwitz by TMC. I assume that this alternative was inserted to cover the situation should it have been held that TMC did not have authority to make such an appointment. Since, however, TMC's authority in this regard was not disputed and as I have held that a tacit appointment was not established, this alternative claim becomes irrelevant.

The second alternative claim was based upon the averment that the "appointment" of Melamed and Hurwitz as conveyancer in each signed deed of sale constituted a stipulation for the benefit of Melamed and Hurwitz, which stipulation the latter had in each case accepted. With regard to the contract for the benefit of a third party, or stipulatio alteri as it is sometimes known, it was stated by SCHREINER JA in Crookes NO and Another v Watson and Others, 1956 (1) SA 277 (AD), at p 291 B - F:

/"........ in the

> "...... in the legal sense, which alone is here relevant, what is not very appropriately styled 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 (cf Jankelow v Binder, Gering and Co., 1927 TPD 364) .......... the typical contract for the benefit of a third person is one where A and B make a contract in order that C may be enabled, by notifying A, to become a party to a contract between himself and A. What contractual rights exist between A and B pending acceptance by C and how far after such acceptance it is still possible for contractual relations between A and B to persist are matters on which differences of opinion are possible; but broadly speaking the idea of such transactions is that B drops out when C accepts and thenceforward it is A and C who are bound to each other."

Although this was a minority judgment (concurred in by FAGAN JA), there is nothing inconsistent therewith in the

/ majority..........

majority judgments and it has generally been regarded as an authoritative statement of the law (see eg George Ruggier and Co v Brook, 1966 (1) SA 17 (N) at p 23 and the cases there cited; Commercial and Industrial Holdings (Pty) Ltd v Braamfontein Industrial Sites (Pty) Ltd, 1969 (1) SA 479 (T), at p 493 E - H; Protea Holdings and Another v Herzberg and Another, 1982 (4) SA 773 (C), at p 779 G - H). Further, as was pointed out in the George Ruggier case (supra, at p 23 H) -

> "It is entirely a question whether there is an intention that the third party can, by adoption of the promise, become a party to the contract in which it is embodied".

I do not think that the relevant provisions of the deeds of sale constituted stipulations for the benefit of a third party (Melamed and Hurwitz) in the above-described sense. To demonstrate this I shall refer

to the Cleveland contract; but my remarks are equally applicable to the Vorner contract, which is in similar terms. The relevant portion of the Cleveland contract, clause 10, which is headed "Transfer", reads as follows:

> "The Purchaser shall pay the costs of this Deed of Sale and all costs of and incidental to transfer of the property including stamp and transfer duty. Transfer of the property shall be passed to the PURCHASER by the SELLER'S Conveyancers, JOEL MELAMED & HURWITZ, as soon as the full purchase price plus interest and all other amounts, charges and costs payable in terms hereof, have been paid, provided that the PURCHASER acknowledges that he is aware that the SELLER cannot, at law, transfer the property to the PURCHASER until proclamation of the Township and until transfer has been registered of such erven as are required to be transferred to the State or to the Provincial or Local Authorities concerned, as may be required by the conditions of establishment of the said Township."

/ I ....................

I do not think that there can be read into this provision an intention on the part of the parties to the contract, viz Cleveland and the purchaser, to confer upon Melamed and Hurwitz the benefit of being appointed to do the necessary conveyancing work and an intention that Melamed and Hurwitz could, by accepting this "benefit" become a party to the contract. The purpose of clause 10 is to regulate the passing of transfer as between seller and purchaser and it makes certain provisions in that regard. The clause contains no express promise in favour of Melamed and Hurwitz and no express benefit is conferred upon that firm. Melamed and Hurwitz are merely mentioned incidentally in connection with the stipulation that transfer shall be passed by the seller's conveyancer. No doubt it was considered convenient that the purchaser should know who the seller's conveyancer was. I think

/ that...............

that both parties would have been surprised to be told that in agreeing to clause 10 they were not only conferring this "benefit" on Melamed and Hurwitz but also permitting the latter, by acceptance, to come in as a party to the contract.

The uncertainty and confusion surrounding appellant's case on the question of acceptance reinforce, I think, the point that this clause 10 was never intended to contain a contract for the benefit of a third party. As I have indicated, it was pleaded originally that the benefit was accepted in each case orally or, alternatively, in writing. In cross-examination, after a certain amount of skirmishing (partly illustrated by one of the passages from his evidence quoted above), Melamed conceded that the alleged acceptance was neither oral nor in writing, but tacit. He was asked, "Tacitly by what conduct?", to which he replied:

/ "By..........

> "By my conduct in asking Galaun to sign the deeds of sale and accepting it tacitly in my own mind there and then."

Further cross-examination revealed that he was not present every time that a deed of sale was signed. This also introduces problems in regard to the proof of acceptance.

In general, I do not think that appellant established its case in regard to the alternative claim based upon an alleged <u>stipulatio</u> <u>alteri</u>.

The appeals are accordingly dismissed with costs, which shall include the costs of two counsel.

M M CORBETT

KOTZÉ JA)
TRENGOVE JA)
SMUTS AJA) CONCUR.
GROSSKOPF AJA)