REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 14/15049

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

3/7/2015
DATE

SIGNATURE

In the matter between:

MR. L.E.D (PTY) LTD

Applicant

and

WAXFAM INVESTMENTS (PTY) LTD

First Respondent

SAVAGE JOOSTE & ADAMS INC

Second Respondent

J U D G M E N T

KEIGHTLEY, AJ:

[1] The applicant in this matter, Mr L.E.D (Pty) Ltd ("LED"), seeks an order of specific performance against the first respondent, Waxfam Investments (Pty) Ltd ("Waxfam"), pursuant to a sale agreement the parties entered into in respect of certain immovable property.

[2] LED seeks an order directing Waxfam to do all things necessary, and to make all payments necessary, to ensure the transfer of the property, described as the Remaining Extent of ERF 66, Edenburg Township ("the property"), to LED.

[3] Waxfam opposes the application on the basis that it lawfully cancelled the said sale agreement.

[4] The second respondent, Savage Jooste & Adams Inc., is a firm of attorneys. The firm was appointed by Waxfam to act as conveyancers to effect the transfer of the property to LED. I refer to the second respondent simply as "the conveyancers".

[5] The conveyancers have been joined in these proceedings in order to give effect to the specific performance sought by LED in the event that Waxfam fails to comply with the court order. In that event, LED seeks relief in the form of a directive to the conveyancers to make the necessary payments out of monies held by them in trust, which monies form part of the purchase price for the property.

[6] The crux of the matter is the question of whether or not Waxfam was entitled under the sale agreement to place LED *in mora* for LED's alleged failure to comply with its obligations, and subsequently to cancel the agreement on this basis. There are two underlying issues to this question.

[7] The first underlying issue concerns LED's obligation to pay penalty interest under the sale agreement following its alleged failure to make timeous payment of the transfer costs. I refer to this as "the penalty interest" issue.

[8] The second issue is which party was responsible for payment of the engineering services fee raised by the city council in terms of sections 48 and 63 of the Town Planning and Township Ordinance[1] ("the Ordiance") following the approval of a rezoning application in respect of the property. I refer to this as the "engineering services fee" issue.

[9] The engineering services fee issue loomed large in the affidavits filed by both of the parties. This is understandable. The fee raised by the city council in this respect was the substantial sum of R1, 16 million. This fee was included in the final rates clearance figures supplied by the council to the conveyancers. Non-payment of the fee had the practical effect that transfer of the property could not take place. Thus, the dispute about who was responsible to pay the fee was a major contributing factor in the litigation.

[10] However, on the morning of the hearing, Mr van der Merwe, for LED, drew the attention of the court and his opponent to the recent decision of the

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1 15 of 1986

Supreme Court of Appeal in *Illovo Opportunities Partnership #61 v Illovo Junction Properties.*[2] In that case it was held that although the local authority fixes the amount of the fee within 30 days of the rezoning scheme coming into operation, payment of the fee only falls due when the owner elects to implement the scheme by developing the land.[3]

[11] On the basis of the *Illovo* decision, it is clear, in hindsight, that the city council acted prematurely in demanding payment of the engineering services fee before it would issue a rates clearance certificate. Practically, this means that if I grant the application, the engineering services fee will not be included as part of the rates clearance figures that Waxfam must pay to cause transfer to be effected. In fact, LED expressly indicated that it no longer persisted with its prayer to this effect.

[12] Despite this development, from a legal point of view, the engineering services issue is still relevant to the dispute between the parties. If LED was liable for the fee in terms of the sale agreement, then its failure to make payment thereof entitled Waxfam to cancel. *Vice versa*, if Waxfam was liable for the fee, it was not entitled to place Waxfam *in mora* and thereafter to cancel for its non-payment of that fee.

[13] The parties are agreed that if I decide in Waxfam's favour on the penalty interest issue, this will dispose of the matter without my having to decide the engineering services fee issue. LED accepts that if I find that it was liable for

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2 (490/13)[2014] ZASCA 119 (19 September 2014), 2014 JDR 1889 (SCA)

3 Para 26

the penalty interest claimed then Waxfam was entitled to cancel the contract solely on the basis of LED's non-payment of that interest. In that case, LED accepts that it would not be entitled to an order of specific performance, even if it might be successful on the engineering services issue.

[14] As far as the facts of the matter are concerned, I summarise them below.

[15] The property in question is an undeveloped piece of land. It was originally zoned as "residential 3". During late 2011, Waxfam, together with the owners of two adjacent undeveloped properties, appointed planning consultants to apply to the city council for a rezoning of the properties from "residential 3" to "special". This would permit a high-density development of the property through the construction of offices, shops, showrooms, places of refreshment, residential buildings and dwelling units.

[16] While the rezoning application was pending, Waxfam put the property on the market.

[17] In late 2012, the planning consultants advised Waxfam that the city council had indicated that the rezoning application was likely to be approved.

[18] Mr Haung, a director of LED, was introduced to the property by the estate agent, Ms Roper, in approximately April 2012. Ms Roper advised Mr Haung of the pending rezoning application in respect of the property. Mr Haung was also interested in purchasing the adjacent properties.

[19] On 19 February 2013 the planning consultants sent a letter reporting to Waxfam and the adjacent property owners on the status of the rezoning

application. The letter advised, among other things, that the town planning department supported the application; that the city council was entitled to levy a contribution for external services as a result of a rezoning in terms of the Ordinance, and that a contribution, being the engineering services fee, was likely to be imposed in this case; that the council would not issue a clearance certificate until the contribution was paid; and, finally, that "the contributions would be included in the relevant sales agreements and would be paid by the purchaser".

[20] It seems that both parties were advised that the city council had approved the rezoning application before the formal decision was made. The city's Executive Director: Development Planning and Urban Management approved the rezoning application on 25 July 2013. Waxfam states that it was advised of the approval in March 2013, and Mr Haung states in his founding affidavit that Ms Roper advised him of the approval on 26 June 2013. Nothing turns on this, as it is common cause between the parties that the city council could not raise the engineering services fee until the approval was promulgated in the Provincial Gazette. This took place some months later.

[21] On 21 June 2013 Mr Haung, on behalf of LED, made a formal offer to purchase the property. Waxfam accepted the offer on 26 June 2013, thus concluding the sale agreement.

[22] For present purposes, the material terms of the sale agreement were as follows:

[22.1] The purchase price for the property was R10, 2 million.

[22.2] LED was obliged to pay a deposit on the purchase price of R1,5 million immediately on acceptance of the offer.

[22.3] The balance of the purchase price was payable within 90 days, by way of an irrevocable guarantee. If not paid, LED would forfeit the deposit.

[22.4] In terms of clause 6, LED assumed the following obligation regarding transfer costs:

> "All costs of Transfer, including, but not limited to, Transfer Duty if applicable and the costs of registering any mortgage bonds which may be required, as well as survey and diagram fees if applicable, and any VAT payable on such costs, shall be paid by the Purchaser. The Purchaser shall, on demand by the Conveyancer, pay to the Conveyancer such costs as are called for by the Conveyancer from time to time." (emphasis added)

[22.5] Clause 9 dealt with *mora* interest. It provided as follows:

> "Should the Purchaser fail to fulfill on due date any of his/her obligations under this Agreement (which shall include the signature of any documentation relating to the passing of Transfer, the payment of the deposit, the delivery of the guarantee referred to in clause 4, payment of Transfer Duty or payment of any other amount due in terms of this Agreement),

then and in that event the Purchaser shall be liable to pay the Seller interest on the full purchase price at the current bond rate of interest charged by Standard Bank of S.A. (Ltd) from the date of the commencement of the delay to the date on which the delay ceases, both dates inclusive, as certified by the Conveyancer ("the breach period"), the said interest being payable prior to Transfer. ..." (emphasis added)

[22.6] Clause 18 provided that if either party was in breach of any of the terms of the agreement, and failed to remedy the breach within seven days of being called upon, in writing, to do so, the aggrieved party would be entitled to cancel the agreement, or claim specific performance, without prejudice to any of its rights to claim damages.

[22.7] No latitude, extension of time or indulgence granted by either party to the other was to be construed as prejudicing that party's right to insist on the strict and punctual compliance by the other party with the terms of the agreement.

[22.8] The property was sold *voetstoets*, subject to all existing servitudes, Title Deed conditions and "all other conditions which may exist in regard thereto".

[23] The agreement did not expressly deal with the issue of rezoning or the payment of the engineering services fees applicable.

[24] On 29 August 2013 the conveyancers requested the city council to provide rates clearance figures as a precursor to obtaining a rates clearance certificate. The city provided the figures on 11 September 2013.

[25] The conveyancers completed the necessary paperwork preparatory to the registration of transfer and furnished LED with a *pro forma* invoice for the costs attendant on the transfer on 20 September 2013 ("the first invoice").

[26] On 26 September 2013 the parties entered into a written addendum to the sale agreement. In terms of the addendum, LED was granted an extension until close of business on 10 October 2013 within which to pay the full purchase price. In addition, the non-refundable deposit was increased to R3 million.

[27] On 7 October 2013, Ms Roper communicated with the conveyancers and advised that she had been requested by LED to ask for a discount on the invoice issued on 20 September in respect of transfer costs. The conveyancers agreed to a discount on their own fee and conveyed this to Ms Roper on 9 October 2013. At the same time, they issued a new invoice for the transfer costs ("the second invoice").

[28] By 10 October 2013 LED had complied with its obligations regarding the purchase price. Payment of the second invoice was not forthcoming. Accordingly on 28 October 2013, the conveyancers sent a letter of demand to LED on behalf of Waxfam. The letter advised in relevant part that unless LED paid the transfer costs in the amount of R783 807, 34 by no later than

close of business on 4 November 21013, Waxfam would be entitled, without prejudice to any of its other rights, to cancel the agreement. In response, LED paid the 9 October invoice on 1 November 2013.

[29] However, this did not resolve the issue. On 26 November 2013, the conveyancers wrote again to LED informing it as follows:

[29.1] In terms of clause 6 of the sale agreement, the transfer costs were payable by LED on demand. The first demand had been made on 20 September 2013.

[29.2] Despite numerous demands for payment of the transfer costs, payment had only been effected on 1 November 2013 in response to the letter of demand dated 28 October 2013.

[29.3] On receipt of that payment, the conveyancers had immediately paid over to the city council the amount due in terms of the rates clearance figures issued in September.

[29.4] However, the city had rejected this payment as the rates clearance figures had by then expired.

[29.5] This necessitated the conveyancers having to apply for new rates clearance figures before it could proceed with the registration of transfer.

[29.6] Consequently, the anticipated transfer during November 2013 was not possible, and it was unlikely that it would be possible to effect transfer before the December 2013 closure.

[29.7] The delay in transfer was caused by LED's failure to pay the costs on first demand.

[29.8] Had LED paid the second invoice within a reasonable time, i.e. by 18 October 2013, the clearance figures originally obtained from the city council would have been paid before their expiry date, and transfer could have been registered in November 2013.

[29.9] In terms of clause 9 of the sale agreement, Waxfam was entitled to claim penalty or *mora* interest.

[29.10] Penalty interest under clause 9 would be calculated from 18 October 2013, being the date when payment could reasonably have been expected in terms of the second invoice.

[29.11] Penalty interest would be calculated from this date. The amount due would be calculated and payment would be required before registration.

[29.12] LED would be held liable for any additional costs arising from the need to obtain new clearance figures.

[29.13] Waxfam's rights were reserved in respect of any further claims it had against LED.

[30] It is common cause that LED did not object or respond to the contents of this letter.

[31] On 15 January 2014, the rezoning was formally published in the Provincial Gazette. Consequent on publication, the city council was entitled (in terms of the situation then prevailing) to raise an engineering services fee in respect of the property. On 13 February 2014 the council advised the conveyancers that it would not furnish fresh rates clearance figures or issue a rates clearance certificate without payment of the engineering services fee in the amount of some R1,16 million.

[32] Pursuant to this development, the conveyancers wrote once more to LED on 18 February 2014 demanding, *inter alia*, the following payments from LED:

[32.1] R1,16 million in respect of the engineering services fee which, it was alleged was "for the Purchaser's account."

[32.2] Penalty interest pursuant to the conveyancers' letter of 26 November 2013 in the amount of R422 013. 14, calculated as from 18 October 2013 to the estimated date of transfer, being the end of March 2014.

[33] The letter placed LED on terms that unless the amounts demanded were paid by 25 February 2014, Waxfam would be entitled to cancel the sale agreement.

[34] LED did not pay any of the amounts demanded.

[35] On 25 February 2014, the date on which the demanded payments fell due, the conveyancers wrote to LED advising that if LED remained in breach by the close of business on 27 February 2014, the sale agreement automatically would be cancelled without further written notice.

[36] LED's attorneys wrote various letters to the conveyancers on 26 and 27 February 2014. The most significant averments made in the letters were that:

[36.1] It was Waxfam's responsibility to pay the amounts due in terms of the clearance certificate and it should have done so regardless of whether or not LED had paid the invoice amounts at that stage.

[36.2] Accordingly, Waxfam was not entitled to cancel the agreement on the basis of any breach on the part of LED in relation to payment of the transfer costs.

[36.3] LED denied it was in breach.

[36.4] LED remained intent on taking transfer of the property.

[36.5] LED required an undertaking from Waxfam that it would make the necessary payments to secure the clearance certificate in order to effect transfer to LED.

[37] In view of the stance adopted by LED, it did not make the payments demanded by 27 February 2014.

[38] In turn, Waxfam did not give the requested undertaking. In its view, LED's failure to comply with the demands made in the letters of the 18 and 25 of February 2014 resulted in the lawful cancellation of the sale agreement.

[39] This impasse between the parties led to LED instituting its application for specific performance on 25 April 2014.

[40] In order to succeed in its application for specific performance LED must establish that Waxfam did not lawfully cancel the sale agreement. This requires LED to show that it was not liable to Waxfam under the sale agreement for either the penalty interest or the engineering services fee demanded in the conveyancers' letters of 18 February 2014 and 25 February 2014. In other words, LED must succeed on both the penalty interest issue and the engineering services issue in order to secure the relief it seeks.

[41] I commence with the penalty interest issue.

[42] This requires me to determine whether Waxfam was entitled to place LED *in mora* under the sale agreement for non-payment of the penalty interest demanded under cover of the conveyancers' letter of 18 February 2014. If so, it follows from the terms of the conveyancers' subsequent letter of 25 February 2014 that the sale agreement was lawfully cancelled when, by close of business on 27 February 2014, LED had not effected payment.

[43] Two clauses of the sale agreement are particularly important for purposes of making a determination on this issue.

[44] The first is clause 9, the *mora* interest clause. In terms of this clause, LED was liable for penalty interest in the event of its failure to make payment on due date of any amount owed under the agreement.

[45] The second is clause 6, the transfer costs clause. This clause is important because the conveyancers' letter of 18 February 2014 based the demand for penalty interest on LED's alleged failure to pay the transfer costs timeously.

[46] In terms of clause 6, LED was obliged to pay the costs of transfer "on demand by the Conveyancer".

[47] The conveyancers first made a demand for payment on 20 September 2013 in the first invoice. LED did not pay the invoice. Instead, it sought a discount on the invoice on 7 October 2013.

[48] The second invoice, constituting a further demand for payment, was dispatched on 9 October 2013. By 28 October 2013, LED had still not paid the transfer costs.

[49] This induced the conveyancers to make a third demand for payment of the transfer costs in its letter of that date. At the same time LED was put on notice that failure to pay the transfer costs by 4 November 2013 would entitle Waxfam to cancel the contract, or to claim specific performance. It was expressly stated that this was without prejudice to any other rights that Waxfam had under the agreement.

[50] LED points out that it complied with the demand for payment made in the letter of 28 October 2013. Accordingly, it submits, it was not in breach of its

obligation in respect of the transfer costs. I refer to this as LED's first contention.

[51] LED contends further that it cannot be blamed for the delay in the registration of transfer caused by the expiry of the rates clearance figures. This is because, so the argument goes, the obligation to pay the amounts due for purposes of obtaining the rates clearance certificate rested on Waxfam, not on LED. Waxfam should have effected payment of the amounts required to obtain a rates clearance certificate timeously, and should not have waited until LED had paid the transfer costs before it did so. LED submits that there is no link between the payment of the transfer costs and the payment of the amounts due by Waxfam for rates clearance purposes. On this basis too, LED denies it was in breach of its obligations under the sale agreement, and contends that it was not liable for penalty interest. I refer to this as LED's second contention.

[52] LED's first contention rests on the premise that the due date for payment of the transfer costs was 4 November 2013. However, this premise is ill-founded if due regard is paid to the terms of clause 6 of the sale agreement.

[53] As I have indicated, clause 6 required LED to make payment of the transfer costs on demand by the conveyancers. The normal method by which conveyancers make a demand for the payment of transfer costs is by issuing an invoice to the purchaser. In this case, the conveyancers made two demands that were unmet, before it dispatched its letter of 28 October 2013, placing LED on terms.

[54] When, as in the present case, a sale of property agreement obliges a purchaser to pay the transfer costs on demand by the conveyancer, it is must be intended that the payment is effected promptly after dispatch of the conveyancers' invoice. LED failed to make any payment in response to both the first and the second invoices. When payment was ultimately effected, six weeks had already elapsed from the date of dispatch of the first invoice.

[55] It is so that LED paid the transfer costs within the time period provided in the letter of 28 October 2013. However, this had limited legal effect. It staved off possible legal action by Waxfam to cancel the sale, or seek specific performance. This being the legal action specifically threatened in the 28 October letter. But it did not prevent Waxfam from exercising its rights under clause 9 of the sale agreement to claim penalty interest for LED's failure to pay the transfer costs on the due date.

[56] The reason for this is two-fold.

[57] In the first place, for the reasons set out above, in my view the due date for the payment of the transfer costs was not 4 November 2013. At the very least, and leaving aside for the moment the first invoice, LED was obliged to effect payment promptly after the conveyancers sent the second invoice. I agree with the contention by Waxfam, set out in the conveyancers' letter of 26 November 2011, that LED should have made payment of the transfer costs at least by 18 October 2013, being within a period of seven days of the second invoice.

[58] In these circumstances, by the time the third demand was made on 28 October 2013, LED was already in breach of its obligation to pay the transfer costs on demand. Liability for penalty interest under clause 9 arose on LED's failure to pay the transfer costs by 18 October 2013. It could not cure this breach and extricate itself from liability under clause 9 by paying the transfer costs before 4 November 2013.

[59] Therefore, notwithstanding LED's payment of the transfer costs in response to the conveyaners third demand, Waxfam was entitled to hold LED liable for penalty interest under clause 9 as from 18 October 2013.

[60] In the second place, the conveyancers' letter of 28 October 2013 threatened LED with cancellation or an action for specific performance in the event of non-payment of the transfer costs by 4 November 2013. The letter clearly was aimed at placing LED on terms in accordance with the breach provisions set out in clause 18 of the sale agreement.

[61] Significantly, however, the letter also expressly reserved Waxfam's other rights under the sale agreement. LED's compliance with the third demand in the letter of 28 October 2013 had the effect that Waxfam could not proceed to claim cancellation under clause 18 at that stage. However, Waxfam retained the right under clause 9, read with clause 6, to hold LED liable for penalty interest based on LED's failure to make payment of the transfer costs on the due date, i.e. by 18 October 2013.

[62] For these reasons, I find that there is no substance in LED's first contention. LED's payment consequent on the demand in the letter of 28 October 2013 did not relieve it of its liability for penalty interest.

[63] In the circumstances, it follows that Waxfam was entitled to place LED *in mora* in respect of the penalty interest, and to cancel the contract on non-payment thereof by 27 February 2014.

[64] Strictly speaking this finding renders it unnecessary for me to consider LED's second contention in respect of the penalty interest issue. For sake of completeness, however, I address it briefly.

[65] There is no dispute that Waxfam was responsible for paying the amounts due to the city council based on the rates clearance figures obtained by the conveyancers in September 2013 ("the rates"). However, for LED's contention to succeed, I must find that the two obligations, viz. LED's obligation to pay transfer costs, and Waxfam's obligation to pay the rates are separate and independent obligations. In fact, LED's stance requires me to find that Waxfam assumed an earlier obligation to pay the rates, in other words, before LED paid the transfer costs. Only if this is so, can I accept LED's submission that Waxfam was responsible for the delay by waiting until LED had paid the transfer costs before paying the rates.

[66] If I find, on the contrary, that the two obligations are interdependent, then they must be presumed to be reciprocal unless there is evidence to the contrary.[4]

[67] Mr Subel for Waxfam submits that the two obligations are reciprocal, and that Waxfam was not under an obligation to pay the rates until LED had paid the transfer costs. In my view, there is merit in this submission.

[68] As I have already noted in relation to LED's first contention, clause 6 of the sale agreement obliged LED to pay the transfer costs on demand. This envisages prompt payment on receipt of an invoice from the conveyancers. In this case, the first invoice was sent shortly after the conveyancers had obtained the rates clearance figures, and prior to Waxfam having paid the rates. Thus, neither the terms of the sale agreement nor the conduct of the conveyancers gave any indication that Waxfam was obliged to pay the rates before payment of the transfer costs fell due.

[69] In fact, they demonstrate the contrary. LED was obliged to pay the transfer costs on demand, and regardless of whether or not the rates were paid. In this case, the demand for payment of the transfer costs was made before Waxfam paid the rates. It follows that LED's obligation to pay the transfer costs preceded Waxfam's obligation to pay the rates.

[70] In addition, the invoices sent by the conveyancers identified the kinds of costs associated with the transfer. What they indicate is that LED was

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[4] Motor Racing Enterprises (Pty) Ltd (in Liquidation) v NPS (Electronics) Ltd 1996 (4) SA 950 (A) 961

responsible for all the costs associated with the various tasks the conveyancers were required to perform preparatory to lodging the transfer documents.

[71] From a practical point of view, the payment of these costs is a precursor to facilitate the registration of transfer. They need to be paid in advance to enable the conveyancers to carry out their tasks and to ensure that transfer can be effected for the benefit of both parties.

[72] One of the costs included in the invoices submitted to LED was the "estimated fee to obtain rates clearance figures and certificate from the council". This is a clear indication that the payment of the transfer costs, and the payment of the rates were interdependent obligations. Although Waxfam was obliged to pay the rates, LED was obliged to pay the costs associated with the conveyancers obtaining the necessary rates clearance figures from the city council, and then submitting the rates payment on behalf of Waxfam.

[73] The interdependence of the two obligations is further demonstrated if one has regard to the purpose for which a rates clearance certificate must be obtained. The purpose is to clear the way for registration of transfer. Without the city council issuing a rates clearance certificate transfer cannot take place. Thus, Waxfam's obligation to pay the rates is intrinsically linked to the transfer of the property and, by extension, to LED's obligation to pay the transfer costs.

[74] For these reasons, I find that the two obligations were reciprocal, rather then separate and independent. Consequently, Waxfam was not under an obligation to pay the rates prior to LED having complied with its obligation to pay the transfer costs. Waxfam was entitled to delay payment of the rates until LED had paid the costs attendant on the conveyancers taking steps to effect transfer.

[75] Accordingly, I am unable to accept LED's contention that it was Waxfam that caused the delay in the transfer. It was LED's failure to comply timeously with its obligation to pay the transfer costs that led to the delay. LED's second contention must be rejected.

[76] For this reason too, Waxfam was entitled to place LED *in mora* in respect of the penalty interest under clause 9, and to cancel the agreement on LED's non-payment by 27 February 2013 in accordance with Waxfam's demand.

[77] Consequently, I find in favour of Waxfam on the penalty interest issue. LED's failure to succeed on the penalty interest issue on its own is sufficient for me to conclude that LED cannot enforce the sale agreement and obtain an order of specific performance against Waxfam. The effect of this, as indicated at the outset, is that it is unnecessary for me to consider and make a determination on the engineering services fee issue. Even if LED were to succeed on that issue, it would still not be entitled to relief.

[78] I therefore make the following order:

1. The application is dismissed with costs, including the costs of two counsel.

R KEIGHTLEY
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard: 5 June 2015

Date of Judgment: 3 July 2015

Counsel for the Applicant: A R van der Merwe

Instructed by: Louise Tonkin Inc. Attorneys

Counsel for Respondent: A Subel SC

E Rudolph

Instructed by: Werksmans Attorneys