IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NUMBER : A5056/2015

COURT *A QUO* CASE NUMBER : 15409/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES / NO
(2) OF INTEREST TO OTHER JUDGES YES / NO
(3) REVISED ✓

17/2/2017
DATE

SIGNATURE

In the matter between

MR. L.E.D. (PTY) LTD Appellant

and

WAXFAM INVESTMENTS (PTY) LTD First Respondent

SAVAGE JOOSTE & ADAMS INC Second Respondent

JUDGMENT

ANDRÉ GAUTSCHI AJ

[1] This is an appeal from a single judge in this division, Keightley AJ (as she then

was), dismissing an application launched by the appellant as applicant against the respondents for specific performance, namely the transfer of an immovable property in terms of an agreement of sale.

[2] The material facts, which were not in dispute, were the following :

2.1 The first respondent ("Waxfam") was the owner of an undeveloped piece of land ("the property") within the area of jurisdiction of the Johannesburg City Council. During late 2011, Waxfam and the owners of two adjacent undeveloped properties appointed town planning consultants to apply to the City Council for a rezoning of the three properties from "residential 3" to "special", which would permit a high density development on those properties.

2.2 The rezoning applications were officially approved on 25 July 2013, but from late 2012 Waxfam knew, through the town planning consultants, that the rezoning application was likely to be approved.

2.3 The appellant ("LED") through its director, Mr Huang, was introduced to the property by an estate agent, Ms Roper, in approximately April 2012. He knew of the pending rezoning application, and was interested in acquiring all three properties.

2.4 On 21 June 2013 Mr Huang on behalf of LED, made a formal offer to purchase the property, which was accepted by Waxfam on 26 June

2013, which was therefore the date of conclusion of the sale agreement.

2.5 The material terms of the sale agreement were the following :

2.5.1 The purchase price was R10.2 million, of which a deposit of R1.5 million was to be paid immediately on acceptance of the offer.

2.5.2 The balance of the purchase price was to be secured within 90 days by way of an irrevocable guarantee[1]. If not so secured, LED would forfeit the deposit.

2.5.3 Clause 6 provided as follows :

> "6. **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."

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[1] I take this to be the proper construction of clause 4.1 of the agreement of sale, which provides :

> "The balance of the purchase price ... shall be paid to the Conveyancers against Transfer within ... 90 days. The Purchaser shall furnish the Conveyancer with an irrevocable guarantee acceptable to the Seller, for payment upon Transfer of the said purchase price ..."

2.5.4 Clause 9 provided as follows :

"9. ***MORA* INTEREST**

Should the Purchaser fail to fulfil 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 date of 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. Such obligation shall be in addition to any obligation the Purchaser may have to pay an occupational consideration for the breach period."

2.5.5 Clauses 18.1 and 18.2, the *lex commissoria* and no indulgence clauses, provided as follows :

"18 **BREACH**

18.1 Should either party commit a breach of any of the terms of this Agreement, and fail to remedy same within 7 (seven) days of being called upon, in writing, to do so, the aggrieved party shall be entitled, without prejudice to his/her rights, to claim any damages that he/she may have suffered as a result of such breach:

18.1.1 to cancel the Agreement by written notice to the defaulting party; or

18.1.2 to claim specific performance by the defaulting party of his/her obligations in terms of this Agreement.

18.2 No latitude, extension of time or indulgence granted by

> either party to the other shall be construed as prejudicing such party's right to insist on the strict and punctual compliance by the other party with the terms of this Agreement."

2.6 On 26 September 2013, the parties entered into a written addendum to the sale agreement, in terms of which LED was granted an extension until close of business on 10 October 2013 within which to pay[2] the full purchase price. The non-refundable deposit of R1.5 million was increased to R3 million.

2.7 Three events occurred which gave rise to the dispute between the parties. The first is that LED was late with the payment of the transfer costs. The second is that Waxfam did not pay the amount required by the City Council to obtain a rates clearance certificate, until LED had paid the transfer costs, by which time the clearance figures had expired and new clearance figures had to be requested. That caused a delay in effecting transfer of the property. Waxfam blamed that on LED.

2.8 The third is that upon publication in the *Provincial Gazette* of the rezoning of the property, the City Council was entitled to raise an engineering services fee, and demanded, wrongly as it turned out by

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2 By payment and not merely the furnishing of a bank guarantee

reason of a subsequent decision of the SCA[3], that the engineering services fee be paid before a rates clearance certificate would be issued. As a result of this SCA decision, the appellant, in the hearing before the court *a quo*, abandoned its stance that it was Waxfam's obligation to pay the engineering services fee, and the parties were agreed that the question of the engineering services fee could be ignored and a decision made purely on the question of the penalty interest. It was ignored by the court *a quo*, and I shall do likewise.

2.9 The court *a quo* engaged the second event, and found that LED was indeed to blame for the delay in transfer. I doubt the correctness of that finding, but in view of my approach to this matter, it is not necessary for me to decide who was to blame for the delay in transfer of the property. I therefore proceed to deal with the facts relevant to the first event.

2.10 On 20 September 2013 the conveyancers, the second respondent, furnished LED with a pro forma invoice for the transfer costs ("the first invoice").

2.11 LED, through Ms Roper, requested a discount on the invoice. The

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3 Illovo Opportunities Partnership # 61 v Illovo Junction Properties (Pty) Ltd (490/13) [2014] ZASCA 119 (19 September 2014)

conveyancers agreed to a discount of their own fee, conveyed this to Ms Roper on 9 October 2013, and on the same date issued a new invoice for the transfer costs ("the second invoice").

2.12 On 28 October 2013, when payment of the second invoice had not been made, the conveyancers sent a letter of demand in terms of clause 18.1 to LED on behalf of Waxfam, calling on it to pay the transfer costs within seven days on pain of cancellation of the agreement of sale. In response, LED paid the second invoice on 1 November 2013.

2.13 On 26 November 2013 the conveyancers addressed another letter to LED stating, in essence, that on receipt of the (late) payment of the transfer costs, the conveyancers had paid over to the City Council the amount due in terms of the rates clearance certificates issued in September by the City Council, but the City had rejected this payment as the rates clearance figures had by then expired. New rates clearance figures had to be requested which would delay the anticipated transfer of the property from November 2013 until some time in 2014. Penalty interest (more correctly *mora* interest) under clause 9 would be charged, and LED would be held liable for any additional costs arising from the need to obtain new clearance figures.

2.14 LED did not object or respond to this letter.

2.15 The rezoning was formally published in the *Provincial Gazette* on 15 January 2014, and on 13 February 2014 the City Council advised the conveyancers that it would require payment of the engineering services fee in the amount of some R1.16 million in order to issue a rates clearance certificate.

2.16 This caused the conveyancers to write to LED on 18 February 2014 demanding payment from LED of *inter alia* R1.16 million in respect of the engineering services fee and penalty interest in the amount of R422 013.14. The latter amount was calculated from 18 October 2013, being the date when payment according to the conveyancers could reasonably have been expected in terms of the second invoice, until the estimated date of transfer, being the end of March 2014. LED was afforded seven days to pay these amounts against a threat of cancellation, as required by clause 18.1 of the agreement.

2.17 LED did not pay the amounts demanded.

2.18 On 25 February 2014, the conveyancers wrote to LED advising that if it remained in breach by close of business on 27 February 2014, the sale agreement would automatically be cancelled without further written notice.

2.19 LED through its attorney denied that was in breach, that it owed any amount at all, or that Waxfam was entitled to cancel the agreement.

[3] Waxfam's stance that it is entitled to penalty interest from the date when the transfer costs were "reasonably" due until the expected date of transfer, is based on its interpretation of clause 9 of the agreement, quoted in paragraph 2.5.4 above, and more particularly on the expression "... from the date of commencement of the delay to the date on which the delay ceases ...". On its interpretation, it was entitled to interest in terms of clause 9 not only for the period of non-payment, but also for the period of delay caused consequentially by such non-payment. In my view, this is a misconception of the proper construction of clause 9. I say so for the following reasons :

3.1 One would expect clause 9 to deal with payment of interest during the period that the purchaser (LED) was in breach of an obligation under the agreement, i.e. from the time that payment was due until payment was made, or from the time that signature on a document was required until it was appended, to use two examples. The period for which interest would be payable is also then defined in clause 9 as "the breach period".

3.2 It would be highly unusual for a defaulting purchaser to have to pay interest during any period of consequential delay for which the seller may be entitled to claim damages. In fact, claiming interest for such period would be regarded as a penalty in terms of the Conventional Penalties Act, No 15 of 1962, which would preclude the seller from claiming damages in addition to the penalty. In other words, Waxfam

would be limited to a claim for interest during such period.

3.3 The misconception arises in my view out of the word "delay", which does not mean a delay in the sense contended for by Waxfam. In my view, the word "delay" is simply a catch-all expression for the failure by LED to fulfil any obligation under the agreement. To hold otherwise would lead to anomalies. Waxfam takes the "date of commencement of the delay" as being the date when payment of transfer costs was due, without considering whether that was in fact the commencement of the delay of which it complains. For instance, assume that LED was obliged to pay the transfer costs on 18 October 2013 but, had it paid the transfer costs on 29 October 2013, no delay in transfer would have ensued, then the date of commencement of the delay cannot be 18 October 2013. In context, the date of commencement of the delay is clearly the date on which LED failed to fulfil an obligation which was due. The word "delay" cannot have different meanings in the same sentence, and accordingly "the date on which the delay ceases" must logically be the date on which the failure to fulfil the obligation ceases, which, in the present case, is when payment was in fact made. That also accords with the definition of this period in the clause as "the breach period", and the fact that the clause deals with "*mora* interest". In addition, the fact that such interest is payable prior to transfer is further support for my approach, since, if the "delay" would cease on the date of transfer, it would not be possible to pinpoint that date prior

to transfer, and it would be practically impossible to give the purchaser an accurate figure which it had to pay prior to transfer.

[4] Accordingly, I find that the period for which penalty interest (or *mora* interest as clause 9 is headed) was payable by LED, ended on 1 November 2013 when it paid the transfer costs.

[5] What was the "date of commencement of the delay"? According to clause 6, the transfer costs were payable on demand by the conveyancers. They were demanded by furnishing an invoice. The first invoice was withdrawn and replaced by the second invoice for a reduced amount. That was furnished on 9 October 2013, which is therefore the date of demand. The agreement is in my view clear – payment is due on demand, which means that the due date for payment is 9 October 2013. LED was in *mora* from the next day, 10 October 2013.

[6] Accordingly, *mora* interest in terms of clause 9 was due and payable for the period 10 October 2013 (the day after the date when payment was due) until 1 November 2013 (when payment was made), and not for any period beyond that. This finding makes its unnecessary for me to consider who caused the delay in the transfer of the property, and specifically whether it was caused by the late payment of the transfer costs, or by Waxfam's delay in paying the rates clearance figures and thereby allowing those figures to expire.

[7] LED's contention is that it was entitled to pay within the seven days afforded

it in terms of the letter of demand of 28 October 2013. That is incorrect. Clause 9 operates independently of clause 18.1. *Mora* interest started to run from the "date of commencement of the delay" in terms of clause 9 without the need for any written notice. The letter of 28 October 2013 was a letter in terms of clause 18.1, necessary in the event of Waxfam wishing to cancel the agreement as a result of non-payment of the transfer costs. The letter therefore did not afford LED an indulgence to pay within the seven day period or excuse it from *mora* interest; it merely required such payment to avoid cancellation. *Mora* interest became due and payable regardless of that letter.

[8] The conveyancer's letter of 18 February 2014 demanded payment of the engineering service fee as well as (overstated) penalty interest, a total of some R1.6 million. The total penalty interest claimed was R422 013.14. On LED's own admission, made in the replying affidavit, an amount of *mora* interest of some R64 000 was due and payable by it[4]. The question is whether the demand, overstated as it was, was a good demand in terms of clause 18.1 and would entitle Waxfam to cancel the agreement. In my view it was. The mere fact that a demand for payment of money is overstated does not make it ineffectual, where there is an admitted portion thereof which is due and payable[5].

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4 Its calculation is incorrect and overstated by three days, but the exact figure does not matter for purposes of this analysis.

5 See, by analogy, in the context of winding-up, Cardiff Preserved Coal and Coke Company v Norton (1867) LR 2 Ch App 405 at 410; Ebrahim (Pty) Ltd v Pakistan Bus Services (Pty) Ltd 1964

[9] Mr Joubert SC for LED sought refuge in three decisions of the then Appellate Division, namely Nel v Cloete[6], Hammer v Klein and Another[7] and Ponisammy and Another v Versailles Estates (Pty) Ltd[8]. I do not think that these cases assist the appellant. Nel v Cloete dealt with fixing a reasonable time in a demand for performance in the absence of a *lex commissoria*. Hammer v Klein dealt with a situation where no date had been provided in the contract for the furnishing of a banker's guarantee by the buyer. When the seller made a premature demand for the buyer to provide the banker's guarantee, the buyer was entitled to ignore the demand without any risk of being placed in *mora*[9]. Ponisammy held that a notice of rescission (in the absence of a *lex commissoria*) had to be clear and unequivocal, which cannot be extrapolated to require that a notice of demand for payment of money is invalid if the amount is incorrectly stated but there is an admitted amount due.

[10] I did not understand Mr Joubert to take serious issue with the fact that an overstated demand could not constitute a valid demand, in the face of an admitted portion thereof, although he did submit that it was a matter of degree, so that a grossly overstated demand would be invalid. I do not think, if the

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(4) SA 146 (N) at 146G-H; Dolphin Ridge Body Corporate v Express Model Trading 289 CC (3906/2010) [2012] ZAWCHC 111 (22 February 2012) at para's [21] – [23], unaffected by the judgment on appeal (Express Model Trading 289 CC v Dolphin Ridge Body Corporate 2015 (6) SA 224 (SCA)) in which condonation was refused in respect of a lapsed appeal.

6 1972 (2) SA 150 (A)

7 1951 (2) SA 101 (A)

8 1973 (1) SA 372 (A)

9 At 105H-106B.

principle is that an overstated demand which includes an admitted indebtedness would constitute a valid demand, that there could be any room for degrees of overstatement. Ultimately, Mr Joubert sought refuge in a submission that the demand made was for a different *causa*, namely penalty interest for consequential delay rather than simply for the breach, and was for that reason invalid. I do not agree that there is a different *causa* involved. The letter of demand of 18 February 2014 refers to clause 9 and *mora* interest. It claims *mora* interest from 18 October 2013[10] as the date from which *mora* interest would commence to run. It does not claim *mora* interest on a different *causa*. It claims *mora* interest in terms of clause 9, and the additional period after 1 November 2013 is as a result of an incorrect construction placed on clause 9 by Waxfam and conveyancers.

[11] Accordingly, I am of the view that Waxfam's cancellation of the agreement of sale was lawful, and that LED's application was rightly dismissed by the learned judge *a quo*, albeit that my reasoning differs from hers.

[12] Mr Subel SC, who appeared with Mr Rudolph for Waxfam, submitted that another ground for cancellation was present. He pointed to the fact that it is now clear that some *mora* interest was payable by LED. However, when the (overstated) demand was made on 18 February 2014, LED's response,

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10 This date differs from the date I have used, namely 10 October 2013, and the extra days are in my view an indulgence afforded by the conveyancers to LED, which, in terms of clause 18.2 of the agreement of sale, is ineffectual.

through its attorneys, was that there was no amount payable at all. That denial (i.e. denying that any *mora* interest at all was payable when indeed it was), so Mr Subel submitted, amounted to a repudiation by LED of the agreement of sale. Such repudiation would require no notice in terms of clause 18.1. Waxfam would be entitled to rely on this ground for cancellation, on an application of the principle that if a party relies on an inadequate ground for cancellation, but at the trial it emerges that a valid ground of cancellation existed at the time, the party would be entitled to rely on that new ground of cancellation[11]. In my view, this submission is correct, and Waxfam's cancellation of the agreement of sale was lawful on this basis as well.

[13] In the result the appeal is dismissed with costs, such costs to include the costs of two counsel.

ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH COURT

I CONCUR

M A MAKUME
JUDGE OF THE HIGH COURT

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11 Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA) at para [28]

I CONCUR

R E MOKAMA
JUDGE OF THE HIGH COURT

IT IS SO ORDERED

M A MAKUME
JUDGE OF THE HIGH COURT

Date of hearing	:	6 February 2017
Date of judgment	:	17 February 2017
Counsel for the appellant	:	Mr DJ Joubert SC
Attorney for the appellant	:	ENS Africa Inc Johannesburg (Mr D Wanblad)
Counsel for the first respondent	:	Mr A Subel SC Mr E Rudolph
Attorney for the first respondent	:	Werksmans Inc Johannesburg (Mr D van den Berg)
No appearance for the second respondent		