

SUMMARY OF THE JUDGMENT

LATE TRANSFER - BUYER TO COVER TRANSFER COSTS BEFORE SELLER PAYS RATES

**Mr. L.E.D (Pty) Ltd v Waxfam Investments (Pty) Ltd and Others
(14/15049) [2015] ZAGPJHC 137 (3 July 2015)**

In a transaction where the purchaser was late in paying the transfer fees, it denied liability for the resulting late registration penalty as the seller had at the time that the purchaser made the payment, not yet paid the rates and taxes. The court confirmed that the two payment obligations were reciprocal and the seller was entitled to delay payment of the rates until the purchaser had paid the conveyancing costs. The court confirmed too that 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 must be intended that the payment is effected promptly after dispatch of the conveyancers' invoice.

The Judgment can be viewed [here](#).

FACTS

Waxfam Investments (Pty) Ltd (Waxfam) was the owner of an undeveloped immovable property, zoned 'residential 3'. During late 2011, Waxfam and 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.

Late in 2012, the planning consultants advised Waxfam that the city council had indicated that the rezoning application was likely to be approved and Waxfam put its property on the market. The property was introduced to Mr L.E.D (Pty) Ltd (LED) by the estate agent involved and LED was advised of the pending rezoning application in respect of the property.

In February 2013 the planning consultants reported that, amongst other things, the town planning department supported the application; that the city council was likely, in terms of the Ordinance, to levy a contribution for external engineering services as a result of the rezoning; 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 sale agreements and would be paid by the purchaser.

LED too was informed of this and subsequently made a formal offer to purchase the property which Waxfam accepted.

For present purposes, the relevant provisions of the agreement were that:

- Regarding transfer costs, LED assumed the following obligation (clause 6 of the agreement):
“All costs of Transfer ... shall be paid by the Purchaser. The Purchaser shall, on demand by the Conveyancer, pay ... such costs as are called for by the Conveyancer from time to time.”
- Clause 9 dealt with *mora* interest and provided:
“Should the Purchaser fail to fulfill on due date any of his/her obligations under this Agreement (which shall include ... payment of any other amount due in terms of this Agreement) then ... the Purchaser shall be liable to pay the Seller interest on the full purchase price ... from the date of the commencement of the delay to the date on which the delay ceases ... the said interest being payable prior to Transfer. ...”
- 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 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.

Rates clearance figures were issued on 11 September 2013. The conveyancers thereafter issued their pro forma invoice to LED on 20 September (“the first invoice”). On 26 September 2013 the parties entered into a written addendum to the sale agreement, in terms of which LED was granted an extension within which to pay the full purchase price. Then on 7 October 2013, LED asked for a discount on conveyancing fees, which was granted and confirmed on 9 October, at which time a new invoice was generated and sent to LED (“the second invoice”).

By 10 October 2013 LED had complied with its obligations regarding the purchase price. Payment of the second invoice was however not forthcoming. Accordingly on 28 October 2013, the conveyancers sent a letter of demand to LED, advising it that unless LED paid the transfer costs by no later than close of business on 4 November 2013, Waxfam would be entitled, without prejudice to any of its other rights, to cancel the agreement. In response, LED paid the second invoice on 1 November 2013.

Hereafter, on 26 November 2013, the conveyancers wrote to LED informing it that it had caused a delay by failing to pay the transfer costs on demand. Payment was only effected on 1 November 2013 in response to the letter of demand dated 28 October 2013 and after issuing the second invoice. When the money was received, application was immediately made to the municipality for a clearance certificate. However, by that time the figures had lapsed and revised rates clearance figures had to be obtained. Due to the time of the

year, this had the effect to push the likely date of registration forward into the new year. This delay, the letter indicated, was caused by LED's failure to pay the costs on demand. Therefore, in terms of clause 9 of the agreement, Waxfam claimed penalty (or *mora*) interest from 18 October 2013, being the date when payment could reasonably have been expected in terms of the second invoice, which interest was payable before registration of transfer.

LED did not respond to this letter.

In January 2014, the rezoning was formally published in the Provincial Gazette, and (in terms of the situation then prevailing) the council raised 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. The conveyancers then wrote to LED demanding payment of this amount, together with the amount of the penalty interest demanded in their previous correspondence to LED. 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.

LED did not pay any of the amounts demanded.

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 would automatically be cancelled without further written notice.

LED then responded and averred that:

- (i) It was Waxfam's responsibility to pay the rates and taxes amounts and it should have done so regardless of whether or not LED had paid the invoice amounts at that stage. 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.
- (ii) LED denied it was in breach and confirmed that it remained intent on taking transfer of the property.
- (iii) 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.

In view of the stance adopted, LED did not make the payments demanded by 27

February 2014. 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 February 2014 resulted in the lawful cancellation of the sale agreement.

LED then instituted an application for specific performance in the High Court.

HELD:

- In order to succeed in its application for specific performance, LED had to establish that Waxfam did not lawfully cancel the sale agreement.

Was Waxfam entitled to place LED in mora under the sale agreement for non-payment of the penalty interest and to cancel the agreement as a result of non-payment?

- The court held that Waxfam was entitled to place LED in *mora* and to cancel the agreement, because:
 1. clause 9, the *mora* interest clause, made LED liable for penalty interest in the event of its failure to make payment on the due date of any amount owed under the agreement; and
 2. clause 6, the transfer costs clause, LED was obliged to pay the transfer costs "on demand by the Conveyancer".
- LED's contention that it complied with the demand as it paid the costs after the conveyancer's letter of 28 October 2013, did not help it, as:
 - (i) LED was required to make payment after the issue of the first invoice. The normal method by which conveyancers make a demand for the payment of transfer costs, is by issuing an invoice to the purchaser. In the present matter the conveyancers made two demands that were unmet, before it dispatched its letter of demand of 28 October 2013, placing LED on terms.
 - (ii) When a sale of property agreement obliges a purchaser to pay the transfer costs on demand by the conveyancer, it 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 after the letter of demand, six weeks had already elapsed from the date of dispatch of the first invoice.
 - (iii) The only effect of the payment of the costs after the letter of demand of 28 October 2013 was to stave off possible legal action by Waxfam to cancel the

sale, or seek specific performance, being the legal action specifically threatened in the 28 October letter. 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.

- As such, 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, whether based on the sending of the first or second invoice. Waxfam was therefore entitled to hold LED liable for penalty interest under clause 9 as from 18 October 2013.
- It followed 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.

If the obligation to pay the amounts due for purposes of obtaining the rates clearance certificate rested on Waxfam, not on LED, should Waxfam have effected payment of the amounts required to obtain a rates clearance certificate timeously rather than waiting until LED had paid the transfer costs before it did so?

- Strictly speaking it was unnecessary for the court to consider LED's above (second) contention, but for the sake of completeness, however, it was addressed.
- It was not shown that Waxfam assumed an earlier obligation to pay the rates before LED paid the transfer costs. Only in such an instance could it be held that Waxfam was responsible for the delay by waiting until LED had paid the transfer costs before paying the rates.
- Rather, the two obligations are interdependent and reciprocal, unless there was evidence to the contrary. There was no such evidence. Rather:
 - (i) Clause 6 of the sale agreement obliged LED to pay the transfer costs on demand. This envisaged prompt payment on receipt of an invoice from the conveyancers.
 - (ii) In addition, the invoices sent by the conveyancers identified the kinds of costs associated with the transfer, all relating to the various tasks the conveyancers were required to perform preparatory to lodging the transfer documents. "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."
 - (iii) 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.

- Accordingly, the court held that it was LED's failure to comply timeously with its obligation to pay the transfer costs that led to the delay.

For these reasons, Waxfam was entitled to place LED in *mora* in respect of the penalty interest, and to cancel the agreement on LED's non-payment.

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