IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE HIGH COURT: MTHATHA)

CASE NO: 1565/2007

In the matter between:

AFRICAN BULK EARTHWORKS (PTY) LTD/

NEW HEIGHTS 55 (PTY) LTD **Plaintiff**

And

LANDMARK MTHATHA (PTY) LTD AND

OTHERS **Defendants**

And

KING SABATA DALINYEBO MUNICIPALITY &

2 OTHERS **3RD Party 1, 2 & 3**

JUDGMENT

DAWOOD J

1. **BACKGROUND**

1.1 The Plaintiff herein instituted action against the Defendant wherein the Plaintiff claimed damages arising out of a breach of an Earthworks contract that was concluded between the Plaintiff and the First Defendant.

1.2 The Plaintiff obtained default judgment against the Third and Fifth Defendants and with the leave of court withdrew its claim against the Fourth Defendant.

1.3 It was agreed between the Plaintiff and the First and Second Defendants that the only issues that remained for adjudication by this court were:-

i) Whether or not the Plaintiff was aware of the claim; and

ii) Accordingly whether or not the Plaintiff was *bona fides* when it concluded the agreement.

1.4 The First and Second Defendant confirmed that the *bona fides* of the Plaintiff was in dispute and in terms of **Section 11** of the **Restitution of Lands Act** the court has a wide discretion with regard to the order to be made if there was no *bona fides*.

1.5 It was agreed by the parties that the Plaintiff would be referred to as African Bulk, the First Defendant as Landmarks Mthatha and the Second Defendant as Landmark Real Estate. Further that the First Third Party would be referred to as the Municipality; the Second Third Party as the Province and the 3rd Third Party as the National Government, and that the Second and 3rd Third Parties would be referred to collectively as the Governments, plural.

1.6 It is common cause between Landmark Mthatha and the Municipality that it was an implied term of the agreement that the Municipality would give to Landmark Mthatha vacant possession of the Land, in the sense that the development work could be conducted and completed lawfully.

1.7 Landmark Mthatha alleges that the Municipality failed to do this and accordingly breached the agreement in that it failed to give vacant possession which enabled Landmark Mthatha to conduct and complete the development, lawfully as a result of the unresolved land claims.

1.8 The First Defendant's further claim as against the Municipality was inter alia that they pay an amount equal to the damages that Landmark Mthatha was directed to pay the Plaintiff, on the basis of the breach of contract, alternatively as against the municipality or the governments on the basis of misrepresentation.

1.9 The First Defendant alleged that it was accordingly entitled to claim specific performance and delay damages arising out of the First Defendant's inability to complete the work within the time period stipulated in the agreement, due to the failure of the municipality to give the First Defendant vacant possession of the land.

1.10 The First Defendant claimed termination damages, in the event of the court not granting specific performance and delay damages, but instead ordering termination of the lease.

1.11 The First Defendant's alternative claim against the Municipality is based on misrepresentation arising from the fact that the Municipality knew about those claims over the land at the time they concluded the lease agreement and failed to tell the Landmarks about them and therefore Landmark Mthatha suffered damages arising out of the misrepresentation.

1.12 The Municipality denied that they had this knowledge and accordingly Landmark Mthatha filed a further alternative claim against the Governments alleging that in the event of it being established that the Municipality had no knowledge, then the Government must pay the damages because they ought to have informed the Municipality about the Land claims and it is their fault or as a result of their misrepresentation that the Municipality was not aware of Land claims.

1.13 It was further submitted that even if Landmark was unsuccessful as against the Governments then the Municipality ought to pay the costs since it was the municipality's fault that Landmark Mthatha had to cite the Governments as conditional third parties.

1.14 The municipalities amended its plea and raised legal impossibility of performance as one of its defences, in the event of Landmark Mthatha establishing that the municipality had failed to give vacant possession pleading that it would be impossible for the municipality to give vacant possession of the subject land for the resumption of development works.

1.15 The Municipality's counsel, Advocate Madlanga S.C thereafter argued for a separation of the issues and wanted the issue of:-

a) whether or not the Municipality was aware of the Land Claims, prior to the conclusion of the lease agreement, and

b) whether it ought to have divulged that to Landmark, being determined first.

1.16 He argued that, that it would be a matter of convenience to the court to hear this evidence first before hearing evidence on the quantum which is in excess of a R300 million claim and that the court should *mero motto* order separation of the issues in terms of Section 33 (4), without the necessity of a formal application for separation.

1.17 The Plaintiff argued against a separation stating that this issue had been debated at length at the pre-trial meeting prior to agreement being reached that there would be no separation.

1.18 The First Defendant's counsel argued that one of the witness's, Mr. Terry would testify on both the merits and the quantum.

1.19 Separation was refused and the matter ordered to proceed on both the merits and quantum as it was not deemed necessary or convenient to separate the issues in this case. Such separation would and in fact result in a further delay of the finalization of the matter.

1.20 The Second and Third 3rd party's counsel Advocate Dukada S.C in his opening address stated that the National Government had donated the property to the Provincial Government on the 1st of April 1997 and the Provincial Government had in turn donated it to the Municipality in December 1997 and the property was eventually transferred to the Municipality in January 1999.

1.21 The case of the Governments is that at the time the Deed of Delegation was issued no claims had as yet been lodged by any of the claimants concerning the property in question with the Regional Land Claims

Commissioner and accordingly no misrepresentation was made by them when they donated the property to the municipality since they had no knowledge of any land claims.

1.22 It was conceded by the Landmarks that as at the time the property were donated there were no Land Claims against the property, the first claim only being lodged at the earliest in September 1998 and the others on the 31st of December 1998.

2 EVIDENCE LED

2.1 The Plaintiff thereafter commenced its case.

2.2 The Plaintiff called **Mr. Francois De Klerk** in support of its case and he testified as follows:-

a) He was a Mechanical Engineer and the Chief Executive Officer of African Bulk Earthworks.

b) In terms of the Bulk Earthworks contract they commenced work on the 7th of May 2007 and intended completing the work on the 10th of September 2007.

c) He was not aware of any Land Claims at the time he commenced work.

d) They were required to spend approximately R300 000 a day on average to complete the contract.

e) A meeting was held on the 17th of May 2007 and Mr Mike Merry from the Municipality was also present and he made no mention of any Land Claims.

f) The developer was required to pay them within 7 days of issuing of the certified payment certificate.

g) Mr. Markovitz representing Landmark Mthatha informed them that financing was delayed and he was arranging bridging finance.

h) He met with Mr. Markovitz and the other shareholders on the 7th of June 2007 at Port Elizabeth and they agreed on the payment terms in respect of certificates 1, 2 and 3 which was to be secured by bridging finance, as well as signing of suretyships by Mr. Markovitz and the other shareholders of Landmark Mthatha for the said payments and the other outstanding payments.

i) He was told at this meeting that the financing was being held up by the Surveyor General diagram for subdivisions and some co-ordinates as well as the Land claims which would be resolved shortly. He thereafter under cross examination conceded that he may have been mistaken about Land claims being mentioned and accepted Mr. Markovitz's version that what was discussed was that the delay in securing finance was caused by the Surveyor's General plan and the securing of the requisite number of leases prior to obtaining ABSA finance. He indicated that some time had passed and his main focus was on receiving payment so he may have been mistaken with regard to what was discussed.

j) However in light of the suretyship agreements concluded and the bridging finance undertaken by Landmark they were willing to continue working on the project and they continued.

k) He received a letter from Mr Markovitz on the 13th of August 2007 informing him that they could not secure the development finance and suggested that he stops work as he would not be in a position to pay them and they accordingly immediately stopped working.

l) In the letter dated 13th of August 2007 Mr Markovitz indicated inter alia:-

"

a) That they had discovered that 8 land claims were registered in 1998;

b) That the Land Claims Commissioner of the Eastern Cape had done nothing about the claims for 9 years.

c) That they were 5 intertwined court cases currently on the go; and

d) The municipality had been aware of the land claims before they put up the land for tender and had failed to disclose theses land claims to Landmark and suggested that the Plaintiff stop working on the site, pending clarity and formalization of settlement."

m) He testified that the First Defendant could not raise the Land claims as a defence to payment in terms of the contract.

"… The employer indemnifies and holds the contractor harmless against loss in respect of all claims, proceedings, damages, costs and expenses arising from …

Clause 9.2.5 further reads the right of the employer to have the work or any part thereof executed at the site;

Clause … 9.2.9 the use or occupation of the site by the works… "

n) They accordingly expected to get paid and were working on site.

2.3 There no questions posed nor was he challenged with regard to his knowledge of Land claims or *bona fides* by any of the parties, nor on the quantum of his claim, placed in dispute.

2.4 The Plaintiff's case was thereafter closed.

2.5 The First and Second Defendant thereafter commenced their case.

2.6 **Mr. Adam Anton Markovitz** was called as their first witness. His testimony was briefly as follows:-

a) He was a property developer and commenced developing property approximately 30 or 40 years ago. He was the Director of Landmark Mthatha.

b) He had read the advertisement with regard to three developments in the Sunday Times Newspaper, in respect of a casino and hotel development and residential premises.

c) He was interested in the shopping centre development and proceeded to comply with all the formalities and was awarded the tender in 2006. On or about 12th of October 2006 a lease agreement was concluded between Landmark Mthatha and the Municipality.

d) The following were *inter alia* the express material terms of the agreement:-

i) That they had a 30 year lease and an option to renew the lease for a further 30 years. (clause 4) *ii)* *That the tenant was obliged to do all things lawful to achieve optimum development within 60 months from date of signature; clause 6.1.1*

iii) *The tenant was entitled to use the premises for a retail shopping centre, clause 6.8*

iv) *The tenant was not allowed to allow the premises to stand empty, clause 6.11*

e) According to him he knew nothing about the Land claims.

f) On the 25th of October 2006 a letter was sent by the Quanza Group to the leasing agent Gayle McArthur wherein it was stated that they had a Gazette in 1997 unopposed and a copy lodged with the Department of Land Affairs that they intended developing a Shopping Centre on the land and it was not opposed by the Department of Land Affairs. The Municipality had accordingly erroneously granted a lease without being aware of the Land claims process and of their intention to proceed with the retail development.

g) The letter indicated that Land claimants had already approached the Director of Land Affairs in Mthatha and registered their objection to the proposed development taking place on land that rightfully and legally now belongs to them and not the City Council of Umtata (KSD) Municipality.

h) They were requested to immediately remove their advertising board and to desist from marketing their retail development.

i) This was the first time he became aware of a Land claim, upon receiving the letter.

j) He wrote to the Municipality on the 1st of November 2006 and he requested the Municipality to inform them in writing about the status of the alleged claim failing which they would apply to court for a remedy including damages on account of the loss suffered due to the development being delayed or cancelled.

k) The Municipality responded by letter dated 2nd of November 2006 stating that the KSD Municipality had a real right in Erf 912, Mthatha conferred upon it by the title deed which shows that the property was transferred by the province of the Eastern Cape.

l) It was also stated in the letter that the land was advertised in the paper calling for development proposals before an award for the development was made. They concluded by saying that development would not be hindered by these frivolous claims.

m) He accepted the Municipality's assurance that this was frivolous and by letter dated 7th of November 2006 requested them to keep him informed of the response to their correspondence to the Quanza Group.

n) Landmarks went on to secure leases and refine the development and design of the centre and signed a contract with the Plaintiff during April or May 2007 for approximately R23 Million to commence work in terms of the Earthworks contract.

o) He had no knowledge of the letter dated **11th of May 2007** which was addressed by the Land Claims Commissioner Ms L Faleni to the Municipal Manager of King Sabata Delinyebo Municipality (KSD) Mrs V Zitumane which reads as follows:-

" A claim for restitution of land rights was lodged as KwaLindile Trust, Kapton, Fairland, Boziya, Tabase and Khambi farms, also including the pieces of land that are currently known as the Holiday Inn, Ekululekweni, Myezo Park, Magwa House, Myezo Garage, Shell Garage and the former South African Embassy.

The claim was lodged on the 3rd of September 1998 and was investigated and found to be compliant in terms of Act 22 and is in the process of being gazetted in terms of Section 11 of the Restitution of Land Rights Act 22 of 1994.

It has been brought to the attention of the commissioner that the land is being developed by the aforesaid Municipality and such actions are aimed at defeating the object of the restitution to its rightful occupants.

In terms of Section 11 (7) of the said Act once a notice has been published in respect of any land no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the Regional Land Claims Commissioner one months notice of his or her intention to do so.

Your actions are in contravention of the said Act and you are requested to refrain from such conduct, until you have proper representations to the Regional Land Claims Commissioner, failing which this matter will be taken to court."

p) According to a letter dated 16th of May 2007 the attorneys for the Regional Land Claims Commissioner wrote to the Municipality indicating that the Municipality was fully aware of the Land Claims.

q) By letter dated 2nd of June 2008 Ms Faleni stated that her investigations revealed that there were at least two competing claims over the land in question. The KwaLindile claim and the Zimbane claim. Ms Faleni indicated that the Zimbane claim had not yet been gazetted but it would be done shortly and that the KwaLindile claim had been published in the Government Gazette and she intended to refer both the claims as a combined referral.

r) She went on to say that the Municipality was aware of at least one, if not more claims prior to the conclusion of the leases and accordingly those leases ought not to have been concluded, she would recommend to the court that it would be appropriate to resolve the claims by ordering the leases be set aside and the land restored to the claimants or group of claimants as the court decides.

s) She accordingly concluded by saying that her office cannot countenance the proposed developments continuing and that if that happens she would consider acting in terms of Section (6) (3) of the Act.

t) Mr. Markovitz understood this to mean that she could cause the lease to be set aside and therefore there would not have a lease and he could accordingly not risk building a Shopping Centre that would cost approximately R322 Million where there was a risk of the lease being set aside.

u) In light of the magnitude of the project he was unwilling to risk following the advises of the Municipality's representative, to the effect that the Regional Land Claims Commissioner's stance was not in accordance with the Act and that nothing prevents the development of the land.

v) Landmarks had sought an indemnity from the Municipality. The Municipality never responded to the numerous requests for an indemnity nor did it provide one.

w) Under cross examination it was put to him that there was no secrecy in the Municipality's dealings with the Landmarks and that it was Mr Merry who brought their attention to the Interdict

Applications.

x) His response was that these disclosures were only made after July 2007.

y) He was referred to a letter dated 29th of October 2003 written by Mr Mike Merry to the Regional Land Claims Commissioner (RLLC) wherein he *inter alia* referred to the Zimbane claim and their letters dated 21st of February 2003 and 25th of August 2003. Mr. Merry had stated *inter alia* that they could not comment on the matter without conclusive mapping. However he indicated that the Transkei Training Trust was not situated on Erf 912 Umtata.

z) He specifically requested information regarding whether or not any other claim had been lodged in respect of Erf 912 Umtata known as Umtata Commonage.

aa) Mr. Merry had asked specifically:-

"Does the claim exist or is the only claim in your possession the one over Manpower Training Centre."

bb) Mr Merry's letter was inter alia in response to a letter which emanated from Mr. Memela dated 25th of August 2003 which is headed:-

"…

Re: Zimbane community claim – Erf 912 Umtata

Mr Memela's letter states that the Zimbane community had lodged a claim in respect of land ***commonly known as Erf 912 which covers the land*** *where there is an Institution* *that was known as Transkei Training Trust.*

Preliminary investigations were conducted and the claim was accepted to meet the criteria for restitution and was validated for further processing.

They placed on record their interest in the matter relating to sub-division, rezoning or any other development on the land, as they had a statutory obligation to resolve the claim lodged with them. The letter was addressed to the Director, Department of Transport, Bisho but was cc'd to Mr Mike Merry."

cc) Mr. Markovitz disputed that the subject land was not rural as he stated that in development terms the whole of Mthatha would be regarded as rural.

dd) It was put to him that in terms of the Act development was not precluded if there had not been any gazetting or any publication of a land claim and he stated that he had no knowledge.

ee) Mr. Markovitz did not dispute that the Zimbane claim was published some 10 years after it had been lodged and the KwaLindile claim 9 years after, in 2007.

ff) Mr. Markovitz accepted that the claims were gazetted after the development project or the lease agreement was concluded.

gg) He accepted that the Abathembu claim has not been published, to date.

hh) It was put to him that there were no claims lodged prior to 1998, Dhlato's claim was in September 1998 and the others in December 1998 and he stated that he could not comment on that.

ii) It was put to him that no permission to occupy can be granted in respect of surveyed land that has an Erf number and he stated that he had no knowledge but knew that the Land Claims Restitution Act came to amend a whole lot of previously legislated ownership issues.

jj) According to Mr. Markovitz the subject land forms part of Ekululekweni Area and he is unaware that it is referring to the Ekululekweni Ministerial Complex but that he cannot answer on behalf of the Commissioner but the description of the area covers all the places that surround the subject land namely the Holiday Inn, Shell Garage and the Embassy.

kk) It was put to him that in absence of the Regional Land Claims Commissioner having gazetted the Land Claims her statement to the effect that *"your actions are in contravention of the Act"* was incorrect. His response was that he was unaware of what section she was referring to.

ll) He conceded that as long as the interdict persisted, neither Landmark nor the Municipality could do anything in furtherance of the development.

mm) Mr Markovitz indicated that they would not have taken a loan at 15% per month interest to pay the Plaintiff in respect of the Earthworks contract if they were aware of land claims and believed that the delays were short term because of the Surveyor's Generals diagram on subdivision and the failure to secure the requisite number of leases.

nn) It was only subsequently discovered that the reason the Surveyor Generals diagram was not forthcoming was because the Land

Claims Commissioner had written to him on the 11th of May 2007 to tell him not to subdivide.

oo) He stated the Municipality was aware of those claims prior to putting development area two out to tender and knowingly proceeded with the tender.

pp) The Municipality failed to disclose that there were such claims either when it awarded the tender or when it concluded the lease or even when it received the letter from the Land Claims Commissioner dated 11th of May 2007 when the municipality was advised not to proceed with the development without giving the commissioner notice.

qq) He testified that the municipality instead spurred the Landmarks on to proceed with a R23 Million Earthworks contract and other development work with Landmarks being completely unaware of the notice.

rr) Bam JP granted the following interim order which prevented them from proceeding with the development:-

"The interim interdict prayed for in paragraph 2.1 of case number LC66/2007 is granted and is immediately operative pending the finalization of serious and consultative negotiations with all parties concerned but before 30th of November 2007.

In the event of the negotiations reaching an impasse, on or before 30th of November 2007, the First Respondent (KSD) is granted leave, if so advised, to make an application in terms of Section 34 of the Restitution of Land Rights Act 22 of 1994 as amended."

ss) If the municipality had given them an indemnity they would have gone back on site and continued but due to the Commissioner's attitude and the judgment of Bam JP they could not continue with the development.

tt) He testified it would be reckless to go back on site having regard to the Commissioners attitude of threats of an interdict and the cost implications despite the Municipality's response that she was wrong even after the initial interdict lapsed.

uu) Mr Markovitz when he was recalled to answer further questions under cross-examination stated the following:-

i) According to him at the time they tendered they were a consortium and subsequently a company was registered. The directors of the company were him, Mr Kisten, Mr Mabanga and Chief Mfundu Mtirara.

ii) Chief Mfundu Mtirara and Mr Mabanga were also shareholders and not just directors.

iii) He indicated that he could not dispute that Chief Mfundu Mtirara was the son of the late Chief Zondwa Mtirara who had signed the claim form in respect of the Abathembu people.

iv) It was put to him that Mabanga and Chief Mfundu Mtirara had knowledge of the land claims prior to the conclusion of the development contract between the Municipality and Landmark and he indicated that he could not dispute that but they never told him this and he was running the company and was effectively its Chief

Executive Officer.

v) It was put to him that Chief Mtirara had informed him of the existence of claims in respect of the subject land prior to the conclusion of the development contract and he disputed that.

vi) He testified that the shareholding in the company was as follows:-

a) Landmark Real Estate owned 45% of Landmark Mthatha;

b) Chief Mtirara owned 22.5%;

c) Mr Mabanga owned 22.5%; and

d) Sesfikile Investment owned 10%; and

e) In addition Landmark Real Estate also had a development agreement with Landmark Mthatha which effectively gave the management of the development, for a fee, to Landmark Real Estate Services.

vii) He was running the company as the employee of Landmark Real Estate and the directors were non-executive directors despite the fact that they held directors and shareholders meetings from time to time.

viii) He was involved in the day to day running of the business and at one point they even signed a power of attorney to him.

ix) The other shareholders and Directors did participate in the meeting and attended meeting but were not involved on a day to day basis

x) Landmark Real Estate saw the advertisement in respect of the tenders for development of the subject land and Mr Tobojani came down and met with Mr Mabanga and Chief Mtirara.

xi) It was <u>not</u> put to him that Mr Tobojani:-

a) enquired about land claims; and

b) was informed of land claims.

xii) According to him he only became aware of Land claims in 2007 and even ABSA bank had never made land claims a requirement until he told them about it.

2.7 The next witness called was the Regional Land Claims Commissioner (RLCC), **Ms Linda Faleni**.

a) She was referred to the Delegation of Ministerial Powers where clause 4 requires *inter alia* the Municipal Council before commencing any development to satisfy themselves beforehand that such development will not result in the dispossession of peoples **existing rights** (formal or informal, in or granted on or over such properties of commonage land. It was a pre-requisite that social impact agreements be concluded with the affected community to their satisfaction and in consultation with the Department of Land Affairs and only thereafter may the said development commence.

b) According to her affidavit deposed to on the 22nd of May 2009 in opposition to the Municipality's **Section 34** applications and he confirmed thereof in 1998 she received 6 land claims in respect of Erf 912.

c) She was not present at a meeting held on the 18th of April 2007 but Mr Memela was and so was Mr Merry as well as the Mayor of the KSD wherein the issue of land claims particularly in respect of Erf 912 was raised.

d) A meeting was held on the 7th of October 2002 with the Municipality wherein she personally informed the Municipality about the claims over Erf 912 and the Umtata Commonage and they were accordingly obliged to give notice of any developments in terms of **Section 11**.

e) She stated in her affidavit in opposition to the **Section 34** Application:-

"... I wish to state that between 2005 and 2006 when the Applicant concluded the lease and development agreements ..., it was already aware of the land claims lodged by the claimant communities ... the Applicant omitted to inform the lessees of the land claims. In so doing the Applicant had taken an unnecessary risk in involving the developers without disclosing material informalities" (my underling)

f) According to her in the spirit of corporate governance it was necessary for them to inform the RLCC and in terms of the condition imposed in the Deed of Delegation the Municipality was obliged to consult with the land claimants and the RLCC prior to any development.

g) She indicated that even if she had not published she could approach the court to stop development but that would be the last step as in the spirit of co-operative governance she would first try to negotiate and come up with a solution as the Government.

h) She confirmed the contents of the letter dated 11th of May 2007 which she had addressed to the Municipal Manager informing them about the claims and requesting them to make representations with regard to developments.

i) She indicated that even at present she had no intention of withdrawing the Section 11 notice and would bring an application for an interdict if development were to recommence. She also confirmed that there were still other land claims pending.

j) She also confirmed the contents of the other letters that emanated from her which were referred to during the course of Mr Markovitz' testimony.

k) She was referred to the letter that the municipality had written dated 24th of July 2008 wherein they had inter alia stated that the impugned development falls within urban land and is an area earmarked for development and it is not feasible to restore the land to any claimant community and that they would persist with the development unless they receive an interdict in terms of

Section 6 (3) of the Act interdicting the development they intended proceeding with development.

l) Her response was that the contents of the letter would defeat the objective of the Act which was restoration of the land and the development would have defeated that objective.

m) According to her two claims were gazetted and 4 more were still to be investigated but had been duly lodged.

n) According to her the claimant have a legitimate restitution claim but are not opposed to a retail complex which will enhance the economy of Mthatha, however they wish to be involved in the conceptualization and development of such a retail complex.

o) The claimants have legitimate claims and cannot be excluded from getting involved in economic opportunities which are available and which result from their claimed land and that the municipality was obliged to consult with communities who had informal rights or restitution rights in terms of the Ministerial delegations relating to the donation of the land.

p) According to her if the **Section 34** Application succeeds then the claimants would be compensated by National Government.

q) She re-iterated under cross examination that since development would affect the passage of the claim and render restoration unfeasible she would oppose it.

r) She indicated that she had not read the advertisement in the Daily Dispatch dated the 18th of October 2005 or the 25th of October

2005 regarding advertising for development on Erf 912.

s) She conceded that when a claim was lodged it was possible that the claim may be found to be frivolous or vexatious and that people may assume until gazetting that the claim may be frivolous or vexatious.

t) She conceded that the agreements were concluded on the 12th of October 2005 whereas the First Gazetting only took place on the 25th of May 2007 after an application had been brought in the High Court.

u) She however indicated that in this case the Municipality was informed of the claims and in the spirit of Co-operative Governance she expected the Municipality to inform them.

v) She conceded that the publication within a reasonable time would put beyond question the issue of land claims but that she was dealing with a number of claims at that time.

w) According to her she was unaware of whether or not anyone had responded to Mike Merry's letter wherein he had enquired about claims lodged in respect of Erf 912.

x) Under cross examination she was referred to the issue of existing rights and questioned whether or not she was aware of any existing rights as opposed to rights that were still being asserted and her response was that she was not aware of any.

y) She was referred to the judgment of **Petse J** (as he then was) in **No-Italy Mtirara v Landmark Mthatha (Pty) Ltd and 10**

Others case number 607/2007 wherein he stated that clause 4 referred to existing rights. **At paragraph 32** the learned Judge stated *inter alia*:-

"There can be no doubt that this clause cannot be construed to encompass someone who has lodged a claim with the Land Claims Commissioner for the restitution of land of which the claimant was disposed after 1913 as a result of past discriminatory laws or practices as provided for in the Restitution of Land Rights Act because in my view the mere lodgment of a land claim with the Land Claims Commissioner is by itself an acceptance by the claimant that he/she does not have existing rights in the land in respect of which a claim is made having been disposed thereof "as a result of past discriminatory practices" hence the claim for Restitution of that land"

z) It was put to her that the provision of **Section 11 (1)** was that once a notice had been published no person may in an improper manner obstruct the passage of the claim.

"(aA) no person may ... lease ... or develop the land in question without having given the Regional Land Claims Commissioner one month's written notice of his or her intention to do so"

aa) Her response was they were obliged to consult with her and negotiate after giving notice so that they can be sure that the passage of the claim is not affected.

bb) She stated that she would not resort to applying for an interdict because in terms of the Constitution she is obliged to deal with the agent of Government before going to court.

cc) It was put to her that the Municipality's witness would testify that in October 2002 meetings the claims were referred to in broad generalized terms and there was no specificity with regard to the exact nature of those claims. She responded by saying that they were given a list of the claims.

dd) She confirmed that the description in the claims were inelegant or confusing but referred to in one way or the other directly to Erf 912.

ee) When questioned by Mr Friedman she indicated that the delays were caused because they had 17 000 claims to deal with and had to prioritise them.

ff) She confirmed that Erf 912 was specifically discussed at the meeting on the 7th of October 2002 and Mr Memela took the minutes.

gg) She confirmed that the Municipality was obliged to give them notice if they intended developing any land under claim even though no land claims had been gazetted.

hh) The Municipality had agreed that they would work together at the meeting in 2002 and that they were required to give notice if they wanted to develop.

ii) She insisted upon further cross examination by Advocate Madlanga S.C that the meeting took place on the 7th of October 2002 and not as reflected on the minutes of the 8th of October

2002.

jj) It was put to her that the meeting was in fact on the 8th of October 2002 and she insisted that the meeting was on the 7th of October 2002.

kk) According to her, there were other claims over where large portions of the town were claimed and she referred to Port Saint Johns as one of them.

ll) She confirmed that Erf 912 in fact covers the bulk or large part of Mthatha.

mm) She testified that in terms of Section 6 (2) she should give priority to claims which affect a substantial number of persons or persons who have suffered substantial losses as a result of dispossession or persons with particular pressing needs.

nn) She however followed the strategy adopted by her office to finalise urban claims that were quicker and then focus on the ones that need more detail. The strategy was to focus on the rural claims or those that were more difficult to deal with and they have settled some of those namely Port Saint Johns and Bizana where the town was also claimed. They also settled a claim in Nyandeni Town.

oo) She indicated that the claims in respect of Mthatha were catergorised as rural claims because these people where coming from farms and the commonage and the land that they lost at the time of dispossession was farm land and grazing land which is under rural claims at the office despite it being urban areas now.

pp) She did not concede that their strategy was contrary to the prescripts of the Act which defined the circumstances under which prioritisation should occur stating that those urban claims also affected a number of people.

qq) It was put to her that the claims relating to Erf 912 affected a number of people and accordingly ought to have prioritised and her response was these were developed properties and the commission and the claimants were not taking developed property.

rr) She was not prepared to accept that no developments that would enhance the economy of Mthatha could occur because of the 12 year delays that emanated from her office, stating that they did not delay and that they were dealing with other claims prioritised in accordance with the Act.

2.8 The next witness was **Mr. Robert Phillip Terry:-**

a) He was a consultant to Landmark Real Estate and he was brought into Landmark Mthatha to oversee or manage the development aspects of this project.

b) On the 14th of June 2007 a meeting was held between Landmark and the Municipality and he recorded the contents of the meeting.

c) Under land claims it was noted.

"The status of the current land claim was discussed. The Municipality assured the meeting that there was no substance to this case and gave an extended explanation as to the history of Erf 912 and the reasons why the land claim was invalid."

d) They were only aware of the No-Italy claim at that time and were not aware of any previous correspondence with regard to land claims prior to that date and equated this as being the same frivolous claim referred to previously.

e) According to him, Landmark Mthatha could not continue with the development under threat of an interdict. It would be unlikely for their financiers to continue to fund the development with a threat of restoration of this land hanging over their head.

f) He stated that it would have been foolhardy in the extreme for Landmark to have entered into or continued with contractors and with other professionals in the high likelihood that Landmark would have been stopped and therefore unable to fulfill obligations to the contracting parties.

g) He stated that the project was a R300 Million one and it was like an oil tanker, which had over a hundred retail tenants and you would have to start re-negotiating with the tenants which vary in size from some of South Africa's largest corporations to individual Mom and Pop stores, that is, smaller stores.

h) He was aware that the Landmarks had suggested that if the Municipality was so certain that the land claims were frivolous and of no substance then the Municipality should indemnify Landmark against any damages that it might incur as a result of these land claims actually coming to fruition. Landmark had written to the Municipality but had got no response to their request, for an indemnity.

i) He aptly demonstrated that he was adequately qualified to express an opinion on the quantum of damages having regard to his extensive experience.

j) He explained the formula utilized to calculate delay damages and termination damages.

k) The Landmark position was that total termination damages would be in the raised sum of R 205 126 073 made up of loss of profit and wasted costs inclusive of legal fees, wasted salaries, travel and accommodation, professional fees, African Bulk certificates 1 and 2, claims from tenants and Bridging Finance interest; and delay damages would be the sum of R272 839 849-00 which constituted loss of profits and the factors listed above under termination damages and in addition increased costs to re-commence.

l) There was agreement between the experts with regard to legal costs, travel and accommodation and salaries and the increased costs of re-commencement of the project.

m) The disputed aspects between the experts were the following:-

i) Professional Fees in respect of delayed damages where the municipality's expert believed that an amount of only R1.37 Million was wasted and Landmark expert stated that the entire amount of R6.8 Million had been wasted in respect of the engineers and architects etc. and he motivated their stance by stating that:-

(a) Their original professional team, the architects and the engineers who are the largest contributors to that professional team indicated that they would not be reappointed to this project under any circumstances, whereas Professor Nkado believed that only 20% of the costs would be lost; and

(b) According to him they would have to start the project afresh, and incur 100% of the costs and this was the stance of Professor Botha as well considering interdicting the fact that:-

1) The Earthworks would have to be removed because they cannot tell what damage the percolating water may have done to those earthworks and they can't build a Shopping Centre on unstable ground conditions;

2) The change in the market interest rates and shopping trends impacts directly on demand for their product, which is retail space; and

3) The design would change; as the puzzle would change and some retailers may take bigger space whist others would take smaller spaces.

ii) Damages in respect of claims by tenants was placed at R5.3 Million by the municipality's expert Professor Nkado on the basis that a 3 month cancellation should have been negotiated whereas Landmarks claimed that the amount would be R68 Million – R70 Million and referred to the penalty clauses in Edcon Group contract which provided for payment of a penalty in the event of delay at rate of R14-00 per square meter per day which he calculated over a 42 month period.

iii) Bridging finance was also in dispute and said to be excessive by Professor Nkado, who utilized the prevailing interest rate as the one which he considered reasonable. He indicated that this was a calculated risk taken to ensure timeously delivery so that they were not hit by penalty clauses by both the municipality and the tenants, that is, so that they would start earlier and finish on time. It was akin to an insurance policy of R20 million for a R300 Million rand project.

iv) Professor Nkado the Municipality's expert opinion was that their loss of profits would only be 15, 5% whereas he stated that on the advice they had received, Landmark should be placed in the position it would have been in but for the breach by the Municipality, and that would amount to a loss of all their profits.

v) The occupancy of the Shopping Centre was also in dispute where Professor Nkado stated that it would be at 80% throughout and although he believed that it would be at 100% from commencement as a compromise placed it at 80% for the first year, 90% for the second year and 100% for the third year and subsequent years.

vi) According to him the legal fees that are being claimed were the legal fees expended by Landmark Mthatha in respect of the land claims in defending its position in court as a party to various cases and that was agreed with Professor Nkado as being wasted costs.

n) They entered into an agreement with the private financier to lend money for what was anticipated to be a period of two months in order to finance payments to the Earthworks contractor, African Bulk in respect of the first 2 certificates for R8 155 000-00.

o) His evidence was that if Landmarks was aware of land claims they would not have entered into such an agreement had there been even a hint of them not being able to proceed with the development.

p) According to him the *in duplum rule* has kicked in, in respect of Landmarks calculations and limits the interest to an amount equal to the capital which has already arrived but has not as yet with regard to the Municipality's expert's calculations which is based on the normal rates of interest on the borrowings of R8,15 Million.

q) In the event of the court exercising its discretion to terminate the lease agreement between Landmark Mthatha and the Municipality then a different set of damages flows. They need to calculate their damages with reference to the value of the asset that they developed, the capital value of the Shopping Centre and take away from that the cost of having developed that Shopping Centre and this had been agreed between the experts based on the Rhoda Report and the JPA report which determine property yields.

r) He used a yield of 7.7% as being the initial yield whereas Professor Botha used a yield of 8,1% and Professor Nkado 9%, and after robust debate on the issue between the experts they applied the capitalization rate of 8,1%.

s) He also added the amount being claimed by African Bulk in respect of the unpaid certificates in the event that the court awards those and stated that there is agreement with regard to these amounts.

t) He read out the judgment by Bam JP in respect of the S**ection 34** Application wherein the following order was made in terms of **Section 34 (5) (c)** of the Act.

"(i) The remainder of Erf 912 Mthatha shall not be restored to any claimant or prospective claimant.

ii) …

iii) The resumption and the initiation of all development projects upon any portion of the remainder of Erf 912 Mthatha by the Applicant shall only proceed with full and exhaustive consultation with the 4th, 5th and present and prospective claimant respondents.

iv) Developers and prospective developers must ensure that whatever agreements reached with the Applicant in respect of Remainder of Erf 912, Mthatha are in compliance with paragraph (iii) of this order and should revise and restructure such agreement accordingly. They must also ensure compliance with the spirit and letter of the Delegation, the constitution and the Act on the part of the Applicant and the 4th and 5th Respondent.

v) The Applicant and the 4th and 5th Respondents are ordered and are expected to take their responsibilities seriously and take the initiative and lead in reaching consensus. They should jointly research projects and lay down the criteria for the advertising and acceptance of tenders for developments on the remainder of Erf 912, Mthatha.

vi) There is no order as to costs."

u) According to him this order involves exhaustive and consultative discussions between the municipality and any claimant or prospective claimant in respect of the land before they could even start to have their own consultative discussions with the municipality and to his understanding no discussions took place between the Municipality and the claimants.

v) The judgment in any event is subject to an application for leave to appeal by the 7th and 10th Respondents and the Municipality as well as cross appeals.

w) He confirmed under cross examination that there was no cession of rights by Edcon Group to Landmark nor was there a letter of demand or any legal action instituted by Edcon against Landmark. According to him the money would be handed over when Landmark faced the inevitable. He however cannot speak for Landmark as to whether or not Landmark would pocket the money if it was not claimed by Edcon.

x) He was aware that one of the terms upon which ABSA was prepared to grant the loan was that there should be no land claims, in respect of the property and that was an important factor for the granting of the loan.

y) He conceded that it would be easy for the borrower to go to the Land Claims Office to determine whether or not there was a land claim but since they were dealing with a municipality he would have expected them to be in a position to give vacant possession when putting a property out for tender and conclude leases and that the municipality had a duty to inform the developers accurately.

z) He stated that the municipality knew about the land claims but chose not to explain their significance or to give them accurate information.

aa) He was not aware of whether or not other entities were approached for bridging finance and whether 15% per month is comparable to what is out there in the market place.

bb) He also accepted that the rate of interest that a bank would charge an individual would vary from borrower to borrower depending on their track record.

cc) That concluded his testimony.

2.9 The next witness was **Zama Zamegile Memela.**

a) He is the Director for Operational Management employed by the Land Claims Commissioner.

b) A meeting was held on the 7th of October 2002 by the Regional Land Claims Commissioner and the King Sabata Dalindyebo Municipality (KSD).

c) According to him the date of the meeting should have been the 8th of October 2002 and the 7th was a mistake or a misprint and that he drafted the minutes which correctly reflect what transpired at the meeting.

d) He confirmed that the mayor raised concerns that Erf 912 had been identified for development purposes so the concern was that, may be the two claims would block the development.

e) According to him there were no other minutes in respect of this meeting and they were the ones taking the minutes not the municipality.

f) He also confirmed that he was the author of the letter that was addressed to the Department of Transport and CC'D to Mr Merry referred to by Mr Markovitz during the course of his testimony but he does not know how or why it was sent to Mr. Merry.

g) A meeting was held on the 18th of April 2007 where Mr Merry and the Mayor of the Municipality were also present.

h) They presented the status of the land claims in Mthatha in the Mthatha region at this meeting and specific references were made to the Zimbane, Ncambedlane, Chief Njemla and the rest of the forestry claims.

i) He explained that the land under restitution claim may not be developed or leased and that the Municipalities were required to make enquiries with the Land Claims Commissioner each time they wanted to develop any land whether there is a claim or not.

j) He confirmed under cross examination that none of the claims had been validated at the time the meetings were held and no decision was taken as to whether or not the claims were valid.

k) He confirmed that the minutes were not forwarded for the Municipality to consider and confirm as being an accurate reflection of what happened at the meeting and that he was not officially appointed the secretary but simply took the minutes.

l) He however stated that they did usually send the minutes to the Municipality, not for confirmation but just, to say that, that was what they had discussed at the meeting. He however cannot recall who faxed it because of the time lapse and accordingly cannot say that it was faxed with certainty.

m) He confirmed that it was usual practice to confirm the minutes of a previous meeting at a subsequent meeting but it was not done here perhaps because they was no immediate meeting after that.

n) According to him the meeting that reflects the 18th of April 2007 was in fact held on the 2nd of April 2007 and is an error. It was pointed out to him in re-examination that the attendance register is dated 2nd of April 2007.

o) He agreed that there was an inordinate delay in processing, investigating and eventually gazetting these claims, relating to Mthatha.

p) He conceded that none of the claims described the property or the subject development land with any degree of precision.

q) He conceded that the Technikon has got nothing to do with the locality of the present subject property but stated that that property also falls under Erf 912 and the subject land also falls under the same Erf number.

r) He does not know whether Mr Merry's letter was replied to and cannot dispute that it was not responded to or whether his office received it.

s) He conceded that there was no provision in the Act that prevented the leasing or developing of land prior to the claim being gazette.

t) It was put to him that witnesses for the Municipality would testify that no specific mention was made with regard to Erf 912. His response was that that wouldn't be true because there were specifics around Erf 912 and the forest and they were specified in all the discussions.

u) He however confirmed that the municipality was not furnished with any maps.

v) According to him he was not sure that he received the letter addressed by Mr Merry but the Municipality was furnished with a list of claims at the meeting on the 18th of April.

w) He conceded that KSD would have been in the dark as to exactly what was being claimed if the letter was not responded to.

2.10 **Professor Pieter Cornelius Botha** thereafter testified

a) He did not know any of the parties to this litigation prior to being instructed to express an opinion.

b) He was given Rob Terry's report and he investigated Mr Terry's methodology and the way that he calculated his delayed and termination damages and adopted a similar approach because he agreed with what Mr Terry had done but there were points of departure particularly with regard to the capitalization rate whereby Mr Terry had a lower cap rate and he had a higher cap rate which he based on the Rode Report and that was the rate agreed upon by the parties.

c) According to him the wasted legal costs were in relation to the proposed development for rezoning and what had to be done for the contracts, he was asked this specifically by Mr Coetzee and merely confirmed it, this is different from the evidence of Mr Terry who stated it was in respect of litigation in respect of land claims, and it was subsequently put to him and it was also in respect of costs for case 66 and 69 and he agreed.

d) He went on to testify with regard to the points of agreement and departure between Mr Terry and him on one side and Professor Nkado on the other hand.

e) He testified that he would not use the old documents as a Quantity Surveyor as he would be responsible professionally for any mistakes so he would do a new comprehensive survey himself.

f) He had no knowledge of short term loan agreement rate of 15% per month because that is something that is out of the ordinary and was Landmarks endeavours and responsibility.

g) He indicated that 5 years after the principal debt was incurred the interest charged would not make a difference whether it was 15,5% per annum or 15% per month in light of the *in duplum rule.*

h) He reiterated that their stance of 80% for the first year 90% for the second year and 100% for the 3rd year was reasonable and a compromise because they still believed that they would have had 100% occupancy from year one and he was of the view that the 80% of Professor Nkado throughout was not reasonable having regard to the stature of the developer in this case.

i) He confirmed the amounts of the revised delay and termination damages as stated by Mr Terry.

2.11 That concluded the First Defendant's case.

2.12 The Municipality thereafter called its witnesses.

a) Mr **Michael John Merry** was thereafter called as the first witness on behalf of the municipality.

b) **Mr Merry** briefly testified as follows:-

c) He commenced employment with the Municipality on the 1st of March 1989 as the Principal Planning Officer and his section is the one that is central to development occurring in or within KSD's area of jurisdiction.

d) According to him he had received a letter dated 25th of August 2003 written by Mr Memela from the land claims commissioner relating to the manpower Training Centre which was purported to be on Erf 912. This claim was subsequently validated in 2007.

e) He responded to this letter by letter dated 29th of October 2003 wherein he stated that the claim was specific in relating to the Manpower Training Centre and that particular facility is not situated on Erf 912 and he then asked if there are any claims on Erf 912 because of that reference to Erf 912 in the letter dated 23rd of August 2003.

f) He also tried to point out in his letter that the remainder of Erf 912 possibly did not qualify to be validated as a claim because it was there prior to 1913, owned by the Colonial Government since 1883 prior to the cut off date of the Restitution Act, which was 1913.

g) He thereafter read the proclamation relating to Mthatha from the

Government Gazette of the Cape of Good Hope issued on October 27th 1883 which was not invalidated but subsequently amended in 1906 detailing the boundaries of Mthatha Municipality and a further amendment in 1931 insofar as the amended boundaries are concerned and the diagram demonstrates that the subject land of this dispute falls within the boundaries.

h) According to him the subject land abuts the Ministerial complex, Ekululekweni; the subject property is on the other side to the East of Ekululekweni and it was not part of Ekululekweni.

i) The subject land would accordingly be part of the Mthatha Commonage according to this description.

j) According to him Dr Dlovo had towards the end of 2004 brought him a copy of the land claim that had been submitted on the 31st of December 1998 on behalf of the Thembuland Kingdom.

k) The claim form and annexures related to various areas in Mthatha but was described as rural area.

l) Upon receiving this claim form he wrote to the land claims commissioner on 10th of November 2004 wherein he requested to be furnished with the status of the claim. The heading of the letter refers to erf 912 Zimbane land claims, the letter *inter alia* reads as follows:-

"The claimants have verbally stated that the remainder of Erf 912 Umtata belongs to the Thembuland Kingdom and they have requested negotiated settlements on the ownership of this land. Has this claim been rejected?

Please can you urgently respond to this letter in writing, as the matter needs to be finalised once and for all."

m) The letter was written by him but signed by the Municipal Manager.

n) He did not receive any response to the letter.

o) The Abathembu claim has not been validated.

p) At the time of the tender he was aware of the Zimbane claim which he considered not to relate to erf 912 but rather to Manpower Training Centre and the Abathembu claim which he believed would not have qualified for validation but also had not been validated.

q) He did not become aware of any other land claims during the tender or the leasing stage of the subject land.

r) He attended a site meeting on the 17th of May 2007 before commencement of the development works.

s) There was a meeting held with the Land Claims Commissioner during April 2007 as a result of the impending development where the Land Claims Commissioner intimated that there was a claim on the land.

t) The municipality was admonished by the Land Claims Commissioner for not consulting them when they were supposedly aware of claims but in the same breath stated that the

RLCC is still to validate these claim.

u) There were no specifics given and they did not know who was claiming.

v) He became aware of the Kwalindile claim after the interdict was served and the Zimbane much later.

w) He confirmed that after the interdict Landmark Mthatha did not enjoy occupation of the subject land in the sense that it could develop and complete the Shopping Centre lawfully.

x) He conceded that the land under development was only defined in 2005 whereas the claims were lodged in 1998 and accordingly it would not be possible to make specific reference to "the land under development".

y) He conceded that the only enquiries he made about land claims to the Commissioner were in respect of the remainder of erf 912 which covered a substantial portion of Mthatha and not specifically the "land under development".

z) He was unaware of whether anyone else at the Municipality made specific enquiries in respect of the property under development.

aa) He indicated that the municipality had served a S**ection 11 (7)** notice on the Commissioner but was not aware that as at the date of service the interdict was still pending and was still in existence when the 30 days expired.

bb) He was also aware of the Section 34 Application whereby the Municipality sought an order that the land not be restored to the successful claimants.

cc) He was referred to the order of Bam JP wherein the learned Judge had *inter alia* stated that prior to recommencement of development there had to be consultations with the claimants and prospective claimants and he indicated that he was not aware of any consultation.

dd) He conceded that it would not be responsible for Landmark to go back on site in light of the order and the Land Claims Commissioner threats.

ee) According to him the clause in the Deed of Delegation relating to existing rights was complied with in that the Municipality had consulted with the Transitional Rural Council who was represented by the communities in the rural areas and the traditional authorities before the donation could take place.

ff) He indicated that there were meetings between the Municipality and Land Claims Office but no specific mention was made of Erf 912.

gg) It was put to him that in the letter written on behalf of the Municipality on the 15th of December 2010 that the subject land is on part of the Ekululekweni portion of the remainder of Erf 912 and his response was that this was at odds with the description which he described only as being the fenced area of the Ministerial Complex.

hh) He confirmed that he considered the delegation to be binding on the Municipality but he believed that it had already been complied with.

ii) He disagreed with Ms Faleni's view that the Mpenweni claim was wide enough to cover Erf 912 and his comment was that this land is north of the river and has no relevance to Erf 912 at all.

jj) He confirmed that the Zimbane claim was headed Erf 912 Zimbane AA District of Mthatha, South Africa and conceded that it would be reasonable to interpret that claim form as including something with regard to Erf 912 and that possibly the claimants wanted to claim Erf 912 and were unaware that the Zimbane AA fell outside Erf 912.

kk) He conceded that if someone had this form that person would know that there was a risk that Erf 912 may be claimed.

ll) He confirmed that if a developer was aware of this they would not spend R55 000 000-00 to go on site and start building a Shopping Centre on the land.

mm) He indicated that he does not think he was present at the meeting of the 7th of 8th of October 2002 and did not receive a list of claims or he would have known about them.

nn) He confirmed that the letter dated 25th of August 2003 referred in the heading "Re: Zimbane Community Claim – erf 912 Umtata".

oo) He however was of the view that because the body of the letter referred to the Training Trust which did not form part of Erf 912 it did not refer to Erf 912 and he was not given the claim form which specifically referred to Erf 912.

pp) According to him they got no response to the letters and assumed that the silence meant that there were no claims backed up by the fact that they believed that any claims on Erf 912 could not be validated because the land had been in the possession of the Colonial Government prior to 1913 and that the Commissioner had acknowledged that by their silence.

qq) He conceded that the municipality did not communicate their stance or the existence of the claim to landmark or the stance of the Land Claims Commissioner with regard to the subject land.

rr) When he wrote the letter in 2004 which is headed. "Re: Land claim Zimbane AA – erf 912", it was on the basis that the possibility existed that the Abathembu claim related to the subject land and he therefore wanted clarity.

ss) He confirmed that but failed to mention this letter or this claim to Landmark.

tt) He conceded that the Municipality as at 2004 was aware of not only one but possibly two claims which had not yet been published and that the claimants in respect of the Abathembu claim verbally stated that they intended their claims to relate to Erf 912.

uu) The municipality however made the assumption because of the lapse of time from the date that the letter was sent to the

Commissioner that there were no claims.

vv) He conceded that three months later on 25th of February 2006 the Municipality advertised for proposals to develop Erf 912, without any follow up letters or meetings called nor any telephonic enquiries pursued after the initial letters were sent, one in 2003 and the other in 2004 prior to the advertising of the development.

ww) He conceded that there was no other co-operative governance between the Municipality and the Commissioner aside from writing these two letters.

xx) At the meeting of the 18th of April 2007 according to him Mr Memela stated how dare the municipality develop without consulting them and he thinks it was with regard to Erf 912.

yy) He confirmed that the Municipality was aware that the attitude of the Land Claims Commissioner is that there may not be development on Erf 912, as at the meeting of the 18th of April 2007.

zz) It was put to him that if at this stage Landmarks were informed it would limit the damages and prevent incurring of Millions of Rands of expenditure and it was possible to stop.

aaa) He conceded that the failure to tell the landmarks about this meeting constituted keeping something secret.

bbb) He confirmed that at the meeting in April he did not deal with the RLCC's failure to respond to his letters.

ccc) He conceded that the Municipality did not inform the Commissioner of their intention to develop directly but merely advertised the development.

ddd) The commissioner was accordingly not directly informed that the land was going to be developed but was expected to gain such knowledge from reading the advertisement and Landmark did not know the attitude of the commissioner.

eee) It was put to him that the Bulk Earthworks contract was signed on the 30th of April 2007 and he saw the vehicles going onto the land and still did not inform anyone that there is a risk and that the Regional Land Claims Commissioner says that you are not allowed to do this and he confirmed this.

fff) He confirmed that he did not inform the Landmarks of the Application to interdict the development on the 9th of May 2007 or the letter dated 11th of May 2007 that was written to the Municipality by the Regional Land Claims Commissioner.

ggg) He conceded that there was an obligation upon the Municipality to conduct its affairs transparently and that they did not in this instance do so which according to him was because they did not think it was necessary to do so.

hhh) He still maintains that the Commissioner's stance was wrong.

iii) The Commissioner had failed to tell them about land claims and even when she did he failed to inform Landmarks and he conceded that they were negligent in this regard and they were not as co-operative as they could have been with the Land Claims Commissioner without the need for interdicts and court cases and having attorneys exchange letters.

2.13 **Professor Raymond Naemeka Nkado** thereafter testified.

a) He listed his extensive experience that aptly demonstrates his expertise.

b) He indicated that he had altered his calculations with regard to the loss of profits and he was now *ad idem* with the Landmarks experts on this point in terms of loss of profits being the sum of R 105 739 795 in respect of termination damages.

c) He assumed with regard to the legal costs that the figures were correct and conceded that the calculations were done by the developer's experts.

d) He went on to justify his stance with regard to why only 20% of the professional costs would be considered wasted when dealing with delayed damages.

e) According to him the bridging finance of 15% per month was excessive and would amount to about 400% per annum. He accepted that bridging finance would attract a different rate of interest because it is usually very short term financing, however no documentation had been furnished to suggest that alternative sources of financing was sought and that this was the best rate obtainable.

f) He was referred to a letter written by Mr Markovitz on behalf of Landmark Real Estate to the ABSA property finance person wherein it was suggested that the projected sale yield or cap rate would be 8,5%.

g) He indicated that the developer would have to try to impress on the bank that the project is highly profitable and that it would command the highest resale value. It would be a reasonable guess but nothing too high because you would like to maintain your credibility with the financier.

h) He stated that if he was aware of this letter and that rate of yield he would have been firmer on his lower yield expectation of 9 %, when they were negotiating.

i) He however failed to state what factors were taken into account and on what basis the concession was made nor did he amplify his reasons for stating that he would have been firmer on his lower yield expectations.

j) He calculated delay damages as being R179 176 344-47 and termination damages as being R151 022 438-25.

k) He was questioned with regard to the Rode Report which put the yield at 8,1% for East London Shopping Centres which is the closest town referred to in the report as Mthatha is not in the report.

l) He confirmed that the IPD put the yield for Eastern Cape at 7,3% for retail during 2007.

m) He conceded that Mr Markovitz was not a Quantity Surveyor and that Mr Terry had put his yield at 7,7% but in the spirit of give and take had increased it to 8,1%.

2.14 **Mr Dowa Vena Mgudlwa testified as follows**:-

a) He was the executive mayor of KSD from 2001 to 2004. He was not the Mayor when the lease was concluded.

b) He attended a meeting on the 7th of October 2002 on Communal Land Rights held at the instance of the Department of Land Affairs.

c) It was a briefing on land rights and the Act. There was land that was being claimed by Zimbane people. There was no specific mention of the particular area on which the development was taking place and they settled that dispute with regard to where construction could take place.

d) The minutes were never sent to the Municipality so it is difficult to accept the authenticity of the minutes because they never read it and he saw it for the first time in court since 2002.

e) He did not agree with the statement that a list of claims was shared and that that he raised concerns regarding the claims by Zimbane, KwaLindile and Abathembu communities over Mthatha Commonage Erf 912.

f) According to him the claim was in reference to what was already actively claimed by the Zimbane community, which is where they were building the houses.

g) He <u>could not remember being furnished with any claim forms</u> by anyone and no list was presented.

h) He indicated that Ms Faleni spoke about land claims in a generalized fashion, and that they had referred to the Zimbane, KwaLindile and Thembuland community.

2.15 **Henderson Mpumelelo Mabanga** thereafter testified briefly as follows:-

a) He is a businessman and was a 22 ½ % shareholder of Landmark Mthatha.

b) He identified prime land for development close to the N2 adjacent to Ekululekweni.

c) He consulted with Advocate Sishuba to investigate the land and discovered that the KwaLindile community had an interest in the land when Mr Sishuba made enquiries from Land Affairs.

d) They spoke to Chief Njemla and community members during the latter part of 2004 or early 2005 who indicated that they had a land claim.

e) He informed them he was interested in developing the land and they indicated that they do not oppose development of the land and they were promised a percentage of the development of the land.

f) They agreed to form a Community Trust.

g) Whilst they were still in the process of sorting out the Trust the Municipality advertised the land in 2005 and he dumped the KwaLindile community when he realized that the Municipality held the title deed to the land.

h) He went to Chief Mfundo Mtirara one of the Abathembu Chiefs.

i) Chief Mtirara informed him that Abathembu also had a claim over the land but the Municipality had the Title Deed of the land.

j) He requested Chief Mfundu to join him in developing the land with his friend Dennis Tobojani who resided in Johannesburg who was with Landmark Real Estates.

k) He telephoned Dennis and informed him about this piece of land and the advertisement.

l) Tobojani was interested and they agreed to form a consortium.

m) They then held several meetings where Mr Adam Markovitz was present but they predominantly dealt with Mr Tobojani.

n) They appointed Mr Markovitz to take over from Tobojani because of his experience coming from a big company and **they did not possess the experience which he possessed.**

o) He and Mfundo were aware of land claims relating to the subject land by the KwaLindile community and the AbaThembu community.

p) He confirmed that he knew Mr De Klerk of African Bulk as they were neighbours and he had assisted Mr De Klerk to get the contract with the landmarks.

q) He did not tell Mr De Klerk about land claims and they never spoke about land claims.

r) According to him the only person who was aware of the land claims was Mr Tobojani who was representing Landmarks real estate.

s) **He did not tell Mr Markovitz about the land claims** because the Municipality held the Title Deed and he had been dealing with Mr Tobojani.

t) He had informed Mr Tobojani that he had dumped the Kwalindile community who had a land claim and invited Mfundo Mtirara who also had a land claim.

u) He accepted that he signed a suretyship in respect of Mr De Klerk but did so because Mr. Markovitz advised them to sign.

v) According to him the bridging finance was taken from a company which Mr Markovitz' father was a part and they had taken their 55% share.

w) He confirmed that Mr Markovitz was the person who really managed Landmark Mthatha, and communicated with the banks and signed cheques.

x) He knew that the KwaLindile claim extended over the land but did not know that it could affect the feasibility of the proposed development.

y) He thought that the land claimed belonged to the Kwalindile Community and then it transpired that the Municipality had the Title Deed over the land.

z) He indicated that he did not know if Mr Markovitz knew about the land claims which would constitute a risk to the development.

aa) He initially denied that he signed anything pertaining to the bridging finance agreement but when the resolution signed by him was shown to him where he had consented to the bridging finance at 15% per month and he accepted that he had signed it.

bb) He confirmed that he did not tell Mr Tobojani that one or both of the land claims could hinder the proposed development because it was said that the Municipality held a Title Deed on the land.

cc) It was put to him that Mr Markovitz signed a bridging finance agreement, agreed to sign suretyship agreement for money owed to African Bulk Earthworks and for the money borrowed and would not have done so if he was aware of land claims. His response was that he did not dispute that.

dd) He confirmed that he also signed the suretyships and agreed to the bridging finance and it was put to him that he was not concerned that the two land claims would constitute a risk to the development and he agreed that it did not concern him because he knew that there was a Title Deed which was in possession of the Municipality.

ee) It was put to him that it was not put to any of landmarks witnesses that Mr Tobojani held discussions with him and was aware or told about two land claims.

2.16 **Chief Mfundo Mtirara** was called as the next witness, he testified as follows:-

a) His father was Chief Zondwa Zwelakhe Mtirara who signed the claim form on behalf of the AbaThembu.

b) He was approached by Mr Mabanga about becoming involved in developments.

c) He went to the Municipality to confirm whether or not the property belonged to the Municipality and he met with Mr Mike Merry who confirmed that it belonged to the Municipality.

d) He was aware of the land claim by the AbaThembu since his father was the one who made the claim and Mr Mabanga mentioned the KwaLindile claim where they alleged that the property belonged to them.

e) According to him Mr Tobojani first mentioned land claims by asking whether this land has any land claims because they sometimes find having gone a long way that the land they develop is under claim.

f) According to him Mr Tobojani asked about the property and he responded by saying that the only claim he knew was the one made by his father.

g) He met Mr Markovitz after they succeeded in being awarded the tender.

h) He confirmed that Mr Markovitz ran Landmark Mthatha.

i) According to him a meeting was held at the Bumbane Great Place with Mr Gwanya, the National Land Claims Commissioner because the AbaThembu wanted to know about the progress of their claim and he had informed Mr Markovitz about this meeting prior to them concluding the lease agreement.

j) He indicated under cross examination that when he was questioned about land claims made by his father stating that it was an old one and he was not sure whether it still existed and in any event his father could not be against the business which he was involved in.

k) He conceded that it would be fair to say that Mr Tobojani was comfortable with what he told him since he was the Chief.

l) He indicated that he was not concerned about land claims constituting a risk to the development until the No-Italy application came to his homestead and he informed Mr Markovitz about this.

m) According to him he sent the documents pertaining to the No-Italy matter to Mr Adam Markovitz who informed him that the Land claim issue was serious.

n) According to him he received the No-Italy papers before they signed the surety for African Bulk and surety for the 15% a month loan and agreed to the 15% per month bridging finance.

o) He confirmed that he only informed Mr Markovitz of the Abathembu claim and not the KwaLindile claim and re-iterated that he was not concerned about the Abathembu claim because it was done by his father who would not go against his business.

p) He conceded under cross examination that after his conversation with Mr Merry he was not concerned that there were land claims over the land which could constitute a risk to the development.

q) He indicated that Mr Mike Merry had told him that he had on many occasions enquired from the Commissioner whether there were claims and he was going to advertise the land because there was no response from the Land Claims Commissioner.

r) It was put to him that it was never put to Mr Markovitz that No-Italy documents were sent to him and neither was there any documentation furnished to confirm dispatch of the documents to him.

s) It was also not put to landmarks witnesses that Mr Tobojani informed him that landmark had previously had problems with land claims or that he enquired about land claims.

t) According to him Advocate Sishuba requested him not to sign the suretyship agreements but they nonetheless did because they saw greener pastures and thought that the ABSA finance will come in shortly because the Surveyor's General diagram was going to be okay.

u) The No-Italy claim was dismissed, he was present in court.

v) He was unaware of any claims of substance on the 11th of June 2007.

2.17 **Mr Qina** thereafter testified that he was a control building Inspector employed by the KSD Municipality and he gave evidence with regard to the various areas mentioned during the course of the testimony of the other witnesses.

2.18 **Dr Delarey Mkhatshwa testified as follows:-**

a) He was the executive mayor of KSD from August 2004 to June 2007.

b) He indicated that he was not aware of any land claims during his tenure in respect of the subject property and the discussions were general without any specific reference to Erf 912.

c) He was unaware of any of the letters written to the Municipality or by the Municipality but according to him the policy was that they respond promptly to all correspondence.

d) According to him there was a meeting during April 2007 but even then there was no mention of Erf 912 specifically but the Regional Land Claims Commissioner said that the Municipality should not proceed with land under claim.

e) They did not in his presence say that if the Municipality wanted to know if there was a claim over any specific land they should ask the Commissioner.

f) He recalls the Zimbane land claim being mentioned, the KwaLindile and the AbaThembu claim.

g) He denied that the Municipality was admonished and said the relationship between them was very good and no one was admonished in his presence but he was present throughout the meeting.

h) According to him the Mayor does not take decisions with regard to sale or lease of land and they are not even involved in the bid processes or questions of budget or by laws which would be done by council for and on behalf of the Municipality.

i) He did not have the power nor was the power conferred upon him to deal with the issue of the lease of land in Mthatha.

2.19 **Mrs Vuyo Zitumane** was the last witness called on behalf of the Municipality:-

a) She was the Caretaker Municipal Manager of KSD Municipality from 31st January 2007 to 31st October 2007.

b) She was unaware of any disputes with regard to land in Mthatha prior to becoming Municipal Manager.

c) In her affidavit in opposition to the relief sought in the No-Italy matter she stated at, *"7.2.2.3" I re-iterate that the portion of the remainder of Erf 912 Mthatha upon which the development is occurring does not form the subject matter of any land claims. Claim is being laid only to portions of the remainder of Erf 912 excluding the portion that is being developed."*

d) The application was dismissed and attempts to appeal were also unsuccessful.

e) The interdict application by No-Italy was launched on the 8th of May 2007 and she opposed that Application as well on the basis of lack of *locus standi*.

f) In her affidavit she stated that the land claims were not published and the mere lodging of a claim does not translate into a recognizable existing right in land.

g) She also stated that the claim is frivolous and vexatious.

h) She became aware of the claim when there were responding to the Application that was lodged by No-Italy Mtirara against the KSD, the first Application.

i) According to her New Ekululekweni is the fenced area of the Ministerial Complex and has nothing to do with the subject land and accordingly the claim in question had nothing to do with the land about to be developed and it was on the basis of legal advice at the time that they reached that conclusion.

j) She was then referred to case number LCC 66 of 2007 launched by Mr Njemla in the Land Claims Court for an interdict and she filed an affidavit opposing the relief sought.

k) In this affidavit she stated that the Deed of Transfer of Ownership to the Municipality was valid and their purported claim had not been validated and did not relate to the subject land which is located between the fence of Ekululekweni and the N2 National road.

l) She went on to say that Petse J found that the Applicant No-Italy did not show that the land claim made on behalf of Thembuland Kingdom encompasses Erf 912 Mthatha on which the development that the Applicant seeks to interdict is taking place.

m) She confirmed that she never told anyone at Landmark about any claims.

n) She confirmed that she did not inform the landmarks about the No-Italy claim.

o) She was referred to her affidavit in case 69 wherein she made reference to proceedings on the 18th of 19th of April 2007 at paragraph 12.10.2 where Mr Memela had requested an audience with the municipality and were accorded audience during the lunch hour where she stated that it was an informal audience and the Commissioner's representatives **furnished them with documents pointing to claims allegedly in respect of remainder of Erf 912 which were still the subject of investigation and research.**

p) According to her a scanty document exists somewhere within the Municipality where reference was allegedly made to the remainder of Erf 912.

q) She then went on to say that they received one document with scanty information on portions of land which were under claim and that information had got nothing to do with the remainder of Erf 912.

r) She went on to indicate that Erf 912 was not mentioned in that document and therefore she subsequently requested this information from the Land Claims Commissioner.

s) She indicated that the Commissioner could have furnished them with documents but those documents are irrelevant in terms of the issue of the land claim in question or else she would not have written to the Land Claim's Office to request information which was not clear at the time.

t) She was not sure that the letter from the Land Claims Commissioner dated 11th of May 2007 related to the subject land and therefore they requested the Land Claims Commissioner to specifically define the land they were talking about. She accordingly confirmed receipt of the letter.

u) There was accordingly no basis why they should have asked landmark to stop when the land in question was not under threat **in terms of their understanding** or to tell them of the dispute.

v) She persisted that the Municipality was not aware of any land claims in respect of the subject land, remainder of Erf 912.

w) She did not deem it necessary to inform Landmark Mthatha about the misunderstanding between the Land Claims Commissioner and the Municipality because there was no threat as far as the

Municipality was concerned and they would have informed Landmark if the Land Claims Commissioner had responded to their queries.

x) According to her the Judge made a ruling to say:-

"Land claims go back to the drawing board because your notice is confusing."

y) It was put to her that this was not useful to Landmark who were bound by the interdict which reads:-

"The interdict prayed for in paragraph 2.1 is granted and is immediately operative pending the finalization of serious and consultative negotiations with all parties concerned but before 30th of November 2007."

z) She indicated that she wouldn't respond to that question and she does not know, but because there was confusion they would not have informed Landmark about this because there was no threat to the land.

aa) It was put to her that the land claims forms could not refer specifically to remainder of Erf 912 or the property under development because it was only identified approximately 5 years after the claim forms were lodged.

bb) She stated that she would not respond to that question.

cc) That concluded her testimony and the case for the municipality.

3 Evaluation

3.1 **Mr. De Klerk** was a good witness who gave his testimony in a frank and forthright manner.

a) His testimony was not challenged under cross examination save with regard to the issue of being told about the Land Claim and his explanation that he was mistaken appears to be genuine.

b) In any event this does not adversely impact upon his bona fides or his awareness of the Lands claim at the time he concluded the agreement or commenced working on the land.

c) Further, even if he was made aware of the land claim in June 2007, his explanation for his continuation beyond that date is acceptable in that he was paid and the suretyship agreements were concluded.

d) Any person would reasonably believe that this would not have been done if there was a danger or genuine fear that land claims would be an impediment to continuation of the work.

e) I accept further that this was a small business and he would not have taken the risk if he was aware of any impediment to his continuation of the work.

f) I have no doubt whatsoever that the Plaintiff was bona fide and was unaware of any land claims at all material times.

g) The evidence proffered on behalf of the First and Second Defendant did not gainsay the Plaintiff's testimony.

3.2 **Mr Markovitz** was an excellent witness.

a) He impressed the court as being an astute businessman who would not have entered into the development if he had been aware of the land claims nor would he have borrowed monies at 15% interest per month despite his father being associated with the company that loaned the monies, nor would he have signed suretyship agreements on behalf of Landmark Real Estate in respect of the loan and Landmark Mthatha's indebtness to the Plaintiff if he was aware of land claims.

b) He did not contradict himself under cross examination and gave his responses in an honest and forthright manner.

c) His explanation for not continuing with the project was perfectly acceptable as was his statement to the effect that he would have continued if the municipality had provided the indemnity.

d) It is accepted and reasonable that it would not make economical sense to return to a development where a threat of an interdict hanging over your head and the possibility existed that the lease would be cancelled and reinstatement ordered.

3.3 It was evident that **Ms Faleni** was making excuses for her delay in finalizing the claims.

a) If she had expedited and finalized the claims timeously and had not caused the inordinate delay the present situation may not have arisen since clarity would have resulted with regard to land claims.

b) However I accept her testimony that she had informed the municipality about the claims and that they related to Erf 912.

c) Whether or not documents were furnished to the municipality does not detract from the fact that she personally and in writing informed them of the existence of the claims.

d) I accept her evidence with regard to what transpired at the meetings despite the fact that the "minutes" had not been confirmed and can at best be referred to as the Land Claims Commissioners written recording of events.

e) However her testimony with regard to what transpired is accepted and she is found to be a credible witness.

f) The municipality could have and should have informed the Regional Land Claims Commissioner of their intention to develop or brought the Section 34 application earlier prior to developing the land. I accept that they failed to do so both having regard to her testimony and that of the Municipalities witnesses.

g) Their awareness of the claims obliged them to do so especially in light of the fact that they had a contrary view to that of the RLCC and ought to have referred the matter to court for clarity or held meetings with the RLCC to discuss the issue and gain clarity from them.

h) The Municipality cannot rely upon the delays of the RLCC in publishing the claim as an excuse for their failure to inform the First Defendant of the existence of the claims and the attitude of the RLCC whether or not they believed her stance to be right or wrong.

i) It was evident from her testimony that the municipality did not notify her or her office in writing or verbally about the proposed development despite being aware of "claims" and despite the request that they should be consulted.

j) The municipality may not have been obliged to inform the RLCC in terms of the Act but was most certainty obliged to do so in terms of the Constitution which imposed an obligation to do so in the spirit of co-operative governance.

k) They failed to do so and it is this failure that has given rise to the present situation and the present action not the delays caused in finalizing the land claims. I accept her testimony to the effect that the RLCC was not opposed to the development at all but wanted the Land Claimants to have a say in whether or not such development would occur and the terms and conditions thereof.

3.4 **Mr. Terry** was an impressive witness and gave his responses in an honest and forthright manner. It is noteworthy that:-

a) he stated that the amount in respect of the agreed legal cost related to litigation over land claims; and

b) there was no cession or demands or summons issued in respect of damages that may arise out of Edcon's penalty clauses.

c) He was able to justify why bridging finance was necessary and that even though the interest on the face of it was excessive, it was intended to be for a short period of time and may well have saved them money at the end of the day by ensuring that the work was timeously completed.

3.5 **Mr Memela** was a good witness who willingly made concessions and I have no hesitation in accepting his testimony that he did inform the municipality that there were claims over erf 912 and had requested the municipality to check with them prior to developing any areas, which the municipality on its own version failed to do. As already indicated his "minutes" cannot be regarded as formal minutes but he has confirmed that it records what was said at the meeting and appears to be what was discussed at the meetings.

3.6 **Professor Botha** was a good witness and to a large extent confirmed what Mr Terry had already testified to.

a) He conceded that he had no idea of the costs orders but simply relied on what was given to him by Landmark.

b) He conceded that the costs were not presented to him and he cannot express an opinion as a matter of law whether or not the municipality would be liable to reimburse the Landmarks for these costs.

c) He also conceded that he was not aware of the bridging finance interest rate in respect of short term loans.

3.7 **Mr Merry** gave his evidence in frank and forthright manner and readily made concessions.

a) It was evident from his testimony that the municipality was aware of the fact that there were claims over erf 912 Mthatha.

b) The issue of whether or not the municipality believed these claims to be legitimate or not was not within the purview of the municipality but rather the Regional Land Claims Commissioner (RLLC) and accordingly the municipality was not justified in rejecting the views of the RLLC based on the interpretation Mr Merry placed on it.

c) If they believed that the RLLC was incorrect they had the right to challenge this in court or to seek clarity on the issue prior to developing the land.

d) They had a duty to make follow up inquiries or at least inform the RLLC of their intention to develop, being aware that reference had been made to erf 912 and that they had not received any clarity on the issue one way or the other.

e) Mr Merry conceded that he failed to make inquiries prior to advertising the land for development.

f) They accordingly failed to discharge their obligations of co-operative governance as provided for in the constitution.

g) Mr Merry's responses confirm this and his concession that the municipality was negligent having regard to the facts appears to be a valid one, both in failing to inform the RLCC of the proposed development and in failing to inform Landmark Mthatha in the circumstances of this case.

h) His subjective belief of whether or not the claims were legitimate or not are irrelevant.

3.8 **Professor Nkado** was a good witness but:-

a) Did not satisfactorily justify his stance that the bridging finance was unreasonable and that his reference to normal interest was reasonable, having regard to his concession that short term loans usually attracted higher interest rates.

b) If this was conceded then his reference to normal interest rates appear to be incorrect and the court is left with Mr. Terry's testimony which justifies the higher interest rates in respect of the bridging finance.

c) Landmark Mthatha had not provided information regarding whether or not other short term loans were available at lower rates but does not necessarily imply that the amount of interest and the obtaining of the loan was unreasonable in the circumstances.

d) It does seem excessive on the face of it but Mr Terry explained why it was obtained and how it was justified. Professor Nkado did not gainsay Mr Terry's testimony in this regard.

e) Professor Nkado's intended withdrawal of his concession on the basis of new evidence being the letter emanating from Mr Markovitz with regard to the 8,5% yield does not appear to be justified.

f) It is evident that the experts being quantity surveyors took into account all relevant factors when discussions were held and that concessions were not lightly made.

g) Mr Markovitz was not a Quantity Surveyor and no evidence was led with regard to how he arrived at his yield.

h) However the experts had a foundation or basis for their figures which was accepted norms in the industry.

i) The Landmarks expert were not given an opportunity to fully address the court on this point since it was a point upon which the experts had agreed save that Mr Terry was still insistent that his position was correct.

j) Professor Nkado did not provide any cogent reason for wanting to withdraw his concession.

3.9 **Mr Mgudlwa** did not appear to have had a clear recollection of what had transpired.

a) His testimony however confirmed that land claims were mentioned in respect of the Zimbane, Lindile and Thembuland communities but in generalized terms without specific reference to erf 912.

b) He however did not furnish any reason or explanation why the Regional Land Claims Commissioner would incorrectly record what had transpired.

c) In any event the likelihood exists that he simply could not recall the event since he did not have his own recording of the proceedings.

d) The testimony of Mr Memela and Ms Faleni are in the circumstances to be preferred on the issue of whether or not erf 912 was mentioned, especially if one accepts that these communities who had made land claims that referred to erf 912 in some form or the other were on his version mentioned at the meeting.

3.10 **Mr Mabanga's** testimony revealed:-

a) that Mr Markovitz was the person involved in the day to day running of Landmark Mthatha;

b) He did not inform Mr Markovitz of the land claims.

c) He in fact he himself did not believe that the claims he was aware of would hinder development due to the fact that the municipality held the title deeds and had informed them that they were the owners of the land.

3.11 **Chief Mtirara's** testimony:-

a) Confirms that Mr Markovitz ran the company.

b) He himself was not concerned about the Abathmebu claim

c) According to him he apparantly only mentioned the Abathembu to Mr Markovitz

d) That he did not mention what he told Mr Markovitz about this meeting at the Great Place nor did he explain why he would do so in light of the fact that he did not consider it to be a threat to the development of land.

e) There does not appear to be any reason for him to have done so and Mr Markovitz' testimony that no mention was made of land claims by Mr Mtirara appears to be more probable in this regard.

f) His statement that Mr Markovitz considered the land claims to be serious when he received the No-Italy application flies in the face of his contention that shortly thereafter a meeting was held to discuss payment to African Bulk and signing of Suretyship and the only impediment discussed on his version was the SG plans.

g) Land claims did not appear to have been a factor taken into account when making the decision to take the loan and sign the Suretyship agreements.

h) No land claims were on his version discussed and it is unlikely that even with his limited experience in business that he would have agreed to sign Suretyship if he was concerned about land claims.

i) Accordingly his statement to the effect that Mr Markovitz considered the land claims to be a serious issue appears to be improbable.

j) In any event this was not put to Mr Markovitz for his comment during his testimony.

k) Insofar as there are differences between his testimony and that of Mr Markovitz, Mr Markovitz's testimony is preferred, to the extent that he was unaware of land claims and not informed of any by Chief Mtirara.

3.12 **Dr Mkhatshwa** appears to be in disagreement with Mr Merry testimony as to what was said at the meeting at which he was present from start to finish.

l) The possibility exists accordingly that he could have forgotten or may not have a proper recollection of precisely what was discussed at meetings with the Regional Land Claims Commissioner.

m) Accordingly the testimony of Mr Merry and particularly Ms Faleni and Mr Memela is to be preferred over his testimony in the circumstances of the case that erf 912 was mentioned.

3.12 **Ms Vuyo Zitumane:-**

a) She most certainly believed that the municipality was correct in their approach and that the Regional Land Claims Commissioner was wrong.

b) However the Act gives the RLLC the power to validate claims and not the municipality to determine whether the claims are proper or not.

c) I accept that erf 912 was mentioned and the fact that the municipality chose to believe that it did not refer to the subject land does not derogate from the fact that erf 912 was mentioned.

d) She also conceded that they did not inform Landmark Mthatha of the RLCC attitude or the claims.

e) She did not state who “alleged” that the claims related to erf 912 and why she considered reference thereto to be alleged.

f) The municipality failed to produce the documents that she referred to as being scant information that was furnished and in possession of the municipality.

g) She however confirmed that something was furnished by the RLCC and the court is left in the dark as to what this is.

h) Her stance indicates that practically there was not, even at this stage, co-operative governance between the municipality and the RLCC despite their attorneys paying lip service to the term and that they failed to discharge their respective obligations in terms of the Constitution.

4 Absolution from the instance

4.1 It is appropriate to furnish the reasons for granting Absolution against the two Governments at this stage.

4.2 The Provincial and National Government applied for absolution at the close of the First Defendant’s case and it was granted with costs of two counsel with reasons said to follow.

4.3 Absolution was sought and granted and the reasons for making that order are briefly set out hereinafter:-

a) It was argued by Mr. Dukada that there were no land claims in existence at the time that the National Government donated the land to the Provincial Government, nor when the Provincial government donated the land to the municipality and accordingly there could not have made any misrepresentations to any parties or to the municipality or failed to disclose the existence of the land claims by the governments.

b) The Deed of Donation did make specific reference to the Restitution of Land Act and made provision for consultations before any development.

c) It was argued that in terms of Rule 13 (7) (a) that where there is a 3rd party claim, the party issuing the notice becomes the Plaintiff and the party against whom the notice is issued becomes the Defendant.

d) The two Governments applied for absolution on the basis that there was no evidence implicating the two Governments in this matter and the fact that they are sued in the alternative does not mean that the court can ignore the fact that no evidence whatsoever has been led against the two Governments.

e) Mr. Dukada submitted that Landmark Mthatha had to make out a prima facie case.

f) He argued that the proper test is whether there is evidence against the government.

g) There was in fact a concession made by the First Defendant's counsel, Mr Coetzee S.C, that the property was donated prior to the coming into existence of the land claims and took place in

1997.

h) He conceded that Landmark Mthatha had not proved a case against the Governments but because the municipality said they did not know and somebody did not tell them, the First Defendant was obliged to join the Governments as parties to the proceedings.

i) His argument was accordingly that if during the course of the Municipality's case they prove that they did not know because the land claims commissioner kept it secret from them or the Provincial Government, not linked to the delegation or transfer, then they would be entitled to rely on such misrepresentation.

j) He conceded that he had not proved a case against the Governments save for a reference to a letter where a question was posed with regard to land claims over the property that was unanswered.

k) There was however no evidence tendered that this letter was indeed received by the land claims commissioner nor was there any proof of delivery tendered.

l) Mr Memela testified that he had not received the letter.

4.4 The reason for granting absolution was simply that no evidence was tendered by Landmark Mthatha against the governments that established a prima facie case against the Governments on the basis of misrepresentation having regard to inter alia to the dictum in **Gordon Lloyd Page and Associates v Rivera and Another 2001 (1) SA 88 (SCA) where Harms JA held at page 92 E – H** as follows:-

*"[2] the test for absolution to be applied by a trial court at the end of the Plaintiff's case was formulated in **Claude Neon Lights (SA) Ltd v Daniel 1976** (4) SA 403 (A) at 409 G – H in these terms:-*

"… when absolution from the instance is sought at the close of the Plaintiff's case, the test to be applied is not whether the evidence led by Plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff (Gascoyne v Paul & Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T).

*This implies that a Plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the Plaintiff (**Marine & Trade Insurance Co. Ltd v Van Der Schyff 1972 (1) SA 26 (A) at 37 G – 38 A,** Schmidt Bewysreg 4th Ed at 91 – 92)."*

a) This judgment authoritively sets out the trite position with regard to the test to be applied when absolution is sought.

b) It is evident applying the test set out in this case, that Landmark Mthatha has failed dismally in establishing a *prima facie* case against the Governments.

4.5 Landmark Mthatha cannot rely upon the speculation or hope that the municipality would make out its case for it against the Governments.

4.6 The test at the close of its case is, has a case been made out against that party and it was conceded that they had not.

4.7 Absolution from the instance was for these reasons granted in respect of the two Governments against Landmark Mthatha.

4.8 Landmark Mthatha was directed to pay the costs of the action, such costs to include the costs of two counsels. Execution of the costs order was to be stayed pending finalisation of the action in order to allow Landmarks to argue that the municipality ought to pay the costs that it was ordered to pay in respect of the governments.

5 **Issues to be determined**

5.1 There is no need to delve into the Plaintiff's case against the First and Second Defendant as it was evident from the testimony even of Mr. Mabanga that the Plaintiff did not know and was not informed of any land claims and accordingly that there is no evidence to suggest that he was *mala fides*.

5.2 Landmark Mthatha's main cause of action against the municipality is breach of contract, and if this is decided in favour of Landmark there is no need to consider the issue of misrepresentation.

5.3 Landmark Mthatha pleaded and the municipality denied:-

a) that the municipality has breaching clause 3.2.1 of the lease by failing to give continued vacant possession of the subject land to Landmark Mthatha in terms of which the development work could be conducted and completed lawfully; and/or

b) the municipality breached clause 3.2.2 in that it knew or ought to have known that there were and are land claims in terms of the restitution of Land Rights Act 22 of 1994 " The RLRA" over the subject land and the Landmarks were unaware thereof.

5.4 Wunsh J**, In Maswanganyi v First National Western Bank Ltd 2002** (3) SA 365 (wld) at 367 H - 368 A held:-

"*One of the fundamental obligations of the seller is to guarantee the purchaser free and undisturbed possession, described as the warranty against eviction. In the words of Norman's 'Purchase and Sale in South Africa', 4th edition at 287 eviction 'means any inference with vacua possessio, whether on the part of the vendor himself or a third party, or any lawful threat thereof.'*

The learned Author quotes the analysis by Demante 'Cours Analytique de code Civile' vol7 at 83 of the guatantee of guarantee as follows:-

> *'The duty of guaranteeing against eviction resolves itself into three obligations:-*
>
> > *a)abstaining from any act which would tend to disturb the purchaser's possession;*
> >
> > *b)protecting him against any attempts at such disturbance, undertaking his defence in any action brought to interfere with his rights.*
> >
> > *c)if unsuccessful in protecting him, indemnifying him against loss'*

In Alpha Trust (Edms) Bpk v Van Der Watt 1975 (3) SA 734 (A) 748 F Botha JA quoted the statement of Schreiner JA in Lammers and Lammers v Giovannoni 1955 (3) SA 385 (A) at 390 B

> *'If (the seller) fails to shield the buyer against eviction he must restore the price and pay the damages suffered by the buyer as a result of the eviction'."*

5.5 It is evident in this case that the municipality failed to give Landmark Mthatha vacuo possession of the land since it was and still is under lawful threat until a final pronouncement is made with regard to the issue of land claims and section 34 (1) reads as follows:-

> *"Any national, provincial of local government body may, in respect of land which is owned by or falls within its area of jurisdiction, make application to the court for an order that the land in question or any rights in it shall not be restored to any claimant or prospective claimant."*

5.6 The regional land claims commissioner has threatened and still threatens to invoke the provisions of section 6 (3) of the RLRA if the landmarks continue with the development.

Section 6 (3) reads as follows:-

"(3) where the regional land claims commissioner having jurisdiction or an interested party has reason to believe that the sale, exchange, donation, lease, subdivision, rezoning or development of land which may be the subject of any order of the court, or in respect of which a person or community is entitled to claim restitution of a right in land, will defeat the achievement of the objects of this Act, he or she may:-

> *a) After a claim has been lodged in respect of such land; and*
>
> *b) After the owner has been notified of such claim and referred to the provisions of this subsection, on reasonable notice to interest parties, apply to the court for an interdict prohibiting the sale, exchange, donation, lease, subdivision, rezoning or development of the land, and the court may, subject to such terms and conditions and for such period as it may determine, grant such an interdict or make any other order it deems fit."*

5.7 It is accordingly evident from the aforegoing that the municipality has breached its obligation to provide vacant possession of land to enable Landmark Mthatha to complete the development, since the land is under threat and subject to unresolved land claims. There is no court order prohibiting the development but practically there is an impediment in the form of a threat of an interdict and of restoration of the land, to the development.

5.8 The issue of whether or not the municipality acted wrongfully or culpably in breaching the contract in that it knew about the land claims and failed to disclose them or even of Landmark Mthatha being aware of the claims at the time of concluding the lease agreement, is irrelevant having regard to the judgment by **K Pillay AJA in Scoin Trading (Pty) Ltd v Bernstein 2011 (2) SA 118 SCA** where the learned Judge at paragraph 17 held:-

"... that mora interest is sometimes regarded as a kind of penalty for a failure to

pay on due date does not mean that the breach of contract is a delict, or that a breach of contract is only established if the debtor acted wrongfully or culpably."

5.9 The fact of the matter is until the present time landmark Mthatha cannot return to the subject land to continue development since a threat of the interdict hangs over its head and it will be extremely unreasonable to expect them to return to the premises and continue development at a cost of R55 Million in the circumstances, until finality is reached in the matter.

5.10 The issue of whether or not the municipality and/or Landmark Mthatha was aware in light of the dictum in *scion supra*, is not relevant. However since it was pleaded it is appropriate to briefly deal with the issue.

a) It was evident from Ms Faleni and Mr Memela's testimony as well as the testimony of Mr Merry that the Municipality was aware of land claims over Erf 912 Mthatha, although factually Mr Merry stated that he did not believe that it covered erf 912 or was valid and requested clarity on the issue which was not forthcoming.

b) There was a dispute with regard to whether Erf 912 was at the meetings specifically mentioned.

c) I have already indicated that I am disposed to accept the testimony of Mr Memela and Ms Faleni in this regard.

d) Even on the municipality's version Mr Merry had received a letter specifically mentioning Erf 912 and he was told in respect of the

Abathembu claim that this related to erf 912.

e) He did not follow up on his queries either telephonically or in writing from the date that he sent the letter until the date that he advertised the land for development or subsequent thereto nor did he or anyone else at the municipality deem it appropriate to even convey the municipality's intention, directly to the land claims commissioner, with regard to their intention to develop.

f) I accordingly have no hesitation, on the facts and evidence led, in accepting that the Municipality was aware of Land claims over the Erf 912.

g) I accept further that there could not have been specific reference to the subject land which was the remainder of Erf 912 since it was not subdivided at the time that the claims were made.

h) I accept that the claims may well have been inelegantly drafted but it was evident that the land claims commissioner believed them to relate to erf 912 and that this incorporated the subject land.

i) Even if there was uncertainty prior to April 2007, even on the municipality's version as at that date they were admonished for developing without consulting the RLCC.

j) They nonetheless failed to even at this stage mention the land claims to Landmark Mthatha causing it to conclude the Earthworks contract, take bridging finance and causing its members to sign suretyships.

k) These expenses could even at that stage be averted if the municipality informed them of the Land claims commissioners stance. The municipality could have further brought the section 34 Application at that stage instead of remaining supine and ignoring the RLCC stance because they believed it to be wrong and instead contended themselves with writing letters.

5.11 The other issue is whether or not Landmark Mthatha was aware of the claims at the time they concluded the lease.

a) Two of the directors and shareholders of landmark Mthatha indicated that they were aware of at least 2 land claims.

b) Mr Mabanga however testified that he did not convey this to Mr Markovitz.

c) Chief Mtirara testified that he had told Mr Markovitz about the Abathembu claim after a meeting held at the King's Place prior to the conclusion of the lease.

d) He however did not furnish any details about precisely what he told Mr Markovitz.

e) It was in any event evident that he did not believe that this claim was a threat to the development because it was made by his father who would not interfere with a business that he was involved in.

f) He further stated that he had forwarded the first set of papers in the No-Italy matter to Mr Markovitz in May 2007 shortly after African Bulk's machinery had gone onto the land.

g) According to him Mr Markovitz had told him that these were now serious land claims.

h) He nonetheless elected to continue with the development and obtain bridging finance and sign suretyship without mentioning land claims when these decisions were taken.

i) It seems highly improbable that Mr Markovitz would have done all this if he had considered these threats to be serious.

j) In any event this version was never put to Mr Markovitz and accordingly little or no weight can be attached to it in determining the issue of knowledge on the part of Mr Markovitz.

k) Mr Markovitz's testimony to the effect that he did not know nor was he informed of any land claims is to be preferred over that of Chief Mtirara since his version, in light of their subsequent conduct, is far more probable.

l) Both Mr Mabanga and Chief Mtirara confirmed that Mr Markovitz's testimony to the effect that he was so to speak the "corporate head" or the managing director or the directing mind of Landmark Mthatha.

m) The knowledge of the other directors or shareholders with regard to the land claims accordingly in the circumstances of this case does not constitute knowledge of Landmark Mthatha.

n) In **Consolidated News Agencies (Pty) Ltd (In liquidation) v Mobile Telephone Networks (Pty) Ltd And Another 2010 (3) SA 382 SCA,** that the essence of the judgment is that in every case the location of the directing mind depends on the nature of the matter under consideration, the relative position of the office or agent, and the relevant facts and circumstances of the case.

o) It is evident as already indicated that Mr Markovitz was the directing mind of the company from the time that the lease was concluded, through to obtaining finances and signing the earthworks contract.

p) I have no hesitation in finding that he, as opposed to the other directors, based on their own testimony as well, was at all material times the directing mind of the company.

q) They have not indicated that they prepared the tender documents or negotiated the terms of the lease and their presence at the meetings does not make them the directing minds of the company.

r) There was no dispute that Landmark Real Estate, represented by Mr. Markovitz was engaged to conduct the development operation.

s) Accordingly Mr Mabanga and Chief Mtirara cannot be considered as the directing minds of the company at the material time of concluding the lease.

t) I have already indicated that I accept Mr Markovitz's testimony to the effect that he had no knowledge of the land claims over the subject land at the time of the conclusion of the lease and was informed by the municipality that the one land claim that he became aware of was frivolous.

u) I accordingly accept that he had no knowledge of land claims and my view in this regard is fortified by his subsequent conduct of:-

  i) obtaining bridging finance at 15% per month;

  ii) having landmark real estate signing surety for the bridging finance;

  iii) Also signing a Suretyship agreement in respect of Landmark Mthatha's indebtedness to the Plaintiff.

v) An astute businessman of Mr Markovitz's caliber and years of experience would not have done any of this if he was aware that the development was under threat.

w) The municipality confirmed that it had not informed him of the land claims commissioner's attitude even after the meeting of April 2007 or after receiving the letter of 11 May 2007, and in fact none of the directors were aware of this and none of them believed that the municipality's title could be challenged.

x) I accordingly accept that the directing mind of the company and accordingly the company had no knowledge of the land claims.

5.12 The next issue is accordingly whether or not the municipality can rely upon the defence of impossibility of performance to avoid being found liable to compensate the first defendant for damages, arising out of the proven breach of contract.

5.13 The municipality raised the conditional defence of impossibility of performance during the trial in November 2010 by seeking to amend its plea to incorporate it as a defence.

5.14 It is trite law that the party who relies upon the defence of supervening impossibility bears the onus to prove it.

5.15 In **M V Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of M V Snow Crystal 2008 (4) SA 111 SCA, Scott JA held,** it is always possible, as a matter of law, for a party to raise the defence of impossibility of performance, the onus for establishing that defence is upon the party raising it.

5.16 Mr Coetzee submitted that the defence of impossibility is in conflict with the municipality's repeated purported tender of performance.

5.17 This tender has been contained in several of the correspondence by the Municipality's attorney referred to during the course of the trial and confirmed by the stance adopted by the witnesses called to testify on behalf of the municipality.

5.18 Mr Coetzee conceded that as a general premise a party cannot be compelled to do the impossible.

5.19 In **Nuclear Fuels Corporation of SA (Pty) Ltd v ORDA AG 1996 (4) SA 1190 SCA at 1206 C –E Howie AJ** quoted with approval the dictum of Strafford J, in Hersman v Shapiro and Co 1926 TPD 367 at 372 where it was held:-

"Indeed, it seems clear that it is impossible to disregard the nature not only of the contract, but of the cause of impossibility, <u>because those causes might be in the contemplation of the parties,</u> or, again, they might be such as no human foresight could have foreseen. That distinction between different kinds of causes of impossibility must be a feature to be regarded before applying this doctrine of impossibility of performance without

qualification.

Therefore, the rule that I propose to apply in the present case is the general rule that <u>impossibility of performance does in general excuse</u> the performance of a contract, <u>but does not do so in all cases,</u> and that we must look to the nature or the contract, the relation of the parties, the <u>circumstances of the case</u>, and the <u>nature of the impossibility involved by the defendant,</u> to see whether that general rule ought, in the particular circumstances of the case, to be applied."(my underlining)

At 1207 G*:- "Here, too, it is not certain whether foresight of the event rendering performance impossible serves to rule out vis major or is an important factor in determining whether, vis major having supervened, it must be inferred, as a fact, that the debtor assumed the risk of impossibility due to vis major. Either way, it is clear from the judgments in Baryley v Harwood that what is relevant is actual foresight, or reasonable foreseeability of the event which causes impossibility not the consequences of such event, as Ramsden (op cit), would have it. If you foresee vis major you must necessarily foresee impossibility of performance. See, too, the dictum in* ***Wilson V Smith and Another 1956 (1) SA 393 (w) at 396 D*** *(cited in the reported judgment at 83 E-F), where the stress is on foresight of the event, not foresight of the consequences."*

Temporary impossibility does not bring a contract to an end unless the foundation of the contract has been destroyed to the extent whether all performance is or would inevitably become impossible or where part of the performance has become or would inevitably be impossible.

5.20 I accept that:-

a) The municipality could have brought a section 34 Application prior to developing, whether or not such claims were precisely defined to obtain certainty and develop without any impediment;

b) The Municipality could also have brought it after the meeting of April 2007;

c) Or even immediately after it was served with the section11 notice;

d) If indeed there is a supervening impossibility it has, having regard to the aforegoing, been created by the municipality's own conduct and they cannot hide behind the alleged impossibility to escape a damages claim in the circumstances of this case;

e) In any event the interdict was not an absolute legal impediment but rather precluded development pending negotiations and was for a limited period of time;

f) the interdict subsequently lapsed and there was no legal impediment;

g) The section 34 order was granted, prior to application for leave to appeal, permitted development subject to consultations with the claimants and with the developers;

h) Even then the Municipality chose to ignore the order and instead simply requested Landmark to resume work on the subject land without consulting;

i) I accept the argument advanced on behalf of the Landmarks that after 21st of January 2008 the problem was not illegality per se, but the re-establishment costs of R55 Million and the threat of the RLCC initiating new interdict proceedings and recommending the setting aside of the lease, that prevented development;

j) The municipality was aware of the land claims and having regard to the facts of this case could or should have clarified the situation irrespective of whether they believed the claims to be valid or not especially since it was not the responsibility of municipality to determine the validity or otherwise of a land claim. This was peculiarly within the purview of the RLCC who indicated that they considered the claims valid;

k) The municipality accordingly could not rely on their subjective belief nor could they hide behind the fact that the claims were not published to justify their actions having regard to their obligation in respect of co-operative governance, as provided for in the constitution;

l) The Municipality despite knowing about the claims and the fact that the Regional Land Claims Commissioner believed them to relate to Erf 912 nonetheless failed to directly notify the RLCC of the proposed development or engage in consultations. This may not have been necessary in terms of the Act but most certainly was in terms of the constitution;

m) I accept that in this case performing became onerous but it is not impossible since there is no order prohibiting it;

n) I accordingly reject the defence of supervening impossibility in this case; and

o) Landmark Mthatha has accordingly established that the Municipality has breached the lease agreement by failing to give Landmark vacant possession that would enable them to lawfully complete the development.

5.21 The next issue is accordingly what relief the court should grant the first Defendant arising out of the breach of contract.

a) Landmark Mthatha's main claim is for specific performance and payment of the delay damages.

b) Mr Coetzee conceded that the court is not bound to order specific performance.

c) The court has a discretion to decline specific performance. In **Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1982 (1) SA 398 (A) at 440 G –H Miller JA held**

> *"That a court is not bound to grant specific performance when the claimant has established the defendant's contractual liability to perform is clear. As De Villiers AJA said in Haynes v King Williamstown Municipality 1951 (2) SA 371 (A) at 378: "It is… settled law with us that although the court will as far as possible give effect to a Plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performance and leave the Plaintiff to claim and prove his id quod interest. The discretion which a court enjoys although it must be exercised judicially is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.""*

d) Mr Coetzee correctly, in my view conceded that in this case ordering specific performance would be unreasonably difficult.

e) The following factors play a role in determining whether or not to grant specific performance:-

   (i) The uncertainty with regard to the outcome of the appeal and cross appeal of section 34 application and the terms and conditions imposed in that order; and

   (ii) The infringement or curtailing of the rights of the claimants or potential claimants in respect of the subject land without them having a say in the matter or being consulted.

5.22 The circumstances of this case clearly warrant me in the exercise of my discretion to refuse to grant specific performance and delay damages.

5.23 I accordingly order that the contract between Landmark Mthatha and the municipality be cancelled or terminated.

5.24 The question now arises with regard to what termination damages should be awarded to Landmark Mthatha.

5.25 All the experts were helpful and were found to be credible witnesses and gave cogent explanations for the stance they adopted.

5.26 The municipality's expert sought to go back on his concession with regard to using a yield of 8,1% based on what Mr Markovitz had submitted to the bank in this regard which was an 8,5% yield.

5.27 Mr Markovitz is not an expert nor was he tested with regard to why he had made this averment.

5.28 It was evident from Mr Terry's testimony that he reluctantly agreed to this percentage being utilized and that there was some robust debate between the experts in this regard prior to consensus being reached.

5.29 I am not disposed to nor was I convinced that any basis existed to deviate from the yield or capitalization rate agreed upon by the experts, being 8,1%.

5.30 I accordingly accept that the loss of profits is the sum of, as agreed by the experts, R105 739 795-00.

5.31 I accept the argument by the Municipality's counsel that Landmark has no *locus standi* to sue on behalf of Edcon who have not even issued a letter of demand against landmark and the court has no idea what defences can be raised against Edcon if it were to institute proceedings or what quantum of damages would actually be awarded to Edcon.

5.32 There was further no evidence that Landmark would actually pay over these monies to the Edcon group and accordingly the issue of unjust enrichment may arise.

5.33 I am not satisfied that Landmarks is entitled to a claim for damages arising out of a prospective claim from Edcon. Edcon has done nothing thus far for whatever reason to recover any damages from Landmark Mthatha. Landmark Mthatha or the Municipality may well be able to raise valid defences against such an action if and when raised.

5.34 I am unwilling to speculate on whether or nor Edcon would succeed or what damages would be awarded. There is however no valid claim against Landmark by the Edcon group at present.

5.35 Landmark has accordingly failed to establish that they have suffered damages under the head “claims from tenants”.

5.36 This head of damages is accordingly excluded altogether.

5.37 I accept the municipality’s contention that Landmarks entitlement, to their head of damages, in respect of legal costs, has not been established.

5.38 The acceptance by the municipality’s expert does not derogate from Landmark’s obligation to establish their claim in this regard especially since none of the experts have any experience in legal costs.

5.39 More importantly however if one accepts Mr Terry's evidence, where he stated that these costs were in respect of land claims.

5.40 These matters were before another court which would have made costs orders which if made in favour of Landmarks can be taxed, and if there were not there is no basis for this court to make such order nor was any cogent evidence presented to suggest that this court should do so.

5.41 There was further no quantification of the costs that Professor Botha stated, as a result of a direct question from the Landmarks counsel, relating to developmental legal costs.

5.42 I am accordingly not in a position to assess how much, if any, of the costs claimed under this head related directly to the development and unfortunately I'm constrained to refuse all the costs under the head "legal fees".

5.43 Professor Botha indicated that he did not have expertise in the area of short term financing and professor Nkado also stated that he was unaware of what rates of interest were charged in respect of short term loans. He further failed to indicate why he then utilized the usual interest rate to calculate the extent of the loss under this head.

5.44 Mr Terry indicated the reasons for taking the bridging finance and explained the benefits to the company in the long run in the ordinary course of events.

5.45 His explanation was reasonable and I am satisfied that in the circumstances Landmark was justified in obtaining the loan at the interest rate they did which has already been hit by the *in duplum rule*. I accordingly grant the bridging finance in the amount of R8 150 000.

5.46 The first Defendant is accordingly awarded the sum of R8 150 000 in respect of the bridging finance.

5.47 There was no dispute with regard to the other heads of wasted costs namely:-

a) Wasted salaries:	R 2 641 667-00
b) Travel and Accommodation:	R 161 832-00
c) Professional Fees :	R 6 857 516-00
d) African Bulk certificates 1&2:	R 6 970 243-00

5.48 I am also satisfied that the damages claimed by the Plaintiff against the first Defendant arose directly from the municipality's breach and accordingly that the municipality should be ordered to pay the amount that the court ordered the first defendant to pay to the Plaintiff together with costs.

5.49 I am however not satisfied that the first defendant has established a sufficient basis for the court to order the "Bullock" type order against the municipality, in respect of the costs order made against Landmark Mthatha when absolution was granted in favour of the Governments.

5.50 The first defendant was on its own admission aware that it did not have evidence to substantiate a claim against the governments but nonetheless elected to cite them as parties and seek relief against them albeit in the alternative.

5.51 Even a finding in favour of the municipality would not of necessity have implied a finding against the governments without any evidence being adduced against them by the party alleging misrepresentation.

5.52 I am not persuaded that I should exercise my discretion and order that the municipality should be directed to pay the costs that Landmark Mthatha was ordered to pay the governments upon absolution being granted.

5.53 I accordingly will not make such an order.

5.54 The municipality had an arguable case in respect of the defences raised which were not spurious or frivolous and accordingly no basis exists for the making of a punitive cost order against it. Their handling of this matter can most certainly be criticized and frowned upon but such criticisms most certainly do not warrant the making of a punitive costs order against them.

6 I accordingly make the following order in the circumstances:-

ORDER

a) The First Defendant is directed to pay to the Plaintiff the sum of R 11 260 148-85 together with interest thereon at the rate of 160% of the ruling bank rate from the 13th of October 2010 to date of payment.

b) The Second Defendant is directed to pay to the Plaintiff the sum of R4 107 742-95, together with interest at the rate of 160% of the ruling bank rate from the 13th of October 2010 to the final payment date (that is 45% of R 9 128 317-66 as agreed between the parties), jointly and severally with the First Defendant, the one paying the other to be absolved.

c) The Second and Third 3rd Parties, the Governments, are granted absolution from the instance as against the First Defendant.

d) The First Defendant, Landmark Mthatha, is directed to pay the Second and Third 3rd parties costs of suit such costs to include the costs of two counsels.

e) The First 3rd Party, the Municipality is found to have breached the implied term of the agreement in that it failed to give the First Defendant vacant possession of the subject land in order to lawfully complete the development.

f) The agreement between the municipality and Landmark Mthatha is accordingly hereby cancelled.

g) The First 3rd party, namely the municipality is directed to pay to the First Defendant the sum of R 130 521 053-00 as termination damages made up as follows:-

(i) Loss of profits called at 8,1% of yield: R 105 739 795-00

(ii) Professional fees: R 6 857 516-00

(iii) Wasted salaries: R 2 641 667-00

(iv) Travel and Accommodation: R 161 832-00

(v) African Bulk certificates 1&2: R 6 970 243-00

(vi) Bridging Finance: R 8 150 000-00

h) The Municipality is directed to pay the First Defendant interest on the aforesaid sum at the rate of 15.5 % per annum from 16th January 2012 to date of payment.

i) The Municipality is directed to pay to the First Defendant the sum of R11 260 148-85, together with interest thereon at the rate 160% of the ruling bank rate from the 13th of October 2010 to date of payment, that being in respect of the Plaintiff's claim as against the First Defendant.

j) The Municipality is directed to pay the First Defendant's and the Plaintiff's costs of suit in this action.

____

DAWOOD J

(JUDGE OF THE HIGH COURT)

DATE HEARD

(JUDGMENT RESERVED): 22 JUNE 2011

JUDGMENT HANDED DOWN: 29 DECEMBER 2011

FOR THE PLAINTIFF:	MR FRIEDMAN
	75 SECOND AVENUE
	NEWTON PARK
	PORT ELIZABETH
CARE OF:	HUGHES CHISHOLM & AIREY INC
	14 PARK ROAD
	MTHATHA
	REF: GERALD FRIEDMAN
FOR THE DEFENDANT:	ADV COETZEE S.C
INSTRUCTED BY:	HUGO COLE INC ATTORNEYS
	FIRST FLOOR
	SOUTH BLOCK OFFICES
	THRUPPS CENTRE ILOVO
	204 OXFORD ROAD
	JOHANNESBURG
	REF: G HUGO/L134
	TEL: 011 268 2026

CARE OF:	J F HEUNIS AND ASS
	26 BLAKEWAY ROAD
	MTHATHA
	REF: JFH/JH 4201

FOR THE 3RD PARTY 1:	ADV MADLANGA S.C;
	ADV MBENEGE S.C;
	ADV DA SILVA; AND
	MR SAKHELA
INSTRUCTED BY :	MNQANDI INC
	18 OWEN STR
	MTHATHA
	REF: NPM/VD/9482
	TEL: 047 531 4400

FOR THE 3RD PARTY 2 & 3:	ADV DUKADA SC;
	ADV MSIWA; AND
	ADV BODLANI

INSTRUCTED BY: THE STATE ATTORNEY

3RD FLOOR PERMANENT

BUILDING

42-48 OXFORD STR

CNR TERMINUS STRE

EAST LONDON

REF: MR MLOLA –893/07 P8

CARE OF: CAPS PANGWA & ASS

SUITE 302 OFFICE 311 & 312

CITY CENTRE BUILDING COMPLEX

YORK ROAD

MTHATHA