THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 136/12

In the matter between: Reportable

KING SABATA DALINDYEBO MUNICIPALITY **Appellant**

and

LANDMARK MTHATHA (PTY) LTD **First Respondent**

AFRICAN BULK EARTHWORKS (PTY) LTD t/a NEW HEIGHTS 55 (PTY) LTD **Second Respondent**

Neutral citation: *King Sabata Dalindyebo Municipality v Landmark Mthatha (Pty) Ltd & another* (136/11) [2013] ZASCA 91 (31 May 2013)

Coram: MPATI P, MAYA, MAJIEDT and PILLAY JJA and ERASMUS AJA

Heard: 18 February 2013

Delivered: 31 May 2013

Summary: **Contract – impossibility of performance due to *vis major* – whether party in breach excused from obligations under contract. Interest – unreasonableness of – short term loan – onus on party alleging unreasonableness to allege and prove that alternative places with lower rate of interest available.**

ORDER

On appeal from: Eastern Cape High Court, Mthatha (Dawood J, sitting as court of first instance):

1 The appeal is dismissed with costs.

2 The cross-appeal succeeds with costs.

3 Para (h) of the order of the court below is amended to read:

'The Municipality is directed to pay the First Defendant interest on the aforesaid sum at the rate of 15.5 per cent per annum from 5 March 2008 to date of payment.'

JUDGMENT

MPATI P (MAYA, MAJIEDT and PILLAY JJA and ERASMUS AJA CONCURRING):

[1] This appeal is against an order of the Eastern Cape High Court, Mthatha (Dawood J), in terms of which the appellant, King Sabata Dalindyebo Municipality (the Municipality), was directed to pay to the first respondent (Landmark) a total sum of R141 781 201,85, as damages, plus interest and costs of suit. Landmark had joined the Municipality as the first third party in an action in which Landmark was sued by the second respondent (Bulk Earthworks) for payment of certain moneys as damages that Bulk Earthworks had allegedly suffered as a result of an alleged breach of contract. Two other parties, namely the Provincial Government of the Eastern Cape and the Government of the Republic of South Africa, were also joined as the second and third third parties respectively. At the close of the case for Bulk Earthworks, absolution from the instance was granted in favour of the second and third third parties. They consequently do not play any part in this appeal. In its order the court below directed the Municipality to pay interest on the sum of R130 521 053 at the rate of 15,5 per cent per annum, calculated from 16 January 2012 to date of payment. Interest on the

balance of R11 260 148,85 was to be payable at the rate of 160 per cent of the ruling bank rate, from 13 October 2010 to date of payment. The judgment of the court below was delivered on 29 December 2011.

[2] With leave of the court below the Municipality appeals against the order just mentioned, while Landmark cross-appeals against that part of the order directing that interest on the larger amount shall be calculated from 16 January 2012. According to its notice of application for leave to cross-appeal, interest ought to be payable from the date of service of the third party notice on the Municipality. In this regard Landmark relies on the provisions of s 2A(2)*(a)* of the Prescribed Rate of Interest Act 55 of 1975, (the Interest Act) to which reference will be made later in this judgment.

[3] Leaving aside the cross-appeal for the moment, the main issue in this appeal is whether the Municipality's plea of supervening impossibility of performance should have succeeded, with the resultant dismissal of Landmark's claim. For a better understanding of the case it is convenient first to set out, briefly, the factual background to Bulk Earthworks' claims against Landmark. In January 1999 the Municipality took transfer of certain fixed property known as 'The Remainder of Erf 912 Umtata', 1740,7900 hectares in extent (the subject land), situated within its area of jurisdiction. The property had been donated by the National Government to the Provincial Government of the Eastern Cape in April 1997, and the Provincial Government, in turn, donated it to the Municipality in December 1997. On 12 October 2006 the Municipality concluded a written lease agreement with Landmark in terms of which the Municipality leased to Landmark a portion of the subject land for a period of 30 years, with Landmark having an option to extend the lease for a further period of 30 years. The leased portion (the property) is defined in the lease agreement as 'the proposed subdivision of the Mother Property, in extent approximately 7,2 hectares' and the 'Mother Property' (which is the subject land) as 'the remainder of Erf 912, Umtata, King Sabata Dalindyebo Municipality, district of Mthatha, Province of the Eastern Cape, in extent 1 624,5303 (One Thousand Six Hundred and Twenty Four comma Five Three Zero Three) hectares'. In terms of the lease agreement Landmark would develop the

property on behalf of the Municipality 'by providing infrastructure or services to the property' and would market and sublet the premises it was required to erect to third parties.

[4] During April or May 2007 Landmark and Bulk Earthworks concluded a written agreement (the contract) in terms of which the latter was engaged by the former to undertake bulk earthworks on the property as part of, or in preparation for, the development, which was referred to as the Mthatha Retail Development. Clause 31.9 of the contract provides that Landmark 'shall pay to [Bulk Earthworks] the amount certified in an interim payment certificate within seven (7) calendar days of the date for issue of the payment certificate'. Bulk Earthworks commenced work on the property on 7 May 2007. The practical completion date is stipulated in the contract as 10 September 2007. Because Landmark was experiencing difficulty in obtaining the required finance from the bank from which it had secured a loan for the development, it delayed with the payments that had become due in respect of the first three payment certificates issued for work already undertaken by Bulk Earthworks. The bank could not advance the required finance because certain conditions pertaining to the loan had not been fulfilled. One of those conditions was that there should be no land claims over the property.[1] It had emerged, however, that the subject land, including the property, was indeed the subject of certain land claims.

[5] On 13 August 2007 Mr Adam Markovitz (Markovitz), a director of Landmark, who was in charge of the development, wrote a letter to Mr Francois de Klerk, the Chief Executive Officer of Bulk Earthworks, in which he advised, inter alia, that Landmark 'will not be able to make payment on the certificate' the following week. Markovitz also

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[1] Section 2(1) of the Restitution of Land Rights Act 22 of 1994 provides:
'A person shall be entitled to restitution of a right in land if –
(a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
(b) . . .
(c) . . .
(d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and
. . . .'

suggested in the letter that Bulk Earthworks 'stop work on site, pending clarity and formalization of a settlement . . .'. Bulk Earthworks immediately ceased operations on the property upon receipt of the letter and subsequently cancelled the contract by way of a letter dated 17 September 2007. On 15 November 2007 Bulk Earthworks instituted action against Landmark, as first defendant, Landmark Real Estate Services (Pty) Ltd (to which I shall henceforth refer as 'Real Estate'), as second defendant and Mr Henderson Mabanga (Mabanga), Chief Mfundo Mtirara (Mtirara) and Ses'fikile Investment Pioneers (Pty) Ltd, as third to fifth defendants respectively, claiming payment of various amounts it alleged were due and payable under the contract. With regard to Landmark's co-defendants in that action, the following was alleged in Bulk Earthworks' particulars of claim:

'The Second, Third, Fourth and Fifth Defendants bound themselves as Surety and Co-Principal Debtors . . . pro-rata their respective Shareholdings, for all amounts payable by [Landmark] to [Bulk Earthworks].'[2]

However, the claims against the third to fifth defendants were later withdrawn and Bulk Earthworks proceeded against Landmark and Real Estate only.

[6] In their plea Landmark and Real Estate averred that when the contract was concluded, Bulk Earthworks was aware that the Municipality was the owner of the property and that Landmark's rights to it arose from a long term lease between the Municipality and Landmark. The plea went further:

'2.7 In or about 1998, land claims as provided for in section 11(7) of the [Restitution of Land Rights Act] ("the land claims") had been lodged with the relevant Regional Land Claims Commissioner ("the commissioner") in respect of the land.

2.8 On or about 25 May 2007 the commissioner published one of the land claims in terms of section 11(1) of the [Restitution of Land Rights Act].'[3]

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[2] The second to fifth defendants were the only shareholders in Landmark, which had been established for the purpose of the development of the property.

[3] Section 11(1) of the Restitution of Land Rights Act stipulates that:

'If the regional land claims commissioner having jurisdiction is satisfied that –

(a) the claim has been lodged in the prescribed manner;
(b) . . .; and
(c) the claim is not frivolous or vexatious,

Section 11(7) of the Restitution of Land Rights Act 22 of 1994 (the Act) provides, inter alia, that once a notice has been published in the *Gazette* in respect of any land which is the subject of a land claim, 'no person may sell . . . , 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 . . . '. Landmark and Real Estate pleaded that when the contract was concluded they were not aware of any land claims in respect of the property. They accordingly denied liability and prayed for the dismissal of Bulk Earthworks' claims, with costs. In the alternative, they requested that judgment in respect of the claims 'be handed down together with the judgment on [their] third party notice'.

[7] Before I turn to the third party notice it is convenient to set out other relevant and undisputed facts. On 3 September 1998 a community known as the KwaLindile Community lodged with the regional land claims commissioner of the Eastern Cape (the commissioner) a land claim in respect of certain land described in the claim form as 'Matiwane Mountain Range'. On 29 December 1998 the abaThembu Community also lodged a land claim for land situated, amongst others, in Umtata. Specific, identifiable, places, which appear to be within the area where the property is situated, are named in the claim form. On 31 December 1998 the Zimbane Community lodged a land claim in respect of land described in the claim form as 'Erf 912 Zimbane A/A district of Umtata – South Africa'. It is not in dispute that no notice was published following lodgement of the three claims before the conclusion of the lease agreement between Landmark and the Municipality in respect of the property. However, by letter dated 11 May 2007 addressed to the municipal manager of the Municipality, Ms V Zitumane, the commissioner advised of the KwaLindile land claim, which, she said, had been investigated and found to be compliant and which was in the process of being gazetted. She warned the Municipality that its actions of developing the property were in contravention of the provisions of the Act and that it should refrain from doing so 'until you have made proper representations to the [commissioner], failing which this matter will be taken to court'. I may mention that there had been some correspondence

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he or she shall cause notice of the claim to be published in the *Gazette* and shall take steps to make it known in the district in which the land in question is situated.'

between the regional land claims commissioner and the Municipality during the second half of the year 2003. In a letter dated 25 August 2003 the commissioner informed the Municipality of the Zimbane Community claim in respect of land known as Erf 912 in the magisterial district of Umtata and placed on record ‘our interest on the matter relating to the sub-division, rezoning or any other development on the land. . .’.

[8] The commissioner published only the KwaLindile Community land claim in the *Government Gazette* on 25 May 2007. On or about 30 May 2007 Chief Monwabisi Njemla of the KwaLindile Community instituted motion proceedings, as applicant, against the Municipality, Landmark and five other respondents seeking an order, amongst others, interdicting the development. According to Markovitz, Landmark and the second respondent only became aware of the interdict proceedings on 19 July 2007. On 14 August 2007 Landmark sought and obtained leave to intervene so as to oppose the application for an interdict. The Land Claims Court granted an interim interdict on 2 October 2007 prohibiting the development ‘pending the finalization of serious and consultative negotiations with all parties concerned but before 30 November 2007’. The consultative negotiations did take place, but were aborted on 21 January 2008, on which date the interim interdict lapsed. In the meantime and while the interim interdict was in force, the Municipality gave notice to the commissioner, by letter dated 10 December 2007, of its intention to develop the property to give effect to the lease agreement between it and Landmark.

[9] Although the interim interdict had lapsed on 21 January 2008 it is not in dispute that the commissioner’s attitude was that she would apply for another interdict if the development were to proceed. This was made clear in a letter addressed to the municipal manager, dated 2 June 2008, which was in response to the Municipality’s notice to the commissioner of 10 December 2007. In her letter (of 2 June 2008) the commissioner stated that she intended referring the KwaLindile and Zimbane Community claims to the Land Claims Court after she had gazetted the latter claim. She then continues in the letter:

'Accordingly, I advise that upon the referral taking place it is my intention, in terms of Section 14(2)*(d)* of the Act, to recommend to the Court that it would be appropriate to resolve the claims by ordering that the leases be set aside and that the land in question be restored to such claimants or group of claimants as to the Court appears just.

In those circumstances this office cannot countenance the present proposed developments continuing and I advise that if that happens, then this office will consider acting in terms of section6(3) of the Act.'[4]

However, the commissioner did not carry out the threat because no further development took place on the property.

[10] With that background I now return to the pleadings. In the statement of claim annexed to its third party notice (I shall, for convenience, henceforth refer to the statement of claim simply as 'the third party notice') Landmark sought an order for specific performance of the lease agreement, together with payment of what was referred to as delay damages in the sum of R290 496 953, plus costs and interest. In the first alternative, an order was sought for payment of the sum of R220 397 556, as damages for breach of contract, plus interest and costs, and in the further alternative, payment of the sum of R92 416 034, as damages suffered as a result of misrepresentation, plus interest and costs. A further order was sought for payment of 'an amount equal to the judgment (if any) and costs (if any) which may be awarded in favour of [Bulk Earthworks] against [Landmark]'.

[11] The allegations made in the third party notice as a basis for the claims were that it was an implied, alternatively tacit, term of the lease agreement that (a) the

[4] Section 6(3) reads: 'Where the regional land claims commissioner having jurisdiction or an interested party has reason to believe that the sale, . . . lease, . . . 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 of the land has been notified of such claim and referred to the provisions of this subsection,

on reasonable notice to interested parties, apply to the Court for an interdict prohibiting the sale, . . . lease, . . . 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.'

Municipality would give Landmark vacant possession of the property 'in the sense that the development work could be conducted and completed lawfully' and (b) the Municipality was not aware of facts 'which constituted a reasonable danger that they would render the continuation and completion of the development unlawful or liable to be set aside, alternatively if so aware, then, that it was obliged to disclose such danger'. As to the averment relating to the lawful completion of the development, it was alleged that as from 25 May 2007 the continuation of the development became unlawful by virtue of the publication of the notice of the KwaLindile Community land claim and, later, by virtue of the interim interdict issued by the Land Claims Court on 2 October 2007. It was accordingly pleaded that in breach of the lease agreement the Municipality failed to comply with either, or both, of the terms as to vacant possession and that it failed to disclose to Landmark, during the course of the negotiations that led to the conclusion of the lease agreement, facts which were known to it but not to Landmark. Those facts were the existence of land claims over the subject land that were lodged in 1998 and which constituted the danger referred to in (b) above.

[12] In its amended plea to the third party notice the Municipality denied that it was aware of land claims relating to the subject land and pleaded, in essence, that Landmark was aware of the existence of the land claims, alternatively that Landmark 'ought reasonably to have been aware of the existence of [the] land claims'. It admitted the allegation of the existence of an implied or tacit term of the lease agreement, which is that it would give Landmark vacant possession of the property. The Municipality pleaded, however, that in light of the gazetting of the KwaLindile Community land claim and the commissioner's 'steadfast threat that she will interdict any development on the subject land', it had become impossible for it 'to afford [Landmark] vacant possession of the [property]'. An additional factor, namely the interim interdict, was also raised during the trial as having rendered performance in terms of the lease agreement impossible. After considering all the evidence the court below found that the Municipality 'was aware of land claims over Erf 912'; that Landmark had no knowledge of the land claims and that although performance relating to the giving of vacant possession had become onerous, it was not impossible 'since there [was] no order prohibiting it'. It accordingly rejected the Municipality's defence of supervening impossibility and found that

Landmark had 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'. This finding rendered it unnecessary for the court to consider Landmark's alternative claim based on misrepresentation. With regard to the alleged knowledge or awareness of the existence of the land claims the court held that '[t]he issue . . . whether or not the [M]unicipality acted wrongfully or culpably in breaching the contract in that it knew about the land claims and failed to disclose them or even . . . Landmark Mthatha being aware of the claims at the time of concluding the lease agreement, is irrelevant. . .'.

[13] The court, in the exercise of its discretion, refused to order specific performance and payment of delay damages. Instead, it ordered cancellation of the contract and awarded 'termination damages' in favour of Landmark in the total amount of R130 521 053, with interest. The 'termination damages' were made up of various sub-heads, namely, loss of profit (R105 739 795), professional fees (R6 857 516), wasted salaries (R2 641 667), travel and accommodation expenses (R161 832), African Bulk (Bulk Earthworks) certificates 1 and 2 (R6 970 243) and interest on bridging finance (R8 150 000). The court further ordered the Municipality to pay to Landmark the sum of R11 260 148.85, being the amount it had ordered Landmark to pay to Bulk Earthworks, with interest. The Municipality was also ordered to pay Landmark's and Bulk Earthworks' costs of suit.

[14] In this court counsel for the Municipality submitted that the issue whether the Municipality and/or Landmark was aware of the land claims in respect of the subject land prior to concluding the lease agreement is paramount and dispositive of the appeal. Counsel accordingly contended that the court below erred in holding that awareness of the land claims by the Municipality and/or Landmark was irrelevant. On the evidence before it, the court below ought to have concluded, so the argument continued, that Landmark was aware, or ought reasonably to have been aware, of claims that had been lodged with the commissioner in respect of the subject land and

that for this reason Landmark's entire third party claim founded on failure by the Municipality to afford it vacant possession should have been dismissed.

[15] On the other hand, counsel for Landmark submitted that Landmark's main cause of action, which was upheld by the court below, was breach of contract in the form of failure by the Municipality to give it vacant possession of the (leased) property and that fault or knowledge of culpability is not a requirement for its reliance on breach of contract. It had, in any event, been made clear at the pre-trial conference, counsel continued, that knowledge was relied upon as part of an alternative claim. The 'alternative claim' was clearly a reference to the claim based on misrepresentation, which it was unnecessary for the court below to consider, in view of its finding on the main cause of action, that is, breach of contract.

[16] The submission on behalf of the Municipality that Landmark had knowledge of the land claims was advanced on the strength of the evidence of two witnesses, namely Mabanga and Mtirara, who testified on behalf of the Municipality. Mabanga testified that in 2004, or early 2005, he identified certain land of which the property formed part, as prime land for development. After certain investigations that he had initiated it was discovered that the KwaLindile Community had an interest in the land. Accompanied by a companion, he negotiated with the KwaLindile Community, who agreed to a proposed development in exchange for a percentage of income from it. However, when the Municipality advertised the property in 2005 for development he abandoned the KwaLindile Community and approached Mtirara, who informed him that his community, the AbaThembu, also had a claim over the land concerned, but that the Municipality was the title deed holder. Mabanga invited Mtirara to join him in developing the land with his (Mabanga's) friend, Mr Dennis Tobojane (Tobojane), a developer who appears to have had an interest in Real Estate. After the two had held several meetings with Tobojane, where Markovitz was also present, it was agreed that a consortium be formed. Markovitz was then appointed to take over from Tobojane and, subsequently, Landmark was established. Thus, when Landmark came into existence both Mabanga

and Mtirara, who each had a 22.5 per cent shareholding in it,[5] knew of the KwaLindile and AbaThembu claims in respect of the subject land. Mabanga testified that he did not know that a land claim could affect the

[5] The other shareholders, Landmark Real Estate and Ses'fikile Investment Pioneers (Pty) Ltd held 45 per cent and 10 per cent shares respectively.

feasibility of the development. He never informed Markovitz about it.

[17] Mtirara testified that at the time the AbaThembu Community land claim was lodged, his father, Chief Zondwa Mtirara, was still alive. His father had signed the claim form on behalf of the Community. He confirmed Mabanga's testimony on how they had met and how Landmark was ultimately established. He testified that he told Markovitz about the AbaThembu land claim but not about the KwaLindile one. He said he was not concerned about the AbaThembu land claim because he knew that his father would not be opposed to the development since he (Mtirara) was involved in it.

[18] I have summarised the evidence of the two witnesses that I consider to be relevant to the issue of knowledge of the land claims over the subject land and thus the property, because the further contention on behalf of the Municipality was that the knowledge of Mabanga and Mtirara should be imputed to Landmark. This is because both were not only shareholders in Landmark, but also directors, so it was argued. However, I agree with the court below that Landmark's knowledge of the land claims at the time the lease agreement was concluded, if the knowledge of Mabanga and Mtirara could legitimately be imputed to Landmark, is irrelevant in the adjudication of Landmark's claim that the Municipality committed a breach of contract. It would have been relevant in the claim based on misrepresentation. This was indeed clear to counsel for the Municipality, who, with reference to the decision in *Stellenbosch Municipality v Lindenburg* (1860) 3 SC 345 at 349, contended in their heads of argument that a person who knew the truth all along 'cannot claim to have been induced by another's misrepresentation'. So much on the issue of Landmark's knowledge of the land claims.

[19] Similarly, the Municipality's knowledge of the land claims is irrelevant for purposes of considering the question whether or not there has been a breach of contract. This is because 'fault is not a requirement for a claim for damages based upon a breach of

contract'.[6] Failure by the Municipality to inform Landmark of the land claims at the time of the conclusion of the lease agreement, if the Municipality did have knowledge of land claims, at the time, is, therefore, also irrelevant in the adjudication of Landmark's claim based on a breach of contract.

[20] As has been intimated above, the Municipality's defence to Landmark's claim based on a breach of contract was that it became impossible for it to give vacant possession of the property to Landmark, due to the gazetting of the KwaLindile Community land claim and the commissioner's steadfast threat of an interdict to the development of the property in the event of it continuing. The defence is, therefore, one of supervening impossibility of performance. In its replication Landmark pleaded, inter alia, that in the event of a finding that Landmark was aware of a relevant land claim or land claims, the Municipality is estopped from relying on such knowledge, because (a) the Municipality intentionally, alternatively negligently, represented that such claim or claims as had been made would not constitute a hindrance to the development, and (b) Landmark acted on the correctness of those facts as represented. It was pleaded further that the publication of the KwaLindile Community land claim and the subsequent interim interdict – both of which had rendered the development unlawful – were in the contemplation of the Municipality and/or that the Municipality foresaw those factors, alternatively, it would have foreseen them had it exercised reasonable care. Finally, it was pleaded that the publication of the land claim and the interim interdict 'were brought about by the fault of the Municipality in that it deliberately alternatively negligently failed . . . , as required by section 41(3) of the Constitution, to make every reasonable effort and exhaust all remedies to settle its dispute with the [commissioner] in regard to the land claims over the subject land'.

[21] That the Municipality failed to give Landmark vacant possession of the property so as to enable it to lawfully complete the development is not in dispute. The questions for consideration, therefore, are whether it was impossible for the Municipality to give Landmark vacant possession of the property and whether Landmark made out the

[6] *Administrator,Natal v Edouard* 1990 (3) SA 581 (A) at 597E-F. See also *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) para 17.

case advanced in its replication in answer to the plea of impossibility.[7] I am not certain that there is any basis for the allegation in Landmark's replication that the publication of the KwaLindile land claim was brought about by the fault of the Municipality. The commissioner was obliged, once she was satisfied that the land claim complied with the provisions of s 11(1)[8] of the Act, to publish it in the *Gazette.* But, in the view I take of the matter, it is unnecessary to discuss this issue any further.

[22] As I have mentioned above, the Municipality relied, as a basis for the defence of impossibility of performance, on the gazetting of the KwaLindile Community land claim – which has as its consequence the prohibition of, inter alia, any development of the land concerned without one month's written notice having been given to the commissioner of an intention to do so – and the commissioner's steadfast threat to interdict any development of the property (s 11(7) of the Act). In this court, however, counsel for the Municipality submitted that the supervening impossibility set in when the Land Claims Court granted the interim interdict on 2 October 2007. If the granting of the interim interdict could be said to have made it impossible for the Municipality to give vacant possession, then this submission, in my view, would seem to be correct. This is so because all that was required after the publication – if a publication of a land claim also affects a development that had already commenced on the land concerned at the time of publication, something that was not raised or argued before us – was for the Municipality to give one month's written notice to the commissioner of its intention to continue with the development. But with the threat from the commissioner to interdict the operations on the property, Landmark could not take the risk of continuing with the development and to incur further expenses in the process. Indeed, by letter dated 4 September 2007, Real Estate advised the Municipality that the existence of the land claims 'and the associated litigation' was inhibiting Landmark from exercising its rights and fulfilling its obligations in terms of the lease agreement. And in a letter dated 1 October 2007, addressed to the Municipality's municipal manager, Real Estate proposed that the Municipality 'provide Landmark

[7] See *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (A) at 1195F-G.
[8] Above fn 3.

Mthatha with an indemnity relating to the consequences of the land claim. . .'. There was no reply to the proposal. Instead, in responding to an earlier letter from Landmark, the Municipality's attitude was revealed in a letter from its attorneys dated 5 October 2007, in which it was stated, inter alia, that the gazetting of the KwaLindile Community land claim 'did not in itself impede the development'. In my view, Landmark was deprived of vacant possession of the property after the gazetting of the KwaLindile Community land claim on 25 May 2007. Section 11(7) of the Act makes it clear that development on land, that is the subject of a claim, is prohibited once a notice of the claim has been published in the *Gazette*.

[23] Proceeding, then, on the basis that the submission that the supervening impossibility – relied upon as a defence – set in when the interim interdict was granted is correct, it seems to me that the cause of the impossibility (a court order interdicting the development) would be *vis major*.[9] Landmark was bound to comply with it and not to continue with the development.[10] The court below rejected the Municipality's defence of supervening impossibility, reasoning, among other things, that it (the Municipality) had been aware of the land claims (prior to the conclusion of the lease agreement) and 'could or should have clarified the situation irrespective of whether [it] believed the claims to be valid or not . . .'; that it could have brought a s 34[11] application prior to developing the property; that if indeed there was a supervening impossibility it had been created by the Municipality's own conduct; and that 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'.

[24] In *MV Snow Crystal: Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) Scott JA said the following (para 28):

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[9] Compare *Peters, Flamman and Co v Kokstad Municipality* 1919 AD 427 at 435; *Bayley v Harwood* 1954 (3) SA 498 (A) at 505G-H.
[10] See *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd* 1992 (2) SA 489 (A) at 498A-C.
[11] Section 34(1) reads:
'Any national, provincial or local government body may, in respect of land which is owned by it 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.'

'(A)s a general rule impossibility of performance brought about by *vis major* or *casus fortuitus* will excuse performance of a contract. But it will not always do so. In each case it is necessary to "look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied". The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant.'[12] (Footnotes omitted.)

Landmark's main argument in this court was that the Municipality had assumed the risk of supervening impossibility by accepting the terms of the lease agreement, which did not limit its obligation to afford it (Landmark) vacant possession of the property. An alternative submission was that the development of the property was not impossible and 'certainly not permanently impossible' and that vacant possession was possible, albeit sometimes temporarily subject to action by the Municipality, which it failed or refused to perform. Both these submissions (main and alternative) are grounded on what was pleaded in the replication (as set out in para 20 above).

[25] As has been mentioned above, the life of the interim interdict granted by the Land Claims Court on 2 October 2007 depended on 'the finalisation of serious and consultative negotiations with all parties concerned', but the finalisation of the negotiations was to occur before 30 November 2007. However, the parties seem to accept that the interdict lapsed on 21 January 2008. Paragraph A(ii) of the order of the Land Claims Court is in the following terms:

'In the event of the negotiations . . . reaching an impasse, on or before 30 November 2007, the [Municipality] is granted leave, if so advised, to make application in terms of section 34 of [the Act] as amended.'

An impasse was indeed reached, but the Municipality did not make application, in terms of s 34, as advised, until September 2008. It was, however, contended on its

[12] See also the cases referred to there.

behalf that no culpability or fault can be imputed to it and that the court below erred in finding that the

supervening impossibility was brought about by its conduct of failing to, inter alia, notify the commissioner of its intention to develop the property and to launch s 34 proceedings timeously. It was argued further that apart from the interdict 'which endured for a few months, no court order prohibited the development'.

[26] Since counsel for the Municipality conceded in this court that the impossibility set in only when the interim interdict was granted, the question of the failure to notify the commissioner of the intention to develop the property will be ignored. In any event, the effect of the failure has already been dealt with above. As to the contention that no court order prevented the development after the interdict had lapsed, this plainly contradicts the Municipality's plea that in the light of the commissioner's steadfast threat that she will interdict any development on the subject land it had become impossible for it to afford Landmark vacant possession of the property. As I have mentioned above, on 10 December 2007 and while the interim interdict was still operative and negotiations taking place, the Municipality's municipal manager wrote a letter to the commissioner giving notice, in terms of s 11(7)*(a*A*)* of the Act, of its intention to continue with the development. In her letter dated 2 June 2008 the commissioner responded, inter alia, that she was inclined to refer the KwaLindile Community land claim to the Land Claims Court and that once that was done 'it would be appropriate to resolve the claims by ordering that the leases be set aside'. The words 'by ordering' were clearly intended to convey that she would seek an order setting aside the lease (in Landmark's case). (There were other lease and development agreements involving other parts of the subject land.) The last paragraph of the letter bears repeating:

'In those circumstances this office cannot countenance the present proposed developments continuing and I advise that if that happens, then this office will consider acting in terms of section 6(3) of the Act.'[13]

During the trial the commissioner, Ms Linda Faleni, confirmed her stance and testified, on 2 November 2010, that should the development continue '[w]e will adopt the same attitude', that is, she would apply for an interdict. Landmark was thus in the same

[13] The subsection is quoted in fn 4 above.

position after the lapse of the interim interdict as it was after the publication of the KwaLindile Community land claim; it could not take possession of the property and continue with the development in the face of a threat of yet another interdict.

[27] I agree with counsel for Landmark that the impossibility of performance raised by the Municipality as a defence was not permanent. It was dependent on the latter taking, or failing to take, action. There is no explanation why no notice was given to the commissioner by the Municipality after the KwaLindile Community land claim was published on 25 May 2007. It is true that the Municipality disputed the description of the claimed land in the publication, but the commissioner had by then made it quite clear that property on which the development was taking place was the subject of land claims. There is also no explanation why the Municipality failed to act upon the advice of the Land Claims Court and invoke the provisions of s 34 of the Act immediately after the negotiations the court had ordered had been aborted in January 2008, and why it did so only in September 2008, when Landmark had already served its third party notice at least on the second and third third parties in February 2008. The s 34 application was granted by the Land Claims Court on 14 December 2010, albeit with certain conditions, which were set aside on appeal to this court. The granting of the application indicates that had the Municipality taken that course timeously the impossibility would have been removed. In my view, the Municipality's argument that the court below erred in finding that the supervening impossibility was brought about by its own conduct (fault) cannot be sustained.

[28] It will have become clear by now that in considering the question whether the impossibility was due to the Municipality's fault, the issue of Landmark's, or even the Municipality's, knowledge of the land claims does not feature at all. It would have if the question of the assumption of risk by either Landmark or the Municipality had to be considered. That has become unnecessary in view of the finding that the impossibility was self-created. It follows that the general rule that impossibility of performance brought about by *vis major* or *casus fortuitous* will excuse performance of a contract

does not avail the Municipality in this case. The appeal against the finding of the court below relating to the defence of supervening impossibility must accordingly fail.

[29] As counsel for the Municipality put it in their heads of argument, the principal finding of the court below which remains contentious between the parties relates to two issues, viz (a) the yield or capitalisation rate used to calculate the value of a development on being sold and (b) the interest levied on the bridging finance.

(a) Capitalisation rate

[30] I have set out above (para 13) the amounts awarded by the court below as damages under separate heads. The sum of R105 739 795 was awarded for loss of profit while the rest, except the amount of R11 260 148.85, was in respect of wasted costs. Before us counsel for the Municipality advanced no argument on the question of the wasted costs, this because, said counsel, the Municipality's expert witness, Professor Raymond Nkado, had accepted the whole amount. For calculating the quantum of damages for loss of profit the resale value of the asset that is the result of the development – in this case a shopping centre – must be determined, from which the cost of the development has to be subtracted. The difference constitutes the loss of profit. The resale value is determined by applying a capitalisation rate; the lower the rate, the higher the resale value. The reverse is also true. The evidence revealed that a change in the rate, even by a small fraction, either way, could result in a significant jump or dip in the resale value.

[31] Two experts testified on behalf of Landmark, namely Mr Robert Terry, a consultant to Landmark and Professor Pieter Botha. Professor Nkado testified on behalf of the Municipality. It is common cause that in their separate reports the three experts initially used different capitalisation rates to calculate Landmark's loss of profit, but after robust debate at a meeting held on 28 October 2010 they agreed on a capitalisation rate of 8.1per cent. However, during his testimony Professor Nkado sought to renege on the agreement and reverted to his initial figure of 9 per cent as a

reasonable capitalisation rate estimate.[14] This change of stance was brought about by the late discovery by Landmark of certain documents, one of which being a letter written by Markovitz to ABSA, in which he motivated for an increase in funding for the development. In an annexure to the letter Markovitz gave a 'projected sale yield' of 8.5 per cent in respect of the development. Professor Nkado testified that had he seen the rate of yield (capitalisation rate) applied by Markovitz at the time he (Nkado) and the two other experts were negotiating around that issue, he 'would have been firmer on [his] lower yield expectation', which was 9 per cent. He was referred, in cross-examination, to certain reports that dealt with capitalisation rates for shopping centres, one fixing the rate for the East London area at 8.1 per cent, while the other fixed a rate for the Eastern Cape in 2007 at 7.3 per cent. But the only basis he gave for deviating from the previously agreed rate of 8.1 per cent was the fixing, by Markovitz, of a rate of 8.5 per cent in his letter to ABSA.

[32] In refusing to deviate from the agreed capitalisation rate of 8.1 per cent the court below held that Markovitz was not an expert on the issue and accordingly that there was no basis for deviating from the agreed rate. Counsel for the Municipality, though, submitted that Markovitz's estimate of 8.5 per cent could not have been a 'thumb-suck'; that he 'is by no means a novice . . . in the business of land development' and that therefore one 'cannot make light of the 8.5 per cent reflected in the annexure to his letter'. Counsel submitted further that on the assumption that Markovitz had not himself decided on the 8.5 per cent rate the inference is inescapable that it came from some other person with the necessary expertise, or, alternatively, that even though Markovitz was not called as an expert, with his 'vast experience in the property development industry, he is most definitely an expert in it' and the rate he had fixed might well have been one that was well considered by him.

[33] I am not persuaded that the court below erred in refusing to deviate from the 8.1 per cent capitalisation rate agreed upon by the three experts. It is true that Professor Nkado testified that a developer would ordinarily try to impress the financier from which

[14] Mr Terry and Professor Botha had pegged their estimates at 7.7 per cent and 8.1 per cent respectively.

he or she seeks funding for a development that the project is highly profitable, but in doing so he or she would, so as to maintain credibility with the financier, make a reasonable guess in respect of the capitalisation rate. The implication then is that the 8.5 per cent rate fixed by Markovitz would have been a reasonable rate. In my view, it would be pure speculation to try to find a reason why Markovitz used the rate which he did when he sought additional funding from ABSA. Markovitz was recalled for purposes of further cross-examination after the documents, of which the letter to ABSA formed part, were discovered, but he was not questioned on his suggested capitalisation rate. The Municipality cannot now seek support from an unexplained suggested capitalisation rate fixed by Markowitz in its attempt to justify a departure from the rate upon which all three experts had previously agreed. I can find no reason to disagree with the conclusion of the court below on this aspect of the case.

(b) Interest on bridging finance

[34] It is not in dispute that around June 2007, when Landmark could not make payment on Bulk Earthworks' certificates because its financier did not release the necessary funds, Markovitz sought, and obtained, on its behalf, bridging finance in the form of a short term loan in the sum of R8 million, at a rate of interest of 15 per cent per month. At this rate, and limited by the *in duplum* rule, Landmark's experts calculated the interest payable on the loan, at the time of their meeting with Professor Nkado on 28 October 2010, at R8 150 000 – one of the amounts claimed in the third party notice as part of 'termination damages' – which the court below ordered the Municipality to pay to Landmark. Professor Nkado's testimony, on the other hand, was that the rate of 15 per cent per month was excessive. He contended for a rate of 15 per cent per annum. It was not argued in this court that the interest rate levied on the bridging finance was usurious or against public policy. This is understandable because it has not been suggested that there is a standard rate of interest beyond which a transaction becomes usurious.[15] As I understand the position at this stage, the issue is not whether or not the Municipality is liable for the interest levied on the bridging finance and paid by Landmark, but rather one of limitation of liability. The question for consideration is whether a rate of 15 per cent per month was reasonable. It was submitted, on behalf of

[15] Compare *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC & others* 2011 (3) SA 511 (SCA) and *Reuter v Yates* 1904 TS 855 at 856, referred to in *African Dawn*.

the Municipality, that there was no evidence whatsoever touching on the reasonableness of the rate; that Landmark appeared to have accepted ‘the very first rate that came their way and that absent any evidence that the

market was tested or that testing it would have been prejudicial, Landmark 'has failed to prove the reasonableness of the rate it is claiming'. In my view, there are at least two reasons why the Municipality must fail on this ground as well.

[35] The first: Professor Nkado accepted that short term loans usually attract a different rate of interest. He conceded in cross-examination that the blow of the 15 per cent per month rate of interest would be softened because interest only runs until it equals the capital amount (in terms of the *in duplum* rule). And calculated at his suggested interest rate of 15 per cent per annum *duplum* would be reached in this case, he said, 'in another two years or so' and he agreed with a suggestion put to him that with compound interest *duplum* would be reached in approximately five years. Considering that the bridging finance was obtained in June 2007, *duplum* would have been reached by the time this appeal was argued. The question of the reasonableness of the rate levied on the bridging finance has thus become moot.

[36] The second reason relates to the submission advanced on behalf of the Municipality that Landmark did not place any evidence before the court below to show that it had tested the market and therefore that it had failed to prove the reasonableness of the rate of interest claimed. In *Everett & another v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C), a case in which one of the issues was mitigation of damages, Corbett J had this to say (at 201G):

'Generally, the burden of proof rests upon the party who asserts that a claimant for damages failed to take reasonable steps to mitigate his loss (*Hazis v Transvaal and Delagoa Bay Investment Co. Ltd.* 1939 A.D. 372). Similarly, in my view, the *onus* of proof would also rest upon the party who asserts that the mode of mitigation employed by the claimant was not a reasonable one in that in an alternative mode, less expensive or burdensome, was available (cf. *Shrog v. Valentine,* 1949 (3) S.A. 1228 (T) at p. 1237). In this regard the Court should not be too astute to hold that this *onus* has been discharged.'[16]

I can find no reason why the same principle should not apply in a case such as the present. It was not in dispute that Landmark obtained a bridging loan for which it was

[16] See also *SOAR h/a Rebuilds for Africa v J C Motors en 'n ander* 1992 (4) SA 127 (A) at 135A-D.

liable to pay interest. The amount of the interest formed part of the damages claimed in the third party notice. It was thereafter for the Municipality to allege and prove the unreasonableness of the rate of the interest payable in that there were alternative places where bridging finance, at a lower rate of interest, was available. This the Municipality did not do.

[37] I turn to consider the cross-appeal. It relates only to the date on which interest on the amount of R130 521 053 awarded to Landmark as 'termination damages' commences to run. The court below ordered that interest shall be paid 'at the rate of 15.5 per cent per annum from 16th January 2012 to date of payment'. It was contended on behalf of Landmark that there was no reason for the court below to deviate from the provisions of s 2A(2)*(a)* of the Interest Act and that interest should have been ordered to run from the date of service of the third party notice on the Municipality. The section reads:

'Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 (Act 34 of 2005) the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.'

Insofar as it may be relevant, s 2A(1) decrees that the amount of every unliquidated debt as determined by a court of law shall bear interest.

[38] The court below gave no reasons why it deviated from the provisions of the Interest Act and counsel for the Municipality could suggest none. True, a court has a discretion, in

terms of s 2A(5),[17] to fix a date from which interest shall run as appears to it to be just. But one would expect some motivation, discernable from the court's judgment, for the deviation from the principle enunciated by Solomon JA in *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 183 that –

'There is no satisfactory reason for following any other practice, and we think that we should now definitively lay down the rule that *mora* begins [to run] from the date of receipt of the letter

[17] Section 2A(5) provides:
'Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law . . . may make such order as appears just in respect of payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.'

of demand. It of course follows that, where there has been no letter of demand, there would be no *mora* until summons has been served on the defendant.'[18]

Counsel for Landmark urged us to amend the order of the court below by changing the date from which interest is to run to 8 February 2008, alternatively to 31 March 2009. The former was the date on which the third party notice was served on the Municipality, and the latter is the probable date on which Landmark would have received the proceeds from the sale of the shopping centre. There was no real opposition from the Municipality's team. However, because it is not clear from the third party notice on what date it was served on the Municipality, counsel were invited to confirm in writing that service was indeed effected on 8 February 2008. This they were unable to do, but counsel for Landmarks submitted that the date on which the Municipality lodged its appearance to defend should be fixed as the date from which the interest shall run. I agree.

[39] There remains the question of costs. Counsel for Landmark submitted that for the reason that the Municipality had been patently remiss in its handling of the matter throughout, we should order that costs be paid on the scale as between attorney and client. Although an order for costs on that scale, alternatively on the basis that the employment of senior counsel was warranted, was sought in the third party notice, the court below did not make such a costs award. I am also not at all disposed to granting costs on the scale as between attorney and client.

[40] In the result I make the following order:

1 The appeal is dismissed with costs.

2 The cross-appeal succeeds with costs.

3 Para (h) of the order of the court below is amended to read:

'The Municipality is directed to pay the First Defendant interest on the aforesaid sum at the rate of 15.5 per cent per annum from 5 March 2008 to date of payment.'

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[18] See also *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 594H-595B.

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