IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 8945/2006

In the matter between:

B B S EMPANGENI PLAINTIFF

(Formerly Z T C CASHBUILD CC)

and

PHOENIX INDUSTRIAL PARK (PTY) LTD. FIRST DEFENDANT

MORELAND ESTATES (PTY) LTD. SECOND DEFENDANT

JUDGMENT Delivered on 06 January 2011

SWAIN J

[1] The central issue in this matter is whether the sale of a certain immovable property (the property), by the first and second defendants to the eThekwini Municipality (eThekwini) on 18 October 2000, constituted a repudiation of any obligations owed by the defendants to the plaintiff, in terms of an agreement of sale (the agreement) concluded between the plaintiff and the defendants, on 11 January 1990, in which the property was sold by the defendants to the plaintiff.

[2] The plaintiff alleges that as result of the defendants' repudiation it cancelled the agreement and, as a consequence advances a claim for the return of the deposit paid by it in the sum of R45,500.00 and damages in the sum of R2,795,000.00 . It was common cause that the plaintiff had paid a deposit in this amount, as well as the quantum of plaintiff's damages.

[3] The defences advanced by the defendants to the plaintiff's claim were as follows:

[3.1] The defendants validly cancelled the agreement prior to the subsequent sale of the property to eThekwini.

[3.2] The claim of the plaintiff had prescribed. This defence raised two distinct periods of time, within which it was alleged that two distinct causes of action possessed by the plaintiff had prescribed, being:

[3.2.1] The period between the date when the suspensive conditions in the agreement had been satisfied, which it is common cause was no later than 04 October 1994 and the date when the defendants' transferred the property to eThekwini, being 20 December 2002. It was alleged by the second defendant that the plaintiff's right to demand transfer of the property had prescribed during this period.

[3.2.2] The period between the date when the defendants

transferred the property to eThekwini, being 20 December 2002 and the date when the plaintiff issued summons, being 21 August 2006. It was alleged by both defendants that the plaintiff's right to claim cancellation of the agreement, payment of the deposit and damages, had prescribed during this period.

[3.3] The first defendant alleged that the plaintiff waived and/or abandoned any rights it had in terms of the agreement.

[3.4] The second defendant alleged that the plaintiff was estopped from averring that the conduct of the defendants, in selling and transferring the property to eThekwini was in breach of the agreement and gave rise to contractual rights for the plaintiff.

[4] A determination of these issues requires a careful analysis of the history of the dispute between the parties, the salient features of which are as follows:

[4.1] In July 1990 the plaintiff, represented by Mr. Balmer, requested a cancellation of the agreement, on the grounds "there was quite a lot of negative publicity in the area, there was quite a lot unrest in the area, and we felt that they weren't going ahead quick enough with it and we just felt a little vulnerable, and so we suggested that maybe we should be cancelling this agreement and they refused to entertain that idea so we said 'well, that's fine, we will just continue with it' ".

Record pg 27 lines 8 – 12

[4.2] The letter of refusal dated 17 July 1990 was sent by

Phoenix South Industrial Park, which in the agreement is described as the seller, being a joint venture between the first and second defendants.

Agreement Exhibit "B" pg 1
Letter Exhibit "B" pg 99

[4.3] The cause of the plaintiff's feelings of "vulnerability" were, according to Mr. Balmer, the fact that the plaintiff was sold the land on the basis that it was buying into an industrial park, similar to the one next door, namely Phoenix Industrial Park, as depicted in a pamphlet which, it is common cause, was Exhibit "E".

Record pg 24 lines 19 – 24

Mr. Balmer said the essential services to be provided would be similar to Phoenix Industrial Park.

Record pg 24 lines 23 – 24

[4.4] Mr. Balmer stated that the pamphlet depicted a sisal barrier encircling the Industrial Park and forty seven metre high mast security lights.

Record pg 25 lines 17 – 24

Mr. Balmer agreed that the plaintiff's attitude was that the pamphlet (Exhibit "E") and what was told to him at the time, was a

representation to the plaintiff with regard to what the sellers would do and what they would provide

Record pg 92 lines 20 – 23

and conceded that as far as services went, namely electricity, sewage and effluent disposal were concerned, his recourse lay with the local authority and not with the defendants, and that this was not an issue.

Record pg 94 lines 21 – 23
Record pg 95 lines 2 - 3

[4.5] Mr. Forbes, on behalf of the second defendant agreed that the brochure provided for these security features and that the defendants would install these features, but not before transfer. They would be installed in time, after "enough" transfers had taken place in the Industrial Park.

Record pg 189 lines 7 – 12
Record pg 205 lines 14 – 22
Record pg 206 lines 4 – 19

He said the obligation to install these features was an act of faith, or trust on both sides and would be honoured because the plaintiff was dealing with a reputable company

Record pg 206 lines 10 – 16

He said that the defendants had erected street lighting internally and would erect high mast security at a later stage

Record pg 189 lines 10 – 12
Record pg 206 lines 20 – 24

but emphasised that the defendants were not responsible for purchaser's site security in the Industrial Park.

Record pg 207 lines 6 – 13

He maintained that the defendants had planted a sisal barrier, was unable to say when, but it had not been successful as the plants had died. He pointed out that in the very nature of things the sisal plants would be very small when planted, when transfer of the property to the plaintiff would take place.

Record pg 207 lines 19 to pg 208 line 9

When Mr. Harpur S C, who appeared for the plaintiff, suggested to him that the plaintiff would think that these security measures would be in place at the time of transfer, his response was that this would depend upon the terms of the agreement, from which the plaintiff would know what was to be delivered.

Record pg 208 lines 12 – 18

[4.6] By letters dated 13 November 1990 and 29 November 1990 the defendants' attorneys informed the plaintiff that they were

in a position to proceed with transfer of the property and requested a copy of the plaintiff's founding statement, to enable them to do so, which request was repeated.

Exhibit "B" pgs 100 – 101

Mr. Balmer stated that after receipt of these letters he consulted his attorneys because there was no township development, as he was led to believe there would be and he felt it was premature to take transfer.

Record pg 27 line 13 to pg 28 line 2

[4.7] As a result the plaintiff's attorneys wrote to the defendants on 04 January 1991 in which the view that it was premature to take transfer was repeated "as several of the aspects relating to the establishment of the industrial park have not been completed and our client will not enjoy the privileges which were anticipated at the time when it purchased the property". Concern was expressed about the security arrangements and the following was added:

"We have been asked to place on record that our client unequivocally accepts that it is bound to take transfer. However, it asks that this be delayed until such time as there has been more meaningful progress in the establishment of the industrial park as a whole".

Exhibit "B" pg 102

In evidence Mr. Balmer stated that the aspects in question were that there was no lighting, there was a limited amount of road, there was

no walling or hedge and there was no homeowner's association.

Record pg 28 lines 16 – 20

[4.8] The response to this letter was a letter dated 22 March 1991 from the defendants' attorneys giving notice to the plaintiff to provide a guarantee for payment of the balance of the purchase price within fourteen days.

Exhibit "B" pg 103
Record pg 29 lines 10 – 15

On the same date a further letter was sent by the defendants' attorneys to the plaintiff's attorneys in which it was recorded that no warranties were given by the defendant in regard to security and asserting that the security provided within the industrial park, was of a much higher standard than most industrial areas and that the plaintiff had no grounds to delay transfer.

Exhibit "B" pg 104
Record pg 30 lines 3 – 16

[4.9] By letter dated 12 April 1991 the defendants' attorneys gave the plaintiff fourteen days notice, in terms of Clause 17 of the agreement, calling upon the plaintiff to furnish them with its founding statement and the necessary guarantee for the balance of the purchase price, failing which the defendants would take such action as they would be entitled to and to claim damages from the plaintiff.

Bundle "B" pg 105
Record pg 17

[4.10] Clause 17 provides that in the event of a failure by the plaintiff to rectify the breach within the specified period, the defendants would have the right, without any further notice, against tender of transfer, to sue for the balance of the purchase price, or sue for the cancellation of the agreement and damages, or cancel the agreement without recourse to legal proceedings in which event all moneys paid by the plaintiff would be forfeited by the plaintiff and retained by the defendants as "a fair and reasonable assessment of the damages sustained by" the defendants.

Exhibit "B" pg 23 – 24
Record pg 30 line 17

[4.11] The response of the plaintiff's attorneys by letter dated 29 April 1991 was to state that the plaintiff did not wish to create the impression that it did not wish to proceed with transfer "but it is merely a matter of timing". A bank guarantee for payment of the purchase price "against transfer at some later stage" was offered. It was stated that once the development of the township "is more substantially underway it would be more amenable to proceeding with this development". The defendants were then asked to delay transfer.

Exhibit "B" pg 107
Record pg 30 line 20 and pg 31 line 15

Mr. Balmer confirmed that the letter correctly reflected his attitude.

However, on 14 May 1991 the plaintiff's attorney wrote to the defendants' attorneys saying that the plaintiff had decided to proceed with the sale of the property, that a copy of the founding statement of the plaintiff would be provided and guarantees would be provided for payment of the purchase price between 15 – 25 June 1991.

Exhibit "C" pg 21
Record pg 49 line 23 and pg 50 line 11

This was then followed by a letter from the plaintiff's attorneys dated 18 July 1991 in which they referred to the limited amount of development at the site, that financial institutions that Mr. Balmer had approached had indicated their concern about financing the project and offering on behalf of the plaintiff to pay an additional R100,000.00, if transfer could be delayed until February the following year.

Exhibit "C" pg 25

Mr. Balmer said that Syfrets was one of the banks involved and they said it would be risky to get involved until the development was complete.

Record pg 52 lines 3 – 7

[4.12] Mr. Forbes stated that this offer was accepted by the defendants and the defendants' attorneys, by way of a letter dated 07 October 1991 agreed to delay the furnishing of the guarantee by the plaintiff to 28 February 1992 on condition that the plaintiff paid the additional sum of R100,000.00 by 18 October 1991.

Exhibit "B" pg 108

Exhibit "C" pg 30

Record pg 31 lines 15 – 20

Record pg 184 lines 1 – 4

Mr. Balmer initially said that the plaintiff had not agreed to pay the additional amount, then said he could not tell whether it had

Record pg 31 lines 20 – 24

but later when cross examined, he agreed that he was aware of the acceptance of the offer.

Record pg 130 lines 11 - 12

Mr. Forbes stated that the plaintiff had never paid the sum of R100,000.00

Record pg 184 line 8

with which Mr. Balmer agreed.

Record pg 130 line 15

[4.13] Thereafter, Mr. Balmer by way of a letter dated 05 November 1991 wrote to the plaintiff's attorneys, in which he said that when the land was purchased a Mr. Clarkson, on behalf of the defendants, had shown him Exhibit "E" which depicted in detail that security would be the same as Phoenix Industrial Park, there would be street lighting, all roads in the development would be tarred, all services would be supplied to the lots and the development would be linked to the Ntuzuma road by a tarred road. It was stated that the plaintiff would pay for the land "when the development, as originally shown, is completed".

Exhibit "B" pg 109 A
Record pg 32 lines 3 – 20.

Mr. Balmer confirmed that these were his instructions and explained that what he was saying was that he was told that it would look like the industrial park over the road, but it was nothing like that.

Record pg 83 lines 2 – 24

On 18 May 1992 the defendants' attorneys wrote to the plaintiff's attorneys, affording to the plaintiff fourteen days within which to comply with all of his obligations, failing which summons would be issued for specific performance.

Exhibit "C" pg 42

[4.14] The defendants then launched application proceedings against the plaintiff on 13 August 1992 in which the defendant sought an order directing the plaintiff to pay the sum of R410,200.00, together with the transfer costs, against transfer of the property to the plaintiff.

Exhibit "F" pg 1
Record pg 32 line 21

The plaintiff opposed the application in which Mr. Balmer attested to the answering affidavit dated 11 November 1992 in which he raised the defence that Section 148 (2) of Ordinance No. 18 of 1976 had not been complied with, in that the relevant certificate was signed by the City Engineer, when it should have been signed by the Town Clerk. As a consequence, the defendants were unable to give transfer of the property. In addition, he raised the same defences based upon the contents of the brochure, Exhibit "E", stating as regards the plaintiff's attitude

"that it is not obliged to take transfer until such time as the applicants give a firm undertaking that they will comply with their aforementioned obligations".

Exhibit "E" pg 74 and pg 81
Record pg 33 lines 6 - 25

[4.15] Mr. Balmer then went on in his answering affidavit to state that he accepted that the agreement did not contain a clause which required the defendants to provide the said security facilities or roads, going on to state

"However, in the light of the above expressed common intention of the parties, it is clear that such a clause ought to be included in the agreement and its omission was a result of common error" and claimed rectification of the agreement by the insertion of the following clause:

"The seller is obliged, within a reasonable period of time from the fulfilment of the suspensive conditions referred to in paragraph 9 hereof, to lay out the roads, provide the security lights and sisal barriers referred to in the advertising pamphlet handed to the purchaser's representatives by the seller's representatives during the course of the negotiations leading up to the sale".

[4.16] No replying affidavit was filed by the defendants, it seems because the defendants were advised by Counsel in an opinion dated 24 February 1993, that the defence raised by the plaintiff concerning the certificate required in terms of Section 148 (2) of the Ordinance No. 18 of 1976, was a good defence. Counsel advised that in the absence of authorisation by the Council given to the City Engineer to discharge the functions of the Town Clerk, the property was not registerable and the application would fail.

Exhibit "C" pgs 50 – 56

Mr. Forbes confirmed that the defendants had received the opinion, which he together with Mr. Quinton were aware of and that as at 13 July 1993 Mr. Quinton stated that the defendants agreed that *prima facie* the provisions of the Ordinance had not been complied with and that strictly speaking the property was not registerable.

Record pg 209 line 18 to pg 210 line 14

Mr. Balmer said that he was never told by the defendants that this point, which was raised by the plaintiff was well founded.

Record pg 54 lines 19 - 20

[4.17] No further steps were taken by any party to the application and on 11 September 1992, being the date specified in the notice of motion, on which date the defendants would seek relief if the matter was not opposed, the matter was removed from the roll. On 15 May 2007 the matter was before Court again, at which hearing an order was taken by consent, referring the issue of costs for determination by the Court hearing the present action.

Mr. Forbes agreed that the documentation indicated that from the time of the agreement in 1990 to October 1994, the defendants had been unable to give transfer of the property because of this problem.

Record pg 217 lines 5 – 10

[4.18] By December 1994 in the view of Mr. Forbes, it was clear that the plaintiff was stalling for time.

Record pg 191 line 9

At this time a Mr. Quinton, employed by the defendants, expressed the view that they were getting nowhere and raised with Mr. Forbes

whether a bulk buyer of other plots in the development would be interested in buying the plaintiff's plot.

Exhibit "C" pg 92

Mr. Forbes was not in favour of this and believed the sub-division allocated to the plaintiff should be retained, so that a separate certificate of registered title should be taken out in this regard.

Record pg 192 lines 12 – 15

Mr. Forbes said a separate C R T, in respect of the property was in fact taken out, so it did not form part of the bulk sale to another purchaser, so that it could be delivered if Mr. Balmer would take transfer.

Record pg 192 lines 6 – 20

[4.19] Mr. Forbes stated he therefore telephoned Mr. Balmer and asked him "are you going to take transfer?" He said they were becoming impatient and the matter had to come to an end.

Record pg 192 line 24 to pg 193 line 14

Mr. Forbes said he could not clearly remember what was said, but the import was that he said if "they" did not take transfer, he would cancel the agreement. He said he was left with the impression that Mr. Balmer would not take transfer and they would have to follow

the cancellation route.

When cross-examined, Mr. Forbes said that he had no recollection of saying to Mr. Balmer that the agreement was cancelled and that

"I most probably would have said it, but I can't tell the Court outright that I know I said it"

Record pg 218 line 21 to pg 219 line 2
Record pg 193 line 15 to pg 194 line 9

and he agreed that he could not be certain about what he said at all.

Record pg 219 lines 22 – 23

As regards the deposit that had been paid, he stated that it was either in that conversation, or another one, where Mr. Balmer said he would get his deposit back. He was of the view that Mr. Balmer would not, because it would be forfeited as "rouwkoop".

Record pg 194 lines 10 – 20

In this regard, Mr. Stewart S C put to Mr Balmer that

"Because Mr. Forbes says that he had a telephone conversation with you and you wanted your deposit and he refused, saying that it was kept, as he put it 'rouwkoop' " to which Mr. Balmer replied "No, I definitely never asked for the deposit"

Record pg 107 lines 4 – 6

and if Mr. Forbes had told him that his deposit was forfeited he would have objected.

Record pg 167 line 21

[4.20] As regards the conversation Mr. Balmer said that "way back in the early days, and I can't remember the period, Ken Forbes phoned me on one occasion, and I can't put a date to it, and he said 'are you going to take transfer of this thing?' and I said 'No', I said 'In its present form no ways' ".

Record pg 39 line 21 pg 40 line 1

He added that he would not take transfer because "I need things to be done"

Record pg 40 line 10

but he never said that he had lost interest in the property and would not take transfer if they did what they were supposed to do.

Record pg 40 lines 11 - 13

[4.21] Mr. Forbes, when asked whether any letter of cancellation was sent, said he could not confirm that. He said that at the time of phoning Mr. Balmer he was in the company of Mr. Quinton and Mr. McCowan and they had agreed to cancel the

agreement. He expected the formal notice of cancellation to be carried out by Mr. Quinton, who was the divisional secretary.

Record pg 194 line 21
Record pg 195 line 17

He said that Mr. Quinton would not have sent the letter of cancellation himself, but would have instructed their attorneys to do so

Record pg 220 lines 13 – 15

and agreed that there was no document on record, recording a cancellation

Record pg 225 lines 23 – 24

and conceded that Mr. Balmer had never agreed to cancel the agreement.

Record pg 226 lines 17 – 18

Mr. Quinton confirmed that in a discussion with Mr. Forbes and Mr. McCowan they had lost patience and he had suggested that the agreement be cancelled, with which they all agreed.

Record pg 248 lines 9 – 10

Mr. Forbes was an acquaintance of Mr. Balmer and Mr. Quinton said to Mr. Forbes, that Mr. Forbes should say to Mr. Balmer they were out of the deal and had had enough. Mr. Forbes was going to cancel the agreement and it was Mr. Quinton's understanding that he had done so by phone. He said there was no record of a letter of a formal cancellation, was unable to say anything further, but it was probable that the defendants' attorneys, Livingstone Leandy, would have been instructed to do so.

Record pg 239 line 11 to pg 241 line 19

Under cross examination, he confirmed that he had given the instructions to Livingstone Leandy to send the letter to the plaintiff dated 12 April 1991, calling upon the plaintiff to provide the necessary guarantee.

Exhibit "C" pg 17
Record pg 244 lines 19 – 25

When it was put to him that Mr. Forbes had said that he (Quinton) would implement the cancellation of the agreement, he agreed that it was the normal thing for him to do. When asked whether Mr. Forbes was correct, he said he could not remember, but Mr. Forbes was going to tell Mr. Balmer. As regards a formal notice of cancellation, he said this was not discussed, but Mr. Forbes was going to phone Mr. Balmer out of courtesy. When the contradiction was again put to him, he said he understood Mr. Forbes would phone Mr. Balmer and he would usually formally write and instruct

Livingstone Leandy. He said it was possible that a formal notice had been sent because there were missing documents.

Record pg 249 line 7 to pg 251 line 19

When asked by me, he said he had no recollection of instructing the attorneys to cancel the agreement.

Record pg 256 lines 8 – 10

Mr. Yarker, a member of the defendants' attorneys at the time, who was handling the transfer of the property, said he could have sent a cancellation letter, but he did not remember whether he did or not.

Record pg 279 lines 20 – 22

[4.22] Mr. Balmer said no notice whatsoever was given to him.

Record pg 39 line 20

He did however state that the plaintiff left the address selected as its *domicilium citandi et executandi* three years after the agreement was signed and only by way of a letter dated 04 May 2000, did his attorney change this address. He agreed that if a notice of cancellation had been sent to the original *domicilium citandi et executandi,* the prospects are that the plaintiff would not have received it.

Record pg 68 line 5 to pg 69 line 15

He did say that he knew nothing about a cancellation of the agreement

Record pg 106 lines 13 – 19

and if he had received a letter of cancellation he would have done something about it.

Record pg 168 line 24

[4.23] As regards the application proceedings, the attitude of Mr. Balmer to the application being left in abeyance, was as follows:

"Okay. What did you do during that period? --- Essentially I did nothing, essentially I – they had put this issue – they had made application to the court so they had locked it up in the courts, I sat and looked at it, I in fact carried on running our businesses. In fact, on two occasions during those years I went across the road and rented premises in the Phoenix Industrial Park, the one was to run a Nik-Nak/knick-knack[?] business and the other one was to run a distribution business and by having go out there virtually every day of my life I could see the property we had bought and I could see that not a lot of progress was being made, but it actually didn't phase me too badly because it suited me quite well to sit on the issue and let it run. So, I didn't really have a big problem with it, but in my opinion it wasn't my responsibility to extract this out of the courts or to get it further down the line, I was quite comfortable with the situation as it stood"

Record pg 34 lines 6 – 18

[4.24] Mr. Balmer said that in 2005 he asked his attorney to find out what was going on with this property in Phoenix Industrial Park, because he would like to solve the problem and settle the issue.

Record pg 37 lines 20 – 25

Mr. Balmer explained that the reason he had asked his attorney to investigate this was because he had been out there to look at some other premises for renting "and, you know, it kind of jolted my memory" so he asked his attorney to investigate it.

Record pg 107 lines 11 – 20

As a result his attorney did a deeds search and established on 04 November 2005 that the defendants had sold the property to eThekwini.

Record pg 38 lines 1 – 15
Exhibit "A" pg 22

[4.25] When asked why he did not make any enquiries about the property at an earlier time, he reiterated what he had previously said, but in the following words:

"Ja, basically in the nineties when this thing got locked up in the courts I then sat back and watched the property because I used to go out to Phoenix Industrial Park across the road, so I knew the progress that was happening and

there was no progress, and I was quite comfortable with it at that point because I felt that if it stayed in the courts it wasn't a negative for me, I didn't' have to pay interest on it, in fact I didn't have to pay for the property either, so I was quite comfortable about it staying in the courts, I didn't have a problem with it. And I also just felt that I wasn't my responsibility to actually – to get in and stir the pot, as you could say, at that point".

Record pg 38 line 21 to pg 39 line 5

When cross-examined, Mr. Balmer said that despite the time between November 1992, when he delivered his answering affidavit and November 2005, being thirteen years, he still expected the sellers to own the property because they had a contract with him. He agreed that the sellers could not be getting any income from the property and it was possible that the sellers were paying rates on the property.

Record pg 109 line 16 – pg 110 line 12

He agreed that in the period November 1992 to November 2005, he never made any enquiries of the sellers as to what was happening, he never made any enquiries of the Lot Owners Association, he never did a deeds search and never enquired of the local authority.

Record pg 112 line 7 – line 15

He agreed that if he had enquired of the sellers in 2000 as to what was happening, they may have told him they intended transferring the property to somebody else.

Record pg 113 lines 2 – 5

He maintained that he had acted reasonably well and disagreed with the proposition that it would have been reasonable of him to enquire at least once a year.

Record pg 113 – lines 11 – 23.

He agreed that there was no circumstance or fact which occurred after October 1994 and prior to transfer of the property to eThekwini, from which the sellers would know, or should have known, that he still wanted the property

Record pg 119 lines 1 – 5

and conceded that his interest could have been sparked by the news of the new Bridge City development, on part of what had been Phoenix South Industrial Park

Record pg 119 lines 13 – 25

but the announcement did not strike him as significant, because it did not happen in the development, but along side it.

Record pg 122 line 21
Record pg 123 line 3

[4.26] After establishing that the property had been sold he

asked his attorney to "at least start by finding out about where our deposit was".

Record pg 39 line 10

His attorney then wrote to the defendants' former attorneys, stating that Mr. Balmer would like his deposit refunded.

Exhibit "B" pg 120
Record pg 41 lines 1 – 18

Further correspondence was exchanged in which the claim advanced was for the return of the deposit.

Record pg 43 lines 3 – 4

No response was received from the second defendant for several months

Record pg 45 lines 8 – 9

and after further delays a letter was written by the plaintiff's attorneys dated 11 July 2006, in which it was alleged that the defendants repudiated the agreement by re-selling the property, the plaintiff accepted the repudiation and elected to cancel and to claim restitution and damages, being the deposit of R45,500.00, as well as damages in the sum of R390,000.00

Exhibit "B" pg 133

Record pg 47 line 16 to pg 48 line 22

[5] Having set out the history of the matter, I now turn to consider the defences set out in paragraph 3 *supra.*

[6] Did the defendants validly cancel the agreement prior to the subsequent sale of the property to eThekwini?

[6.1] In terms of Clause 17 of the agreement, the defendants were obliged to afford to the plaintiff a period of fourteen days within which to rectify any breach. This the defendants did by way of the letter dated 12 April 1991 as well as the letter dated 18 May 1992.

[6.2] As a consequence of the plaintiff's failure to furnish the founding statement of the plaintiff, as well as the necessary guarantee, the defendants elected to claim specific performance and did so, by way of the application proceedings on 13 August 1992.

[6.3] It is clear that the issue of a summons for specific performance does not bar a subsequent claim for cancellation and damages, if the plaintiff's change of mind follows from the defendants' persistence in his refusal to perform.

Christie - The Law of Contract in South Africa

5th Edition, pg 541

Cohen v Orlowski
1930 SWA 125

[6.4] Consequently, the defendants were entitled to change their election and to decide at the meeting in December 1994, to cancel the agreement rather than enforce it, assuming without deciding, for present purposes that the plaintiff's conduct constituted an unjustifiable refusal to perform.

[6.5] It is clear, however that the notice period provided for in Clause 17 is an essential part of the defendants' cause of action.

Henriques v Lopes
1978 (3) SA 356 (W) at 358 C

This is so, because whether the debtor is *in mora*, depends strictly on whether the creditor has taken the action required by the contract.

Christie *supra* at pg 499

[6.6] I put it to Mr. Stewart S C that the defendants, on changing their election from enforcement to cancellation of the contract, were obliged to give a further notice to the plaintiff, advising it that in the event of a failure to perform within a period of fourteen days, the defendants would cancel the agreement.

[6.7] His response was that where the failure to perform by the plaintiff amounted to a repudiation of the agreement, no further

demand was necessary. This proposition is undoubtedly correct, because in the words of Christie

"No useful purpose could be served by demanding that a debtor perform that which he has evinced an unequivocal intention not to perform, and it can come as no surprise to him to be told by the Court that his own repudiation put him *in mora*".

Christie *supra* at pg 501

[6.8] However, there are two very important distinguishing features in the present case. Namely, a change of election, as well as the notice period required in terms of Clause 17. Surely the plaintiff was entitled to be afforded the opportunity to rectify its default, when faced with an intention to cancel the contract and not one to enforce it? The cause of action to claim cancellation and damages, differs entirely from the cause of action to enforce the agreement and consequently a further notice in terms of Clause 17 would equally seem to be a necessary part of the defendants' cause of action.

[6.9] In my view therefore, any purported cancellation of the agreement by the defendants was invalid, because it was not preceded by the requisite notice in terms of Clause 17.

[6.10] In any event, I am not persuaded on the evidence that the defendants discharged the onus resting upon them of proving that they had given notice to the plaintiff, of the cancellation of the agreement.

[6.11] Mr. Forbes said that he had no recollection of telling Mr. Balmer that the agreement was cancelled but "most probably would have said it". All that Mr. Quinton could add was that it was his understanding that Mr. Forbes had cancelled the agreement by telephone. According to Mr. Balmer, all that Mr. Forbes asked was whether he was going to take transfer, to which he replied that he would not "in its present form".

[6.12] As regards a formal letter of cancellation ever having been sent to Mr. Balmer, Mr. Forbes said he expected Mr. Quinton to carry this out. Mr. Quinton agreed that it was the normal thing for him to do. It was possible that formal notice had been sent, but he had no recollection of instructing the attorneys to cancel the agreement.

[6.13] Mr. Yarker said he could have sent a letter of cancellation, but could not remember whether he did or not.

[6.14] Mr. Balmer said that no notice of cancellation was ever given to him and if he had received one, he would have done something about it. He conceded that the plaintiff had moved from the address selected as its *domicilium citandi et executandi* three years after the agreement was concluded and that if the notice had been sent there, the prospects were that the plaintiff would not have received it. I find it grossly improbable however that the defendants' attorneys would have sent such a notice to the *domicilium* address, rather than to the plaintiff's attorneys, when regard is had to the fact

that the parties had been embroiled in litigation for some time, (in the form of the application proceedings), at the time when such a notice would have been sent, i.e. December 1994.

[6.15] I am therefore satisfied on the evidence that the defendants have failed to discharge the onus of proving the cancellation of the agreement.

[6.16] A further submission by Mr. Stewart S C in this regard, was that even if the defendants' decision to cancel was not communicated to the plaintiff at the time, i.e. late 1994 or 1995, it was however communicated to the plaintiff when the plaintiff learnt of the transfer to eThekwini, such transfer being consistent only with the agreement previously having been cancelled. It is clear that a notice of cancellation only takes effect from the time it is communicated to the other party.

Swart v Vosloo

1965 (1) SA 100 (A) at 105 g

[6.17] This argument proverbially puts the cart before the horse. The issue is whether at the time the defendants sold the property to eThekwini the agreement was still binding, or had been validly cancelled by the defendants. If the former, the defendants' conduct constituted a repudiation of the agreement, entitling the plaintiff (leaving aside the issue of prescription) to cancel the agreement. It cannot be said that the plaintiff's discovery of the repudiation, constituted receipt by the plaintiff of the defendants' previously unconveyed intention to cancel.

[6.18] In the light of the conclusions I have reached in this regard, it becomes unnecessary for me to consider whether the conduct of the plaintiff in refusing to take transfer at that stage (for the reasons set out in the plaintiff's opposing affidavit in the application proceedings), constituted a repudiation of the agreement, entitling the defendants' to cancel the agreement.

[7] Turning to the issue of prescription. As pointed out above, two distinct periods, associated with two distinct claims, are in issue.

[7.1] In the first period between the date when the suspensive conditions in the agreement had been satisfied, which was no later than 04 October 1994, and the date when the defendants transferred the property to eThekwini, being 20 December 2002, the second defendant alleged that the plaintiff's right to demand transfer of the property, had prescribed during this period.

[7.2] In the second period between the date when the defendants transferred the property to eThekwini, being 20 December 2002 and the date when the plaintiff issued summons, being 21 August 2006, both defendants allege that the plaintiff's right to claim cancellation of the agreement, payment of the deposit and damages, had prescribed during this period.

[8] In regard to the first period the following issues arise:

(a) When precisely did prescription begin to run in respect of the plaintiff's claim to transfer of the property?

(i) Whether the plaintiff was aware of the fulfilment of the suspensive conditions, or could have acquired this knowledge by exercising reasonable care.

Second Defendants' Plea paras 3.2 – 3.5

(ii) Whether the defendants wilfully prevented the plaintiff from becoming aware of the fulfilment of the suspensive conditions.

(b) What effect, if any, did the launch of the application proceedings have upon the running of prescription?

(i) Did the launch of the application proceedings interrupt the running of prescription in terms of Section 15 (1) of the Prescription Act No. 68 of 1969.

(ii) Did these proceedings constitute an ongoing acknowledgement of liability by the defendants to the plaintiff, to transfer the property to the plaintiff and thereby interrupt the running of prescription?

(iii) Did the fact that the plaintiff had raised as a defence in the application proceedings, rectification of the

agreement, have the effect of preventing the running of prescription?

[9] It should be noted that the plaintiff did not plead that the institution of the application proceedings by the defendants, to obtain payment of the purchase price by the plaintiff and to compel the plaintiff to take transfer, constituted an interruption of the running of prescription in terms of Section 15 (1) of the Prescription Act No. 68 of 1969. However, the parties appear to have approached this matter on the basis that this is an issue to be decided.

Second Defendant's supplementary note
Plaintiff's supplementary note

I will therefore deal with this issue.

[10] The additional issue of whether the defendants wilfully prevented the plaintiff from coming to know of the existence of the debt, relates to the so-called second period, as it is only raised in connection with the averment made by the plaintiff in its particulars of claim, that it only became aware of the breach and repudiation of the agreement on 04 November 2005, when it established that the defendants had transferred the property to eThekwini.

Plaintiff's particulars of claim – para 8
Pleadings pg 6

1st Defendant's special plea – paras 5 and 6
Pleadings pgs 43 to 44

Plaintiff's replication paras (j) and (k)
Pleadings pgs 56 to 57

2nd Defendant's plea para 3.5
Pleadings pg 59

Plaintiff's replication paras (j) and (k)
Pleadings pgs 70 to 71

It seems to me however, that in fairness to all of the parties I should also consider this issue in relation to the so-called first period. In the very nature of things, particularly when considering whether the present claim of the plaintiff prescribed during the so-called second period, it would be artificial to draw a rigid line between these periods. I have therefore included it as an issue to be decided in this regard

[11] When precisely did prescription begin to run in respect of the plaintiff's claim to transfer of the property?

[11.1] Extinctive prescription commences to run as soon as the debt is due and in its broadest sense a "debt" in the Act refers to an obligation to do something, whether by payment or by the delivery of goods or services, or not to do something.

H M B M P Properties (Pty) Ltd. v King
1981 (1) SA 906 (N) at 909 A – B

A debt is "due" when it is claimable by the creditor and payable by the debtor

H M B M P Properties *supra* at 909 C – D

A debt is only due when the creditor's cause of action is complete. The creditor must be in a position to claim payment forthwith and the debtor must not have a defence to the claim for immediate payment.

The Law of South Africa
Volume 21 – First re-issue para 142

Evins v Shield Insurance Company Ltd.
1980 (2) SA 814 (A) at 838

The cause of action must be complete at the stage when summons is served.

Santam Insurance Company Ltd. v Vilakazi
1967 (1) SA 246 (A)

[11.2] It is therefore clear the defendants' cause of action was only complete on 04 October 1994 when the condition in Clause 10

(a) of the agreement, that the local authority must have consented to the transfer, was fulfilled. The defendants' cause of action to demand payment of the purchase price, as against the reciprocal obligation to transfer the property, was therefore only complete on this day. It should be borne in mind that as regards the payment of the purchase price, the plaintiff is the debtor and the defendants are the creditors. Consequently, as regards payment of the purchase price, the debt of the plaintiff, as well as the corollary of that debt, being the defendants' right of action to claim payment, would begin to prescribe on that date and would be extinguished simultaneously with the debt.

Lawsa *supra* at para 140

The obligation to give transfer and its corollary, the right to take transfer, must inevitably also be extinguished simultaneously with the prescription of the right to receive payment and the obligation to make payment. This is because Section 13 (2) of the Act provides for the simultaneous prescription of reciprocal debts.

[11.3] Prescription consequently began to run in respect of the defendants' right to claim payment, as well as the plaintiff's right to claim transfer, on 04 October 1994.

[12] Was the plaintiff aware of the fulfilment of the suspensive conditions on 04 October 1994, or could the plaintiff have acquired this knowledge by exercising reasonable care?

[12.1] Of significance in this regard is that the telephone conversation between Mr. Forbes and Mr. Balmer took place during December 1994, shortly after a certificate of registered title had been issued in respect of the property. Mr. Forbes phoned Mr. Balmer to ask if he was prepared to take transfer. According to Mr. Balmer he said he would not "in its present form" and because he needed "things to be done".

[12.2] On the evidence there is consequently no indication that Mr. Forbes told Mr. Balmer that the suspensive condition had been fulfilled and that Section 148 (2) of the Ordinance had been satisfied. What is clear however, is that Mr. Balmer's refusal to take transfer had nothing to do with this issue, but rather lay in the issue of security, that he wanted attended to before he would take transfer.

[12.3] Of relevance in deciding whether a reasonable man in the position of the plaintiff, in the circumstances, could reasonably be expected to have enquired whether the requisite certificate of registered title had been issued, are the following facts:

[12.3.1] Mr. Yarker confirmed having written to Mr. Balmer by way of a letter dated 28 June 1994, in which he said that he understood that the plaintiff's dispute with the sellers regarding certain aspects of the sale agreement had been resolved and that "you are willing and wishing to take transfer"

Exhibit "B" pg 113

Record pg 273 line 6 to pg 274 line 3

Mr. Yarker said that he knew Mr. Balmer and he could not say what had led him to this understanding, but he might have been advised of this by his litigation partner.

[12.3.2] In the letter he enclosed the necessary documents and furnished the necessary details to enable him to effect transfer.

[12.3.3] Mr. Balmer said that he did not know where Mr.Yarker got the idea that the matter had been resolved, but this was factually incorrect.

Record pg 35 lines 7 – 17
Record pg 100 line 19

[12.3.4] Mr. Yarker then received no response so he sent a further letter dated 17 October 1994 to Mr. Balmer, annexing a copy of the letter dated 28 June 1994 and asking for a response.

Exhibit "B" pg 119
Record pg 274 lines 10 to pg 275 line 1

[12.3.5] In this letter Mr. Yarker referred to the fact that Mr. Balmer had undertaken at a social function to get back to him.

Record pg 274 line 15

[12.3.6] Mr. Balmer confirmed having received this letter and that he had said to Mr. Yarker that he would get back to him.

Record pg 35 line 18 to pg 36 line 5

[12.3.7] Mr. Balmer confirmed that he had written a note on this letter saying he had phoned John Lister, his attorney, on 27 October 1994, who told him he would contact Mr. Yarker.

Exhibit "B" pg 119
Record pg 36 lines 6 – 16

[12.3.8] Mr. Yarker said that Mr. Lister never phoned, but from a letter he received from Mr. Quinton, dated 08 November 1994, he confirmed that Mr. Lister wrote a letter to him, in which Mr. Lister had made a proposal on behalf of Mr. Balmer, which was rejected by Mr. Quinton. He was unable to say what the proposal was.

Record pg 275 lines 8 – 23

[12.3.9] Mr. Balmer said he never heard anything further from Mr. Lister

Record pg 36 lines 19 – 20
Record pg 101 line 12

but agreed that Mr. Lister had written to Mr. Yarker

Record pg 102 line 2

but said he had no idea what his proposal was, and this was the first time he had seen this

Record pg 102 line 6

and agreed that his proposal was not to pay and accept transfer

Record pg 103 lines 11 – 14

and that his attitude was because of the complaints he had about the industrial township being non-existent, until the defendants fixed up these aspects, he was not going to take transfer.

Record pg 102 line 17
Record pg 103 line 10

[12.3.10] Mr. Yarker then replied to Mr. Quinton's letter by letter dated 01 December 1994, in which he had asked for details of Mr. Balmer's "certain other defences", enclosing a copy of the relevant paragraphs of Mr. Balmer's affidavit dealing with the security aspects and the roads.

Record pg 276 linjs 5 – 15
Exhibit "C" pg 92

[12.4] From the aforegoing it must have been obvious to Mr.

Balmer, that some two years after the plaintiff had raised the issue of the absence of the relevant certificate of registered title, the defendants were ready and willing to effect transfer to the plaintiff. In addition, it is quite clear that the defences the plaintiff persisted in had nothing to do with the absence of the relevant certificate and no reliance was placed upon this aspect by Mr. Balmer, during the above interaction.

This is particularly so when regard is had to the fact that Mr. Balmer's attitude was that the defendants "had locked it up in the courts" and "it suited me quite well to sit on the issue and let it run" **and** "it wasn't his responsibility to extract it out of the courts".

Record pg 34 lines 6 – 18

In the circumstances, I disagree with the submission made by Mr. Harpur S C that the defendants persisted in their misleading stance of maintaining that the engineer's signature of the certificate was sufficient.

[12.5] In my view, a reasonable man in the position of Mr. Balmer, could reasonably have been expected to have made enquiries to ascertain whether the relevant certificate had been issued in the interim, at least by no later than December 1994. The plaintiff could accordingly have acquired knowledge of this aspect by no later than December 1994.

[13] Did the defendants wilfully prevent the plaintiff from coming to

know of the fulfilment of the suspensive conditions on 04 October 1994? In this context "wilfully" means "deliberately" or "intentionally" but it does not mean "fraudulently".

Lawsa *supra* at para 142

Jacobs *supra* at 250 J – 251 B

[13.1] When regard is had to the evidence that the defendants were willing to go ahead with transfer of the property, up until the refusal of Mr. Balmer to take transfer, during the telephone conversation with Mr. Forbes in December 1994, which was two months after the certificate of registered title had been granted, it is clear that there could have been no deliberate, or intentional conduct, on the part of the defendants to conceal this fact from the plaintiff. For what purpose would the defendants deliberately conceal this fact, when it is clear that they wished to pass transfer to the plaintiff and, from a procedural point of view, this obstacle to effect transfer had been resolved?

[14] What effect did the launch of the application proceedings have upon the running of prescription? Did the launch of these proceedings interrupt the running of prescription in terms of Section 15 (1) of the Act?

[14.1] The running of prescription is interrupted "by the service on the debtor of any process whereby the creditor claims payment of the debt".

Section 51 of the Act

[14.2] In terms of Section 15 (6) of the Act "process" includes a notice of motion.

[14.3] As pointed out by Mr. Stewart S C, it is clear that in order to interrupt prescription, the process will only be effective if at the time of the service, the creditor has a complete cause of action.

Lawsa *supra* at pg 147

In order to interrupt prescription, there must at least be a right enforceable against the debtor, in respect of which extinctive prescription is running.

Neon & Cold Cathode Illuminations (Pty) Ltd. v Ephron
1978 (1) SA 463 (A) at 470 – 471

For the reasons set out above, it is clear that prescription only began to run in respect of the defendants' right to claim payment, as well as the plaintiff's right to claim transfer, on 04 October 1994. According to the return of service in the application proceedings, the notice of motion was served upon the plaintiff on 25 August 1992. Consequently, this did not have the effect of interrupting the running of prescription, because it had not, at that stage, commenced running.

[14.4] The answer of Mr. Harpur S C to this was that the plaintiff did not contend that the service of the application

proceedings *per se* interrupted prescription, but the ongoing tender recorded therein, which continued to be a full application, constituted the interruption of any running of prescription that may have occurred. Any running of prescription was accordingly continuously interrupted. A consideration of this argument falls within the next issue to be considered.

[15] Did the application proceedings constitute an ongoing acknowledgment of liability by the defendants to the plaintiff, to transfer the property to the plaintiff and thereby interrupt the running of prescription?

[15.1] The plaintiff pleads that the defendants made an ongoing admission of liability to the plaintiff "pursuant to the said agreement" by never withdrawing the application proceedings, with the result that prescription has been interrupted.

Plaintiff's replication to first and second defendants' pleas
Pleadings pgs 55 and 69

[15.2] Section 14 (2) of the Act provides that if the running of prescription is interrupted by an acknowledgement of liability, prescription commences to run afresh from the day on which the interruption takes place. The Act does not envisage a situation where the acknowledgement of liability is "ongoing". However, it is clear that at common law it is possible for prescription to be repeatedly interrupted and that upon each interruption prescription

begins to run *de novo*, because the effect of an interruption of prescription is to blot out the time which has already run.

Backoolal v Cassim N O & others
1977 (2) SA 297 (D) at 300 E - G

[15.3] In order to decide whether there has been an acknowledgement of liability, such as to effect an interruption of the running of prescription, the enquiry is a factual one with regard to the intention of the debtor.

Lawsa *supra* at para 145

Agnew v Union & South West Africa Insurance Co. Ltd.
1977 (1) SA 617 (A) at 623 A – B

As stated by Broome J P in

Petzer v Radford (Pty) Limited
1953 (4) SA 314 (N) at 318 D – E

"what we are concerned with is the state of mind of the debtor: did he intend to admit that the debt was in existence and that he was liable therefor".

[15.4] At the time of the launch of the application proceedings, the acknowledgement of liability by the defendants to pass transfer to the plaintiff, was conditional upon the performance by the defendant of its reciprocal obligation, to pay the purchase price and

to secure the performance of such obligation, by the furnishing of the requisite guarantee, as well as to pay the transfer costs. For the reasons set out above, the plaintiff maintained that it was not obliged at that stage to furnish any guarantee, to secure payment of the purchase price.

[15.5] For the purposes of the present enquiry, the issue of whether the plaintiff was justified in its refusal to take transfer and pay the purchase price is irrelevant, because we are concerned with establishing by way of a factual enquiry, what the state of mind of the defendants was. The defendants quite clearly never intended to acknowledge an unconditional liability to effect transfer to the plaintiff. From a reading of the opposing affidavit filed by the plaintiff in the application proceedings, the plaintiff adopted the stance that it was not obliged to provide the requisite guarantee for the reasons set out above, and asked for the application to be dismissed with costs.

Exhibit "F" pg 84 para 15

It is common cause that the application was then left in abeyance by all of the parties, with the issues defined in this manner.

[15.6] In my view, because the defendants never had in mind an unconditional acknowledgement of liability to pass transfer and any acknowledgement was predicated upon an unconditional acceptance by the plaintiff of an obligation to furnish a guarantee to secure payment of the purchase price and pay the transfer costs,

which never occurred, the running of prescription was not interrupted in terms of Section 14 (1) of the Act.

[15.7] A further argument of Mr. Harpur S C in this regard has to be considered. That is that as a consequence of the application proceedings, the issues between the parties *vis a vis* the agreement, had been frozen by the operation of *litis contestatio* and the application was still *sub judice*. The argument advanced was that when a matter is subject to litigation and *litis contestatio* has been reached, as in the present application, the issues between the parties are frozen and the rights of the parties preserved as at that time. It is submitted that if the plaintiff's rights in terms of the agreement, had not prescribed at that time, they could not have prescribed thereafter, unless the application proceedings had subsequently been dismissed. This proposition is undoubtedly correct, provided of course that the institution of the application proceedings, had the effect of interrupting the running of prescription, in the first place.

[15.8] Consequently, the submission of Mr. Harpur S C that because *litis contestatio* had occurred at the latest by the end of 1992 and "the position between the parties was frozen as at that time", with the result that prescription could not have commenced running thereafter on 04 October 1994, (as contended for by the second defendant), overlooks the fact that for the reasons set out above, the service of the notice of motion did not have any effect upon the running of prescription. The case of

van Rensburg v Condoprops 42 (Pty) Limited
2009 (6) SA 539 (E) at 547 B – D

relied upon by Mr. Harpur S C, is clearly distinguishable, as Leach J (as he then was) found that the summons in that case, had interrupted the running of prescription, "in respect of such debt".

[15.9] A further argument of Mr. Harpur S C in this regard was the following: the running of prescription was prevented by the raising of the defence of rectification by the plaintiff, in the application proceedings. As pleaded the issue is as follows

"Since the claim for rectification cannot (as a matter of law) prescribe, the plaintiff's claims under the agreement could not have prescribed and did not prescribe".

Plaintiff's replication to first and second defendants' pleas
Pleadings pgs 56 and 70

[15.10] The authority relied upon by Mr. Harpur S C, namely

Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd.
2009 (3) SA 447(SCA)

simply decided that prescription does not run against a claim for rectification of a contract. It is no authority for the proposition that a claim for rectification of a contract, prevents the running of prescription in respect of a cause of action, founded upon such unrectified contract. There is accordingly no substance in the argument.

[16] I am accordingly satisfied that the defendants have discharged the onus of proving that prescription of the plaintiff's claim to transfer of the property commenced running on 04 October 1994 and was completed by the 04 October 1997. I am fortified in this view by the principle that prescription is intended to penalise "the negligent creditor". It is clear from the evidence of Mr.Balmer that he was content to leave matters as they stood, because it suited him not to take transfer until the development of the industrial township had progressed. When regard is had to the fact that the agreement was concluded on 11 January 1990, the application proceedings were instituted on 11 August 1992, the answering affidavit of Mr. Balmer was filed on 12 November 1992 and thereafter there was no contact between the parties until Mr. Forbes asked Mr. Balmer in December 1994, whether he was prepared to take transfer, to which Mr. Balmer indicated he would not, it is astonishing that only on 02 November 2005 did Mr. Balmer ask his attorney to investigate what had happened to the transaction. In my view, such an inordinate delay leads to the reasonable inference being drawn that Mr. Balmer intentionally refrained from making enquiries, because he anticipated that to do so, could lead to renewed demands for him to take transfer. In this context Mr. Balmer may be regarded as a "negligent creditor".

I am also fortified in this view by the words of Grosskopf A J A (as he then was) in the case of

Murray & Roberts Construction (Cape) (Pty) Ltd.

v

Upington Municipality

1984 (1) SA 571 (A) at 578

where he had the following to say when referring to the purpose of extinctive prescription

"…its main practical purpose is to promote certainty in the ordinary affairs of people. Where a creditor lays claim to a debt which has been due for a long period, doubts may exist as to whether a valid debt ever arose, or, if it did, whether it has been discharged. The alleged debtor may have come to assume that no claim would be made, witnesses may have died, memories would have faded, documents or receipts may have been lost etc. These sources of uncertainty are reduced by imposing a time-limit on the existence of a debt, and the relevant time-limits reflect, to some extent, the degree of uncertainty to which a particular type of debt is ordinarily subject".

It is clear from the evidence that the defendants assumed that no claim would made by the plaintiff and that the memories of the witnesses have faded in respect of important issues. In addition, a repeated theme in the evidence was that documents had become lost during the long intervening period.

As a consequence, the defendants' conduct in selling the property to eThekwini did not constitute a repudiation by the defendants of their obligation to the plaintiff in terms of the agreement.

[17] Turning to the so-called second period of prescription, which relates to the period between the date when the defendants

transferred the property to eThekwini, being 20 December 2002, and the date when the plaintiff issued summons, being 21 August 2006. Both defendants pleaded that the plaintiff's right to claim cancellation of the agreement, payment of the deposit and damages, had prescribed during this period. In the light of the conclusion I have reached as to the prescription of the plaintiff's right to claim transfer, it may appear to be unnecessary to decide this point, but I will do so for the sake of completeness.

[18] The issues that arise in this regard are:

[18.1] Whether the plaintiff could, by the exercise of reasonable care, have acquired knowledge of the sale of the property to eThekwini on 18 October 2000 and the subsequent transfer of the property by the defendants to eThekwini on 20 December 2002, before the date when plaintiff acquired such knowledge, being 04 November 2005.

[18.2] Whether the defendants wilfully prevented the plaintiff from acquiring such knowledge, before plaintiff acquired such knowledge on 04 November 2005.

[19] The evidence of Mr. Balmer establishes that his attorney established on 04 November 2005, that the defendants had sold the property to eThekwini.

[20] When asked why he had not made any earlier enquiries, Mr. Balmer said that if it stayed in the courts it was not a negative for him, as he did not have to pay interest and did not have to pay the purchase price. He also said that it was not his responsibility, as he put it, to "get in and stir the pot". Despite the lapse of thirteen years between when he filed his answering affidavit and when he found out the property had been sold, he said he still expected the sellers to own the property, because they had a contract with him. He agreed that the sellers could not be getting any income from the property and it was possible that they were paying rates on the property. He also agreed that if he had made enquiries of the sellers in 2000 as to what was happening, they may have told him they intended selling the property to somebody else. He also agreed that there was no circumstance or fact which occurred after October 1994 and prior to the transfer, from which the sellers would know, or should have known, that he still wanted the property. He however disagreed with the proposition that it would have been reasonable of him to enquire at least once a year what had happened to the property.

[21] I am again driven to infer that Mr. Balmer consciously refrained from making any enquiries, because he feared that to do so would resuscitate the demand by the defendants for the plaintiff to take transfer, which he did not wish to do, because of what he regarded as the inadequate development of the project. When the inordinate delay of thirteen years is considered in the light of the

facts set out in the preceding paragraph, I am satisfied that a reasonable man in the circumstances, could reasonably be expected to have enquired of the defendants what was happening with regard to the property, on at least an annual basis. In the light of the fact that the property was sold to eThekwini on 18 October 2000, if this reasonable course had been followed, the plaintiff would have been aware during 2000 that the defendants intended selling the property to eThekwini, or had already done so. At the very latest this information could have been acquired by the end of 2001, by the exercise of reasonable care.

[22] Turning to the issue of whether the defendants wilfully prevented the plaintiff from acquiring such knowledge before 04 November 2005.

[22.1] On the evidence it is clear that Mr. Forbes and Mr. Quinton had decided to cancel the agreement in December 1994. Both of them believed this had been carried out by the other. Mr. Forbes, when asked what his response would have been to any enquiry by Mr. Balmer about the land, after the discussion to cancel, said "that the agreement has been cancelled a long time ago".

Record pg 198 lines 1 – 2

Mr. Quinton said that

"It was suggested that the agreement be cancelled and that is what I assume has taken place, or that's what I know took place in fact"

Record pg 239 lines 16 – 17

[22.2] There could consequently be no reason for the defendants to intentionally prevent the plaintiff from coming to know of the sale to eThekwini, because they believed the sale agreement with the plaintiff had been brought to an end, a considerable time before this.

[23] Consequently, on the basis that at the latest, the plaintiff by the exercise of reasonable care could have established by the end of 2001, the sale of the property to eThekwini, and allowing the defendant a further reasonable period of six months within which to make its election to treat the contract as at an end, prescription commenced running by no later than 01 July 2002.

H M B M P Properties *supra*

[24] Consequently, the plaintiff's claim for damages and repayment of the deposit prescribed by no later than 30 June 2005, whereas summons was only served on 21 August 2006.

[25] Turning to the first defendant's defence that the plaintiff waived and/or abandoned any rights it had in terms of the agreement. Again, because of the conclusion I have reached regarding the issue of prescription, it is strictly unnecessary to

consider this issue, but I will do so for the sake of completeness.

[25.1] Crucial to the success of this defence is the requirement that the outward manifestations of an intention to waive by the plaintiff, of its rights in terms of the Agreement, have to be adjudged from the perspective of the defendants, or their notional *alter ego,* the reasonable person standing in their shoes.

Road Accident Fund v Mathupi
2000 (4) SA 38 at 50 A

[25.2] However, a reasonable person standing in the shoes of the defendants, in the light of the evidence of both Mr. Forbes and Mr. Quinton, that they believed the agreement had been cancelled, would not be led to believe that because of the plaintiff's inaction, it had waived its rights under the agreement, but rather that it had accepted the cancellation of the agreement. A subjective belief that the agreement had been validly cancelled, is irreconcilable with a reasonable belief that the other party has waived it rights under an agreement, which the other party regards as binding and enforceable.

[25.3] The defence of waiver by the plaintiff of its rights under the agreement, raised by the first defendant, must accordingly fail.

[26] Turning to the defence of estoppel raised by the second defendant, namely that the plaintiff is estopped from averring that

the conduct of the defendants, in selling and transferring the property to eThekwini was in breach of the agreement and gave rise to contractual rights for the plaintiff.

[26.1] At the heart of this defence lies the requirement that in order to found an estoppel, the representee (the defendants), should have acted reasonably in forming the impression they did, as a consequence of the representation made by the representor (the plaintiff).

N B S Bank Limited v Cape Produce Co. (Pty) Limited & others 2002 (1) SA 396 SCA at 411 (J)

It is essential that the representee (the defendants) should have been misled by the representation made by the representor (the plaintiff).

[26.2] Again however, it is difficult to see how the defendants could have been misled, (by what Mr. Stewart S C refers to as a representation by silence), as a result of the failure by the plaintiff to make enquiries, when for the reasons set out above, the defendants believed the agreement had been validly cancelled. In this context a subjective belief that the agreement had been validly cancelled, is irreconcilable with a reasonable belief that the other party by its silence, has represented that it not longer wishes to enforce its rights under a binding and enforceable agreement.

[26.3] The defence of estoppel raised by the second defendant must accordingly fail.

[27] Consequently, the plaintiff's claim must fail, in the light of my findings that:

[27.1] The plaintiff's claim to transfer of the property had prescribed, before the sale of the property by the defendants to eThekwini. As a consequence, the sale of the property did not constitute a repudiation by the defendants of their obligations in terms of the agreement. The plaintiff consequently had no claim for cancellation of the agreement, together with payment of damages and return of the deposit.

[27.2] In any event, any such claim by the plaintiff had prescribed before the service of the summons in the present matter.

[28] As regards the costs of the application proceedings, which were reserved for decision by this Court, by virtue of the fact that none of the parties pursued these proceedings, which were allowed to lie dormant from 1992 until 2007, it would be just if each of the parties were ordered to pay their own costs.

The order I make is the following:

a) The plaintiff's claim is dismissed.

b) The plaintiff is ordered to pay the costs of the first and second defendants.

c) In the application proceedings under Case No. 5541/1992, each of the parties is ordered to pay their own costs.

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K. Swain J ***/Appearances***

Appearances:

For the Plaintiff	**:**	Mr. G. D. Harpur S C
Instructed by	**:**	Pearce, Du Toit & Moodie Durban
For the 1st Defendant	**:**	Mr. P. J. Combrinck
Instructed by	**:**	Livingstone Leandy Durban
For the 2nd Defendant	**:**	Mr. A. M. Stewart S C
Instructed by	**:**	Garlicke & Bousefield Inc

Durban

Date of Hearing : 19 - 20 October 2010
01 - 03 December 2010

Date of Filing of Judgment : 06 January 2011