NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

Case No. EL 169/2014
ECD 469/2014

In the matter between

BLAKE GORDON SUMMERS	**First Plaintiff**
CLINTON KEITH SUMMERS	**Second Plaintiff**

and

PORT FERRY PROPERTIES 78 (PTY) LIMITED	**Defendant**

JUDGMENT

HARTLE J

[1] The plaintiffs, who are brothers, purchased two separate erven from the defendant in the Khamanga Bay Property Development, Cintsa, resorting under the administrative area of the Great Kei Municipality.

[2] The erven are numbered [...] and [...] Cintsa. They were purchased on 3 March 2004 and 7 May 2004 respectively. Transfers of the erven were effected on 5 July 2005 and on 18 August 2004 respectively.

[3] The deeds of sale, pursuant to which each erf was purchased, were subject to common suspensive conditions being fulfilled as soon as possible after the date of the last signature of the deeds, namely:

> "14.1 The provision by the Seller at its cost of infrastructural services including water, electricity, sewerage and roadworks in accordance with the Local Authorities requirements. (Sic)
>
> 14.2 The Seller obtaining the necessary financial support on Mortgage Bond or otherwise to enable it to complete the installation of services referred to in paragraph 14.2 above." [1]

[4] I also highlight clause 13.1 under "Purchaser's Acknowledgment", which is of some significance according to the plaintiffs:

> "13.1 The Purchaser acknowledges that insofar as he will be the owner of a property forming part of the **Khamanga Bay Development**, he will be obliged together with the owners of the other properties in the development, to maintain and attend to general upkeep of the private roadways, parking areas and common facilities and amenities such as lighting, security features, perimeter walls, sewerage systems, stormwater drains, cabling, the maintenance of garden areas, water features and without derogating from the generality hereof all such improvements and structures not forming part of a property purchased by purchasers in the

[1] It is common cause that this should have been a reference to the preceding sub-clause, 14.1 and it was read accordingly. The second condition is not in contention.

> Khamanga Bay Development. To this end the Purchaser agrees to become a member of the **Khamanga Bay Home owners Association** consisting of all the owners of properties in the development which Association shall meet at least on an annual basis in order to determine the financial requirements of the Association to fund expenses of common structures, amenities, rates and taxes in respect of such structures and or amenities, insurances and all other necessary expenses for which the Association shall be liable by virtue of its ownership of common areas and for the day to day conduct of the development …"

[5] Occupation was to be given to the plaintiffs on registration of transfer, which was to be effected by the seller's conveyancers, Messrs Bate Chubb & Dickson Inc. of East London. The further provisions appear to be standard, including the usual acknowledgement that the deeds constitute the entire agreement and that any variations are to be in writing and signed by both parties.

[6] The plaintiffs plead that they received transfer of the erven because it was represented to them by the seller's conveyancers that the suspensive condition referred to in clause 14.1 had been fulfilled. They claim that the condition was however not fulfilled in either instance, a realization which only dawned on them in August 2013 after they had, *inter alia*, received a circular letter from the homeowners association's attorneys attaching a compliance notice issued by the Department of Economic Development, Environmental Affairs & Tourism ("the Department") calling attention to a number of compliance issues bearing upon the defendant's obligation to provide infrastructural services, and that the representation made to them to the contrary by the conveyancer was therefore false, because it had in fact not been fulfilled. This, in their expectation, means that the sales lapsed for want of compliance with the suspension condition and that no lawful *causa* existed for registration of transfer into their names at the time title

in the properties passed to them. Accordingly, they claim restitution entailing a refund of the purchase prices paid for each erf, cancellation of the transfers and the necessary re-transfers of the properties back to the defendant at the latter's expense. Based on the defendant's alleged misrepresentation, they also seek damages, being the wasted costs of the transfer and bond registration costs, bond cancellation costs, interest paid on the putative mortgage bonds, and interest they would have earned on the wasted costs.

[7] Much hinges on the interpretation of clause 14.1, the plaintiffs contending that it means that the infrastructural services required by the local authority were to have been put in place as a matter of fact before the transfers could be registered, whereas the defendant contends for a different meaning, namely, that the actual installation of the infrastructural services was not required and that the suspensive condition could be fulfilled by way of an agreement concluded between it and the local authority that it would in due course attend to the installation of the infrastructural services, such undertaking being underwritten by a guarantee to secure it doing so.

[8] On the basis of this interpretation contended for by the defendant, its case is that the suspensive condition was indeed fulfilled prior to the transfers. In the result there was no misrepresentation, or rather it pleads that the representation that the suspensive condition had been fulfilled by it, through its arrangement with the Great Kei Municipality to install what services were necessary in due course, was true. Further and in any event the defendant pleads that the transfers could only be effected, and were effected, after an endorsement of the relevant powers of attorney by the local authority and the granting of certificates by the Development Tribunal to the effect that the requirements referred to in clause 14.1 had indeed

been complied with. Fulfilment was additionally certified by the engineer of the development. The defendant pleads further that the plaintiffs accepted transfer on the basis that the suspensive condition had indeed been fulfilled.

[9] The defendant denies that the compliance notice issued by the Department in or about March 2013 has any bearing upon the fulfilment of this condition. It admits however that the Department issued a directive that all construction at Khamanga Bay should cease at that point and that no further occupation of the properties was to be allowed until the development's sewerage treatment facility was completed. The relevance of this will become apparent when I summarise the evidence below.

[10] The following facts and circumstances are relied upon by the defendant as being relevant both to its stance concerning the interpretation of the suspensive condition and its purported fulfilment thereof:

> "3.3.1. The properties sold were defined as being "subject to the conditions and servitudes mentioned or referred to in the title Deeds as registered in favour of the Seller or in prior Deeds to the property or as endorsed on the General Plan of the Khamanga Bay Property Development of which the aforementioned erf forms a part."
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> 3.3.2. The development was approved by the Eastern Cape Development Tribunal on 24 April 2001 subject to Defendant "being responsible for provision of basic services to the area." This approval is annexed as "PF1".[2]

[2] The annexure is a letter addressed by the Eastern Cape Development Tribunal to "Settlement Planning Services" concerning the defendant's application for the establishment of a land development area in respect of Khamanga Bay. It advises that the Tribunal has in terms of sections 33(1) and 34 of the Development Facilitation Act, No. 67 of 1995 ("DFA"), considered the application for, *inter alia*, a township establishment. The next paragraph goes on to state that "this approval", which is assumed from the context, is subject to, *inter alia*, the company being responsible for provision of basic services to the area; water activities to be in compliance with the Water Services Act; and

3.3.3. Such approval was endorsed and adopted by the Great Kei Municipality on 6 February 2003. A copy of this endorsement is annexed as "PF2".[3]

3.3.4. This endorsement was substituted by the approval of 6 July 2004, which is annexed as "PF3".[4]

3.3.5. On or about 28 June 2004 Defendant[5] and Great Kei Municipality entered into an agreement relating to the provision of services in a phased development. A copy of this agreement is annexed as "PF4 new" and it is referred to herein as "the phased development agreement".[6] This agreement provided, inter alia, for the following:

3.3.5.1. As an interim measure, the developer will provide for defined phases in the development a conservancy tank sewerage disposal system complying with the requirements of the local authority;

3.3.5.2. That, in view of the lack of potable water to service the entire development and the high cost of providing services, the parties have agreed that the development will take place in defined phases to be agreed upon between the parties on the basis of availability of services and the approval of environmental authorities;

3.3.5.3. The parties agree that, in order to expedite the sale of erven in the development, the developer may, subject to the provision of an acceptable guarantee to be provided by the developer's attorneys in favour of the local authority

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engineering services to comply with relevant SABS Codes and Redbook Guidelines for engineering services and amenities.

[3] This approval for the township establishment by the Tribunal is confirmed by the municipality and is regarded as its own approval in terms of section 25(1) of Ordinance 15 of 1985 ("LUPO"). It notes that the conditions contained therein are also the Minister's, being conditions pursuant to section 42(1) of LUPO and then obviously the rezoning.

[4] The letter confirms the condition stated in the preceding paragraph, and adds that two further conditions which it requires be inserted in the title deeds, namely that the approval is subject to the conditions contained in regulations 3.4 and 3.5 of the Scheme Regulations contained in PN 1047/88 promulgated in terms of section 7(2) of LUPO; and the erf being used to the purpose permitted in terms of the zoning scheme.

[5] This agreement on the face of it is between a different development entity than the defendant, and the municipality, and post-dates the dates of the sales in this litigation. This is common cause between the parties.

[6] I have adopted the same nomenclature for the agreement in my judgment.

covering the estimated cost to complete services, transfer the undermentioned erven to the purchasers thereof;

3.3.5.4. As soon as may be reasonably possible after the developer has completed the installation of the internal services in any phase of the development, the developer shall supply the local authority with a certificate from the Consulting Engineers of the developer certifying that such services have been provided in accordance with the standards approved by local authority and environmental authorities and, upon receipt of such certificate, the local authority undertakes to authorise the transfer of the erven included in such phase, provided that the local authority shall at all times have the right, before authorising such transfer, to verify that the desired services have been installed and provided to its satisfaction.

3.3.6. Even [...] and [...] fall into the first phase of the development referred to in this Agreement and Erf [...] falls into phase 3 of the development referred to in this Agreement.[7]

3.4. Plaintiffs were at all material times aware of the phased development agreement and its terms.

3.5. Transfer of the erven, which are the subject of this action, to Plaintiffs took place in accordance with the provisions of the phased development agreement, and in particular Defendant pleads that:

3.5.1. The consulting engineers sought clearance from the Great Kei Municipality for the transfer of the properties relevant to this action, subject to the provision of the appropriate guarantee, by letters dated 4

[7] It emerged from the evidence that the same relief had initially been sought in the action in respect of erf 1531, but that the plaintiffs had on-sold this property during the course of the litigation.

June 2004 and 25 April 2005 copies of which are annexed as hereto marked "PF5a" and "PF5b".[8]

3.5.2. Such clearance was in fact granted by the Great Kei Municipality and was so endorsed upon the powers of attorney relating to the transfers of the properties relevant to this action;[9]

3.5.3. Fulfillment of all the conditions relevant to the establishment of the township was certified by certificates in terms of section 38(1)(c) and (d) of the Development Facilitation Act 67 of 1995;[10]

3.5.4. These endorsed powers of attorney, together with the certificates, are annexed as "PF6" (ERF [...]), "PF7" (ERF [...]) and "PF8" (ERF [...]);

3.5.5. As at 25 April 2005 a developer's guarantee in the sum of R389 251.00 had been issued in respect of the reticulation services, which guarantee was accepted by the municipality as fulfilment of the requirements imposed." (sic)

[11] So much for the pleadings in respect of the principal aspects.

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[8] In the first of these communications dated 4 June 2004 ("the first guarantee") the engineer on behalf of the developer seeks clearance from the municipality) on the strength of a "Developers Guarantee" to allow transfer of the erven in phase 1A (which includes erf 1525), 1B and 2. (In the introduction the engineer clarifies that the developer has after consultation with the municipality "decided to alter the phasing for transfer purposes" with the new phasing reflected below.) An assessment of costs of outstanding work for storm water, sewers, and water as at 11 May 2004 is provided in a total value of R185 250,00 and constitutes the value of the guarantee put in place to ensure transfer of the listed erven. The second communication dated 25 April 2005 ("the second guarantee") follows the same approach. It relates to phases 1A, B, 2 and 3 and includes both erven in contention in this action. It estimates costs of outstanding work as at 25 April 2005 (which postdates the transfer of erf 1525), and relates to roadworks, storm water, sewers and electrical. The value of the guarantee is R385 291.00.

[9] The certificates issued by the municipality are dated 6 July 2004 in respect of erf 1525, and 10 June 2005 in respect of erf 1445. On the face of it the endorsements are effected on the premise that the provisions of section 31 (1) of LUPO have been complied with in respect of the subdivisions concerned. An endorsement by the Development Tribunal dated 15 June 2005 also appears on the power of attorney in respect of erf 1445. A separate certificate issued in terms of section 38 (1) of the DFA relative, *inter alia*, to erf 1525 was put up by the defendant as proof that the Tribunal on 2 July 2004 was satisfied that the conditions of establishment of the township concerning each erf reflected therein had been complied with, and that the respective obligations of the defendant and the Great Kei Municipality to provide the engineering services contemplated in section 40 of the DFA, if applicable, had been fulfilled.

[10] See fn 9 above.

[12] The defendant belatedly during the course of the trial also introduced a special plea of prescription. It asserts in this respect that "the evidence presented on behalf of the Plaintiff (obviously predicated on the interpretation of the suspensive condition which they prefer) indicates that they knew or ought reasonably to have known that the bulk services, which they contend had to be provided, were not provided and consequently the debt became due at the time when transfer occurred and/or soon thereafter and/or by no later than January 2006." Since the action was only instituted during February 2014, the defendant pleads that the plaintiffs' claims were by then prescribed.

[13] No formal response was delivered to the special plea, but I was informed from the bar by Mr. de la Harpe, who appeared for the plaintiffs, that they would fall back in their pleadings on what was alleged in this respect, namely that it was represented to them that the suspensive condition had been fulfilled and that they had relied upon the representation as true and taken transfer of the properties *sans* any knowledge to the contrary that there was an issue with the defendant's compliance therewith. It was only on 1 August 2013, after they received the circular letter from the attorneys acting on behalf of the homeowner's association which gave cover to the compliance notice from the Department, indicating non-compliance by the defendant with its requirements at least, that it then became known to them that the suspensive condition had in fact not been fulfilled.

[14] On the issue of the interpretation of the suspensive condition, much of what each party's case is follows from what has been pleaded and the relevant documentation which speaks for itself. Some of the oral testimony has a particular bearing, but was largely focused on the fulfilment issue.

[15] The first plaintiff testified regarding the sales in which he was implicated.[11] He and his brother, the second plaintiff, signed the respective deeds of sale. They were contacted afterwards by the conveyancer, Mr. Warren, of Bate Chubb & Dickson Inc., who advised them that all the suspensive conditions had been met and that they could attend at their offices to sign off on the transfer documentation, which they did. They paid the relevant costs attendant upon registration of transfer and the relevant mortgage bonds when these amounts were due. Relying on Mr. Warren's assurances that the suspensive condition had been fulfilled in each instance, they understood that the infrastructural services were actually in place.

[16] They found out in 2013, however, that this was not the case when they received a circular letter from the homeowner's association informing them that there was a moratorium or embargo on building houses in the resort going forward as there was a problem with the services. It was at this point that they became aware of a problem and immediately consulted their attorney of record, Messrs Bax Kaplan Attorneys, who on 8 August 2013 addressed a letter to the other owners in the development, on behalf of the trustees of the home owner's association as well, calling attention to the compliance notice which had been issued by the Department dated 22 March 2013 in terms of section 31 L of the Environmental Management Act, No 107 of 1998, ("EMA"). In a nutshell the notice spells out that the existing sewage treatment facility is unlawful and inadequate to provide for the sewerage requirements of the Khamanga Bay Development and poses the risk that that raw sewage will spill over onto the Cintsa West beach which is a high use recreational area for local residents. The developer is instructed to stop and desist with its unlawful activities or to lawfully regularize its affairs. Bax Kaplan note in their letter that this information has irregularly not

[11] The second plaintiff did not testify.

been made known to the owners and urges them to review the compliance notice and to comment on it. It points out the trustees' dilemma that they will be unable to allow any further construction on site in the circumstances and that they had unwittingly approved the construction of more than 19 units oblivious to the prohibition outlined in the compliance notice.[12] This nascence of the problem led to the issue of the summons.

[17] Under cross examination the first plaintiff expressed the view that he understood the suspensive condition to mean that services to the necessary standards "had to be done 100%". He reiterated that the circular letter had brought with it the clear realization, for the first time, that the services had not been completed by the developers whereas he and the first plaintiff were "under the impression that they had been completed." He deferred to the engineer who would be able to confirm whether or not the services were in fact in in accordance with what was required in 2005. He clarified that he and his brother had stopped going on site shortly after they had bought, as there was no reason for them to go there. They never built there; neither did they submit plans towards this end.

[18] He agreed that he and his brother had attended a meeting on site on 16 July 2005 which was held on the lawn of one of the owners. Leaving aside that he has no recall of what was said at the meeting at the time, the technical information which had been discussed there would not have assisted him to appreciate whether he was happy or not with the services installed at that time because he is not an expert or even clued up regarding what the Red Book standards are. They had no reason to distrust the developers when they said thing were going to be attended to.

[12] The letter and compliance notice are marked annexures "POC4.1" and "POC 4.2" to the plaintiffs' particulars of claim respectively. The letter is dated 8 August 2013. The compliance notice is dated 22 March 2013 and is directed to the developers of the main developing entity, Port Ferry Properties 71 (Pty) Ltd.

They were also not privy to what the specifications were going to be and, regarding the infrastructure, had no knowledge of other owners' projects in the development. They didn't check on what was done and what wasn't done. In fact, they had "no idea". No services were ever discussed with them. At the end of the day they simply accepted the say so of Mr. Warren that the condition in clause 14.1 had been met, there being no basis to doubt a "legal personality" telling them that this was the case. He reluctantly conceded however that it would seem from the minutes of the 2005 meeting that the services were not 100% complete at that time. The developer did however give the undertaking that they would be attended to down the line and he was "happy" to accept these assurances. They only noticed in 2013 that the developer appeared not to have done what was promised.

[19] Put to him that the minutes of a later meeting of owners held on 14 January 2006, at which he and his brother were again present, also reflect that services were not 100% in by obvious implication based on the assessment report raised at the time, he conceded that he could have heard that that was the case. He was not prepared to agree, however, that *he knew* at that stage that they were not 100% in place (despite his concession and waiver elicited during cross examination referred to above), alluding instead to the moment in 2013 when he knew this for sure. He asserted that Mr. Warren had in any event assured them when they took transfer that the services were complete, as if to suggest that there was no obligation on them to think about it any further once he had given that pledge.

[20] Pressed to deal with the issue of his been present at the meeting and not expressing any dissatisfaction that the services were by then (on the plaintiffs' understanding of the meaning of clause 14.1) not completed, he resorted to his lack of technical skill to know any better and added that "his site" was not discussed at

that meeting. This lack of knowledge extends even to 2013 by when he claims he was still none the wiser whether the developer had completed the services or not. Pressed again to confirm that in 2005 there were no services to their plots, he replied: "I'm not saying that, I wouldn't know. I only know what Mr. Warren led us to believe."

[21] He maintained that he and his brother were first time developers and knew nothing about developments at the time, let alone about contracts or the sale of properties, asserting instead that he was "just a normal man in the street", a theme he repeated several times during cross examination whenever he had to account for what he knew or didn't.

[22] He explained that a provision appearing in the deeds which reflects that he and his brother were going to earn estate agents' commission on the sales was inserted by a director of the defendant as a ruse for them to get a discount on the sale price. He volunteered that a director involved in the development had intimated that it wasn't his property and that he wasn't entitled to give a discount, but this is how he could assist them to pay less for the purchase prices.[13]

[23] Regarding erf [...], which they sold after the issue of the action but which was acquired together with the two erven *in casu*, he rationalized that they were entitled to sell this plot at a profit (even though they had asserted no legal *causa* for this transfer either), because it was "in our name". Asked if he was satisfied that they had a valid sale agreement in place in respect of this plot on-sold by them he claimed not to be happy with the agreement but asserted that legally they were the

[13] Interestingly, the discounts offered were not factored in in the proposed restitution by the parties reflected in the prayers, assuming the plaintiffs benefitted from the commissions stipulated.

owners entitled to sell as they did. He was astute to add however that they are contesting the ownership which was conferred on them under false pretences. He reasoned that he wasn't happy that they had sold this plot at a profit as the putative owners but claims that they "had to accept that this was the case until (they) could prove otherwise."

[24] The blame for his and his brother's dilemma was placed squarely at the feet of Mr. Warren who in his opinion had misled them.

[25] Despite the first plaintiff's professed lack of awareness of "these things,' what was done and to what standard (prefaced by the refrain that he is a layman), he roundly criticized Mr. Warren for failing in his duty as a conveyancer to check whether the municipality's officials had done what they were supposed to have done. His lack of understanding did not extend to the import of Mr. Warren's confirmation that the suspensive condition had been fulfilled, however, because he appeared to believe that this excused them from having to "think about services again".

[26] Tersia van der Merwe testified on behalf of the plaintiffs. She too is an owner of a property at Khamanga Bay. She purchased a plot in January 2004 and commenced building a home on it in mid-June 2006. Construction was completed about 9 months later. She discovered after the fact that her property was in phase 3. There were some roads which existed at the time although her erf was on a gravel road, the surfacing of which was completed in 2009. She described the landscape at the time as being "basically undeveloped land". This accords with photographs taken by her on 11 March 2007 when a truck arrived from Johannesburg to deliver her furniture. She also submitted two photographs taken

in June of 2013 and 2014 respectively which depict at the gated exit outside the estate a storm water pipe leading onto the beach. She claims to have not been knowledgeable on storm water and engineering requirements at the time. As for the sewerage system in place, she had been told by one of the people involved in the development, a Mr. Taylor, that there was a sump on the estate for the catchment of sewage which was gravity fed down to the bottom of the estate and which was adequate for approximately 10 houses. The sump was located close to the beach access near one of the gates.

[27] By 2011 she was a trustee of the homeowner's association and happened to be privy to complaints from owners that there was a smell there from the sump overflowing. This was in June/July and in December during the holiday seasons when homeowners came for holidays, thus increasing the volume of sewage. The sump was emptied initially twice and then three times a week. It was drawn up per "honey sucker" truck which was then transported away to a sewer pond on Mr. Taylor's farm across the road, a fact she discovered in 2010. Her attempts to obtain proof that the pond was a registered pond had come to naught.

[28] She could confirm in her capacity as trustee that storm water reticulation plans were only submitted in 2007. Although the plan reflects two retention ponds, she could say that the larger of the two was not yet in place in terms of full capacity. She clarified that another pond existed but on private property off the estate. A gabion wall which is supposed to have been built for the storm water discharge management system according to the plan had not also yet been constructed.

[29] She gave a context to the Department's compliance notice. It fortuitously came to her attention as part of a bundle of documents that were given to the homeowner's association as an interested party when the application for a sewerage plant was made. She noticed the document whilst perusing the basic assessment report prepared by an environmental consultant appointed by the developer. She realized that it was important and circulated it to the owners. Up until that point the association had unwittingly been approving building plans submitted to it for approval, actually in contravention of the law she recognized, because the compliance notice had not been published to the association, the last approval being around August 2013, just before she became aware of the notice.

[30] Negotiations with the developers arising upon this unsatisfactory state of affairs culminated in the developers providing an irrevocable undertaking to the Department and the association regarding the completion of the infrastructure of the estate premised on an assurance that a sum of six million rand would be held in trust for these purposes. The witness accepted the undertaking on behalf of the association on 5 February 2015 in her capacity as chairperson, which measure resulted in the moratorium on building being uplifted, at least to the extent that 14 more houses could be built.

[31] Although the association is meant to take over all the infrastructural facilities in the development once completed, she lamented that they had not received a single engineer's certificate regarding the execution of these works. Although the last undertaking was signed in February 2015, she clarified that the work as at the date of her testimony was not yet complete. The sewerage plant and the building of the reservoir were waiting approval from the Department. The storm water had not yet been done

[32] Concerning water, she clarified that the estate gets water from three boreholes and that they were using a borehole on Mr. Taylor's farm. The registration for these boreholes had been done incorrectly before and was in the process of being correctly registered and licensed for domestic use.

[33] Under cross examination she clarified that she was not aware that the development was to have evolved in phases.

[34] She agreed that by the time she got to the property there was water if she opened a tap, there was electricity and there was a sewerage system in place in that she could flush a toilet and the waste would be taken away. She conceded that she only came to know of issues with sewerage in 2011 in her official capacity. She also agreed that there were basic roads in place although there was mud when it rained.

[35] The plaintiffs finally adduced the expert testimony of Winnifred Muckle who is a qualified and registered civil engineering technologist with experience in design work, project administration, contract administration, quantities and the certification of works, *inter alia*. Although she was not involved in the development, she explained that she had been requested by the plaintiffs' attorneys to assess the relevant documentation (such as was available)[14] and to summarise what engineering services were required and to say whether or not and when in her professional opinion these were put in place.

[36] I do not intend to repeat her expert report which she traversed in her testimony but, in her opinion, and having regard to what the municipality says in

[14] There was an issue with missing documentation from the municipality's formal files.

the phased agreement concerning what the expected infrastructural services were, she concludes that in respect of both phases 1A and 3, at the time of transfer, these services were not complete. Instead guarantees were put in place before clearance was sought for the transfers for amounts which were equal to the engineer's assessment of costs to complete those in due course. However, the guarantees do not deal with water source or sewerage in her opinion.

[37] She readily conceded under cross examination however that she could not gainsay the evidence of the defendant's engineer who might say that the services were in place according to the municipality's requirements at the time, albeit subject to a guarantee, although she expressed reservations about them being up to standard. She also conceded that developers did and do enter into phased development agreements with the municipality such as happened in this instance, and that such agreements were lawful at the time, or at least permitted by the provisions of the DFA.

[38] The defendant adduced the testimony of six witnesses. I will begin with a summary of the evidence of the conveyancer who acted on behalf of the developer and who was instrumental in seeking clearance from the municipality for the transfers of the plaintiffs' plots at the relevant times.

[39] Mr. John Angus Miles Warren is a director of Bate Chubb and Dickson and a qualified attorney and conveyancer. He was involved from the inception of the development. He explained that there were four Port Ferry companies registered, 71 being the primary developing company that would deal with the administration of the infrastructure and which acquired subdivided and whole farms for development. The defendant is one of the four entities to which the property on

which Khamanga Bay is being developed was transferred. It and the other three developing companies were expected to contribute to the costs of the overall development.

[40] It was envisaged from the outset that the development was going to take place in phases. Various agreements were put in place towards this end and once the development was ready to be marketed, they prepared a standard deed of sale. He worked with a template which he adapted, especially inserting the suspensive conditions in clause 14, because it was necessary, so he explained, to have clarity as to the stage at which he could pass transfer. He needed it to be clear that this was going to happen once the municipality was satisfied that he could pass transfer in respect of each erf and that the provision of these services had been met according to their requirements. So much for the reason for clause 14.1.

[41] He related generically what he would have done in the case of each sale, suggesting that he would have told the purchasers that transfer could only proceed when the suspensive condition had been fulfilled to the satisfaction of the municipality and that there were phases, more exactly that some transfers would go through earlier than others, depending on what phase the particular property was in. He would have been present at the signing of each agreement, as the deeds reflect in the present instance. The plaintiffs, in the guise one or other different entity had bought three plots over and above those that are the subject of this action. One adjoining erf [...] had a peculiar suspensive condition inserted at the instance of the purchaser (who the first plaintiff said was the second plaintiff) that certain gum trees be removed before transfer could be effected. In that matter the transfer had been delayed quite substantially for several months while they tussled over the fulfillment of the extra condition even though the municipality and the

Development Tribunal had already given clearance for their purposes. In legal correspondence which passed on the issue it seems that the purchaser was not prepared to accept that the agreement had lapsed for want of compliance with the suspensive condition which had not had a definite time frame to it, but which the seller had sought to define to bring the matter to a conclusion.

[42] In the instance of the relevant erven, after the communication was made to him that the services had been completed as envisaged in the deeds to the satisfaction of the municipality, transfer documents were prepared for signature. Powers of attorney were sent to the municipality in batches for approval and in the case of these two erven the documents were returned to him endorsed by the municipality which signified to him that it was satisfied that the services had indeed been completed to their satisfaction. The designated officer of the Development Tribunal also gave consent. With these clearances and endorsements, the way was cleared for him to submit his documents to the deeds office for registration, which he did, and transfer was effected accordingly.

[43] He was involved in the preparation of the various guarantees which were issued from time to time in favour of the municipality. These were required to be put in place by the developer to guarantee the cost of completing what he called the "smaller items" relating to particular phases in order to secure the completion of that work with each batch ready for transfer. These guarantees would be substituted as the circumstances required to ensure ongoing progress. He acknowledged the significance of the phased services agreement concluded by the main developing entity with the municipality which spelt out that transfers would be effected in phases and that the guarantees provided would be phase specific to cover the cost of items being minor of nature rather than essential services, which

were then still incomplete. He confirmed his insistence that transfers could not be proceeded with until accord was reached with the municipality regarding these outstanding aspects and the costs to complete these minor works.

[44] He firmly rejected any notion that that he had misled the plaintiffs or concealed any facts or misrepresented to them that the condition had been fulfilled.

[45] Under cross examination he readily conceded that the agreements drafted by him bear no mention at all of a phased development. However, he expressed the view that the meaning of clause 14.1, in line with the defendant's case, is "plain and simple". This notwithstanding, he ultimately agreed, as he was firmly nudged into conceding, that he had to accept - on the plaintiffs' interpretation that all services had to be complete when transfer went through, that the services were then not complete at the defining moments. He was not about to be coerced into agreeing though that the necessary corollary was that he had erred then in telling the plaintiffs that the suspensive condition had been fulfilled because of a wrong interpretation applied by him. Rather, he asserted that they accepted that the condition had been fulfilled. His recall of a discussion had with one of the brothers before coming in to sign the transfer documentation entailed an acceptance that the essential services were complete but that there was a minor outstanding issue that would have been completed shortly. The brother accepted that this was the position.

[46] Mr. Warren asserted that whereas the phased agreement was not yet in place when the plaintiffs concluded the sale agreements, the concept of such a development was certainly "contemplated," the formal agreement being negotiated over a period of time.

[47] Although the defendant did not qualify Mr. Warren as an expert witness, he offered the view that in conveyancing practice it is standard, as is the term giving expression to this expectation in clause 14.1, that no transfer can in fact take place until the municipality is satisfied that the services are in. Asked how the purchasers through the home owner's association could own services if they weren't in, he suggested that they would be responsible for the upkeep of such services as related to their own property and which were in. They would simply not be responsible for services in respect of properties not yet transferred.

[48] Asked what proof he had in compliance with section 31(1) of the Land Use Planning Ordinance, No. 15 of 1985 ("LUPO") which requires a transferor before transfer to furnish proof to the local authority concerned that any condition upon which the application for subdivision concerned was granted has been complied with, he asserted that the endorsement by the municipality of the power of attorney was the necessary proof that they accepted that the services had been completed to their satisfaction.

[49] Whilst accepting that his role as conveyancer requires him to act in the interests of the seller and purchaser alike, he reasoned that it was not his responsibility to deal with the aspect of the engineer's certificates, neither was he responsible for services. He was only one in a significant team of different professionals dealing with various aspects coordinated by the developers. His particular responsibility was to ensure that the local authority was satisfied concerning the provision of services.

[50] Pressed to agree that the very nature of providing a guarantee suggested that the services were not completely installed (the guarantee being the sop as it were),

he offered the view that the municipality did not have to be satisfied that every single aspect of the entire infrastructure was complete. He clarified that there are few developments that ever go through to transfer where every single aspect is complete, but in this instance, he was confident to assert that the services were completed to the satisfaction of the municipality as contemplated in clause 14.1. In his view this condition means that the provision of infrastructural services is qualified by "when the local authority says its okay". That is how it works, he added, that is "the system".

[51] He believed that he had met his fiduciary duty to the purchasers by ensuring that the municipality had communicated to him that they were satisfied that he could proceed with transfer because the infrastructure was completed to their satisfaction. He added that the plaintiffs were co-incidentally represented by their own attorneys throughout the transaction, who happened to have intimate knowledge of the development.

[52] He appeared to have no knowledge of the provision in the phased development agreement which requires in the third phase that the developer is to provide a certificate to the local authority from its consulting engineer certifying that such services have been provided in accordance with the standards approved by the municipality and environmental authorities, again deferring to the engineer's own separate role played in the professional development team. He also claimed to be unaware of the Department's letter dated 8 June 2005, immediately predating the transfer of erf [...], warning the defendant's environmentalist, Mr. Selkirk, that further transfers above a number of 150 erven could not proceed until all the infrastructure was in place for the complete development as approved.

[53] Similarly, he claimed to be unaware of a letter of the same date addressed by the municipality to a Mr. Stanton, a client of his and involved in the development, evidently returning powers of attorney in respect of certain erven including erf [...], which indicates that further transfers will only be authorized provided certain requirements are met, namely, the submission of an engineering services summary report, an onsite inspection and certification of phase 3, the submission of a close off report for phases 1 - 3, a new services agreement setting out the total development of the property being concluded with the municipality and the withdrawal of existing guarantees in respect of erven already serviced and in respect of which such guarantees were issued.

[54] He could not comment how it came to pass that despite these letter, or in ignorance of them, the endorsement of the municipality was obtained on the 10th. He was not prepared to concede that this information was possibly withheld from him, suggesting rather that it wasn't his responsibility. He was firm that he would not have passed transfer in respect of erf [...] had he known that he should not have done so.

[55] Mr. Christiaan Johannes van den Berg was employed by the Great Kei Municipality (amongst other local governments) and the provincial department of local government in or about 2013/2014 as a consultant to mentor struggling municipalities that did not have the capacity to deal with town planning matters. His particular experience is in the field of local government. In this role and capacity he got alongside Mr. Dicks, who was head of local government administration in the Great Kei Municipality at the time, basically performing the duties of the municipality's town planner. He would assist in preparing documents

and getting approvals relating to rezoning, sub division, town planning applications and the like.

[56] He was familiar with the application by the Khamanga Bay Developers to approve a holiday resort. He was aware that when the township was approved by the Development Tribunal the Registrar of Deeds had insisted on a duplicate approval for the sub-division pursuant to section 25 of the LUPO, which was necessary to enable the municipality to control the development. The Tribunal in posing conditions had merely required that basic services be provided. He adverted to the provisions of the Municipal Systems Act[15] which defines basic services as those needed to sustain a basic level of existence. In his view this was obviously not acceptable in terms of the high-class holiday resort development envisaged. It was the practice in terms of the DFA at the time to allow developments in phases, subject to municipal control. There had to be standards set however (to exercise this control) which could only be achieved by way of a service level agreement.

[57] Generally the transfer process commenced with the submission by the transferring attorney of the power of attorney signed by the seller. In respect of this development the municipality maintained a data base to ensure that only those erven approved or allowed in a particular phase were approved by it for purpose of transferring. When a power of attorney came in they would first check if it was in an approved phase. The power of attorney would then be forwarded to the engineering assistant or technical adviser for checking whether the services as agreed upon were installed. Once the certificate was obtained from the engineer or

[15] No. 32 of 2000.

technician of the municipality, it would next be taken to the Development Tribunal for signature in terms of the Development Facilitation Act, No. 67 of 1995 ("DFA"). Mr. Mfenyo, the incumbent at the time, had to certify (a) that the municipality was happy with the services and (b) that its requirements had been complied with.

[58] If their technical manager, Mr. Roberts, made a report that he was happy that the services had been provided for in accordance with the service level agreement, once his approval was reported, the municipal manager or the finance officer would then endorse the power of attorney thereby allowing transfer to be effected. This endorsement constituted the necessary authorization to the conveyancer to proceed to registration of the particular erf in the deeds office.

[59] He acknowledged the official stamp of the municipality and endorsements in the case of the two transfers in contention on the relevant powers of attorney. DFA approval was also apparent.

[60] The fact that transfers were registered in the development up to phases five and six confirmed for him that the earlier phases had been completed to the satisfaction of the municipality, and that the services were of the required standard. He explained that in big schemes certain aspects of the services, expected to cater for the greater number of erven, would be developed in a certain phase, in a certain manner, to the satisfaction of the municipality.

[61] He personally has dealt with many developments and could say without reservation that the municipality was particularly careful in its control of developments, to the extent that they were capable of doing so, in ensuring that their requirements were complied with. This is because ultimately the

development would be handed over to a homeowner's association and they did not want the association and future owners to suffer because of their negligence.

[62] Under cross examination he agreed that until the conclusion of the phased development agreement there was no phased development. He clarified that the agreement took some time to get into place. When it was pointed out to him that the approval of the development by the DFA also makes no mention of any phased development he pointed out that that would be correct because this aspect is usually left to the municipality and the developer to agree on as is provided for in the DFA.

[63] He himself did not check to see that the services of Phase A1 were in, because that was for the engineering Department to oversee. He could not verify if by the time the power of attorney in respect of erf [...] was endorsed on 6 July 2004 the work outstanding as at 13 May 2004 and in respect of which a guarantee had been issued for phase 1, had been completed. He noted however that the phased agreement allowed for any outstanding work to be completed at the cost of the developer, which was the exact reason for which a guarantee would be given.

[64] He did not agree that the guarantee put in place based on the assessment of costs by the engineer to complete the services dated 24 August 2005 in respect of the phases mentioned in the letter showed unequivocally that the services were not complete. Rather, so he clarified, it showed that the services were being installed to the permitted or desired standard by the municipal engineer as required at the time. He pointed out that there is no standard of services in any approval except the DFA approval which refers to the Red Book standard, which is a much lower standard of service.

[65] He maintained that when the relevant powers of attorney were endorsed, Mr. Roberts was satisfied that those erven had been serviced to his satisfaction and to the agreed upon standard which the engineers had looked at. It was not for them to second guess the certificate that the services were in. They had to rely on the abilities of their technical officials to report accurately and this is precisely what happened. They would also subsequently get reports or memoranda from their engineer who would go on site and certify that he was happy with the standard of services.

[66] As for the municipality's letter to Mr. Stanton returning the powers of attorney and posing conditions in respect of transfers going forward (which appears to have been generated about the time that erf [...] was in the process of being transferred), he proposed that it could have been that the municipality allowed these powers to go through with the rider indicated by them in their letter because they were already in the pipeline. He added that powers of attorney are submitted a long time before they are actually returned to the conveyancer, leaving the possibility for much to happen in-between.

[67] Finally, he expressed the view that if the municipality recorded and returned the powers of attorney to the conveyancer it meant that their requirements had been met and that the transfer could be registered. Conversely if there was an issue with the services satisfactorily being in place, the powers of attorney would not have been endorsed. Instead, the transfers would have been stopped and further enquiries made, which is exactly what ultimately happened when the municipality put its foot down and indicated that no further powers would be endorsed for transfer until they were satisfied that they had an engineer's certificate.

[68] Mr. van der Merwe is the civil engineer employed by the developers who was involved in the development from design phase. He was instrumental in getting the plans for essential services approved by the municipality, and thereafter assisted with the implementation of the project.

[69] He identified his letter seeking clearance from the municipality to allow the transfer of erf [...], amongst others, which he pointed out was "on the backing of a guarantee" for the value of the outstanding services prior to those services being 100% complete. He acknowledged that the clearance was in fact given. He was involved at this critical point, and later when it came to the transfer of erf [...] as well, to the extent that he needed to establish the value of the guarantees in order to get the services clearances to be issued by the municipality. Before doing so he inspected the services for completion and identified what was not yet completed in order to ascertain a value of that based on current rates in the industry. As far as he was concerned the services were substantially complete except for a few minor items that were then outstanding. He was satisfied that the owners taking transfer on this basis would have been able to build houses because the access to services would be there, save for the minor items that were still required to be attended to.

[70] Services obviously had to be completed prior to houses being connected to the services. In all instances this ritual of sign-off was on a phase specific basis.

[71] There were to his knowledge items outside of the reticulation system that still needed to be put in place. As for the sewerage system the plan was changed from an initial septic tank for each individual plot to a communal service tank. This was not installed in 2004/2005 (as appears from the guarantees), but in his view there was a facility with a limited capacity in place which was functional.

[72] Under cross examination he indicated that they never got anything in writing from the municipality for the design of the roads and storm water systems, but explained that there is such a thing as a deemed approval of a plan when the municipality does not respond within a certain period. Plans for retention ponds as a means to properly manage the storm water run-off were done, but only in 2007. He explained though that his plans, i.e. the complete set of drawings for the entire infrastructural services in 2004, were sent in a piecemeal fashion. There was a design specification for the roads, a reticulation network for waste water, the treatment process for the sewerage system, and the conservancy tank which was added at the bottom of the site because there was uncertainty about what would finally happen, i.e. whether the waste would be treated on or off the estate property.

[73] He acknowledged that it was he who on 23 April 2003 addressed the municipality with a view to introducing a phased development approach in order to accelerate the process of transfer of individual erven to purchasers and earlier endorsement by way of the necessary service clearance certificate on the back of a guarantee, in an acceptable format, to cover the cost of all outstanding items that could affect the endorsement of the powers of attorney. The values to be indicated would have to adequate to ensure that the outstanding items could be completed by the municipality should the development fail to complete these aspects. At the time such an approach was gaining popularity in other municipalities so that the process of registration could run concurrently with the installation of services to ensure an “early delivery”. This suggestion of his, as it turned out, was taken up by the municipality and is reflected in the phased development agreement.

[74] He agreed that the first guarantee did not account for the final completion of Khamanga Drive in the development, but noted that this was done in phases as well.

[75] He accepted that clause 13 of the phased development agreement required a certificate from the consulting engineer or the developer to the effect that the said services had been provided in accordance with the standards approved by the local authority and the environmental authorities. He had however never furnished a certificate of completion in the sense of final completion, but in his view the letters of guarantee stood in place of such certificates.

[76] Adverting to the letter addressed by the municipal manager to Mr. Stanton warning that no further transfer would be accommodated, he could not recall having submitted a registered certificate of completion in respect of the initial services to phase 3 as required, only the estimates of costs, namely the guarantees. Neither could he recall having written a services summary report which the municipal manager had indicated needed to be provided in order to stipulate the required services of each phase, 1A to 3, as against certified completion achieved on site.

[77] Once he had issued these guarantees he believed it was a “legal matter”. By this he meant that if the municipality was satisfied, it could then endorse the deeds of transfer so that the properties could be transferred. The process thereafter, once the work was completed, was to issue a certificate (when 100% complete I understood him to mean) and to consequently withdraw the guarantee. Asked why he continued to issue such letters of estimates and guarantees regarding phase 1A even after the transfers of this phase had gone through, he explained that phase 1A

was "rolled in" with the other phases in subsequent guarantees. This did not necessarily mean however that there were still outstanding aspects of the works in respect of phases 1A, or 3 for that matter. He would mention these phases in later guarantees because it needed to be clear to the municipality that transfers of erven in these earlier phases could still happen.

[78] He could not state with certainty whether work identified by the first two guarantees in any of the particular phases was still outstanding or not by the date of his testimony. He claimed not to have the drawings.

[79] He agreed that he would have had a hand in inputting the R6 million guarantee as well.

[80] The defendant also adduced the evidence of Mr. Steven Roberts who was in the employ of the Great Kei Municipality from 2002 until 2007 as their technical manager. He is a qualified civil engineer. His job entailed everything to do with infrastructure within the municipal area of administration including the management and control of same, whether existing or planned in the future.

[81] He explained that there was a very high demand on the East coast for developable property at the relevant time and that the municipality had a major obstacle in that there was no available infrastructure in place. It accordingly fell to developers to fund and provide bulk infrastructure. Many of the existing developments that they inherited from their predecessor did not have adequate bulk infrastructure. The municipality had to provide access to adequate infrastructure for all. It also had to ensure that developers providing their own infrastructure would do so to an adequate level. Khamanga Bay was seen at the time as the "next

level" of development. Many of the developments before had entailed the conversion of existing facilities into a different type of ownership, but Khamanga Bay was starting from scratch and providing everything of its own. They were mindful that they were going to be facing a lot more challenging developments than this, but saw the Khamanga Bay development as a test case to ensure that the municipality could exercise control in a rational manner, not in an "*ad hoc*" manner as had been done by its predecessor.

[82] He personally had input in the initial design phase of the development. He explained commonly how a developer would initially propose a development. This would invite comment from his Department and they would indicate what further requirements the municipality might have. Thereafter the administrative processes would be followed through the various Departments to ensure that the developer gets an approval. Once granted it would be up to the municipality to ascertain that the services are being implemented and that its requirements are being met. As for transfers, they considered this the most critical stage because once transfer passes the municipality loses control over what happens in the development. Unlike the older systems -which entailed a one-time approval and that was that, they now had a specific checklist in which there were specified phases, each with its own requirements. For the first time they also augmented with construction guarantees to the value of outstanding work. This represented a departure from the past where they had previously relied on the good faith of the developer to follow through. The envisaged guarantee would have to be sufficient for the municipality to engage contractors itself to supply what the developer fell short of. This novel approach entailed strict control of the development from the municipality's side.

[83] The concept of the phased agreement was something that they had to consider in terms of bigger developments where there was not an existing infrastructure to plug into, but where an overall bulk infrastructure had to be supplied. It would not make financial or technical sense for the developer to do the whole thing all at once and they had to give recognition to the unique features of each development. For example, sewerage works would be suspended until a certain flow could be reached whereby the plants would be able to technically operate. Roads would be done to a lower standard bearing in mind that heavy vehicles would cause them damage during the construction phase, only to be finalized properly at the end of the project. He described the phasing as a case of financial necessity from the developer's point of view. The municipality was however happy to accommodate a developer on this basis, recognizing that if the development fails, the municipality loses.

[84] In the case of the Khamanga Bay development he attended regular site meetings convened by the developer. In the initial construction phase there would also be fixed meetings of their own and they would inspect progress on the site.

[85] With reference to the first letter of the developer dated 4 June 2004 requesting clearance for transfer to be allowed in Phase 1A, he explained generically again that such a letter would serve as the engineer's certificate for the relevant phase that the services are in at that stage as well as an assessment of the value of works still to be completed which would in turn be covered by the guarantee. He would go and physically verify this on site and then send a report back to the manager allowing him to release the property, which was the case for this particular batch of erven including erf [...]. By the endorsement the municipality indicated that its infrastructural requirements had been met. He was

the person making these inspections and submitting the reports. They were careful to keep effective control in this manner to avoid being on the hook themselves later on to provide the services.

[86] Regarding the next letter dated 25 April 2005 in which clearance was sought in respect of phases 1A, 2 and 3, which would include erf [...], he was prompted to suggest that the same applied. The municipality was satisfied after he did the physical inspection on site that its requirements in respect of infrastructural services were met up to the end of the relevant phases. He confirmed with reference to photographs that this is what the development looked like at the time in 2004 within a week of his inspection.

[87] He clarified regarding a memorandum which he addressed to the municipal manager dated 31 May 2005 regarding the development that, despite concerns raised, none of his comments regarding internal services were intended to indicate that there was in his view not compliance with his Department's requirements in respect of those erven covered up to phase 3, including erven [...] and [...].[16] To the contrary, the requirements were met at that stage for the relevant number of

[16] The concern raised by him in the memorandum is that "certain of the service requirements are not clearly specified or, possibly, clearly understood. There also may be certain contradictory issues arising out of the previous service agreement". He goes on to refer to the two levels of approval being proposed namely for transfer versus the number of dwellings allowed to be developed and adds the concern that "the developer is effectively requesting the approval for transfer of increasing numbers of erven while proposing the same number of dwellings being permitted for construction". He sounds the caution that "it is an accepted principle of residential developments that a construction of dwellings will not take place immediately and generally proceeds relatively slowly". In this regard the number of dwellings permitted to be constructed should be clearly stated and can in effect be viewed as an "insurance clause". It is on this basis that he proposes the three point course to be followed which entails an approval for transfer of the proposed Phase 3 erven as follows:

"(a) The developer providing an engineering services summary report. This report needs to clearly stipulate the required services for each phase to date [1A – 3] as against the certified completion achieved on-site. This is to include work descriptions as well as values to enable the Municipality to monitor the situation more effectively.

(b) The completion of phase 3 is required to be certified as above and inspected on-site. The developer is required to convene a meeting on-site at the completion of Phase 3 in order that the entire development to date can be assessed in terms of general conditions of approval, specific engineering requirements and EMP requirements. At the conclusion of the meeting the developer will be required to submit a close-off report for Phases 1 to 3…

(c) No further authorization for transfers be granted subsequent to phase 3 until the above conditions are satisfactorily met."

erven. In any event, he was further satisfied that the water for the development was suitable for human consumption.

[88] He was satisfied that the level of services provided in what had been constructed until then was of a much higher standard than any other developments overseen by them at the time. He was impressed by the "extra care" that he saw the contractor going into there and the quality of work in his view was above what he would have expected from a commercial contractor.

[89] He added that as far as he was concerned, infrastructural services for those erven the transfers of which were already approved, were available to these owners who would have been in a position to build, albeit he would have carefully considered their building plans relative to the overall interests of the development.

[90] Under cross examination he readily conceded that the infrastructure at Khamanga Bay was not completed even as at the date of his testimony, but he qualified this concession with regard to how they approached the issue of endorsements being in accordance with their requirements at each relevant phase.

[91] He agreed that there might possibly not be approved drawings which were submitted by Mr. van der Merwe, the civil engineer whose services were retained by the developer who designed the infrastructural works. However he suggested that the drawings would probably have been approved as part of the written approval, thus suggesting an implied approval. He acknowledged that none of the formal approvals by the municipality or the Development Tribunal refer to drawings.

[92] With reference to the phased development agreement he confirmed his understanding to be that a development in phases entails the completion of the infrastructure in each phase and then transfer but completion meaning complete to the satisfaction of the controlling authority. Satisfaction in his view would mean that if there are certain outstanding items of work, the guarantee in place would cover the cost of these. He explained further that, in practical terms, the only aspects that they would allow to go under guarantee would be things which are not practical to complete at that stage, for example a main road through the development which could not be done at the beginning of the project because it would be destroyed during the construction of the development.

[93] He agreed that what the phased development agreement provided for was that the relevant properties could be transferred on the strength of the guarantee. He clarified that although the second guarantee tendered and accepted in 2005 also refers to Phase 1A (given the impression in Mr. de la Harpe's view that a year later these services guaranteed had still not been installed), the works specified at that point would have been completely different. They would probably have affected the relevant phases mentioned or even random erven. In his view there would have been further progress as further phases were developed which would be a logical progression.

[94] Even absent a formal certificate from the consulting engineer, required in terms of paragraph 13 of the phased development agreement, he was not fussed that this was an issue because as far as he is concerned the letters generated by the engineer - who had designed the development and who was supervising the works, giving a summary of the works completed and still necessary, constituted such a certificate. From that summary they could assess whether they were happy with

the completion at that stage and whether or not there was compliance with their requirements. Asked to state where it says the works are complete, he clarified that it does not have to say that it is complete. As far as he is concerned a certificate of completion is a formal document issued at the end of the job. He disagreed that the terminology used in the services phased development agreement was correct.

[95] When it was pointed out to him that the letter seeking clearance for transfer in Phases 1A, 1B and 2 and 3 does not even deal with pollution control but is for reticulation services only, he explained that that was a bulk supply for the future phases after these under discussion and that it was also secured by a separate guarantee with the developer. He reiterated that whatever one would call it, the summaries of works were acceptable for their purposes and were accepted by the Land Use Planning Committee as a certificate, whether right or wrong.

[96] He disagreed that there was an issue with the water service. Asked if he was monitoring the sewerage system which would be a full waterborne system he clarified that he was monitoring the first three phases at that stage which entailed the provision only of a conservancy tank.

[97] He disagreed strongly that the prerequisites for the necessary approvals were not complied with and also that the interpretation of the municipality's requirements was loosely based on whatever he thought was okay. Instead he reiterated that their requirements were specifically based on the agreed terms. He pointed out that the municipality was represented by four people who were making the decisions and signing the documentation. Apart from himself, there was full input from the administration department, from town planning (represented by a

representative in Bhisho because they did not have a town planner), and by the building control officer when he was available or when he could get one appointed.

[98] In response to the suggestion that transfers were authorized at Phase 3 after his memorandum, without a water treatment works having been put in place, he suggested that it was quite possible phase-wise that the treatment works would not have been required by that date.

[99] He disagreed with the postulation that because matters culminated in the guarantee being issued to the homeowner's association for the sum of R6 million to cover the outstanding works in 2015 that this accorded with the plaintiff's view that the infrastructural works were still not in. It is his view that they were just not complete. He added that the requirements of those services had probably also had changed quite significantly over a ten year period. However, his involvement ended in 2007.

[100] He denied that in his time transfers were authorized before the infrastructural works were complete to the municipality's satisfaction.

[101] As much as Mr. de la Harpe sought to get Mr. Wayne Selkirk, an independent pollution control officer hired by the Department of Environmental Affairs in 2002 to police the development at Khamanga Bay for environmental compliance, to agree that the infrastructural services were not in accordance with the requirements of the law, or SABS standards for water, or otherwise came up short at the time of the transfer of the relevant erven, he confirmed in his testimony that there was no breach in respect of any of the essential services at the defining moments.

[102] His concern was to ensure that the requirements postulated in the Record of Decision for the development, and also in the environmental management plan, were met by the developers.

[103] In respect of water, a borehole referred to as Taylor's Caravan Park had been allocated for use by the development. It had a total yield of 64 cubic metres per day and was registered with the Department of Water Affairs. There was also a second borehole in Inkwenkwezi Game Reserve with a yield of 129 cubic metres per day. This too was registered with the Department of Water Affairs in 2004. Both boreholes were reserved for the use of the development. As for Zones 1A, B and 3, the reticulation for the water supply was by then in place and potable class 1 water was available.

[104] The sewer reticulation was also in place for phases 1A, 1 B and 3. There was a requirement for future phases for the provision of a treatment facility, but the municipality as per letter dated 31 May 2005, was satisfied that the conservancy tank approach could be used until such time as 60 erven were developed. As far as he was concerned there was compliance by the developer in respect of this service at the relevant moments.

[105] The storm water systems for those phases were also in place.

[106] Under cross examination he conceded without hesitation that, subsequent to his role played at the time, he had become involved, in 2002/2008, in offering professional services to the developers. In this respect he had prepared a proposal with regard to future sewerage treatment and also facilitated various discussions with regard to the upgrading of the storm water management system.

[107] Finally the defendant adduced the evidence of Sharon Russel, a control scientific technician in the employ of the Department of Water Affairs and Sanitation, who confirmed that, in respect of the period 2004/2005, the borehole in use that fed the development was registered with the Department, which thereby authorized it to use the water pending the Department's verification and validation processes which were underway even as at the date of her testimony. The borehole in favour of the development at the Inkwenkwezi Game Reserve was also registered, under the Keith Stanton Family Trust, but according to her it was not being utilized at the development at the defining moments. As for the standard of the water, it was classified class 1 and was, therefore, fit for human consumption.

[108] She agreed that in terms of the Water Act, all water use, not just emanating from boreholes, was presently required to be registered with the Department and that there was also now a licensing process, apart from registration.

[109] Even though in respect of the relevant erven a licence was not in existence in 2004/2005, there was, by the time of her testimony, an application pending in this respect. Further, although the development is incorrectly registered for a schedule 1 use, this was going to be corrected through the licensing and verification process which was underway. Schedule 1 water use is not billable, but the development was certainly going to attract payment of the necessary tariffs going back to date of registration once this aspect of the licencing was finalized, which was in the final processes according to her.

[110] In 2003 SABS used her own department's classification system until such time as theirs came into effect in 2004. They had tested the development's water

at the time of the transfers using the standards applied by the Department and it was indeed class 1 water.

[111] That concluded the evidence.

[112] I commence with the issue of the interpretation of the suspensive condition in clause 14.1.

[113] In Natal Joint Municipal Pension Fund v Endumeni Municipality[17] the Supreme Court of Appeal per Wallis JA set out the correct approach to be adopted in respect of the interpretation of documents as follows:

> "[18] The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of

[17] 2012 (4) SA 593 paras [18] and [20]

> departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.
>
> …
>
> [20] Unlike the trial judge I have deliberately avoided using the conventional description of this process as one of ascertaining the intention of the legislature or the draftsman, nor would I use its counterpart in a contractual setting, 'the intention of the contracting parties', because these expressions are misnomers, insofar as they convey or are understood to convey that interpretation involves an enquiry into the mind of the legislature or the contracting parties. The reason is that the enquiry is restricted to ascertaining the meaning of the language of the provision itself."

[114] The endeavor is not to ascertain what the intention of the parties was, but rather what the language used in the contract means.[18] Indeed, what the parties and those who testified think with hindsight, or believe regarding the meaning to be attached to the clauses of the agreement, and thus what their intention was, is not of any assistance in the exercise.

[115] In Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk[19] the Supreme Court of Appeal emphasized that while the starting point are the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, *but are considered in the light of all the relevant and admissible contexts, including the circumstances in which the document came into being*. Wallis J writing in that judgment as well noted that the former distinction between permissible background

[18] Shakawa Hunting and Game Lodge (Pty) Ltd v Askari Adventures CC [2015] JOL 33131 (SCA) and Worman v Hughes and Others 1948 (3) SA 495 (A) at 505.
[19] 2014 (2) SA 494 SCA at par [12].

and surrounding circumstances was never very clear and has since fallen away. Interpretation is no longer a process that occurs in stages but is instead "essentially one unitary exercise".

[116] With these pointers in mind I proceed to deal with the issue of the interpretation of clause 14.1.

[117] It is not in contention that the Great Kei Municipality is the local authority envisaged in the clause and that the infrastructural services contemplated include water, electricity, sewerage and road works. The difference in opinion centers on what is meant by "the provision by the seller" at its costs of these services, as further qualified by the phrase "in accordance with the local authority's requirements".

[118] It is common cause that the local authority can only impose requirements in accordance with what the law provides. Factually what those requirements are or were, or rather the detail of the services required by the municipality, are similarly not in contention. These requirements are spelt out in the phased development agreement and appear to be accepted by the parties as the "what" of the municipality's requirements.

[119] The qualification "in accordance with the local authority's requirements" directs whose requirements are to control the provision by the seller of the services at its costs, namely those of the local authority.

[120] The ordinary popular and grammatical meaning of the word "provision" is "the action of providing or supplying", "something supplied or provided" [20]. It is plain however that the provision in this instance, the action word, is qualified by the phrase "in accordance with the local authority's requirements". It cannot be read in isolation.

[121] The ordinary popular and grammatical meaning of "requirement" is "a thing that is needed or wanted", "a thing that is compulsory" and "a necessary condition".[21]

[122] The ordinary popular and grammatical meaning of the phrase "in accordance with" is "in a way that agrees with or follows (something, such as a rule or request); or something is done in accordance with a particular rule or system, it is done in the way that the rule or system says that it should be done; in accordance with a rule, law, wish etc.[22]

[123] The suspensive condition is self-evidently for the benefit of the purchaser and poses on the seller an obligation to provide the infrastructure at its costs at the direction of the local authority as it were. The condition is sub-clause 2 is for the benefit of the seller, its stated purpose being to enable it to secure the necessary finance to enable it to complete the installation of services referred to in clause 14.1. Mr. de la Harpe suggested that this objective informs the interpretation of clause 14.1 because it is envisaged by the last suspensive condition in 14.2 that the seller will obtain the financial support to complete the installation of the necessary services, which, in turn, presupposes that the seller had not, at the time when the

[20] Concise Oxford English Dictionary
[21] Concise Oxford English Dictionary
[22] https://www.collinsdictionary.com

agreements of sale were concluded, either began or completed the installation of the required infrastructural services. A further indication that they were not yet complete, so he submitted, is evident from the expectation that the suspensive conditions were to be fulfilled "as soon as possible" after the signing of the agreements. I think it can safely be assumed, on everyone's version, however, that when the deeds of sale were signed, the construction of the development was still in its infancy and that the services as designed (or contemplated) were still to be provided or completed.

[124] It is also not in contention between the parties that the obvious purpose of the purchases was for the plaintiffs to acquire plots which would be developed by the construction of holiday homes on them in due course, given the approval of the township as a holiday resort, and that essential services would be necessary to enable that objective. It follows logically that without the services in place, the erven could not be put to the purpose of the purchases.

[125] Also not in contention is that the erven purchased are not independent erven but instead form part of the Khamanga Bay Property Development. This perspective is endorsed by clause 13.1 of the deeds which envisages that each transferee will be the owner of a property forming part of that development, and that each is obliged together with the others to become a member of a homeowner's association consisting of all of the owners having common objectives in relation to the upkeep of the services, facilities and amenities as well as the day to day conduct of the association's business.

[126] So too, the obvious purpose for the inclusion in the deeds of sale of clauses 14.1 and 2 was to fix a time or event by when the sales would become effective.

This must be so because the very nature of a suspensive condition is that the operation of a contract is suspended subject to the occurrence of a future event. Only if and when the condition has been fulfilled will an enforceable contract exist.

[127] What the conditions in this instance both contemplate is that for the deeds of sale to become enforceable, something has to occur or be achieved by the seller at its cost. In respect of clause 14.1 it is the provision by the developer of the infrastructural services at its cost in accordance with the local authority's requirements. It is common cause that the condition in clause 14.2 was fulfilled, however, and that the issue of the seller's financial ability to provide the services is not in contention.

[128] A sensible meaning also requires one to have regard to the legal sub-text which applied at the time in respect of property developments generally, the erven in this instance obviously forming part of an approved township development, and the conditions of establishment more specifically.[23]

[129] It is accepted that the development was approved by the Eastern Cape Development Tribunal ("the Tribunal") in terms of sections 33 and 34 of the Development Facilitation Act, No. 67 of 1995 ("DFA"). The provisions of the DFA have been declared to be in conflict with the Constitution,[24] but section 33 of the DFA provided that the Tribunal could at its discretion impose conditions for the establishment of, *inter alia*, engineering services and the provision of streets.

[23] See definition of "land development area", "land development application" and "land development" in section 1 of the DFA.
[24] Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC)

Section 40 of the DFA required a certain legal comity between the developer and the municipality as is evidenced from this clause:

> "40. Engineering services.—
> (1) Every land development area shall be provided with the engineering services *agreed upon between the land development applicant and the local government body in a services agreement complying with the prescribed guidelines and approved by a tribunal.*
> (2) Subject to any exemption authorised by a tribunal in relation to a particular services agreement—
>
> (a) the land development applicant shall provide the engineering services classified by regulation as internal services;" (Emphasis added)

[130] In this instance the approval of the development was given in the form of Annexure "PF1" to the defendant's plea on 24 April 2001.[25] It was subject to the developer being responsible for the provision of basic services to the area, the water activities being in compliance with the Water Service Act, and all engineering services complying with the relevant SABS codes. These are self-evidently conditions for the approval of the development and are not to be conflated for present purposes with the suspensive conditions in 14.1, although the provision of services as agreed between municipality and developer have an obvious correlation.

[131] The township approval was also given "subject to", "conditions of establishment applicable … in line with all guidelines outlined in annexure "N" to the DFA regulations". These regulations in turn provide that: "conditions imposed by various departments and parties and imposed by the Tribunal shall be complied with before any rights may be exercised". In the relevant context the rights to be

[25] See footnote 2 above.

exercised must be the right to take transfer of the sub-divided erven in the approved development, but only upon fulfilment of the suspensive condition obviously.

[132] It is also necessary to set out the provisions of section 38 of the DFA, as it provides a context to the phased development agreement and its permissibility. The relevant portions provide that:

> "38(1) - A registrar shall commence registration of ownership of land in a land development area, when—
>
> (a) a general plan of the land development area has been approved or provisionally approved;
>
> (b) a subdivided register for the land development area has been opened;
>
> (c) the designated officer has informed the registrar that any conditions of establishment relating to the land development application and which have to be complied with prior to the commencement of such registration, have been complied with; and
>
> (d) the designated officer has informed the registrar that the respective obligations of the land development applicant and the relevant local government body to provide the engineering services contemplated in section 40, have been fulfilled.
>
> (2) Despite the provisions of subsection (1), a registrar shall commence transfer of initial ownership of erven in a land development area when—
>
> (a) …;
>
> (b) …;
>
> (c) …;

(d) the designated officer has informed the registrar that the land development applicant, or the relevant local government body, as the case may be, has delivered to the designated officer—

(i) a guarantee in the prescribed form in favour of that surveyor, conveyancer, professional engineer, local government body or other person determined by the designated officer, and issued by a financial institution or other guarantor acceptable to the designated officer, in an amount sufficient to cover the costs of—

(aa) …

(bb) complying with conditions of establishment; and

(cc) fulfilling the respective obligations of the land development applicant and the relevant local government body to provide the engineering services contemplated in section 40; and

(ii) the powers of attorney and other documents prescribed or necessary to enable the person in whose favour such guarantee is made to perform the acts contemplated in subparagraph (i);"

[133] A different condition is imposed in section 31(1) of LUPO, which provides that:

"31(1) – Before registration by virtue of a sub-division in respect of which an application has been granted under Section 25 is effected by the registrar of deeds concerned, the transferor shall furnish proof to the Local Authority concerned that any condition on which the application for subdivision concerned was granted, has been complied with, and no written authority under Section 96(1) of the Municipal Ordinance, 1974, … or section 96(1) of the Divisional Councils Ordinance, 1976, … shall be issued unless such proof has been furnished."

[134] Evidently the last requirement poses the legal prescripts for the transfer of subdivided erven, and does not assist in determining what clause 14.1 means. The issue of transfer only arises upon fulfilment of the suspensive condition, the interpretation of which is first in contention.

[135] What the provisions above cumulatively demonstrate is the overarching responsibility of the local authority to oversee the process before the critical moment of transfer and then to vouch for compliance. It also reflects that the municipality is given the power within a certain sub-set to enter into a services agreement to ensure that it meets the objective of exercising control over the process by directing the developer to do what it requires. It is the entity that is ultimately responsible to ensure that the necessary engineering services are provided, or guaranteed, and that the conditions of establishment are also met. The buck stops with it as it were.

[136] Finally, in respect of aspects that are obvious from the deeds of sale and require no clarification, it is common cause, firstly, that they do not refer to a phased development at all. This absence is of no significance to my mind, however, once it is accepted that the municipality was entitled to conclude an obviously separate services agreement with the developer to allow the development to evolve in phases, and to exact its measure of satisfaction by accepting guarantees in amounts sufficient to provide for those services in pursuit of its own obligation to oversee compliance with all the conditions of the sub-division. This could happen at any stage prior to transfer of initial ownership of erven in such a development. What is recognized in the deeds is that the relevant erven form part of the approved development and follow that approval and its necessary sequelae.

[137] Secondly, the deeds do not employ the words read into them by the first plaintiff according to his testimony, namely that the provision by the seller of the infrastructural services *had to be in 100%*, as he put it. I have already pointed out above that the provision of the services cannot be viewed as a standalone condition for fulfilment. Rather the act of providing those services is subject to another layer, which is that it must be done in accordance with the local authority's requirements. The plaintiffs on the one hand defer to the phased development agreement as determining what services had to be provided, but on the other hand ignore the obvious implication of that acceptance, which is that the services would be provided, in accordance with the municipality's requirements, on a phased basis, and subject to guarantees being provided in lieu of the works being completed 100% at the time of transfer in each phase.

[138] That brings me to the context at the relevant time when the agreements of sale were concluded or the factual matrix as counsel sought to call it.

[139] On this issue, the import and significance of the phased development agreement cannot be overlooked, even though this agreement was only put in place after the signing of the deeds of sale. What is however not in dispute, and can safely be accepted from the evidence - even if the plaintiffs maintain that they had no personal knowledge that the development was being marketed as a phased development, is that the concept of a phased development and more importantly an arrangement to provide guarantees in lieu of completed services (even if it was a "pretence" as suggested by Mr. de la Harpe), was already known to all the players in the development before the deeds of sale *in casu* were signed.

[140] Attention was drawn by Mr. van der Merwe in his evidence to the letter addressed by him to the Great Kei Municipality dated 23 April 2003 in which the genesis for the phased development agreement appears. Its full contents bears repeating:

> "Sonnekus and Torien cc. are acting as the consulting engineers for the installation of services to this development. Good progress is currently being made on the installation of the bulk services and phase 1 internal services.
>
> The Developer is keen to accelerate the process of transfer of individual erven to purchasers in order to maintain the existing momentum on the sale of these properties. These transfers can however not be registered until such time as the endorsement of the Powers of Attorney which again is dependent on the issue of the Services Clearance Certificate. In order to accelerate this process, the Developer is requesting approval to lodge a guarantee, in an acceptable format, with the municipality to cover the costs of all outstanding items that could effect the endorsement of the Powers of Attorney. The value of the guarantee shall be sufficient to ensure that the outstanding items could be completed by the municipality or other nominated parties should the Developer fail to complete.
>
> This approach has previously been implemented successfully by the Buffalo City Municipality and is becoming very popular with Developers as the process of registration can run concurrently with the installation to ensure an early delivery.
>
> Could you please consider this request and provide us any requirements that you wish to impose should you agree to the principle."

[141] This critical letter self-evidently pre-dates the signing of the deeds in question and sets the tone for the municipality putting down its requirements in the phased development agreement.

[142] It is further consistent with the evidence as a whole that the developer's dealing with the municipality was evolving on a continual basis with each of them giving and taking along the way. This reciprocity was confirmed in the testimony of Messrs. van den Berg and Roberts who explained that the municipality did not have the capacity at the time to provide decent infrastructural services for new developments to plug into and that it was keen to give the developers *in casu* a hand up as it were. This was to be a mutually beneficial arrangement. The developers would be given the space and time to achieve their purposes by developing in phases, and the municipality would be getting something of value in return. In the meantime it would maintain the necessary control through the services agreement.

[143] The special role played by the municipality in this respect, as the ultimate controller of the process, assures me that the phrase "in accordance with (their) requirements" qualifies that they and only they could determine when the event or occurrence suspended by the operation of the suspensive condition had arrived. This fits in with the defendant's case that the developer does what it must, until and when the municipality says it is satisfied that, in respect of the erven in that specific phase, transfer could be effected or not. The unchallenged evidence is that this is also the practice in the industry, namely that the municipality has the final say regarding the standard of infrastructural services and when these are provided to its satisfaction. The fact that the municipality came around to the popular approach of providing guarantees in lieu of actual services, also confirms to my mind the fluidity of the arrangement between the developer and municipality and the manner in which the municipality could control its oversight, rendering what the developer was doing at all stages of the project as time went on, "in accordance with (its) requirements".

[144] The plaintiffs' expert, Ms. Muckle, could not gainsay that such an arrangement, between the developer and municipality for the provision of infrastructural *services inter alia* in a phased incremental manner, and even on the basis of a fictional fulfilment as it were by the giving of guarantees was both legally permissible, and accorded with her experience of what happens in the industry.

[145] Mr. Warren also confirmed in his testimony that, in practice, the moment of the fulfillment of the suspensive condition is when the municipality say it accepts that the provision of services it is met to its satisfaction, subject to the guarantees being put in place to meet the particular exigencies in each instance. This fits in seamlessly with the reason offered by him for including the condition in the deeds, namely that someone, and that being the municipality, had to say when it was satisfied that transfer could be passed, not of a separate standalone property, but of erven in a multi-dimensional and large resort development, the control of which development the municipality was overseeing.

[146] When this background is taken into account, it makes sense that the "provision of services…. in accordance with the municipality's requirements", means that they have the final say and that such provision cannot meet the target unless and until they confirm as much.

[147] The alternate interpretation contended for by the plaintiffs, namely that the services had to be in 100%, appears to me to be strained and divorced from the bigger picture, which is the mutually beneficial arrangement between developer and municipality. The phased development agreement is but only a manifestation

of what they considered their requirements were and how they would oversee the development.

[148] The fact that there is no contractual privity between the plaintiffs and the developing entity in that phased development agreement is further neither here nor there. The municipality was indeed obliged to record the specifics of how services would be provided and what their expectations were, and how they would control the process, in a separate services agreement. The role of the primary developing entity which concluded that agreement with the municipality was aptly explained in the evidence.

[149] In the result I am satisfied that the defendant's interpretation of the phrase "the provision of services … in accordance with the local authority's requirements", means that the actual installation of the services was not required, but that the condition could be fulfilled by way of that phased development agreement between its primary developing entity and the municipality that it would in due course attend to the installation of the infrastructural services in respect of the relevant erven, such undertaking being underwritten by the guarantees to secure it doing so. It follows from this that when the municipality indicated that its requirements were met to its satisfaction in the case of each plot, that this was the defining moment when the agreements in contention became enforceable and transfer could then be effected.

[150] This is the ordinary grammatical meaning of the condition in my view and is the only one which in my view makes business sense in all the circumstances. It is also the only meaning which accords with the stated purpose for the inclusion of the condition in the agreements, namely to earmark when transfer to the purchaser

of an erf could take place. The interpretation also facilely accords with the factual matrix within which the deeds were concluded.

[151] The party relying upon a contract and, if the contract is subject to a suspensive condition, the fulfilment of that suspensive condition bears the onus of proof of both the terms of the contract and the fulfilment of the suspensive condition. In this matter the Plaintiffs claim that the suspensive condition was not fulfilled (even on the interpretation contended for by the defendant) and the Defendant claims that it was. In such circumstances it is trite law that the onus falls on the Defendant, who relies upon the fulfilment of the suspensive condition to prove that fulfilment. That must be so because there is no onus to prove the negative.[26]

[152] Given my finding on the interpretation issue, it can hardly be gainsaid that in the case of these two transfers the condition was fulfilled when the municipality said the services in respect of each erf were provided in accordance with their requirements at the defining moments.

[153] In my view it is entirely irrelevant that it might now appear that the municipality should not have endorsed the powers of attorney for the various reasons contended for by the plaintiffs. The defendant's stance (confirmed by those who testified regarding the municipality's role in the process) is that once it is accepted that their interpretation of what the condition in clause 14.1 means prevails, the suspensive condition was then met by the endorsements by the municipality that the transfers could then be effected, whether right or wrong.

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[26] Resisto Dairy (Pty) Ltd & Auto Protect Insurance Co Ltd 1963(1) SA 632 (A) at 644 G

[154] I am inclined to agree with this assertion. It is the end of the matter insofar as this litigation is concerned, but that does not mean that the owners or the home owner's association are without their rights to vindicate their positions if they feel aggrieved.

[155] Neither can it be suggested, on the basis of my finding on the interpretation issue, that Mr. Warren made a misrepresentation to the plaintiffs when he said that the suspensive condition had been fulfilled. He was entitled to rely on the Municipality's say so in conjunction with all the role players that they were satisfied that the services were provided in accordance with their requirements, which approval was confirmed by endorsing the relevant powers of attorney in each instance. Even the absence of any formal engineer's certificate does not detract from those endorsements.

[156] Finally, it appears to me to be unnecessary to determine the issue of prescription in all the circumstances. Had I found in favour of the plaintiffs on the interpretation issue, however, I daresay that I would have had a problem concluding that neither actual nor constructive knowledge could have been imputed to them in circumstances where the first plaintiff conceded that they were aware that the services were by the dates of the earliest meetings of the owners in 2005/2006 not 100% in. Indeed on his own version the first plaintiff was prepared to accept at the time that certain works even after transfer would be completed "down the line", a concession in itself that the services were not 100% in.

[157] In the premises I issue the following order:

1. The plaintiffs' action is dismissed with costs.

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B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING: 12, 13, 14 & 15 September 2016 and 9 & 10 March 2017

DATE OF JUDGMENT: 22 February 2018

APPEARANCES:

For the plaintiff: Mr. D H de la Harpe instructed by Bax Kaplan Russell Inc, East London (ref. SLN Clarke/sd/MAY11050).

For the defendants: Mr. A D Schoeman instructed by Bate Chubb & Dickson Inc, East London (ref. Mr. Kretzman/P128/Mat12314).