IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 15986/2012

In the matter between:

DANIE PIETER MYBURGH Plaintiff

and

EQUESTRIAN VALLEY (PTY) LTD Defendant

JUDGMENT DELIVERED ON 04 FEBRUARY 2016

RILEY, AJ

[1] In and during the beginning of 2006 the plaintiff became aware through his attorney and friend that plots were available to be purchased in the Hunters Valley Equestrian Residential Estate ('Hunters Valley'). Hunters Valley is situated in the Swartland, fifty kilometres from Cape Town and a mere thirty minutes along the N7

described as an exclusive new equestrian residential estate, comprising of twenty four separate title residential erven of approximately 11,000 sq. m (1 Ha) each. According to a brochure prepared by estate agents, Ridsdale & Associates who were responsible for marketing and the sale of the plots at Hunters Valley, the development is aimed at not only those who ride the hunt or own and wish to stable horses, but anyone who would like to enjoy a country lifestyle with the added benefit of being in an equestrian environment.

[2] The brochure further states that purchasers are to commence building their own '*werf*' and homestead and ancillary buildings within two years of purchase of the property according to the needs and assembly of the purchaser. In addition, the brochure states, *inter alia* that residents at Hunters Valley will have overriding rights in perpetuity over the remainder of the farm in terms of their title deeds, that additional facilities to be provided, would include a new stable block to be built in the near future with stables offered for sale or to rent, livery services will be offered and that the owners of the farm, Rondeberg, have allocated a budget to restore the original homestead and adjoining barn as a restaurant and '*clubhouse*' facility.

[3] On 17 August 2012 plaintiff issued summons against the defendant based on a material breach by the defendant of an essential term of two agreements relating to the sale of portions 18 and 19. Plaintiff avers *inter alia* that:

1. In terms of clause 19 of the sale of agreements, the parties expressly agreed and the defendant warranted that the equestrian facilities proposed

viz stables, dressage, cross-country and show jumping will be developed according to a site development plan;

2. That it was an implied term of the agreements that the equestrian facilities would be installed on a permanent basis within a reasonable time after registration of transfer of the properties into the name of the plaintiff;
3. That clause 19 and the implied term referred to hereinbefore were material terms of the sale agreements and that despite the expiry of a reasonable time and despite demand, defendant has failed to install the equestrian facilities on a permanent basis;
4. That defendant's failure as aforesaid amounted to a breach of the sale agreements and that due to the breach; the plaintiff cancelled the sale agreements and or alternatively cancelled them by issuing the summons.
5. That due to the defendants breach of the contract, plaintiff has suffered damages amounting to R588 440-14 in respect of *inter alia*, transfer costs, bond registration costs, service fees and interest component in respect of the loans made by plaintiff; costs of the cancellation and the levies paid by plaintiff to the Home Owners Association;
6. Plaintiff tenders to transfer the properties back to defendant at the defendants costs against repayment of the purchase price plus interest thereon;
7. In the alternative and should the court find that the plaintiff was not entitled to cancel the sale agreements, plaintiff avers *inter alia* that:

7.1 He is entitled to an order directing the defendant to permanently install the equestrian facilities within a reasonable time after the service of the summons;

7.2 If the defendant has not installed the equestrian facilities within a reasonable time after service of the summons and particulars of claim, the plaintiff will become entitled to cancel the agreements by written notice to the defendant;

7.3 That the reasonable time referred to hereinbefore will have expired within six months of receipt of the summons alternatively within such time as the court may direct.

[4] In its plea defendant avers *inter alia* that –

1. Plaintiff's claim should be dismissed as plaintiff did not commence the building of the dwellings and permissible out-buildings on the properties purchased by him within the two years from the date of registration of transfer namely, 20 August 2009, nor did it complete the building thereof within one year from such commencement;
2. That as a result of plaintiffs' failure to meet the obligations referred to in the preceding paragraph, defendant was not obliged to perform as claimed by plaintiff;
3. Defendant further denies that plaintiff had lawfully cancelled the sale agreements or that plaintiff is entitled to cancel the agreements and that the plaintiffs' purported cancellation of the agreements amounted to a unilateral

repudiation, which repudiation defendant elected not to accept.

[5] In plaintiff's replication he admits that he had not complied with the undertaking to commence building within two years from the date of registration of transfer and that he did not complete the building within one year from the date of commencement of the building works, (clause 16.3), but denies that defendant was entitled to withhold its obligations to develop the equestrian facilities, viz stables, dressage, cross-country and show jumping according to a site development plan (in terms of clause 19), alternatively that he is not obliged to comply with clause 16.3, unless and until the defendant has complied with his obligations as set out in clause 19.

[6] Considering the developments in the trial of this matter, I deem it necessary to mention the following at this stage:

1. On 4 February 2013 plaintiff's attorneys stated *inter alia* in the Rule 37 questionnaire that at that stage there was no intention to amend the pleadings nor did it intend to call expert evidence. It was estimated that the trial was estimated to take three days to complete;
2. On the same day the matter was placed on the continuous roll;
3. On 25 April 2014 the parties were given notice of the Rule 37(8) conference which was set down for 13 May 2014;
4. According to the compliance certificate filed on 13 October 2014 a pre-trial was held before Veldhuizen J on 13 May 2014 and postponed to 26 August 2014 and the matter was marked trial ready;

5. On 15 October 2014 after the final pre-trial, Veldhuizen J found that the matter is trial ready;
6. On 29 October 2014 the matter was set down for hearing on 11 February 2015.
7. The trial commenced on 11 February 2015 on the understanding that the parties were of the view that it would be concluded in two days;
8. During the course of the trial, and after plaintiff had already commenced adducing evidence, I was advised on 16 March 2015 that the plaintiff had consulted an expert who was to testify at the trial. Needless to say, this resulted in the defendant also deciding to call its own expert witness.

[7] I mention these aspects as neither of the parties made any mention of calling expert witnesses before pleadings were closed nor after the matter was declared trial ready and even before the commencement of the trial.

[8] In addition, the plaintiff brought an application to amend its particulars of claim after the trial had already commenced. As will appear later herein the application to amend is opposed by the defendant. I deal with the issue of the amendment sought by the plaintiff later on in this judgment. I pause to mention that whilst I was in the process of considering judgment in this matter, and on 22 January 2016, plaintiff served a further notice in terms of Rule 28 on defendant in which it sought to amend the amount claimed in paragraph 12 and prayer D to its particulars of claim from R588 440-04 to R686 790-75. The purpose of the amendment was to bring the interest accrued to the capital amount claimed by plaintiff up to date as at the time of the judgment. At a meeting held

with counsel for both parties on 1 February 2016, counsel for the defendant advised that defendant would not be objecting to the amendment sought. No doubt these developments and the manner in which the parties conducted the matter resulted in a situation where a trial which was estimated to last for two days was drawn out over a lengthy period of time.

[9] I now turn to deal with plaintiff's application to amend his particulars of claim. On 6 March 2015 and after the trial had commenced the plaintiff delivered a notice of his intention to amend his particulars of claim. The purpose of the amendment was to introduce an alternative cause of action based on repudiation in addition to the existing cause of action based on breach and cancellation.

[10] On 11 March the defendant delivered a notice objecting to the amendment. Defendant complained *inter alia* that the proposed amendment lacked sufficient particularity in that it did not specify what acts by the defendant amounted to the repudiation. In addition defendant complained that plaintiff has failed to state when and how the repudiation was accepted by the plaintiff.

[11] On 12 March plaintiff delivered a notice of motion and affidavit in support of an application for leave to amend his particulars of claim in accordance with the notice in terms of Rule 28(1).

[12] On 16 March 2015 I heard argument on the application for leave to amend and advised the parties that I was inclined to order that the particularity sought by the defendant be provided but I nevertheless prevailed on the parties to attempt to resolve the matter between themselves. The trial was in the interim to continue.

[13] On 19 March 2015 the plaintiff delivered a new notice in terms of Rule 28(1) in which he avers that he had provided the particularity sought by the defendant. Defendant was clearly not in agreement and on 2 April 2015 defendant delivered a notice of objection. The notice of objection was similar to the objection raised to the plaintiff's first notice of intention to amend. In essence, defendant's objection is that the amendment by plaintiff seeks to introduce a cause of action that did not exist at the time the summons was issued.

[14] On a consideration of the notice of intention to amend, the amendment appears to seek to include the assertion that the plaintiff accepted the defendant's repudiation of the agreements on 16 August 2012 by the sending of a letter of cancellation alternatively that '… *the plaintiff hereby accepts the repudiation*'.

[15] Mr Baguley who appeared for the plaintiff submitted that the defendant will not suffer any prejudice should the amendment be granted as the plaintiff's repudiation case rests on exactly the same facts as the breach of contract case and in his view no new evidence would be required.

[16] The general principles applicable to amendments sought during the course of a trial is succinctly summarised at para [34] in **Randa v Radopile Projects CC** 2012 (6) SA 128 (GSJ) and are as follows:

16.1 The court has a discretion whether to grant or refuse an amendment;

16.2 An amendment cannot be granted for the mere asking; some explanation must be offered therefor;

16.3 The applicant must show that *prima facie*, the amendment has something deserving of consideration, i.e. a triable issue;

16.4 The modern tendency lies in favour of the grant of an amendment if such facilitates the proper ventilation of the dispute between the parties;

16.5 The party seeking the amendment must not be *mala fide*;

16.6 The amendment must not '*cause an injustice*' to the other side which cannot be compensated by a cost order;

16.7 The amendment should not be refused simply to punish the applicant for neglect;

16.8 A mere loss of [the opportunity of gaining] time is no reason in itself for refusing the application;

16.9 If the amendment is not sought timeously, some reason must be given for the delay.

[17] It is accepted law that '*a litigant who seeks to add new grounds of relief at the eleventh hour does not claim such an amendment as a matter of right but rather seeks an indulgence*'. See Erasmus, Superior Court Practice (RS 40, 2012 B1 – 183). It is

also clear from the authorities that except in special or exceptional circumstances a summons may not be amended so as to include a cause of action not existing at the time of its issue. See Erasmus *supra* RS45, 2014 p. B1 – 180). It is also so that a plaintiff who relies on repudiation must inter alia allege and prove '*an election by the innocent party to terminate and communication of the election to the guilty party*'. See Amler *supra* 7 ed. at p.340.

[18] It is further accepted law that a failure to plead the *facta probanda* for a cause of action will generally render a pleading excipiable; particularly in circumstances where a defendant is not allowed sufficient time to obtain further particularity, and will generally not be allowed. In **Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another** 1967 (3) SA 632 (D), Caney J held that a party '… cannot … save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable (Cross v Ferreira, *supra* at p. 450), or deliberately refrain until a late stage from bringing forward his amendment with the purpose of catching B his opponent unawares (Florence Soap and Chemical Works (Pty) Ltd v Ozen Wholesalers (Pty) Ltd 1954 (3) SA 945 (T)) or of obtaining a tactical advantage or of avoiding a special order as to costs (Middleton v Carr, 1949 (2) SA 374 (AD) at p. 386)."

[19] I accept that delay, on its own, is generally not a bar to an amendment. The plaintiff has however provided no reasonable explanation why this new cause of action was not originally pleaded when action was instituted nor has the plaintiff explained why

the amendment was not sought before the close of pleadings. The plaintiff in fact brought the application for the amendment a week before the continuation of the trial which was postponed on 12 February 2015. In my view the plaintiff must at the least have been aware of the need for the amendment since at least 11 February 2015 when his evidence was led. It is necessary to note in this regard that in paragraph 6.2 of his founding affidavit the plaintiff states that the evidence regarding his acceptance of the defendant's alleged repudiation can be discerned from the evidence already led.

[20] On a consideration of the issues in dispute between the parties in this matter, I am satisfied that the amendment which plaintiff seeks will introduce a new cause of action which did not exist at the time of the issue of summons. Plaintiff has not made any effort to identify and/or to present to the court special or exceptional circumstances upon which it relies to persuade the court to exercise its discretion in his favour. Plaintiff has as much conceded that the amendment will be refused if he seeks to introduce a cause of action which has prescribed. On a consideration of the facts, I am satisfied that the defendant will be prejudiced should the amendment be allowed as defendant will find itself in a position where it does not know what case it is required to meet and will only hear in argument for the first time what defendants alleged repudiation is, when it occurred, and when it was allegedly accepted. In my view the effect of the amendment will further result in a situation where the defendant will have been caught '*unawares*' and will create situation where the plaintiff will obtain a tactical advantage over the defendant which will result in defendant being prejudiced. On the whole and guided by the authorities hereinbefore referred to I am not prepared to exercise my

discretion in favour of granting the amendment as sought. The application accordingly falls to be dismissed.

[21] It is common cause that on 25 May 2006 plaintiff purchased portions 18 and 19 from the defendant and purchased a third plot from a third party during February 2007. The material terms of the sale agreements in relation to portions 18 and 19 are not in dispute and can be summarised as follows:

1. The defendant would give transfer of the portions (‘*plots*’) to the plaintiff which would entail attending to the sub-division of the plots which in turn would require compliance with the statutory compliance of the requirements as set out by the relevant local and or government authorities;
2. Defendant would ensure that all the infrastructural services were installed;
3. A Home Owners Association would be established;
4. Plaintiff and his successors in title were granted a perpetual right for equestrian purposes over the Rondeberg Farm;
5. The plaintiff would pay the full purchase price on transfer of the portions in his name;
6. Plaintiff would complete building in accordance with the prescribed architectural guidelines by no later than two years after transfer of the portions in his name.
7. The plaintiff would become a member of the Home Owners Association and would pay the concomitant levies due in this regard.

[22] In respect of portion 19, two special conditions were included in writing in the agreement which are that '…*the equestrian facilities proposed, viz stables, dressage, cross-country and show jumping arena will be developed according to the site development plan*'. In the other sale agreement plaintiff was afforded the right to purchase additional plots in any second residential phase of Hunters Valley. Plaintiff took transfer of portions 18 and 19 on 20 August 2009. It is not in dispute that the delay in having the plots transferred and registered into defendants name was *inter alia* as a result of difficulties encountered from the government and/or local authorities in obtaining approvals or compliance with their requirements.

[23] In my view the crucial issues to be determined is whether or not the plaintiff was entitled to cancel the sale agreements referred to hereinbefore and in particular whether the defendant had breached the agreement by failing to perform, which would include whether or not the obligation to provide the equestrian facilities was due, whether or not defendant had been placed in *mora*, whether or not the plaintiff had the right to cancel the agreements and whether plaintiff had given proper notice.

[24] Plaintiff testified at the trial and called Katherine Anne Mary Stofberg, Paulene Anne Doo and Wayne David Thurgood to testify in support of his case. The defendant called Frederick David Bryant ("Bryant"), Carol Claassen, Dr Cordeux Vere Hubert Allen ("Dr Vere Allin"), Danielle Pienaar and Dr Willem Sternberg Pretorius ("Pretorius") to testify on its behalf. I mention at the outset that I do not intend to repeat the whole of

the evidence of the respective witnesses and shall refer to the evidence of the witnesses in so far as I deem it necessary to determine the issues.

[25] It is necessary to point out at this stage that the constitution of Hunters Valley Equestrian Centre and Residential Estate provide that the home owners are required to form an association known as the Hunters Valley Homeowners Association ("HVHOA"), which has an object to regulate and control all aspects of the development, the buildings and structures erected or to be erected on the units, the maintenance thereof and the promotion, advancement and protection of the communal and group interest of the members generally upon the terms and conditions as set out in the constitution.

[26] In terms of clause 6 of the constitution the trustee committee shall from time to time make levies upon the members for the purpose of meeting the expenses which the association may incur in obligations under the constitution. Clause 6.2 provides *inter alia* that the committee shall estimate the amount which shall be required by the HVHOA to meet its expenses during each year together with such estimated deficiency, if any, as shall result from the preceding year and shall make a levy upon the members equal as nearly as is reasonably practical to such estimated amount. In terms of clause 6.2 such levy shall be made payable by equal monthly instalments due in advance on the first day of each and every succeeding month of such year.

[27] Section 6.3 provides that any amount due by a member by way of a levy shall be due by him to the association.

[28] Clause 11.1 of the constitution provides that in the event of any member and the trustee committee of the HVHOA being unable to resolve a difference or dispute amicably; such member or trustee committee shall be entitled to request in writing that an attempt be made to resolve the difference by way of mediation. The mediator shall be the nominee of the President for the time being of the Law Society of the Cape of Good Hope.

[29] Clause 12 of the constitution provides inter alia that any dispute, question or difference arising at any time between a member and the trust committee out of or in regard to:

> '12.1 ….
>
> 12.1 the regulations made by the trustee committee; or
>
> 12.2 a difference or dispute which could not be settled by way of mediation; shall be submitted to Arbitration by an Arbitrator appointed by the President for the time being of the Law Society of the Cape of Good Hope.'

[30] Notwithstanding the aforesaid provisions it is common cause that at no stage after the registration and transfer of portions 18 and 19 into plaintiff's name, did plaintiff at any time request that any of the disputes that he may have had with the defendant or the HVHOA be referred to either mediation or arbitration.

[31] Considering the issues involved, I deem it necessary to highlight certain facts and/or events as they occurred chronologically after plaintiff signed the offer to purchase and the registration and transfer of portions 18 and 19 into his name.

[32] On 7 February 2007 Carol Claassen, the representative of the estate agents, Ridsdale & Associates, forwarded to the plaintiff an answer to an email, in which plaintiff asks '*what still needs to be done before transfer*?' The response thereto was prepared by Bryant a representative of the defendant and also a trustee of the HVHOA. In his response Bryant states *inter alia* that '… *we are required to have the perimeter fenced before the final10% of the properties are transferred, however we will commission this during March*.' In the same email in regard to the question regarding '*Main Farm House Restoration, Stables and Clubhouse – when is that all happening – before or how long after transfer. When is it expected to be finished*?' Bryant responded as follows:

> *'Again both these fall within the 10% ruling (Main House and Stables that is). I am not aware of any plans to build a clubhouse. A firm of architects, (Rennie Scurr Adendorf) who are experts in the restoration of old buildings around the Cape have been commissioned to do a study and to revert with recommendations …. This report is imminent, however, we don't anticipate commencing with these activities until the first tranch (potentially 21 properties) have been transferred …*'

[33] On 10 August 2007 Alida Ridsdale of Ridsdale & Associates addressed an email to plaintiff regarding the status and progress of the Rondeberg sewage treatment

works together with a copy of the minutes of the meeting of the Hunters Valley Shareholders and professionals.

[34] On 2 August 2007 a meeting of the Hunters Valley Shareholders took place to establish the position regarding the sewerage system at Rondeberg and to decide on actions and responsibilities in order to gain the required approvals or compliance with the relevant local and other government authorities. On 10 August 2007 the plaintiff was sent a copy of the minutes of this meeting via email.

[35] On 22 October 2007 the plaintiff emailed Bryant and wanted '*any indication when transfer is suspected* (sic) *going to take place*?'

[36] On the same day Bryant responded by email and advised that '*we have been pushing very hard over the past two months or so; and have a further engineer who has a good relationship with DWAF to see the approval through. We have made significant progress in this period and I wish I could give you a firm date. However what is clear is that personalities and egos are involved and we are being made to pay for it! We are hoping to get this through before year end*'.

[37] On 15 May 2008 Sanette Van Vuuren ("Van Vuuren") of the transferring attorneys, Bornman and Hayward emailed plaintiff and advised him that the transfer documents were ready for signature. On the same day plaintiff responded by stating

that he was in the middle of nowhere and that he would go to Louis Trichardt to sign off the documents at a representative whom he had selected.

[38] In a further email from plaintiff to Van Vuuren on the same date, he draws her attention to the fact that he has a clause in two of the three contracts that states that the developer must show the intent of developing the project as the marketing has pictured it. Plaintiff wanted to know whether this had been attended to.

[39] On 21 August 2009 plaintiff was informed by Van Vuuren in writing that the registration in respect of portion 19 had taken place. On 3 September 2009 Van Vuuren emailed plaintiff proof that registration and transfer had taken place on 20 August 2009 in respect of portion 18.

[40] On 2 October 2009 an email was sent by Bryant to plaintiff and the other property owners at Hunters Valley inviting them to the inaugural meeting of the HVHOA to be held on 14 October 2009.

[41] On the agenda for discussion is *inter alia* the constitution of the HVHOA and the completion of the remaining development items. It is common cause that plaintiff did not respond to this email nor did he attend the meeting. According to plaintiff he was working in Botswana at the time and he only had intermittent access to email, once or twice a month.

[42] On 6 October 2009 Bryant sent plaintiff an email to which was attached the constitution of the HVHOA as well as the servitudes registered over the farm. In this email plaintiff was advised that the constitution of the HVHOA sets out the details and responsibilities of the HVHOA and the appointment of trustees and other individuals. Plaintiff did not respond to this email.

[43] On 14 October 2009 the inaugural meeting of the HVHOA took place. As appears from the minutes of this meeting, which is not disputed, Bryant '*updated the meeting on progress and outstanding items at site, as well as the sales and registration of the properties*'. According to his report, thirteen properties had been registered at that date, five of which went to the original developers. '… *A further four properties requiring confirmation from the purchasers. There are therefore four unsold properties which have been handed back to Ridsdale and Associates for sale*'. At the meeting there was also discussion in relation to the completion of remaining development items which was addressed by one of the representatives of the defendant. It is common cause that plaintiff did not attend this meeting nor did he send a representative. Plaintiff further did not request that any of the issues which are the subject matter of the dispute in this matter, be tabled for discussion.

[44] On 2 December 2009 Bryant sent an email to plaintiff enclosing the minutes of the HVHOA meeting of 14 October 2009. Plaintiff did not respond to this email.

[45] On 30 March 2010 Bryant addressed an email to plaintiff and the other members of the HVHOA giving notice of the Annual General Meeting ("AGM") of the HVHOA which was to be held on 20 April 2010. The agenda, which was included in the notice, included items such as property sales, barn house and stabling requirements in new barn. Members were invited to forward to Bryant any issue that they would like included and or added to the agenda. The plaintiff did not provide any comment nor did he request that any issue be included or added to the agenda.

[46] At the AGM of the HVHOA on 20 April 2010 the minutes reflect that the following issues *inter alia* were discussed:

> '*9. Horse barn, Karin Watling had brochures from Rolf Knittel to investigate. There was no indication who required stables. A circular to go out to all owners requesting this info. (D Bryant)*
>
> *10. Dressage area. Karin suggested that Kobus Conradie could advise. Vere Allin mentioned what other local residents are doing …*'

[47] It is common cause that plaintiff did not attend this meeting. According to him, he was out of the country at the time. On 28 April 2010 an email was sent to plaintiff enclosing the minutes of the meeting of 20 April 2010. He did not respond to this email.

[48] On the evidence it is clear that the plaintiff had raised no objection with the defendant or the HVHOA in regard to the issues in dispute in the present matter. When he testified, plaintiff explained that his failure to do anything up until this stage was due

to the fact that he was involved in a big project in Botswana and thereafter in the Congo which kept him busy. He also testified that considering the area and the harsh conditions that he worked under, he was not always in a position to respond to emails. I must immediately point out that I am not persuaded by the explanations given by plaintiff in this regard. Even though he may not have always been in a position to respond to emails immediately, it was not completely impossible for him to do so. There was also no reason why he could not have briefed his wife and/or his friend and attorney of record, to deal with these issues in his absence considering how close these issues were to his heart.

[49] On 5 October 2010 the plaintiff addressed an email to Bryant in which he simply states: '*No more levies will be paid by me until the development of this project are being completed as promised and special clauses in the contract that states that developers must develop the equestrian centre, dressage are met. My trust in the developers for doing what they said has come to a grounding halt*. *Seeing that I invested into 10% of this initiative my concern is that I have been taken for a ride second to none. I have paid R3000.00 every month on levies for one full year. What do I have to show for it … three stands with a tar road … no development in improving the barn facilities etc. I will not commit one cent more to the project until I see this concept development and completed to what was provided*'.

[50] On 6 October 2015 Bryant acknowledged receipt of plaintiff's email and undertook to forward plaintiff's email to the directors of defendant and thereafter revert to him.

[51] On 21 December 2010 Bryant responded to the plaintiff and advised that the directors had discussed his (i.e. plaintiff's position) and that they felt that they should meet with him to hear what his concerns may be. Bryant advised plaintiff that the defendant's directors would still like to arrange the meeting early in the New Year.

[52] It is not in dispute that plaintiff did not take up the offer of the meeting with the defendant's directors. What is important is that in the same email, Pretorius responds to plaintiff's concerns as follows:

> '*The intent of the developer to provide equestrian facilities i.e. stables, dressage and show jumping arenas, eventing courses and outride areas on completion of the project remains.*
>
> *[Point 1]. It may be pointed out that a temporary stabling facility is in operation and running smoothly (there is, in fact, a waiting list to get in). In addition, the existing facilities, namely eventing course and extensive outride areas are being used enthusiastically and successfully, as demonstrated by recent 3 phase event and Hunter trials. Endurance riders, of which some are national riders who regularly compete in World Championships, are also utilising the outride areas for training, and regard it as the best in the country. As the owner of two properties, I certainly share Mr Myburgh's disappointment in the rate of progress to completion of the project. The economic downturn, and difficulties encountered with state departments were, however beyond the control of the developers; and my opinion is that they performed better than could be*

expected in the circumstances. The speculative purchase of properties with its attendant risks is of course entirely the choice of the purchaser.

I am in no position to comment on the alleged misrepresentations by the selling agent as I was not present at their discussions. As for the non-payment of levies to the HOA are concerned, this is a matter for the trustees to manage according to the constitution of which Mr Myburgh has a copy, and undertook to abide by …' (my emphasis)

[53] It appears that even though the idea was that defendant's directors would contact plaintiff early in the New Year to set up an appointment to discuss the plaintiffs concerns, this did not happen. Plaintiff himself did not call for a meeting with defendant's directors.

[54] On 17 April 2011 and seemingly in response to the email from Bryant (and the comments of Pretorius), plaintiff addressed an email to Bryant in which he asked him to ask Pretorius to explain how his investment of his three plots are protected and how '*Point 1 is going to be achieved seeing the company Hunters Valley doing the investment, has apparently being deregistered by Cipro*'.

[55] On 18 April 2011 plaintiff addressed a further email to Bryant which was also forwarded to Pretorius, Dr Vere Allin and Gavin Watson of the defendant. In this email plaintiff states *inter alia* that '*Bottom line a (sic) invested nearly two million rand in these three plots, and I need to know how the developers is going to give me reassurance on the re-sell value of this investment*'. What is abundantly clear from the tenor of the

plaintiff's later emails is that since he believed that he had invested heavily in Hunters Valley Equestrian Residential Estate, that he wanted the defendant to provide him with guarantees and/or as he put it, reassurance on the '*re-sell value of this investment*'. What is telling that plaintiff does not request to meet with the defendant and/or its representatives to discuss his concerns.

[56] Plaintiff testified that at the beginning of 2012 he engaged the services of a Pretoria law firm Markram for advice. What is clear is that although he allegedly instructed Markram to '*get hold of the site development plan*' that Markram did not do anything, nor did plaintiff follow up and or pursue the issue through them in any way.

[57] On 25 April 2012 the AGM of the HVHOA took place. Plaintiff did not attend this meeting. His excuse for not attending the meeting is that he was not in Cape Town. It is necessary to note that plaintiff did not request that any of the issues raised by him in his correspondence to defendant at that time, be placed on the agenda. According to the emails which were sent to the plaintiff, issues discussed, related *inter alia,* to the fact that the Cape Hunt and Polo Club ('CHPC') had been dissolved and that the jumps, stands and other equipment would be moved to the farm and that from '*the kitty*' of the disbanding/liquidation of the CHPC, those funds would be used to build a dressage arena. This was subject to finalisation. The budget of the HVHOA was tabled and it was agreed that the levy was to remain increased to R1 150-00 (15%), and that water charges would be levied with immediate effect. It was recorded that the HVHOA had the right to increase the levies by a factor of three if no buildings have been built after a

two year period. It was further agreed that as the economic downturn was responsible for the lack of houses, that the increased levy would be inappropriate and that the position would be reviewed annually.

[58] It is necessary to note that even though the installation and/or building of a dressage area and issues relating to rates featured in the discussions and from the minutes, plaintiff did not deem it necessary or important to address these issues with defendant or the HVHOA in correspondence. This is important, particularly, since the minutes indicate that the dressage arena issue is noted as being subject to finalisation and that Dr Vere Allin of the defendant was seized with the issue.

[59] On 5 November 2010 Bryant sent plaintiff the HVHOA's November levy. Plaintiff responded on that same day by stating that he '*will start paying my levies once again when and if the developers start developing the promised end product as marketed to me*'.

[60] On 16 August 2012 plaintiffs' attorney of record wrote to the defendant and stated *inter alia* that:

> '1. *Our client purchased Portions 18 and 19 (a portion of portion 5) of the Farm [R……], [Number 1……..] in the Division Cape Town, in the City of Cape Town from the company on 25 May 2006;*

2. *In terms of clause 19 of the sale agreement it was agreed that the company warrants an acceptance of the agreements that equestrian facilities will be developed according to the site development plan; and*
3. *Notwithstanding the expiry of reasonable time and our clients demand the equestrian facilities have not been developed, which amounts to a breach of the sale agreements;*

   It is further our instructions to inform you that due to the aforesaid breach our client hereby cancels the sale agreements and reserves his rights to claim damages arising from the breach of agreements'.

[61] It is common cause that the sale agreements do not stipulate a time for performance of the obligation to develop the equestrian facilities. Although clause 19(1) of the agreements provides that '*the seller warrants on acceptance of this agreement that the equestrian facilities proposed, viz stables, dressage, cross-country and show jumping area will be developed according to a site Development Plan*' no evidence whatsoever was presented by the plaintiff at the trial about what the Site Development Plan referred to in Clause 19(1) entailed nor was it presented to the court.

[62] Mr Baguley submitted that in the absence of a definite time specified for performance of the defendant's obligations that this court is constrained to find that it was an implied term of the agreement that the development of the equestrian facilities was to take place within a reasonable time from the date of transfer of the properties to the plaintiff. He further submitted that the word '*developed*' in Clause 19(1) can permit

of no other meaning than that the facilities were to be developed permanently and that to the extent that the parties did not expressly agree that the facilities would be permanent, it was plainly a tacit term of the agreement that it would be permanent.

[63] He however conceded that the plaintiff was required to prove a material breach of an essential term of the agreement, which he accepted had to go to the root of the contract i.e. a breach which is fundamental, vital or essential. He submitted that the development of the equestrian facilities goes to the root of a contract for the sale of properties in an intended equestrian estate. He contended that without them, there are just parcels of land, attractive to no one. According to him the lapse of three years between the date of transfer i.e. 20 August 2009, and the alleged date of cancellation i.e. 16 August 2012 is a reasonable time within which to have developed the equestrian facilities.

[64] He submitted that the defendant has admitted that it did not develop the equestrian facilities in accordance with Clause 19 and that at the time of the purported cancellation of the agreements on 16 August 2012, the defendant had exhibited an intention not to perform all of the obligations in the agreements according to their true tenor and consequently the plaintiff was therefore justified in thinking that the performance in terms of Clause 19(1) will not be forthcoming.

[65] Mr Baguley contended that the word '*developed*' in Clause 19(1), suggested that something will be '*built*'. He placed strong reliance on the advertising brochure

which was given to prospective purchasers which refers to the estate as '*exclusive*' that a new stable block would be built, that the original homestead would be restored and that the adjoining barn would be converted to a restaurant and clubhouse. He further placed reliance on an article which appeared in Business Day in 2004 about the estate in which Dr Vere Allin is allegedly quoted as saying '*our aim is to offer a world class equestrian facility, including arenas for show jumping, dressage and enough space for cross country events*'. Because of this he contended that the defendant has materially breached the agreement and has repudiated them. He submitted that the plaintiff ought to be put into the same position as he would have occupied had the contracts not been entered into (i.e. so-called negative interest or reliance interest).

[66] On a consideration of the evidence as a whole I am satisfied that the majority of the witnesses confirmed that the biggest attraction and the major advantage of the Hunters Valley Equestrian Estate are the overriding rights and concomitant riding trails. In this regard Bryant testified that people buy in the estate to get out of the city, and from a horse riding perspective, to have a facility where they can exercise their horses safely and the fact that they may use the over 550 hectares farm. A further major attraction, which is also pointed out in the marketing brochure, and was highlighted in the evidence, is the huge focus on the hunt. On the evidence, hunter's trials are held annually on the estate and the existing cross-country track is used for this event. There are between three to five '*hunts*' held annually which are well attended. I am satisfied on the evidence presented that what has been described as '*the material equestrian facilities*' on the estate were those that have an affiliation to '*the hunt'*. Claasen testified that this quality of the estate was pointed out to the plaintiff when she marketed the

development to him and he understood this to be so. Claasen testified that it was not specifically anticipated that a dressage arena and a show jumping arena would be built on the estate. She testified that it was seen as part of an '*equestrian development adding onto what is existing there … it was – you know, it was of the mention but not the foremost equestrian event'.*

[67] Although reference is made to, and reliance is placed by plaintiff on the article in a Business Day newspaper of 3 September 2004, plaintiff conceded during cross-examination that what was contained in the article was not promised to him. He further conceded that what is contained in the article is not contained in the agreement and that nowhere in the agreements is reference made to the facilities being permanent. I am satisfied that the article in any event only came to the plaintiff's knowledge, and/or was obtained in January 2015, in preparation of the trial. On a consideration of the pleadings, I am satisfied that no reference is made to this Business Day newspaper article and more importantly there is also no reference to what is contained in the article, if compared with what is contained in the sale agreements.

[68] It is also instructive that no reference whatsoever is made to the article or its contents in any of the correspondence addressed by the plaintiff to the defendant, except that reference is made to the '*Marketing brochure*'. With regard to the reference or reliance by plaintiff, on '*a world class equestrian facility*' as referred to in the newspaper article, it is necessary to point out that no reference is made to such facilities

in plaintiff's particulars of claim. At most reference is made to proposed '*permanent*' equestrian facilities.

[69] On a consideration of the evidence it is clear that the defendant's witnesses, Bryant and Dr Vere Allin had not seen the article prior to these proceedings. In respect of the alleged references in the article that "*Our ultimate aim is to offer a world class equestrian facility including arenas for show jumping, dressage and enough space for cross-country events … [and] that additional stables are being built*', Dr Vere Allin testified that there are existing stables on the farm and that stables are not being built. He testified that he did not remember saying what was contained in the article but that it was certainly his *'… dream to have a facility or equestrian facilities that will be, as good as any in South Africa*'.

[70] I am satisfied on the evidence that Dr Vere Allin and Bryant drew clear distinctions between the '*upmarket*' residential estate (as referred to in the brochure) and the equestrian facilities available on the estate, which was clearly, predominantly aimed at - '*the hunt*'. Bryant was prepared to concede that if one was '*talking about an upmarket equestrian estate where show jumping and dressage - you are trying to attract the show jumpers and dressage, then it is not adequate, …*'

[71] When it was put to Dr Vere Allin in cross-examination, with reference to the photographs of the show jumping arena, that given the nature of the development; its quality, its world class character, its upmarket feel, approach '… *that what you see in*

this picture is not what you would expect from a development like … for a show jumping arena', he was of the view that the upmarket development refers to Hunters Valley with twenty-four plots on it, the riding trails and the cross-country course, which is something that few equestrian estates actually have. He did not exclude the possibility that three phase eventing, i.e. including dressage and show jumping could be achieved on the estate.

[72] It is not unreasonable to conclude that the introduction by plaintiff of the obligation on the part of the defendant to develop a '*world class*' and/or '*upmarket*' equestrian facilities is an opportunistic afterthought, after consideration of the article in the Business Day newspaper in preparation of the proceedings. Accordingly, I am not prepared to place any reliance on the content of the Business Day article in determining the contractual obligations of the parties and more particularly, in so far as reliance is placed thereon to make a determination on the quality of the equestrian facilities which defendant is required to provide in terms of clause 19 of the sale agreements.

[73] I am satisfied that neither Bryant nor Dr Vere Allin had any contact with the plaintiff prior to the conclusion of the sale agreement and that they did not make any promises to him before he signed the agreements with regard to the proposed equestrian facilities and in particular in respect of the quality of the proposed facilities.

[74] On the evidence presented at the trial, I am further satisfied that the following facilities and improvements were in existence at the time when the plaintiff purported to cancel the agreement and/or issued summons:

1. the extensive out-riding trails for the purposes of the Hunt, trail and endurance riding (the rights which have been secured, in perpetuity, by the members of Hunter's Valley over the 500ha farm known as Rondeberg);
2. the existing stables;
3. the development of a cross-country course (during 2008 or 2009); and, less significantly;
4. the levelling of veld/farmland (with a grader) for an arena which was done in 2010;
5. the planting of beef-wood trees to demarcate the arenas;
6. the obtaining of equipment for use in dressage and show jumping (some from the Cape Hunt and Polo Club which was dissolved prior to 25 April 2012 and that the equipment was moved to the Rondeberg farm).

[75] I do not deem it necessary for the purposes of this judgment to repeat the whole of the evidence of the expert witnesses who testified at the trial. I shall refer to certain aspects of their evidence to the extent that they may be relevant. According to the evidence of Danielle Pienaar ("Pienaar"), defendant's expert witness, the show jumping and dressage facilities which she inspected at Hunters Valley are arenas that she would rate as 2.5 stars out of 5 on her personal rating system that she had developed over the years. She considered them safe and suitable for low level training. The plaintiff's expert, Thurgood, agreed that the arenas was suitable for low level training (i.e. dressage and jumps of up to 1 metre). He further conceded that he did not attend the site and inspect it, and that he expressed his opinion based on the photographs that

were used at the trial. According to him "the arenas concerned did not qualify as arenas and he described them as '*… nothing more than jumps in an open veld … the ground is uneven … there are … dips, molehills and rocks … [which] will cause a horse to break a leg …*' Pienaar, who had inspected the arenas differed from him in this regard and was adamant when cross-examined that the arenas concerned, qualified as arenas for low level training. She also did not regard the arenas as dangerous for horses in the event of low level training. According to Thurgood's expert report the arenas could be installed at a '*modest cost*' '*possibly*' two hundred and fifty thousand rand (R250 000-00). When cross-examined, he however testified that it could be built at a cost of R50 000-00. Even though the experts differed about whether or not the areas concerned were arenas or not they agreed that the show jumping and dressage arenas provided, allowed for low level training of horses in those disciplines. What is further clear from their evidence is that the building of show jumping and dressage facilities would depend on the client's specific needs and requirements.

[76] On the whole the evidence presented by the defendant, which was not disputed by the plaintiff in a meaningful way, shows that the stables were in place and in use, that arenas have been developed (albeit for low level training); are available and are being used by a number of persons including home owners and visitors of Hunters Valley. On the evidence there has been no request for additional stables and although the plaintiff was at liberty to put in a request for stables he did not do so when invited. What is clear is that the defendants have always considered the arenas to be a work in progress. In his evidence Bryant accepted that defendant was obliged to provide the

facilities in terms of Clause 19 but testified that he was not sure what facilities plaintiff had in mind when he requested them. According to Bryant's evidence the members were using the existing facilities and there was no general unhappiness with the level of the facilities and specifically not the outriding facilities. What is clear is that the plaintiff and the defendant had completely different visions or dreams about what the development of the equestrian facilities at Hunters Valley entailed.

[77] In respect of when the facilities would be developed, the plaintiff testified that he always asked when they (i.e. defendant) would do it. According to him Bryant always said that they were busy putting in facilities regarding the residential services and once that is completed they will go over '*and finish the project as marked*'. In this regard it is the defendant's case, that although not contained in the agreements, that it was understood and accepted by the parties that it is obliged to '*complete*' the development of the stables and arenas (i.e. for show jumping and dressage purposes), once the first tranche (i.e. 90%, or 21 of the 24 plots) have been sold and transferred. This has been commonly referred to as the so-called 10% rule. In this regard Bryant testified that in his estimation there was no specific date attached to the 10% ruling, but that it was envisaged that once 90% of transfers of properties had been taken, funding would be available and the defendant would then proceed with the '*outstanding facilities*' such as the dressage and show jumping facilities. The overwhelming evidence supports the defendant's version that all the home owners were aware of this and accepted this. This is borne out by the contents of the email correspondence between the representatives of the defendant and the plaintiff. In this regard reference is made *inter*

alia, to the email sent by Bryant to plaintiff on 7 February 2007 on the day the latter purchased his third property; and the email by Pretorius dated 20 December 2010 where he clearly states that the intent of the developer to provide the equestrian facilities '*i.e. stables, dressage and show jumping arena … On completion of the project remains!*'

[78] Pretorius also testified that once the 22nd property was registered that the defendant would be obliged to have these facilities in place. The plaintiff confirmed that he was aware of the 10% rule, but surprisingly, and notwithstanding Bryant's emails, testified that to his understanding it did not apply to the development of the stables or other equestrian facilities. I am satisfied that the overwhelming probabilities favour the defendant's version on the issue of when the facilities would be developed and/or completed. I agree with Mr Cooper that in the absence of a fixed date in the agreements for the completion of the 'equestrian facilities', that it made commercial sense, considering the particular circumstances of this case, that the logical date or time for the completion of the proposed equestrian facilities would be no later than when defendants had sold and transferred 90% of the sub-divided properties on the estate. On the evidence this would be the time when the development would be virtually fully occupied and the defendant would also be in a financial position to complete these facilities. It is necessary to point out that the plaintiff has presented no evidence regarding what in his view would be considered a reasonable time. Plaintiff's version that the obligation contained in the contract had to be fulfilled by May 2008 is highly unlikely, improbable and falls to be rejected.

[79] The plaintiff has conceded that he did not give prior notice to the defendant of his intention to cancel the agreements. He testified that he had approached attorneys Markram to assist him with the problems he was experiencing with defendant. According to him he was not informed by Markram that he was required to give defendant prior notice of his intention to cancel. If the plaintiff's version is to be believed, it is difficult to accept that even though he did consult the attorneys, that he did not instruct them to cancel the agreement and/or at least request them to give notice to the defendant to fulfil its obligations in terms of the agreement. His version that they did not inform him what was required to be done is unlikely and does not make sense. He further does not explain why he failed to follow up the issue with them after the initial instruction and/or what he did thereafter.

[80] On consideration of the emails sent by plaintiff to the conveyancing attorneys dated 19 May 2008; and the emails to Mr Bryant dated 5 October, 5 November 2010 in which he states that he will not be paying his levies to the Hunters Valley Home Owners Association, and April 2011, I am satisfied that they do not contain a demand for performance by defendant by a fixed date. The emails further make no mention of an intention to cancel the agreements. On the contrary they rather show intent to remain bound by the sale agreements. Indications and/or conduct that illustrate that plaintiff could not have considered the defendant's alleged non-compliance with the sale agreements as material and that he had by his conduct elected to abide by them, is evidenced by the following:

1. His failure to respond at all to any of the notices and minutes to meetings particularly where those minutes or meetings related specifically to the issues which now form the subject matter of this dispute;
2. His failure to attend meetings and particularly those where the proposed equestrian facilities were on the agenda and were discussed;
3. The fact that Claasen testified that plaintiff had spoken to her about his friend and attorney of record, Langley, who had at one point invested in the development but had cancelled his purchase at Hunters Valley. According to her plaintiff had told her that '*the idea was that he was hanging in on the project and wanting to eventually sell … two of his units to build on the third one*';
4. Plaintiff could, or did not previously consider the defendants alleged conduct to be a repudiation of the contract, as this claim was only introduced belatedly in March 2015 after the trial had already commenced;
5. Even though plaintiff avers that the defendant was obliged to perform by May 2008, he notwithstanding this, took transfer of all three properties on 20 August 2009 well knowing that the obligations contained in Clause 19 had not been complied with;
6. On being questioned by the court about why he did not ask that the issues which are now in dispute were not included on the agenda and in particular the development of the site and the equestrian facilities he testified that '… *I can't tell you that I was unhappy so yes I have to assume that how they put it out in these emails is still the way that I saw the project; that the first year after*

transfer … …I didn't feel that I should query it and that I had no reason to query it at that stage'.

7. The plaintiff paid his levies from the date of transfer until approximately October 2010 at which time he stated that he would no longer be paying levies. The plaintiff does however not put the defendant to terms in the sense of demanding performance by a particular date. Nor does he mention an intention to cancel the agreements in his email of 5 October 2010.
8. In his emails of 17 and 18 April 2011 he once again does not put the defendant to terms nor does he mention an intention to cancel but rather requires the defendant to give him an assurance in regard, to as he put it, the '*re-sell value*' of his investment;
9. The plaintiff concedes that he received the notice to attend a meeting held on 25 April 2012. It is common cause that, as in the case of other meetings, the issues which were addressed related to the progress on the estate. Plaintiff did however not respond to these emails/notice, nor did he in the alternative arrange for his wife and/or his attorney to attend the meetings or arrange for his attorney to address correspondence to the defendant with regard to his complaints.

[81] The authorities are clear that placing a party in *mora* by way of a valid demand and subsequent breach is not sufficient to entitle an innocent party to cancel the contract. Something more is required i.e. the failure to perform must be material and this is the case when '*time is of the essence*'. (i.e. where the plaintiff has given the

defendant notice of his intention to cancel the agreement should he not perform by a fixed date which is reasonable). In **Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd** 2005 (3) SA 54(W) at para 16, the court held that '*Mora in our law simply means breach. When it comes to breach of a clause which provides that a party "shall" do something by a specified time, failure to do so would put the party in mora ex re. No prior demand or interpellation is required. The general rule is that breach of contract through failure to perform timeously gives the injure party no more than a claim for damages or for specific performance or both. By itself the mere failure to perform timeously does not bestow a right of cancellation upon the injured party. The injured party is entitled to resile; as opposed to claiming damages or specific performance, only when, in addition to the mora or breach of a material term, time is of essence for the performance of that term. The reason for this is apparent. It is only when time is of the essence that such a breach goes to the root of the contract*.'

[82] In **Mackay v Naylor** 1917 TPD 533 at 537 the court held that '*the general rule of law is that obligations for the performance of which no definite time is specified are enforceable forthwith, but the rule is subject to the qualification that performance cannot be demanded unreasonably so as to defeat the objects of the contract or allow an insufficient time for compliance*'. This principle is sometimes stated as follows, '*where no time for performance is given, the obligation must be performed within a reasonable time*'. It is clear from the authorities that where no time has been set for performance, as in the present matter, the party claiming cancellation is required among other things to place the other party in *mora* by making demand for performance. See **Breitenbacht**

v Van Wijk 1923 AD 541 at 549. Trengrove JA summarised the principle as follows in **Ver Elst v Sabena Belgian Airlines** 1983 (3) SA 637(A) when he stated at 644 D – H that: '*Dit beteken egter nie dat as hy sou nalaat om binne 'n redelike tyd te presteer, hy sonder meer in mora sou verkeer nie want, soos Wessel AR in Nel v Cloete (supra) na aanleiding die versuim van 'n verkoper om te presteer op 159 F – G gesê het: 'Blote versuim van die verkoper om so gou as wat redelike wyse moontlik is te voldoen, het egter nòg volgens Romeinse reg, nòg volgens Romeins-Hollandse reg, nòg volgens geldende reg, die gevolg dat die verkoper sonder meer in mora verval. Met ander woorde, hierdie versuim het geen uitwerking op die regsposisie van die kontrakterende partye vir sover dit die ontstaan van mora betref nie …*

Indien die skuldeiser stappe wil doen om die skuldenaar in mora te stel, is dit 'n vereiste dat hy 'n kennisgewing aan hom rig waarin hy die skuldenaar op ondubbelsinninge wyse maan dat hy op of voor 'n bepaalde dag moet presteer. Hierdie aanmaning is egter nie op ontbinding van die kontrak gerig nie, maar is slegs bedoel om 'n datum vir prestasie van 'n opeisbare vordering met sekerheid te bepaal, waar dit in die kontrak nog uitdruklik nòg stilswyend beding is. Waar die tydperk wat gegun is, redelik blyk te wees verkeer die skuldenaar in mora indien hy by verstryking daarvan in gebreke bly.' See also **Johannesburg City Council v Norven Investments (Pty) Ltd** 1993 (1) SA 627(A) at 633 C – F and **Scoin Trading (Pty) Ltd v Bernstein** [2010] ZASCA 160; 2011 (2) SA 118 (SCA) at para 12.

[83] Since Clause 19 does not contain any time limit for the performance of the obligation i.e. the development of the proposed equestrian facility, the plaintiff was in my

view required to demand performance within a stipulated time on pain of cancellation, where the defendant is in *mora*. It is now accepted law that in order to place the defendant in *mora*, the plaintiff must have made a demand which is clear and unequivocal and in which he called upon the defendant to comply with such demand within a time which was reasonable in the circumstances and at the same time contain an offer by the plaintiff to perform his reciprocal obligations. See Christie et al, The Law of Contract in South Africa 6 ed. P519, Harms, Amler's Precedent on Pleadings 7 ed. and **Kragga Kamma Estates v Botha N.O.** 1965 (3) SA 46 (AD) 61 G – 62C.

[84] Having regard to the authorities hereinbefore I am satisfied that the plaintiff's emails of 5 October 2010 and 6 November 2010 fall far short of the requirements of demand, if they can be construed to constitute a demand at all. In my view the defendant was accordingly not placed in *mora* by the plaintiff. As appears from the above, plaintiff has also failed to discharge the *onus* to show what a reasonable time is and also that he allowed the defendant a reasonable time for completion of the development of the proposed equestrian facilities.

[85] The defendant's purported cancellation of the agreement must of course also be seen against the backdrop that he himself was required to perform certain obligations in terms of the agreements. According to Christie, The Law of Contract in South Africa 6 ed. p438, reciprocity applies '… *in any bilateral or synallagmatic contract, i.e. one in which each party undertakes obligations towards the other; the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready, to perform his own obligation*'.

[86] In the present matter the following are important indicators that reciprocity of obligations apply:

1. The agreements contain a number of obligations for both the plaintiff and the defendant;
2. The plaintiff had an obligation to commence and complete the building within a certain period of time;
3. This obligation to commence building was prominently disclosed in the marketing brochure, which also included defendant's obligations.

[87] In the present matter it is common cause that plaintiff did not comply with his obligation to complete the building within the time period as stipulated in the agreements. The overwhelming evidence points to the fact that the Hunters Valley development is a development focussed primarily on the hunt and that there are equestrian facilities available which include extensive riding trails, a cross-country course, arenas and stabling. On the evidence the defendants have fulfilled virtually all their obligations, in that transfer of the portions sold to the plaintiff have taken place, services have been installed, servitudes to protect the rights of the members of the development have been registered and a home owners association has been established.

[88] The evidence further points to the fact that both homeowners and visitors use the cross-country track, arenas, stables and the homestead. I further take into account

the fact that the reason for the defendant's failure to perform as contemplated in Clause 19 was at least partly due to the plaintiff's failure to complete building as he was required to and due to several factors outside of the control of the defendant, for e.g. the difficulties and delays in obtaining the necessary governmental authorisations and the economic down turn. Considering the facts and circumstances hereinbefore set out, and even if I were to find that defendant was in breach of its obligations, then I am in any event not persuaded that plaintiff has shown that defendant's breach of its obligations was so material as to warrant cancellation of the agreements. My finding in this regard is fortified by the fact that when I weigh up and balance the competing interest between the plaintiff and the defendant, that the plaintiff's cancellation, considering the circumstances of the matter, is radical and cannot be permitted. See **Singh v McCarthy Retail Ltd t/a McIntosh Motors** 2000 (4) SA 795 (SCA); **Aucamp v Morton** 1949 (3) SA 611(A). I am accordingly satisfied that should I grant the plaintiff cancellation in these circumstances that it would be disproportionate to the alleged breach. In my view it would therefore be '*unfair or inequitable*' to force the defendant to comply with its obligations under Clause 19 in circumstances where the plaintiff has himself failed to fulfil his obligations under the sale agreements. See **Botha and Another v Rich N.O. and Others** 2014 (4) SA 124 (CC).

[89] An additional hurdle that the plaintiff faces in this matter and which he has failed to overcome is that even if I were to find in favour of the plaintiff and consider the grant of an order for specific performance, I would be unable to do so. I say this because plaintiff has failed and neglected to present evidence regarding what the proposed

equestrian facilities would be, where they would be situated, what the size would be, how they would look and/or what the costs would be to erect or build these facilities. No evidence was presented about what the so-called site development plan entailed or what it was supposed to contain. I have already dealt with plaintiffs attempts to rely on the contents of the marketing brochure and/or the article in the business newspaper. The court should not be placed in a position where it is required to speculate or play a guessing game on what is supposed to be contained in the '*site development plan*' and particularly what was envisaged by the parties by the inclusion of Clause 19 in the agreement.

[90] In the premises the plaintiff cannot succeed with his claim for cancellation of the sale agreements or any of the other relief he claims.

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

The plaintiff's claim is dismissed with costs.

_____

RILEY, AJ