REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO:15003/08

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

TYRONE PAUL HANNA Plaintiff

versus

CHRISTIAAN JOHANNES BASSON First Defendant

PAUL DREYER Second Defendant

PLOT 31 VAALBANK CC Third Defendant

JUDGMENT

PG CILLIERS AJ:

INTRODUCTION

[1] The Plaintiff seeks an order against the First Defendant for specific performance of an agreement. He does so in the form of a claim for payment of a sum of money *in lieu* of specific performance.

[2] The Plaintiff, the First Defendant and the Second Defendant concluded an agreement during 2002 relating to the development of the Farm Vaalbank IR, Farm No. 476, Unit 31, held under title deed T57406/1994 ("*the immovable property*") situated on the Vaal River.

[3] The Plaintiff, the First Defendant and the Second Defendant intended the developed property to serve as a weekend retreat for them. Their intention was to enter into a closely-knit relationship (akin to that existing between family members) in their joint use of the immovable property. In this regard the immovable property was intended to be developed by the construction of three similar residences – each of them to be used by each of the parties - and an employee's cottage on the immovable property.

[4] It is common cause that the relationship of friendship that formerly existed between the Plaintiff, on the one hand, and the First Defendant and the Second Defendant, on the other hand, came to an end.

[5] A bitter feud followed in the litigation that ensued between, in particular, the Plaintiff and the First Defendant.

THE FACTS

[6] The First Defendant obtained the sole membership of the Third Defendant. He did so during or about 2002.

[7] The Third Defendant is, and was at all relevant times since 1994, the owner of the immovable property.

[8] During 2002 the Plaintiff and the Second Defendant had been friends for a period of approximately 18 years.

[9] The Plaintiff and the First Defendant were known to one another from business dealings that they have had prior to and until 2002.

[10] At the time of conclusion of the agreement in 2002 the First Defendant was the sole member of the Third Defendant.

[11] The Plaintiff, the First Defendant and the Second Defendant entered into informal discussions towards the middle of the year 2002 in relation to the possible development of the immovable property.

[12] During or about July/August 2002 an agreement was concluded between the parties in terms of which the immovable property would be developed for the aforesaid purpose.

[13] The terms of the agreement are in dispute. I shall presently return to dealing with this issue, to the extent that it is relevant.

[14] In August 2002 the First Defendant commenced with the development of the three residential units on the immovable property. The First Defendant financed the entire development.

[15] The development of the three residential units was finalised towards the beginning of December 2002.

[16] On 1 December 2002 the parties took occupation of each of the three residential units on the immovable property.

[17] In January 2003 the First Defendant presented the Plaintiff with a tax invoice that was issued by the First Defendant to the Plaintiff. The tax invoice is a standard form tax invoice that was completed in the handwriting of the First Defendant. In relevant part it contained the following:

"11-12-2002

Mr T Hanna

← 33 ⅓ % share of Plot 31 CC	*R633 250-00*
Less: -	
Kitchen	*R 8 297-00*
A/C Absa Bank Branch 334705	*R624 953=00*
A/C NO 4042517679	*R 8 229-32*"

[18] The undisputed evidence of the First Defendant, with regards to the tax invoice, entailed the following:

18.1 Since the day that the parties took occupation of the residential units on the immovable property he informed the Plaintiff and the Second Defendant that the cost of development of the property had to be re-paid to him over a period of twenty years at the prime interest rate of ABSA Bank Limited, together with 1 (one) percentage point;

18.2 The First Defendant was informed by a representative of Absa Bank Limited that the prime interest rate of ABSA Bank Limited at that time amounted to 17%;

18.3 At the time that he presented the tax invoice to the Plaintiff his then bank manager (one Willem Brits) informed him that a re-payment of the capital amount of R624 953 over a period of twenty years (at the then prime interest rate of 17 percentage points) together with 1 (one) percentage point amounted to R8 229-32 per month;

18.4 The First Defendant then proceeded to complete the tax invoice issued to the Plaintiff by writing the amount of R8 229-32 onto the tax invoice. This constituted the monthly instalment that the Plaintiff had to repay to the First Defendant over a period of twenty years.

[19] The evidence of the Plaintiff was that the monthly repayment of R8 229-32, together with the Plaintiff's portion of the expenses with regards to maintenance of the immovable property, were paid promptly by him until 2007.

[20] The Plaintiff's further evidence in this regard was he, during the year 2007 also paid the monthly instalment of R8 229-32 a year in advance.

[21] The First Defendant did not dispute the aforesaid, but added, in his evidence, that interpersonal difficulties arose with regards to the following:

21.1 The Plaintiff brought a dog to the immovable property. This, the First Defendant said, was in violation of the "house rules" that no animals would be brought to the immovable property;

21.2 The Plaintiff, on occasion, brought a number of people to the immovable property and the relationship between the parties became strained by reason of the noise that was created by the Plaintiff and his guests;

21.3 The Plaintiff brought quad bikes onto the immovable property. This, the First Defendant says was in violation of the "*house rules*" that no noise pollution would be created by any of the parties on the immovable property;

21.4 During the year 2006 the Plaintiff effected alterations to "*his*" residence on the immovable property in that he converted the motor vehicle garage to a bedroom.

21.5 The relationship between the Second Defendant and the Plaintiff became strained for a reason that was not known or disclosed to the First Defendant.

[22] The aforesaid complaints by the First Defendant were not put to the Plaintiff in cross-examination. The first occasion on which these complaints were mentioned in the trial was during the First Defendant's evidence.

[23] I interpose at this stage to mention the following:

23.1 The First Defendant's evidence was that the Plaintiff and the Second Defendant approached him in the year 2002 and requested that a membership interest of ⅓ (one third) to each of them had to be transferred to them. The First Defendant refused to adhere thereto and informed the Plaintiff and the

Second Defendant that the *pro rata* membership interest in the Third Defendant would be transferred to them upon payment of the purchase price in full by each of them. This portion of the evidence of the First Defendant was not disputed by the Plaintiff;

23.2 The First Defendant never, during the course of the years 2002 to 2007 advanced that the Plaintiff was in arrears with regards to his repayments in respect of the outstanding capital of R624 953-00, or in any other respect. No evidence was presented that the First Defendant ever demanded from the Plaintiff to pay alleged arrear amounts in respect of the monthly instalments on the outstanding capital of R624 953-00 – not until 20 February 2008.

[24] On 5 April 2007 the Plaintiff requested the First Defendant to furnish him with the outstanding balance of the capital amount outstanding.

[25] In this regard the evidence of the Plaintiff was that the First Defendant did not, when the request was made, object to the furnishing of the settlement figure to the Plaintiff. This portion of the evidence by the Plaintiff was not disputed.

[26] The First Defendant's formal response to the request by the Plaintiff to be furnished with the settlement figure on the outstanding capital was to instruct his then attorneys of record, Negota SSH Incorporated ("*Negota*") to direct a letter to the Plaintiff and to the

Second Defendant in which the following conveyances were made, in relevant part:

"We confirm that our client is considering selling the property known as Plot 31, Vaalbank and has received offers in the region of R5 000 000-00.

3. As a gesture of courtesy, our client hereby affords you a period of 90 (ninety) days within which to submit a formal Offer to Purchase, should you wish to purchase the property from the Close Corporation. Should our client not receive an acceptable Offer to Purchase from you before expiry of the 90 (NINETY) day period, the property will be sold on the open market.

4. Should you not wish to purchase the property, you are requested to notify our offices of you decision as soon as possible, in order for our client to proceed with the marketing of the property."

[27] The First Defendant admitted in his evidence that the contents of the letter of 11 April 2007 were a lie. He testified that he made the false conveyances only to elicit a response from the Plaintiff and from the Second Defendant.

[28] On 7 June 2007 the Plaintiff's then attorneys of record addressed a letter to Negota. In the said letter the following issues were recorded, in relevant part:

"*The contract is not disputed, but you have advised the writer that the contract is invalid due to non-compliance with the Alienation of Land Act, 68 of 1981….*

The Act is not applicable…..

In breach of the contract, the CC intends to sell the Plot. We have to reserve our client's rights, including the right to supplement the facts set out in this letter….

How does one take the matter further?

Our client demands that:

1. Your clients agree to abide by the contract as set out herein.

> 2. *Your clients agree to the registration of a caveat against the Plot's title deed to the effect that our client's consent to any alienation of the Plot is required;"*

[29] The First Defendant therefore already took the position on or before 7 June 2007 that the agreement that was concluded between the parties was invalid and he also communicated his stance in this regard to the Plaintiff.

[30] The First Defendant reiterated that he regarded the agreement as invalid on 6 August 2007 when Negota recorded in this regard:

> "*Our client contends that no valid agreement has been entered into between the respective parties."*

[31] The parties held an informal discussion on 27 August 2007 and again on 30 August 2007.

[32] On 31 August 2007 the Plaintiff's attorney confirmed that the First Defendant's attorney furnished him with an undertaking that the First Defendant would not proceed to sell the Third Defendant and/or its assets until the parties have either reached a settlement agreement or confirmed that they were unable to reach a settlement agreement.

[33] In response to the above confirmation of an undertaking Negota informed as follows on 10 September 2007:

> *"We have been instructed by our client, Mr C Basson that he is not prepared to furnish your client with an undertaking that he will not dispose of the membership of the CC."*

[34] On 19 December 2007 the Plaintiff offered to purchase the Third Defendant and all of its assets at a purchase consideration of R3 750 000-00. This offer was rejected by the First Defendant on 8 January 2008. In rejecting the offer the First Defendant's then attorney informed that the Plaintiff had an opportunity until 15 January 2008 to furnish to the First Defendant an offer of no less than R5 000 000-00 for the purchase of the Third Defendant.

[35] On 20 February 2008 another attorney, Mr André de Klerk ("*Mr de Klerk*") directed a letter to the Plaintiff's attorneys of record. The contents of this letter of demand are recited in its entirety:

> "*We refer you to the above matter in which we have filed a notice of intention to oppose on behalf of the First and Second Respondents.*
>
> *We are instructed to advise you on behalf of your client that the agreement he relies on in his application is null and void and unenforceable on the grounds set out in the correspondence attached to your clients' founding affidavit as well as on the grounds of the fact that the alleged agreement do not comply with the provisions of the Property Time-sharing Act and the provisions of the Share Blocks Control Act.*
>
> *Alternatively and in the event that it should be found that the alleged agreement is valid and legally enforceable, then our clients' views are that your client is in breach of the alleged agreement in that:*
>
> 1. *Your client has failed to pay his monthly instalments of R8, 229.32 to our clients from July 2007 to date hereof. The arrears amount to R65, 834.56.*
>
> 2. *Your client has also failed to pay his monthly contribution towards electricity and water consumption, garden services, salary for the gardener and cost of maintenance amounting to approximately R1, 333.32 per months as from 1 December 2007 plus a contribution of R1, 666.66 for a burst geyser in the bathroom of the gardener. The total outstanding amount is R5, 666.62.*
>
> *Our client, the First Respondent has requested your client on various occasions that he is in default and that our clients will terminate you client's further occupation of the property.*

We are instructed to advise you, as we hereby do, that should the total amount of R71, 501.18 (R65, 834.56 plus R5, 666.62) not be paid into out (sic) trust account on/before Wednesday, 27 February 2008, the alleged agreement with your client will be cancelled forthwith and without any further notice to you or your client. In the event of cancellation of the alleged agreement, it will be required that your client immediately vacates the property.

Our trust bank particulars are as follows:

André de Klerk Attorneys

Absa Bank Lynnwood

Account number 405-098-7713

Branch code 334-745

Reference B108"

[36] On 21 February 2008 the Plaintiff's attorneys responded to the aforesaid demand and claims. In relevant part the following issues were recorded:

"*However our client denies that the agreement relied on is null and void and we shall leave this matter to be finally decided on by the courts.*

With regards to your alternative we place it on record that our client had in fact paid up in advance with regards to monthly instalments and despite, on numerous occasions, requesting a detailed breakdown from your client setting out exactly how much was outstanding, same has not been forth coming (sic). Our client once again tenders to settle your client in full as soon as he has received said breakdown. We further require a detailed breakdown to determine exactly how you calculated the amount of the arrears. Specifically taking into consideration, as stated above, our client has paid in advance with regards to the monthly instalments.

With regards to your claim for full monthly contribution towards electricity, water and gas consumption said amount will be placed into our trust account and held there pending the finalisation of this matter. Our client however tenders to pay said amount over immediately on receiving an agreement from your client confirming the validity of the agreement between our respective clients with regards to the property….

We also wish to understand on what basis your client intends cancelling an agreement that he alleges is null and void."

[37] In the meantime the Plaintiff launched an urgent application on or about 7 February 2008 to obtain *interim* interdictory relief against the First Defendant and the Third Defendant. The sets of relief that were sought included an order restraining the First Defendant from alienating or encumbering any part or the whole of the membership interest in the Third Defendant and an order interdicting the Third Defendant from alienating or encumbering the immovable property.

[38] Negota caused the delivery of a notice of intention to oppose the urgent application on behalf of the First Defendant and the Third Defendant.

[39] Mr de Klerk also caused the delivery of a notice of intention to oppose the urgent application on behalf of the First Defendant and the Third Defendant.

[40] On 22 February 2008 the Plaintiff's attorney informed Mr de Klerk that a notice of intention to oppose was received from Negota in which it claimed to be acting on behalf of the First Defendant and the Third Defendant. Clarification was, in this regard, sought from Mr de Klerk.

[41] On even date the Plaintiff's attorneys of record also required clarification from Negota with regards to the issue of delivery of notices of intention to oppose both by Negota and by Mr de Klerk.

[42] On 22 February 2008 Mr de Klerk informed the Plaintiff's attorneys by formal letter that he would continue to act on behalf of the First Defendant and the Third Defendant. He also conveyed that Negota

would withdraw the notice of intention to oppose that was delivered by it. The First Defendant, in this letter, persisted with the stance that the agreement between the parties was invalid. The First Defendant also again continued to claim, as alternative to the position taken that the agreement was invalid, payment of the alleged arrear amounts. The following was stated with regards to the nature of the repayments on the capital outstanding.

> *"2.3 The monthly instalments, which is (sic) nothing else, but* ***occupational interest*** *(my emphasis) on the amount of R633 250.00 are in arrears as is clearly evidenced by annexure "****FA8****" to your client's founding papers*."

[43] On 27 February 2008 the Plaintiff's attorneys of record informed Mr de Klerk that:

43.1 The Plaintiff tendered an amount of R8 230-00 towards the monthly instalments;

43.2 The Plaintiff was never furnished with copies of electricity bills and the garden service statement, but that he was prepared to pay the amount claimed by the First Defendant into the trust account of the Plaintiff's attorneys with instructions to pay same over as soon as copies of the relevant documentation confirming the amount in question were received;

43.3 Until clarification was brought, firstly, to the question as to whom of Mr de Klerk and Negota held the mandate to act on behalf of the First Defendant and the Third Defendant as well as, secondly, clarification was obtained on the validity of

the agreement between the parties, the monies would be held in the trust account of the Plaintiff's attorneys.

[44] On 27 February 2008 Mr de Klerk informed the Plaintiff's attorneys that he held the mandate to act on behalf of the First Defendant and the Third Defendant. He also conveyed that Negota undertook to file a notice withdrawing the notice of opposition that was delivered by it.

[45] Mr de Klerk also placed on record that, should the amount of R65, 834.56 *alternatively* R71, 501.18 not be paid on 27 February 2008, per the demand of 20 February 2008, the "*alleged*" agreement would be regarded as cancelled and that the Plaintiff then had to vacate the portion of the immovable property that he occupied.

[46] On 28 February 2008 the Plaintiff's attorneys informed that the amount of R65, 834.56 would be paid under protest into the trust account of Mr de Klerk as soon as confirmation was received from Negota that they were withdrawing as attorneys of record and that Mr de Klerk indeed held a mandate.

[47] On even date Mr de Klerk informed the Plaintiff's attorneys, in relevant part, as follows:

> *"The alleged agreement has been cancelled on the 27th February 2008.*
>
> *Our client is in the circumstances not prepared to accept any further payments from your client.*
>
> *We have again request Mr Seyffert Strydom of Negota SSH Incorporated to withdraw as attorneys of record."*

[48] On 3 March 2008 the Plaintiff's attorneys informed Mr de Klerk that payment had been made under protest on 29 February 2008 and that, should it later be determined that Mr de Klerk was not the mandated attorney it would be required that the monies immediately be transferred to the trust account of the Plaintiff's attorneys.

[49] On 7 March 2008 Mr de Klerk repaid to the Plaintiff's attorneys the amount of R65, 834.58 and informed them that the "*alleged*" agreement was duly cancelled.

[50] On 12 March 2008 an order was granted by agreement in the terms that the sets of *interim* relief were sought.

[51] In further correspondence of 18 March 2008 and 3 April 2008 Mr de Klerk again confirmed that all payments that were received pending the outcome of the action to be instituted constituted occupational rental (or interest).

[52] On 22 May 2008 the Plaintiff's attorneys requested from Mr de Klerk to explain on what basis the Plaintiff was regarded as a tenant.

[53] No response was received to the above request.

[54] On 7 October 2008 Mr de Klerk again confirmed the view of the First Defendant that no valid agreement was in existence between the parties.

[55] The First Defendant's view that no valid agreement was in existence between the parties was still persisted with as late as 25 February 2009 when Mr de Klerk conveyed the following in this regard:

> *"We again record that our client's view remains that there is no agreement between him and your client with regard to the sale of the property, and that the monies that your client has paid thus far, is accepted without prejudice to our client's rights and as occupational compensation*."

[56] The First Defendant conceded in the present proceedings that a valid agreement was entered into between the parties.

[57] The First Defendant alienated a third of the membership interest in the Third Defendant to his brothers. The membership interest in the Third Respondent is currently owned by the First Defendant, his brothers and the Second Defendant. The transfer of the one third membership interest in the Third Defendant only took place after the commencement of the present proceedings.

[58] The dispute between the parties is to be adjudicated within the context of the aforesaid set of facts.

THE DISPUTES

[59] The following issues were in dispute:

59.1 The issue whether the Plaintiff duly performed his obligations in terms of the agreement;

59.2 The issue whether the First Defendant repudiated the agreement;

59.3 If so, the issue whether the First Defendant and/or the Third Defendant were still in repudiation of the agreement prior to the date of cancellation of the agreement;

59.4 The issue whether the First Defendant validly cancelled the agreement on 27 February 2008;

59.5 The issue whether the First Defendant made performance of the Plaintiff's obligations in terms of the agreement impossible by intentionally frustrating and preventing performance.

[60] The Plaintiff claims payment of what it calls "damages *in lieu* of specific performance". The claim in this regard is for payment of the amount of R1 808 853.43, less the contract price.

[61] The First Defendant contends that a valid cancellation of the agreement took place on 27 February 2008. Consequently, so the First Defendant contends, an order for specific performance, albeit in the form of payment of a sum of money, is not sustainable.

[62] The First Defendant also advances that, even if he did not cancel the agreement validly on 27 February 2008, the Plaintiff did not suffer any "damages".

THE AGREEMENT

[63] The Plaintiff pleaded the relevant terms of the agreement between the parties as follows:

> *"During or about 2002 and at or near Johannesburg the Plaintiff and the First and Second Defendants entered into an oral contract ("**the contract"**). The material express, alternatively implied, further alternatively tacit terms of the contract were inter alia:*
>
> *8.1 The First Defendant would finance the construction of three similar residences and an employee's cottage on the plot;*

8.2 The Plaintiff and the Second Defendant would each purchase a third of the members' interest in the Third Defendant from the First Defendant;

8.3 The Plaintiff, First and Second Defendants and their successors would occupy a specific residence to be erected on the plot and would take occupation on completion thereof;

8.4 The Plaintiff, First and Second Defendants each would be responsible for the maintenance of the individual residence (sic) they occupied on the plot;

8.5 The purchase prices payable by each of the Plaintiff and Second Defendant to the First Defendant would be a third of the cost of the Defendant's membership in the Third Defendant plus a third of the construction costs of the three similar residences and the employee's cottage on the plot, adjusted for individual changes to the residences concerned;

8.6 The purchase prices for each of the third of members' interest purchased by the Plaintiff and Second Defendant was payable in monthly instalments over twenty years, the instalments to be calculated at the prime interest rate charged by the First Defendant's bank from time to time plus 1%;

8.7 The Plaintiff, First and Second Defendants would pay in equal shares the running expenses of the Third Defendant including without limitation property rates, services charges, borehole maintenance costs, garden services, and employee costs;

8.8 ……

8.9 ……

8.10

8.10.1 ……..

8.10.2 ……..

8.11 Any party wishing to dispose of his third membership in the Third Defendant would first offer such membership or right to the remaining persons from amongst the other parties [and their successors];

8.12 The selling price of such membership or right to any such membership (sic) would not be more than the cost of such membership, or in the case of the sale of the First Defendant's interest to be calculated in the same manner as the cost of membership of the Plaintiff and the Second Defendant;

8.13 The First Defendant would allow the Plaintiff and the Second Defendant access to the Third Defendant's books of account and source documents, financial statements, and other documents reflecting proof of compliance with regulatory prescriptions."

[64] The Plaintiff furthermore alleges that the agreement consisted, in part, of a written memorial. In this regard the following is pleaded:

"*On or about 11th of December 2002 and at or near Randpark Ridge the Plaintiff and the First Defendant agreed on the cost of the third membership purchased by the Plaintiff and the First Defendant reduced the agreement to writing and recorded that:*

9.1 The cost of the Plaintiff's third membership would to be (sic) R624 953-00;

9.2 The initial monthly instalment would be R8229-32; and

9.3 The Plaintiff would make payments into the First Defendant's account at his bank, Absa Account number 4042517679, Branch code 334705."

[65] The First Defendant pleaded the following regarding the relevant terms of the agreement:

"4.1 During or about December 2002, the First Defendant entered into an oral agreement with the Plaintiff and Second Defendant at the plot;

4.2 The agreement contained the following express, alternatively tacit, alternatively implied terms:

4.2.1 The First Defendant would finance the construction of three similar residences and an employee's cottage on the plot;

4.2.2 The Plaintiff and the Second Defendant each purchased 1/3 of the First Defendant's members' interest in the Third Defendant from the First Defendant;

4.2.3 The purchase price in respect of the Plaintiff was the amount of R624 953-00;

4.2.4 The purchase price was payable over a 20 year period in 240 monthly instalments of R9 644-97 each, commencing on 11 December 2002;

4.2.5 The purchase price outstanding from time to time would bear interest at a fixed annual interest rate of 18%;

4.2.6 ……..

4.2.7 ……..

4.2.8 ……

4.2.9 The Plaintiff and the Second Defendant would be liable towards the Third Defendant for 1/3 of the monthly operation cost of the plot;

4.2.10 Each party would be solely responsible for the maintenance costs pertaining to the residence he was entitled to occupy;

4.2.11 In the event of either the Plaintiff or the Second Defendant wishing to dispose of their right, title and interest to the members' interest of the Third Defendant prior to them having made payment of the full purchase price and interest, the First Defendant would acquire a pre-emptive right in such intended disposition in which event the Plaintiff and/or the Second Defendant would only be redeemed such portion of the capital of the purchase price actually paid at that time;

4.2.12 In the event of the Plaintiff or the Second Defendant wishing to depart from or exit from the agreement with the First Defendant, before having paid off any capital on the purchase price, the First Defendant would not be obliged to reimburse them and they would forfeit any right, title and interest to the members' interest he may have acquired up to that stage;

4.2.13 In the event of the First Defendant wishing to dispose of this (sic) members' interest in the Third Defendant, he would establish the open market value for the particular residential unit to which he had exclusive use and will offer same at such value to the Plaintiff and the Second Defendant;

4.2.14 Only the Plaintiff and the Second Defendant would be entitled to purchase and acquire 1/3 of the First Defendant's members' interest in the Third Defendant and none of their successors or assigns would be entitled to same or to claim same;

4.2.15 In the event of breach by the Plaintiff of his obligations towards the First Defendant, the First Defendant would be entitled to cancel the agreement and the Plaintiff and any person occupying a particular residence on the plot through him, should immediately vacate same."

[66] In the First Defendant's evidence he disputed, in main, the following terms alleged and relied on by the Plaintiff:

66.1 The agreement in relation to the applicable interest rate. The First Defendant's evidence in this regard was that it was agreed that the interest rate would be fixed at the then prime interest rate of the First Defendant's banker (ABSA Bank Limited) plus 1 (one) percentage point;

66.2 The precise terms of the right of pre-emption. It suffices to say that the First Defendant did not dispute the portion of the agreement regarding the right of pre-emption that, should the Plaintiff wish to dispose of his interest in the Third Defendant, he had to offer same for sale to the First Defendant and to the Second Defendant at an amount equal to the original purchase price.

[67] The only relevant term of the agreement that remained in dispute and that bear relevance to the issues is the term relating to interest. In particular the dispute revolved around whether the interest rate was to be fixed over the twenty year period of repayment or whether the interest rate was to be a fluctuating rate.

THE ISSUE OF BREACH OF CONTRACT BY THE PLAINTIFF

[68] In the First Defendant's letter of demand of 20 February 2008 it was claimed that the Plaintiff failed to pay his monthly instalments for the period July 2007 to 20 February 2008 and that the Plaintiff failed to pay his monthly contribution towards electricity and water consumption, garden services, salary for the gardener and cost of maintenance for the period 1 December 2007 to 20 February 2008.

[69] Any possible arrears in the monthly instalments and in the contribution towards the monthly electricity and water consumption, garden services, salary for the gardener and cost of maintenance accordingly only arose after July 2007.

[70] The Plaintiff relied on calculations that were made by an actuary, Mr Jacobson to show that, if the interest rate was a fluctuating one (and not fixed as contended for by the First Defendant) that he was not in arrears with regards to the monthly instalments as at date of the letter of demand on 20 February 2008 or as at date of cancellation.

[71] The report by Mr Jacobson was not disputed by the First Defendant. The First Defendant nevertheless persisted that the agreement, in this regard, expressly was that the interest rate was fixed at 18% per year.

[72] The First Defendant's version that the interest rate was agreed to be fixed at 18% over the entire repayment period was confirmed by the Second Defendant in his evidence.

[73] I think that the parties did not come to an express agreement on the issue whether the interest rate would be fixed or whether it would be a fluctuating interest rate. The impression that I gained from the evidence of the Plaintiff, the First Defendant and the Second Defendant is that the discussions surrounding the interest rate was limited thereto that it was to be equal to the prime rate of Absa Bank together with 1 (one) percentage point.

[74] It is nevertheless not, in my view, necessary to make any finding with regards to the dispute regarding the question whether the

interest rate was to be fixed or whether the interest rate was agreed to be a fluctuating interest rate. This is so because it is not necessary to make any finding on the issue whether the Plaintiff was in arrears with payment of the monthly instalments as at 20 February 2008 or 27 February 2008. My reasons for this view follow.

[75] The First Defendant already advanced before 7 June 2007 that the agreement was invalid and unenforceable. The First Defendant persisted in this view and position taken by him until at least 25 February 2009.

[76] In ***Nash v Golden Dumps (Pty) Ltd***[1] Corbett JA held as follows with regards to the repudiation of an agreement:

> "*Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate an unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract….. where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated…."*

[77] The test for repudiation is not a subjective test. It is an objective test.[2]

[78] In determining whether a party repudiated a contract the emphasis is not on the repudiating party's state of mind and on what is subjectively intended, but on what someone in the position of the innocent party would think he intended to do. Repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position

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1 1985 (3) SA 1 (A) at 22D – F.

2 Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA) at 294B.

of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with the true intention of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.[3]

[79] In assessing the conduct from which the inference of impending non- or malperformance is to be drawn, it ought to be borne in mind that conduct must be clear-cut and unequivocal. It must not be equally consisted with any other feasibly hypothesis.[4]

[80] In ***Tuckers Land and Development Corpn (Pty) Ltd v Hovis***[5] Jansen JA said the following in this regard:

> *"It should therefore be accepted that in our law an anticipatory breach is constituted by the violation of an obligation ex lege flowing from the requirement of bona fides which underlies our law of contract."*

[81] Repudiation of a contract takes place before performance is due and it may take the form of a statement that the party concerned is not going to carry out the contract.[6]

[82] In my view the First Defendant renounced the agreement prior to 7 June 2007 when the position was taken by him in his communication with the Plaintiff that the agreement between the parties was invalid and unenforceable.

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3 Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd (supra) at 294F – G.
4 Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd (supra) at 294J – 295A.
5 1980 (1) SA 645 (A) at 652G.
6 Kameel Tin Co (Pty) Ltd v Brollomar Tin Exploration Ltd 1928 DPT 726 at 731 – 732.

[83] The First Defendant's conduct constitutes conduct from which the only reasonable inference can be that the First Defendant did not regard himself bound by the agreement and that he was not prepared to perform in terms thereof. This inference is not equally consistent with any other feasible hypothesis.

[84] The First Defendant's conduct would have conveyed to the reasonable person looking at the matter from the perspective of the Plaintiff that the First Defendant did not regard himself under obligation to perform in terms of the agreement and to carry out the agreement.

[85] The perception that the First Defendant did not regard himself under obligation to perform properly in terms of the agreement was fortified in the following:

85.1 The persistent conveyances by the First Defendant's attorneys until 25 February 2009 that no valid agreement was in existence between the parties; and

85.2 The communication by the First Defendant that any payment that were made by the Plaintiff were only paid as so-called "*occupational interest*" and "*occupational rent*".

[86] In my view then the First Defendant repudiated the agreement on or before 7 June 2007 and he did not repent his repudiation of the

agreement before the attempted cancellation of the agreement on 27 February 2008.[7]

[87] Another consideration is whether the First Defendant's demand for payment of the alleged arrears on 20 February 2007 (as alternative to a court finding that the agreement is invalid and unenforceable) assists the First Defendant to escape the legal consequences of his repudiation of the agreement.

[88] In my view it does not.

[89] The First Defendant was not entitled to both approbate and reprobate in this regard.

[90] Once a party to a contract adopts the position that an agreement is invalid and unenforceable, that party renounces the very existence of an enforceable agreement and the obligations created by it. If the renounced agreement is ultimately found to be invalid and unenforceable no obligation in general rests on either party to perform in terms of the agreement. If the renounced agreement is ultimately found to be valid and enforceable the party that took the communicated view that the agreement was invalid and unenforceable would have repudiated the agreement. In the latter case the party that repudiates the agreement cannot in law be permitted to simultaneously (even if it be in the alternative) claim specific performance from the other party to the agreement whilst it is contended that the agreement is invalid and unenforceable –

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[7] In terms of the Repentance Principle. See in this regard Sandown Travel (Pty) Ltd v Cricket South Africa 2013 (2) SA 502 (GSJ) at 512H-515I.

subject to the innocent party remaining, to the knowledge of the party repudiating, willing and able to perform.

[91] In consonance with my aforesaid view it is trite law that, while repudiation endures the innocent party is relieved from the obligation to perform or render performance provided that the innocent party remains, to the knowledge of the party repudiating, willing and able to perform.[8]

[92] In ***Erasmus v Pienaar***[9] Ackermann R (as he then was) embarked on a detailed analysis of the effect of an act of repudiation on the continued existence of the obligation to perform by the innocent party if he does not accept the repudiation and does not terminate the agreement in consequence thereof. After a thorough and convincing analysis of the position in our law the conclusion to which he had come was that the repudiation does not lead to the innocent party's obligations to be extinguished.[10] The innocent party's obligation to perform is only suspended for as long as the repudiation of the agreement is persisted with, subject thereto that the innocent party is at all times willing and able to perform and that it is communicated to the party that repudiated.[11] I find myself in agreement with this view.

[93] The Plaintiff was willing and able to perform his obligations in terms of the agreement in full and such fact was conveyed to the First Defendant since at least 5 April 2007. This fact appears not only

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8 Erasmus v Pienaar 1984 (4) SA 9 (T); Moodley v Moodley 1990 (1) SA 427 (D); GNH Office Automation CC v Provincial Tender Board, Eastern Cape 1998 (3) SA 45 (A) 51F.

9 (supra)

10 at 21A

11 at 21E, read with the passage at 28I – 29A.

from the repeated requests by the Plaintiff to be furnished with the total outstanding amount so as to effect payment thereof in full, but also from the offer that was made to purchase the Third Defendant at a purchase consideration of R3 700 000-00.

[94] It was indeed also the evidence of the Plaintiff that he stopped payment of the monthly instalments by reason of the claims that were made by the First Defendant that the agreement was null and void. He only continued with payments after he was advised to do so. The Plaintiff's evidence in this regard was not placed in dispute.

[95] In the premises the letter of demand of 20 February 2008 was invalid for the following reasons:

95.1 The Plaintiff could not have been said to be *in mora* with regards to his contractual obligations in a period that performance thereof was suspended.[12] Once the duty to perform on the specified dates from month to month was suspended, it cannot be said that the Plaintiff failed to pay on the appointed day;

95.2 It was not open to the First Defendant to demand specific performance *in the alternative* and inconsistent with the main position taken by him that the agreement was invalid and unenforceable.

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[12] In ***Laws v Rutherfurd*** 1924 AD261 at 262 Innes CJ stated *mora debitoris* as follows: "*Principle which applies when a debtor undertakes to discharge an obligation on a specified date; the creditor need make no demand: Dies interpellat pro homine, and the debtor is in mora if he fails to pay on the appointed day*."

[96] If I am wrong in my aforesaid conclusions there exists a further difficulty regarding the demand for payment on 20 February 2008.

[97] During the period 20 February 2008 and 27 February 2008 the First Defendant was ostensibly represented by two different sets of attorneys i.e. Mr de Klerk and Negota. Negota only withdrew as attorneys for the First Defendant on 12 March 2008.

[98] A debtor's obligation is not discharged unless he can show that he has made payment to a person recognised by law as competent to receive the payment in discharged of the obligation.[13] An agent must be an authorised agent to receive payment.[14]

[99] If the Plaintiff effected payment to Mr de Klerk and the last-mentioned attorney did not have the authority to receive the payment as agent, the First Defendant could validly have advanced that the Plaintiff's obligation was not discharged by payment to a person not recognised by law as competent to receive the payment in discharge of the obligation. The mere conveyance by Mr de Klerk, as the then professed agent, that he was authorised to receive payment on behalf of the First Defendant would not have bound the First Defendant if Mr de Klerk was indeed not the agent of the First Defendant.

[100] The conduct of the First Defendant in the above regard made proper and timeous performance by the Plaintiff impossible in that he employed two different sets of attorney at the time and he failed to

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13 Harrismith Board of Executors v Odendaal 1923 AD 530 at 539.

14 Christie: The Law of Contract in South Africa (Sixth Eddition by R H Christie and G D Bradfield) at 424

take appropriate steps in the relevant notice period to communicate to the Plaintiff that Mr de Klerk was his authorised agent to receive payment of the amounts claimed. In this regard the First Defendant failed to co-operate with the Plaintiff to the extent necessary so as to enable the Plaintiff to perform and he was accordingly in *mora creditoris*.[15]

[101] It follows that the agreement was still *in esse* at the time that the present proceedings were launched.

THE PLAINTIFF'S ENTITLEMENT TO PAYMENT OF A SUM OF MONEY IN LIEU OF A CLAIM FOR PERFORMANCE OF THE AGREEMENT IN FORMA SPECIFICA

[102] The Plaintiff is accordingly in principle entitled to claim specific performance of the agreement and his claim will generally be granted, subject only to the court's discretion. In this regard Innes J held as follows in ***Farmers' Co-op Society (REG) v Berry***:[16]

> "*Prima facie every party to a binding agreement who is ready to carry out his own obligations under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by Kotzé CJ in Thompson v Pullinger (1894) (1) OR at p301 "the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt." It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance will be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of Storey (Equity Jurisprudens,*

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[15] Martin Harris en Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens 2000 (3) SA 339 (A) and Ranch International Pipelines (Transvaal) (Pty() Ltd v LNG Construction (City) (Pty) LTd 1984 (3) SA 861 (W) in which a wide definition of the concept of a failure to co-operate was accepted from the then expositions of the Vet and Yates at 163 – 175.

[16] 1912 AD 343 at 350

> *SEC.717 [a], "it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it." The election is rather with the injured party, subject to the discretion of the Court."*

[103] The First Defendant disposed of the one third membership interest in the Third Defendant that was intended by the parties to the agreement to ultimately be transferred to the Plaintiff. The disposition took place after the present proceedings were commenced with.

[104] In accordance with the maxim *lex non cogit ad impossibilia* specific performance will never be ordered if compliance with the order would be impossible.[17]

[105] The Plaintiff sought an order for performance *in forma specifica* in the original particulars of claim. The Plaintiff's claim was thereafter amended to the effect of seeking an order that was referred to in the amended particulars of claim as "damages as surrogate of performance". The amendment was brought after the disposition of one third of the membership interest in the Third Defendant by the First Defendant.

[106] In ***Isep Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd*** [18] Jansen JA argued that damages as surrogate of performance do not really constitute a claim for damages, but rather amount to specific performance in a different guise and if our law were to recognise this remedy, many ancillary rules would have to be introduced.

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17 Christie (supra) at 547

18 1981 (4) SA 1 (A)

[107] It has become settled practice in the meantime that a claim for payment of "damages *in lieu* of specific performance" is competent to bring.[19]

[108] In my personal view the use of terminology referring to "damages" in claims for the payment of a sum of money *in lieu* of performance of contractual obligations *in forma specifica* is unfortunate. Such claim is not strictly one for the payment of damages. The claim remains one for specific performance, albeit not in the nature of performance *in forma specifica*. The use of the word "damages" also unnecessarily creates confusion with a claim for the payment of contractual damages pursuant to a breach of contract. The nature of the claim for payment of contractual damages pursuant to a breach of contract and the nature of a claim for the payment of a sum of money *in lieu* of performance of contractual obligations *in forma specifica* are fundamentally different. The first concerns payment of damages caused by reason of the breach of contract and can be claimed irrespective of whether the contract is rescinded or not. The latter serves to obtain payment of a sum of money as surrogate for performance *in forma specifica*, in appropriate circumstances. It also only lies if the contract is not terminated.

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[19] In Mostert NO v Mutual Life Assurance CO (SA) Ltd 2001 (4) SA 159 (SCA) at para [74] serious doubts were expressed by the Supreme Court of Appeal about the correctness of the majority decision in ISEP Structural Engineering (supra). The competence of such claim was also considered in Sandown Travel (Pty) Ltd v Cricket South Africa 2013 (2) SA 502 (GSJ) at para [67]; Visagie v Gerryts en 'n Ander 2000 (3) SA 670 (C).

THE DETERMINATION OF THE EXTENT OF THE PLAINTIFF'S CLAIM

The general measure of damages in contractual claims

[109] As stated above, a claim for payment of damages *in lieu* of specific performance should not be confused with a claim for damages that follows as a result of breach of contract. In instances of a claim for damages to be paid that were caused by a breach of contract the innocent party can claim *interesse intrinsecum et extrinsecum* (intrinsic damage and extrinsic damage).[20]

[110] In such cases the defaulting party will have to compensate the injured party for his loss and it naturally follows from that fact that the injured party must be placed in exactly the same pecuniary position that he would have been in if the contract had been performed. (*si reiser vendita non tradatur in it qwod interest agitur: hoc est qwod rym habere interest emtoris. Hoc autem interdum pretium egreditur si pluris interest qwam ris valeat vel empta est*).[21]

[111] Unlike damages claimed in delict, damages for breach of contract are normally not intended to recompense the innocent party for his loss, but to put him in the position he would have been in if the contract had been properly performed.[22] This does not mean that, in cases of breach of contract, a party does not have the election, depending on

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[20] Pothier, Oblig, s.162

[21] D.19.1.1.pr; D.10.4.9.8:39.2.4.7

[22] Trotman v Edwick 1951 (1) SA 443 (A) at 449B – C: "*A litigant who sues on contract sues to have his bargain or its equivalent in* money *or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him*."

the appropriateness, whether to pursue either his negative or positive *interesse*.[23]

The general measure to determine the extent of a sum of money to be paid in lieu of performance in forma specifica

[112] A claim for payment of a sum of money *in lieu* of performance *in forma specifica* is an entirely different legal figure and legal remedy.

[113] The purpose of such a claim is to put the innocent party, as much as possible, in the position that he would have been in if performance was made *in forma specifica*.

[114] In cases of the sale of a thing the general measure to put an innocent party in such a position is to determine the market value of the thing sold and to subtract from that market value the value of a counter performance (the price that had to be paid). This is in accordance with the rule of the English law that, if a vendor fails to deliver goods and the purchaser had not paid the price, then the measure of damages is the difference between the contract price and the market price of goods of a similar description and quality at the time when they ought to have been delivered.[24]

The extent of the Plaintiff's claim

[115] The market value of one third membership interest in the Third Defendant is not in dispute. It amounts to R1 808 853,43.

[116] The contract price is also not in dispute. It amounts to R624 953.00.

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[23] Per Farlem J (as he then was) in Main Line Carriers (Pty) Ltd v Jaad Investments CC 1998 (2) SA 468 (C).

[24] (Mayne Damages 10th Edition, p167 - ; Katzenelenbogen Ltd v Mullen 1977 (4) SA 855 (A).

[117] The instalments that have been paid by the Plaintiff is common cause. They are reflected in the report by the actuary, Mr Jacobson to total the amount of R578 726.03.

[118] The First Defendant's argument, eloquently put forward by Mr du Plessis SC, with regards to the amount of the Plaintiff's claim can succinctly be summarised as follows:

118.1 It is not in dispute between the parties that they have agreed on a right of pre-emption in favour of the First Defendant, at a purchase consideration equal to the original contract sum;

118.2 The subjective market value of one third membership interest accordingly could never exceed the original contract price;

118.3 If the general measure to determine the extent of damages to be paid *in lieu* of specific performance is to be applied *viz*. the difference between market value and the contract price, the Plaintiff does not have any claim for the payment of damages.

[119] The parties were unable to furnish to me any authority in which it has been considered what the effect of an agreed right of pre-emption is on the determination of the market value of a thing. I have also been unable to find any comparable authority.

[120] It is necessary to examine the nature of a right of pre-emption at the outset.

[121] A right of first refusal is a preferent conditional right to purchase, generally referred to as a right of pre-emption. This right gives the grantee a right to purchase if the condition in question is satisfied.

[122] The grant of a right of pre-emption does not compel the grantor to sell. It only compels him to give the grantee the preference in case he decides to sell at all.[25]

[123] The word "*refusal*" was interpreted in English law, within similar context, to mean the following:

> "*Now, a refusal, to my mind, implies an offer. A thing is not in ordinary parlance refused before it is offered*.[26]

[124] The aforesaid exposition was accepted in South African law to be correct.[27]

[125] It follows from the aforesaid that the grantor of a right of first refusal is under obligation to offer the grantee the thing for sale and the offer has to be one which is capable of being turned into a contract by acceptance.

[126] In ***Owsianick v African Consolidated Theatres (Pty) Ltd***[28] Ogilvie Thompson JA said the following with regards to a right of pre-emption:

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[25] Owsianick v African Consolidated Theatres (Pty) Ltd 1967 (3) SA 310 (A) at 319D. although Ogilvie Thompson JA dissented in the case, his exposition of Voet 18.1.2 and the judgment by Innes JA in Van Pletsen v Henning 1913 AD82 appears to be correct.

[26] Manchester Ship Canal Co v Manchester Racecourse Co [1900] 2 Ch 352 at 364.

[27] Soteriou v Retco Poyntons (Pty) Ltd (supra) at 932G.

[28] 1967 (3) SA 310 (A) at 316

> *"A right of pre-emption is well-known in our law (C Cohen v Behr 1946 (CPD 942 at PP948 – 949 and authorities there cited) and it is to be distinguished from an option to purchase. Upon exercise of the latter by the holder of the option, the granter of the option is obliged to sell. The granter of right of pre-emption cannot be compelled to sell the subject of the right. Should he, however, decide to do so, he is obliged, before executing his decision to sell, to offer the property to the grantee of the right of pre-emption upon the terms reflected in the contract creating that right."*

[127] If the terms of the right of pre-emption is not adhered to, the grantee is entitled to claim damages if the thing is sold in the open market without adherence to the terms of the right of pre-emption.[29]

[128] The first observation that needs to be made is that a right of pre-emption is a personal right and it only serves to ensure the following between the contracting parties:

1281.1 That a restriction is placed on a sale of the thing in the open market, unless it is offered firstly to the grantee of the right of pre-emption at the agreed price or the determined price;

128.2 The grantee of the right of pre-emption is offered the first opportunity to purchase the thing at the agreed or determined price – irrespective of the true market value of the thing.

[129] It follows from the aforesaid that, if the grantee of the right of pre-emption does not avail himself/herself/it of the right of pre-emption, the other contracting party is free to sell the thing in the open market at a price equal to market value.

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[29] Venter v Birchholtz 1972 (1) SA 276 (AD) at 283H-284A

[130] The agreed right of pre-emption placed an obligation on the Plaintiff to offer his one third membership interest to the First Defendant at the original contract price before it was open for him to sell it in the open market. The agreed right of pre-emption also entitled the First Defendant to be offered the one third membership interest of the Plaintiff at the original purchase price before the Plaintiff would have been entitled to sell his membership interest in the open market.

[131] The second observation to be made is that, on the contemplation of the parties at the time of conclusion of the contract, the Plaintiff would only have obtained his membership interest in the Third Defendant after the lapse of a period of twenty years. He would, accordingly, not have been entitled to sell one third of the membership interest in the Third Defendant before the lapse of a period of twenty years, unless he made payment of the original contract price in full before the expiry of the period of twenty years.

[132] The third observation that needs to be made is that it becomes a speculative task if an attempt is made to predict what the parties would have done after the lapse of a period of twenty years or after payment of the original contract price was made in full and the Plaintiff wished to dispose of one third of the membership interest in the Third Defendant.

[133] In the period of twenty years (and thereafter) many different possibilities might have arisen. I name a few.

[134] The first is the possibility that the First Defendant may have disposed of his one third of the membership interest. The First

Defendant's right of pre-emption would then have been lost. The second possibility is the death of the First Defendant, in which event the right of pre-emption would have come to an end. The third possibility is that the parties to the agreement may have jointly decided to dispose of the immovable property in its totality at a market related price or to have disposed of all of the membership interest in the Third Defendant at a market related price. The fourth possibility I mention is that the immovable property could have been destroyed or expropriated.

[135] I have come to the conclusion that the existence of the right of pre-emption does not have a sufficiently exclusive relation to the true market value (price) of one third of the membership interest in the Third Defendant to permit of equating the agreed price on exercise of the right of pre-emption to true market value of the one third membership interest for the Plaintiff.

[136] The possible future event of a sale of one third of the membership interest in the Third Defendant to the First Respondent by reason of the invocation of the right of pre-emption is no more than one of several possibilities that may occur in future.

[137] None of the several possibilities (of which the invocation of the right of pre-emption is but one) detracts from the fact that the Plaintiff would, had the contract been performed *in forma specifica*, have received a membership interest of which the market value would have been equal to one third of the objective market value of the totality of the membership interest in the Third Defendant.

[138] The fact that disposal of the entirety of the membership interest in the Third Defendant is a real possibility is evidenced by the fact that the Third Defendant threatened (albeit that he lied in this regard to evoke a reaction) to dispose of the entirety of the membership interest in the Third Defendant and that he refused, even on the threat of an application to be brought to the High Court, to give an undertaking that he would not do so.

[139] In my view the fallacy in the argument that was advanced on behalf of the First Respondent is that the argument elevates one of several possibilities as to future events to a singular stand-out fact that would occur definitely, to the exclusion of any other possible future event and to then super-impose the agreed price on an objective market value.

[140] The effect of such an approach would be to confine the value of performance *in forma specifica* by the First Defendant only to the four corners of the right of pre-emption. This is in my view untenable.

[141] In the premises I find that the market value of one third of the membership interest in the Third Respondent is equal to the objective market value thereof. The amount of the objective market value of one third of the membership interest in the Third Defendant that was agreed to by the parties amounts to R1 808 853,43.

CONCLUSION

[142] The Plaintiff is accordingly entitled to payment of a sum of money *in lieu* of performance *in forma specifica* in an amount that constitutes

the difference between the objective market value of one third of the membership interest in the Third Respondent, less the original contract price - after deducting the instalments that were paid by him. The First Defendant did not advance that interest should be brought into the calculation and he did not provide present any argument on the issue.

[143] The Plaintiff claimed specific performance of the agreement since inception of the present proceedings and the refusal by the First Defendant to adhere to the demand was not justified. The Plaintiff is accordingly entitled to interest from the date on which the present proceedings were commenced with. Summons was served on 20 May 2008.

[144] In the result the following order is made:

1. The First Defendant is ordered to pay to the Plaintiff the amount of R1 762 626.46;

2. The First Defendant is ordered to pay to the Plaintiff interest on the amount of R1 762 626.46 at the rate of 15.5% per annum, calculated from 20 May 2008 to date of final payment;

3. The First Defendant is ordered to pay the Plaintiff's costs, inclusive of the reserved costs of 25 February 2015.

P G CILLIERS
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 24 February 2015, 25 February 2015, 18 March 2015, 19 March 2015

Date of Judgment: ___ August 2015

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