

SUMMARY OF THE JUDGMENT

CHANGING YOUR MIND ON THE OTHER'S BREACH OF CONTRACT

Primat Construction v Nelson Mandela Bay Metropolitan Municipality (1075/2016) [2017] ZASCA 73 (1 June 2017)

Our law generally holds that if party A repudiates a contract, party B may choose to abide by the contract and enforce A's performance; or accept the repudiation and cancel the agreement and claim damages from A. Once the choice is made, B cannot turn around and change his mind. However, as was argued in this case, would B be allowed to change tack and cancel the agreement and claim damages if A persisted in the breach by evincing an unequivocal intention not to remedy the breach?

The Judgment can be viewed [here](#).

FACTS

Primat Construction CC (Primat) was appointed, after a tender process, by the Nelson Mandela Bay Metropolitan Municipality (the Municipality) to upgrade certain roads in the Municipality's jurisdiction.

There were delays in the progress of the work due to various factors. These included severe storm damage and the late payment of an insurance claim to Primat in respect of the damage. Delays also resulted from the non-payment by the Municipality of monthly payment certificates issued to it by Primat.

The project's completion date was extended from time to time.

Nonetheless, the extended completion dates were not met and the Municipality wrote to Primat and attempted to terminate the contract, as provided for in terms of various clauses in the contract. The letter however did not constitute proper termination (as required in terms of the agreement) and thus constituted a wrongful repudiation of the agreement by the Municipality.

Primat advised the Municipality that it rejected the termination and sought to proceed with the contract and fulfill its performance obligations (i.e. insisting on specific performance by the Municipality). It also advised the Municipality that it was entitled to rectify any alleged breaches by it after being given the requisite notice and that, since Primat had not been given notice, the termination was ineffective.

The Municipality however persisted in the repudiation and denied Primat access to the

site and appointed new contractors - despite intervention by the Primat's credit insurers Coface (which had issued a guarantee in respect of Primat's obligations under the contract) and various requests from Primat to grant it access to the premises.

As a result of the Municipality's continued refusal to grant Primat access to finish the project, Primat then decided to alter its response to the Municipality's repudiation by cancelling the agreement and claiming damages.

This, the Municipality argued, Primat was not entitled to do. Primat, it alleged, was bound by its election not to accept the repudiation and could not subsequently cancel the contract and claim damages.

The Court of first instance held that where the repudiation had continued, the innocent party was entitled to change its election and cancel the contract. On appeal to a full bench, the decision was reversed and it was held that there had to be another manifest act of repudiation before the innocent party could change the election. The appeal was upheld.

The present matter deals with Primat's subsequent appeal to the Supreme Court of Appeal.

The question before the Court was if there had been a repudiation of the contract by the Municipality, was Primat bound by its election not to accept the repudiation? Primat argued in the appeal that the full bench erred in requiring an additional act of repudiation before it was entitled to make a new election and claim cancellation and damages.

HELD:

- One must have regard to the nature of repudiation and to the principles applicable to the doctrine of election, in determining whether an aggrieved party to a contract can change his or her election.
- A repudiation occurs where one party to a contract, without lawful grounds, indicates to the other party (in words or by conduct) a deliberate and unequivocal intention no longer to be bound by the contract. When there is a repudiation the aggrieved party may elect to cancel and sue for damages, in which case he or she will inevitably be bound by that election, or elect to abide by the contract and claim performance. Once the contract is cancelled it cannot be revived.
- Generally, the aggrieved party must choose between these different remedies and is bound by his or her election as the remedies available to the innocent party are

inconsistent. The choice of one necessarily excludes the other. Nonetheless, if the aggrieved party elects to abide by the contract and claim performance from the party who has repudiated, he or she may claim performance, and in the alternative, cancellation and damages. This is the so-called double-barrelled procedure by virtue of which the aggrieved party may claim in one action, first performance, and in the alternative, if that is not forthcoming, cancellation and damages. This is a useful procedural device.

- But where the aggrieved party has elected to abide by the contract and there is persistent breach despite the opportunity to relent, the aggrieved party may elect to cancel. Put differently, where the defaulting party is clearly determined not to purge the breach, and shows an unequivocal intention not to be bound by the contract, the aggrieved party may abandon his or her futile attempt to claim performance and change the election, claiming cancellation and damages. 'Persistence' in this sense should be understood 'as a further indication of intention to repudiate after having been given an opportunity to reconsider' in which case 'what is involved is an election to cancel based on repeated breach rather than a change of mind'.
- The requirement of a new and independent act of repudiation by the Municipality before Primat could change its election and exercise its right to cancel and claim damages is not one mentioned in any of the earlier authorities. And, as Primat submitted, it made no sense because it would allow the defaulting party who steadfastly refused to comply with the contract to keep the contract alive until it committed another act of repudiation.
- In the present matter, the Municipality persisted in its repudiation. It refused Primat access to the site, appointed new contractors and maintained that the contract was terminated. The objective construction of that conduct showed an unequivocal intention on the part of the Municipality no longer to be bound. That was how Primat reasonably perceived it.
- No further act of repudiation was necessary. Any contention that there must be yet another act manifesting that intention would be artificial. It was sufficient that Primat reasonably perceived that the Municipality would not repent of its breach, despite the opportunities given to it to do so and then to change its election, as it did.
- Thus, where the defaulting party persists in its repudiation and shows that it will not comply with its obligations and will not allow the other party to perform, it does not need a further act of repudiation to give the innocent party, who unsuccessfully tried to uphold the contract, a right of cancellation. It makes no sense to say that the

innocent party has to wait to change its election until the other party commits another act of repudiation when it is persisting in the initial wrongful conduct. Once it is clear that the breach will not be repented of, the initial election not to repudiate can be changed and the contract can be cancelled.

The appeal accordingly succeeded.

CONTACT US

- | | | | |
|----------------------------------|--------------------------------------|-------------------------------------|------------------------------------|
| ■ CAPE TOWN
Tel: 021 406 9100 | ■ SOMERSET MALL
Tel: 021 850 6400 | ■ TYGER VALLEY
Tel: 021 943 3800 | ■ FOURWAYS
Tel: 010 001 2632 |
| ■ CLAREMONT
Tel: 021 673 4700 | ■ STELLENBOSCH
Tel: 021 001 1170 | ■ MENLYN
Tel: 012 348 1682 | ■ CENTURION
Tel: 012 001 1546 |
| ■ FISH HOEK
Tel: 021 784 1580 | ■ BLOUBERG
Tel: 021 521 4000 | ■ ILLOVO
Tel: 011 219 6200 | ■ BEDFORDVIEW
Tel: 011 453 0577 |