

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO 42317/2011

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

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DATE

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SIGNATURE

In the matter between

SANDOWN TRAVEL (PTY) LTD

PLAINTIFF

versus

CRICKET SOUTH AFRICA

DEFENDANT

J U D G M E N T

Summary

Agreement repudiated by one party which allows innocent party to elect whether to keep the contract alive or to cancel it. Principle that innocent party who elects to keep the agreement alive when anticipatory breach occurs, may elect to rather cancel the agreement when the time for performance arrives, has become part of our law. In addition, the party keeping the contract alive may claim damages as surrogate for performance from the guilty party. No tender to perform its part of the agreement by the innocent party necessary

when the repudiating party clearly indicates that it will not be bound by the agreement.

WEPENER J:

[1] The plaintiff, a travel agency, seeks damages from the defendant in the sum of R1,64 million pursuant to, what it alleges to be, a repudiation by the defendant of an agreement between the parties and which repudiation the plaintiff accepted.

The Agreement

[2] During 2009 the plaintiff and the defendant entered into a written agreement in terms whereof the plaintiff was to render services (referred to as travel services) to the defendant (the client) for a fee of R97 000.00 plus VAT per month. The relevant provisions of the agreement for purposes of the plaintiff's claim against the defendant are contained in clause 2 thereof and read as follows:

- '2. *Period*
- 2.1 *The Agreement will commence on the Effective Date.*
- 2.2 *The Agreement will endure for a period of 2 years.*
- 2.3 *The Travel Agent or the Client shall provide written notice of intention to terminate at least 6 months before the end of the contract date. In the event of such notice not being forthcoming at least 6 months before the end of the contract date then the contract will automatically renew for another year, on the same terms and conditions, subject to the same 6 months' notice process applying to the new period.'*

[3] It is common cause that the effective date was 1 October 2009.

The Pleadings

[4] In its particulars of claim, after setting out the terms of the written agreement between the parties, the plaintiff avers:

- '5. *The plaintiff complied fully with its obligations under the agreement.*
- 6. *On 31 March 2011 and as no written notice of intention to terminate the agreement had been given by either party, the agreement was renewed for another year from 1 October 2011 to 1 October 2012 ("the new period"), on the same terms and conditions, subject to the 6 months notice process applying to the new period.*

7. *On 6 April 2011 the defendant purported to give the plaintiff notice of termination of the agreement effective on 30 September 2011.*
8. *The plaintiff disputed that this notice of termination was timeously given and on 23 September 2011 the parties attempted to mediate the dispute as provided for by the agreement but no settlement could be reached within a period of fourteen days, or at all.*
9. *Neither party referred the dispute to a referee.*
10. *On or about 30 September 2011, the defendant ceased using the services of the plaintiff and ceased making an office available for the plaintiff's consultants.*
11. *The foregoing conduct on the part of the defendant amounted to a repudiation of the agreement, which repudiation the plaintiff accepted on 10 October 2011. A copy of the acceptance of the repudiation is annexed hereto marked "POC2".'*

[5] The conclusion, that the defendant repudiated the agreement, may therefore be based either on the allegations contained in paragraph 10 of the particulars of claim only i.e. the conduct of the defendant by refusing to utilise the services of the plaintiff or on all the averments contained in paras 7 to 10, which include the notice of termination that was given on 6 April 2011. In the letter POC2, it is stated that the failure to utilise the services of the plaintiff from 1 October 2011, together with the notice of termination of 6 April 2011, constitutes a repudiation of the agreement and I am of the view that the allegation of a repudiation, relies on all of the conduct referred to.

[6] The only defences upon which the defendant relied at the trial are those set out in para 7.3 of its plea. That para reads as follows:

- '7.3 Alternatively, and in any event Defendant avers that the Plaintiff was not entitled to cancel the Agreement by virtue of the Plaintiff having previously and during April 2011 elected to enforce compliance of their Agreement, "POC1" and not to cancel the Agreement. Alternatively it made such election on 30 June 2011 following a repudiation of the agreement by the defendant on 25 June 2011.'*

The plea contained in the last sentence of the paragraph was added at the outset of the trial by way of an amendment.

[7] All other issues raised on the pleadings were abandoned at the commencement of the trial and in so far as there were allegations that the plaintiff failed to perform its mandate or a denial of a repudiation (and all other issues which were contained in various letters), the defendant disavowed any reliance thereon.

[8] The parties agreed that, in the event of the plaintiff succeeding in its claim, the damages suffered by it amount to the sum of R1,64 million.

The Evidence

[9] Two witnesses testified on behalf of the plaintiff and the defendant led no evidence. The evidence established, and it was common cause between the parties, that the defendant failed to give timeous notice to terminate the agreement as required by clause 2 thereof and that it was consequently automatically renewed for a period of another year, such renewal period being from 1 October 2011 to 30 September 2012.

[10] However, shortly after the automatic renewal date and on 6 April 2011, the defendant wrote to the plaintiff that it wished to terminate the agreement after the effluxion of the initial period of 2 years, the latter which would be the 30th of September 2011.

[11] On 11 April 2011 the plaintiff responded as follows:

'We are saddened by the decision taken by CSA to terminate the agreement with Sandown Travel. Sandown Travel believe that since we have started there have been no incidents that have been reported to us that would have led CSA to take this decision.

Whilst Cricket South Africa (CSA) does have the right to terminate the contract, notice of termination has to be given timeously.

I refer you to clause 2.2 of our agreement which sets out the procedure. A copy of the clause is attached.

Our contract is for a period of 2 years commencing on 1 October 2009 and ending on 30 September 2011. Cricket South Africa were obliged in terms of clause 2.2 to give us written notice of intention to terminate the contract, AT LEAST 6 months prior to the 30th September 2011. In other words notice to terminate was required to be given on or before 30 March 2011.

The clause goes on to state that if this notice was not given at least 6 months before the end of the contract date, then the contract will automatically renew for another year.

As your notice to terminate the contract was not given on or before 30 March 2011 (effectively the last day of the minimum 6 month notice period) our contract was automatically renewed for a further year and will now terminate on 30 September 2012. The delivery of your notice on 7 April is therefore of no effect.'

[12] The next relevant document emanated from the defendant on 25 June 2011. It reads:

'We refer to the above and specifically to our email dated the 07th of April 2011.

We wish to confirm that such an email was an official notification that our contract with yourselves shall not extend beyond the 30th of September 2011.

In view thereof, we wish to advise that there shall be no business from Cricket South Africa to yourselves from the 01st of October 2011.'

[13] On 30 June 2011 the plaintiff responded (through its attorneys) that:

'Cricket SA's purported cancellation dated 7 April 2011 is accordingly of no force and effect.

It is accordingly common cause that the contract was automatically renewed by virtue of clause 2.2. of the agreement and our client will therefore not recognise any attempts by Cricket SA to resile from the agreement prior to 30 September 2012.'

[14] The plaintiff, as it was obliged to do, continued to render travel services to the defendant up to and including the end of September 2011 when the defendant refused to allow it to continue to do so.

[15] Further correspondence shows that the plaintiff remained steadfast in its attitude that the agreement was to endure for a period of another year whilst the defendants resolve to bring the agreement to an end as at the end of September 2011 by virtue of the letter of cancellation of 6 April 2011, remained unchanged.

[16] Because of these two opposite positions, Mr Newall, on behalf of the plaintiff, insisted that plaintiff's Mr Ciochetti should meet the managing director of the defendant in accordance with the provisions of clause 11 of the agreement which obliges the parties to meet and attempt to settle any dispute between them. The meeting occurred shortly before the end of September 2011 and the defendant's managing director, Mr Majola, remained resolute that the agreement was at an end as at the end of September 2011.

Repudiation of the Agreement

[17] During argument, the defendant's counsel accepted that its letter of 6 April 2011 constituted a repudiation of the agreement. I have mentioned that it

is alleged, in the alternative, that the repudiation occurred on 25 June 2011 when the defendant (again) stated that the agreement would not continue beyond 30 September 2011. The letter of 25 June 2011, however, only reiterated the stance adopted by the defendant in its letter of 6 April 2011. In my view, the letter of 25 June 2011 did accordingly not constitute a new and independent attempt to terminate the agreement. (The parties' referred to the first letter of termination either as having been written on 6 or 7 April 2011 but nothing turns on this and I refer to it as the letter of 6 April 2011, being the date appearing thereon).

[18] As from 6 April 2011 and repeatedly and consistently thereafter, the defendant deliberately and unequivocally stated that from October 2011 it intended to no longer be bound by the terms of the agreement.

[19] This conduct amounts to a repudiation or anticipatory breach of the agreement on the part of the defendant.

'[16] 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, 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 . . . ' (per Corbett JA in Nash v Golden Dumps (Pty) Ltd 1985 (3) SA 1 (A) at 22D – F.'

See *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at para 16.

[20] Whether the conduct of the party constitutes a repudiation is determined objectively in order to decide whether it indeed amounts to a repudiation. See *Erasmus v Pienaar* 1984 (4) SA 9 (T) at 20C-H where it was said:

'Die toets is 'n objektiewe een. Nienaber Anticipatory Repudiation in English and South African Law of Contract, A Comparative Study ('n ongepubliseerde proefskrif, Desember 1961) konstateer op 267 die volgende:

"... it would seem as if the test applied in South Africa in order to determine whether certain conduct constitutes a repudiation, is the same as that applied in England, viz culpable conduct of such a nature as to lead a reasonable person to believe that an actual breach would be committed."

Die geleerde skrywer op 249 stel dit op 'n basis analoog aan estoppel:

"Although the repudiator did not in fact repudiate the contract he did so conduct himself as to lead a reasonable person, namely, in the position of the promisee, to conclude that he was going to commit an actual breach."

In *Karswell v Collard* [1893e 20 ER (HL) 47 is die toets deur Lord HERSCHELL gestel as:

"What effect the conduct... would be reasonably calculated to have upon a reasonable person."

Dit wil voorkom of hierdie benadering ook deur ons Appèlhof onderskryf word. In *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) op 387B is onder andere die volgende stelling van DEVLIN R in *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401 op 436 met instemming aangehaal:

"The test of whether an intention is sufficiently evinced by conduct is whether the party renouncing has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract."

Sien ook *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) te 845 - 846B en *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) te 653E waar hierdie toets weer eens bevestig is.'

[21] In *Datacolor* at para 16 it was said:

'At the same time this Court has repeatedly stated that the test for repudiation is not subjective but objective (Ponisammy and Another v Versailles Estates (Pty) Ltd 1973 (1) SA 372 (A) at 387A - C; Stewart Wrightson (Pty) Ltd v Thorpe (supra at 953E - H); Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou (supra at 845A - 846G); Tuckers Land and Development Corporation (Pty) Ltd v Hovis (supra at 653B - G); OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd and Another 1993 (3) SA 471 (A) at 480I - 481H; Highveld 7 Properties (Pty) Ltd and Others v Bailes 1999 (4) SA 1307 (SCA) at 1315F - G, 1318A - E, 1318H - J). Thus it has recently been said in Metalmlil (Pty) Ltd v AECI Explosives and Chemicals Ltd 1994 (3) SA 673 (A) at 684I - 685B:

"It is probably correct to say that respondent was bona fide in its interpretation of the agreement and that subjectively it intended to be bound by the agreement and not to repudiate it. This fact does not, however, preclude the conclusion that its conduct constituted repudiation in law. Respondent was not manifesting any intention to conduct its relations with appellant and to discharge its duties to appellant in accordance with what it was obliged to do on an objective interpretation of the agreement. In effect, it was insisting on a different contract, however bona fide it might have been in its belief that it was not."

Conceivably it could therefore happen that one party, in truth intending to repudiate (as he later confesses), expressed himself so inconclusively that he is afterwards held not to have done so; conversely, that his conduct may justify the inference that he did not propose to perform even though he can afterwards demonstrate his good faith and his best intentions at the time. The emphasis is not on the repudiating party's state of mind, on what he 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 of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.'

[22] The plaintiff itself viewed the conduct of the defendant as a '*purported cancellation*', which conduct, objectively considered amounts to a repudiation of the agreement by the defendant.

[23] The final letter of significance that was written on behalf of the plaintiff by its attorney on 10 October 2011 reads:

'We have been advised that you no longer utilise our client's services in terms of the Travel Management Agreement, but instead now utilise the services of Rennies Travel.

The above, together with your termination letter, constitutes a repudiation of the Travel Management Agreement which repudiation our client accepts.'

I deal with the acceptance below. The defendant, in terms of this letter, regarded the letter of 6 April 2011 to form part of its repudiation of the agreement.

[24] Objectively, the defendant repudiated the agreement on 6 April 2011.

The Election

[25] Subsequent to the repudiation of the agreement on 6 April 2011 the plaintiff elected to keep the defendant to the terms of the agreement. It said so in all the correspondence. The plaintiff, however, decided to change this stance on, or shortly before, 10 October 2011, after the meeting between Mr Ciochetti and Mr Majola had taken place. It was then that its attorney wrote the letter referred to above in which it accepted the defendant's repudiation of the agreement.

[26] It is this acceptance which resulted in the institution of the present action against the defendant. The plaintiff's cause of action is founded upon the repudiation of the defendant, the plaintiff's acceptance thereof and its consequent claim for damages flowing therefrom.

[27] Counsel for the defendant, argued that the plaintiff may not '*approve and reprobate*', it may not keep the contract in esse and then have a change of heart and cancel it. Once the plaintiff elected to keep the contract alive after the repudiation thereof by the defendant, the plaintiff was bound by its election and limited to enforce remedies against the defendant based on the election. The defendant was consequently, so it was submitted, precluded from claiming damages based on cancellation, as it doing.

[28] The conduct of the plaintiff evinces a clear intention to keep the contract alive. All the correspondence show that it elected to treat the defendant's repudiation as incompetent and of no force and effect. It said in a letter dated 30 June 2011 that it '*will not ... recognise any attempts by Cricket SA to resile from the agreement prior to 30 September 2012*'.

[29] The plaintiff's election, taken from 6 April 2011 up to shortly before 10 October 2011, was one that affirmed the implementation of the agreement. The letter of 10 October 2011, which purported to cancel the agreement, must be seen against this background.

[30] The legal position regarding the remedies available for an innocent party in circumstances where the other commits an anticipatory breach or repudiation of an agreement has been set out in a number of decided cases. He or she must elect either to treat the contract as binding or terminate it. Once an election has been made, however, that person is bound by that election. He or she is bound to enforce the remedies available to him or her pursuant to the election and he or she is not at liberty to seek redress against the defaulting party by way of remedies inconsistent with the election. *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (AD) at 469H.

[31] The question of an election occupied the attention of the Appellate Division twice in June 1912. On 7 June 1912 the Appellate Division heard *Hlatswayo v Mare and Deas* 1912 AD 242, the bench comprising De Villiers CJ, Innes J, Solomon J, CG Maasdorp JP and J De Villiers JP. Three judgments – all agreeing and allowing the appeal – were handed down. De Villiers CJ (Innes J concurring) handed down a judgment. Solomon J handed down a judgment in which CG Maasdorp JP concurred. J de Villiers JP handed down a separate judgment. At issue was a procedural election, namely whether a party was entitled to re-open its case, having acquiesced (so the opposing party claimed) in a provisional judgment of a Magistrate. Having declined to decide whether the conduct in question amounted to acquiescence under the Roman-Dutch doctrine of this name, or an election,

or a waiver, De Villiers JP held that the distinction did not matter. Dealing generally with such situations, the Judge President held as follows at p259:

'At bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate.'

The language of '*approbate and reprobate*' is that of contract.

[32] On 19 June 1912, Innes J, Solomon J and CG Maasdorp JP heard the matter of *Farmers' Co-operative Society (REG) v Berry* 1912 AD 343. The case concerned the entitlement of an aggrieved party to claim specific performance, and whether – if the defaulting party preferred to make payment rather than tender performance – the aggrieved party was deprived of his election. Innes JA – who delivered the unanimous judgment – dealt with the argument in the following way at p350:

'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 Jurisprudence, 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.'

[33] The decision in *Segal v Mazzur* 1920 CPD 634 had already been handed down. The contract in question was for the supply of milk. When the plaintiff did not receive payment on time, he cancelled the contract. One of the defences raised by the defendant was that the plaintiff had continued to supply milk after not receiving timeous payment, and thereby electing to abide by the contract. Watermeyer AJ dealt with the question of election at page 644 – 645 :

'Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has the choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but when once he has made his election he is bound by that election and cannot afterwards change his mind. ... If, with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way.'

[34] The Appellate Division again considered the matter in *Bowditch v Peel and Magill* 1921 AD 561. The matter concerned misrepresentations which allegedly induced a contract. Innes CJ held as follows at p572:

'A person who has been induced to contract by the material and fraudulent misrepresentations of the other party may either stand by the contract or claim a rescission. (Voet, 4.3, secs. 3, 4, 7). It follows that he must make his election between those two inconsistent remedies within a reasonable time after knowledge of the deception. And the choice of one necessarily involves the abandonment of the other. He cannot both approbate and reprobate.'

[35] Following the earlier decisions, there is a plethora of authority which supports the view that an election, once made, is binding. They include the following decisions of the Appellate Division / Supreme Court of Appeal:

35.1 *Chamber of Mines of South Africa v National Union of Mineworkers and Another* 1987 (1) SA 668 (A) where the following was said at 690 D-G regarding an election generally:

*'One or other of two parties between whom some legal relationship subsists is sometimes faced with two alternative and entirely inconsistent courses of action or remedies. The principle that in this situation the law will not allow that party to blow hot and cold is a fundamental one of general application. A useful illustration of the principle is offered in the relationship between master and servant when there comes to the knowledge of the former some conduct on the part of the latter justifying the servant's dismissal. The position in which the master then finds himself is thus described by Bristowe J in *Angehrn and Piel v Federal Cold Storage Co Ltd* 1908 TS 761 at 786:*

"It seems to me that as soon as an act or group of acts clearly justifying dismissal comes to the knowledge of the employer it is for him to elect whether he will determine the contract or retain the servant ... He must be allowed a reasonable time within which to make his election. Still, make it he must, and having once made it he must abide by it. In this, as in all cases of election, he cannot first take one road and then turn back and take another."

35.2 In *Administrator, Orange Free State, and Another v Mokopanele and Another* 1990 (3) SA 780 (A) at 787 G – H it was held that :

'The legal doctrine here involved may perhaps best be described as that of election. But in a situation such as this the exact nomenclature is less important than a recognition of the fundamental principle that a contracting party who has once approbated cannot thereafter reprobate.'

35.3 The identical principle was restated in *Merry Hill (Pty) Ltd v Engelbrecht* 2008 (2) SA 544 (SCA) at 550 B – E (para [15]) which expressly approved the following statement of the law by Friedman JP in *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C) at 542 E – F :

'When one party to a contract commits a breach of a material term, the other party is faced with an election. He may cancel the contract or he may insist upon due performance by the party in breach. The remedies available to the innocent party are inconsistent. The choice of one necessarily excludes the other, or, as it is said, he cannot both approve and reprobate. Once he has elected to pursue one remedy, he is bound by his election and cannot resile from it without the consent of the other party.'

[36] The election to keep the contract in esse was completed when the plaintiff informed the defendant of the choice it had made. *Mutual Life Insurance CO of New York v Ingly* 1910 (TPD) 540 at p550.

[37] The plaintiff's response to the repudiation was clear. It elected to treat the agreement as binding and not to cancel the agreement. This much is clear from the plaintiff's communications to the defendant. Also, in evidence Mr. Newall said that as far as he was concerned it was '*business as usual*' for the plaintiff. He said during cross examination that throughout the period April 2011 to shortly before 10 October 2011, the plaintiff sought to persuade the defendant to comply with the provisions of the agreement. The letter of 10 October 2011 in which the plaintiff stated that it accepted the defendant's repudiation and sought to cancel the agreement, is in conflict with its initial election.

[38] Applying the above principles, the plaintiff would ordinarily be bound by its election to enforce the agreement and it could therefore not later cancel the agreement, unless there is another ground upon the plaintiff can rely.

The repentance principle

[39] There are decided cases, which have held that, despite an election to keep a contract alive, the innocent party may, in the case of anticipatory breach, reconsider its position when the time for performance arrives.

'The principle is now well established that a refusal by one party to a contract to perform it before the date of performance arrives places the other party in a position to elect whether to treat such conduct as a breach of contract, or persist in the

contract and hold his opponent to all its terms when the due date should arrive. If he adopts the former course and accepts the renunciation, the whole contract is at an end, save for the purposes of an action for the breach arising out of such renunciation. If however, he refuses to accept such renunciation, he keeps the contract alive, not only for himself, but also for the other party thereto; and he must in that case perform all his duties and discharge all his obligations under the contract, while he enables the other party to reconsider his position and even to perform the contract at the due date, notwithstanding his previous repudiation; and the contract so kept on foot is shorn of none of its terms or conditions, so that the party who has attempted to put an end to it may take advantage of any subsequent circumstances which would have justified him in refusing to complete the contract.'(My emphasis).

De Wet v Kuhn 1910 CPD 263 at 264

[40] During argument I raised the decision of *Cohen v Orlowski* 1930 SWA 125 with counsel. In that case it was held at 133 as follows:

'In the present case the plaintiff is not seeking to enforce a contract which he had previously elected to treat at an end by reason of the defendant's repudiation – he is now treating as at an end an agreement repudiated by the defendant, but which plaintiff had previously elected to treat as standing. The correct view of the matter, in my opinion, is that the plaintiff did what he was entitled to do, and that is that he refused to accept the repudiation of the agreement by the defendant. He thereby allowed the defendant to repent of his repudiation and gave him an opportunity to carry out his portion of the bargain, but when the defendant nevertheless persisted in his repudiation, the plaintiff was entitled to change his mind and notify defendant that he would no longer treat the agreement as existing, but that he would now regard it as rescinded and sue for damages.'

[41] Counsel for the plaintiff, argued that the passage in *Cohen* should find application in this matter. If that is so, the plaintiff was entitled to cancel the agreement on 10 October 2011 and sue for damages. It would then be entitled to its damages, as claimed herein.

[42] However, counsel for the defendant argued that the passage in *Cohen* is an outlier in our jurisprudence and that it does not accord with the established principles laid down in numerous decisions of the courts of South Africa, some of which have been referred to earlier in this judgment. He further argued that the *Cohen* matter was incorrectly decided as it relied on *Kameel Tin Company (Pty) Ltd v Brollomar Tin Exploration Co Ltd* 1928 TPD 726, which latter case, he argued, was wrongly decided by Greenberg J. It

has however, since the *Kameel Tin* judgment, been held in a number of decided cases that an innocent party may, when the other contracting party commits an anticipatory breach, elect to ignore the breach and keep the contract alive in order to allow the defaulting party to repent of his or her repudiation. Nicholas AJA said in a minority judgment in *Culverwell and Another v Brown* 1990 (1) SA 7 (A) at 17E-F:

'And where the injured party refuses to accept the repudiation and thereby allows the defaulting party to repent of his repudiation and gives him an opportunity to carry out his portion of the bargain, and the defaulting party nevertheless persists in his repudiation, the injured party is entitled to change his mind and notify the other party that he would no longer treat the agreement as existing, but that he would now regard it as rescinded and sue for damages. See Cohen v Orlowski 1930 SWA 125 at 133.'

[43] The principle that the innocent party may, when the defaulting party commits an anticipatory breach, change his or her mind if the defaulting party persists with its repudiation when the date for performance arrives, has been applied since 1910. In *Cohen v Orlowski*, distinguishing the facts of the case from a single act of repudiation which occurred in *Segal v Mazzur* 1920 CPD 634, Bok J said at 132:

'I do not see how that decision can be regarded as authority for the proposition that the innocent party elects to sue on the contract repudiated by the guilty party, and the guilty party persists in his repudiation, the innocent party cannot change his mind and sue for damages, treating the contract as cancelled'.

Similarly in *Kameel Tin* Greenberg J said at:

'When the date has arrived and the party who is obliged to perform refuses to perform, the innocent party may insist on performance of the contract, or he may sue for damages or he may disregard the contract'

[44] The principle that an innocent party can change his or her mind if the guilty party persists in his or her or repudiation at the time when performance in terms of the contract arrives, according to both *Cohen* and *Kameel Tin*, is limited to cases of anticipatory breach of an agreement, i.e. a breach of the agreement before the date on which performance is due.

[45] The principle has been applied in a number of cases. Nicholas AJA referred to it with approval in *Culverwell* without the majority judgment dissenting therefrom.

[46] Both the *Cohen* and the *Kameel Tin* matters were referred to in *Walker v Minier et Cie (Pty) Ltd* 1979 (2) SA 474 (W) but distinguished on the facts for the reasons set out in that case at pages 480 and 481.

[47] The repentance principle was also accepted, *inter alia*, in *BBS Empangeni CC (Formerly ZTC Cash Build CC) v Phoenix Industrial Park (Pty) Ltd and Another* (8945/2006) [2011] ZAKZDHA 1 (6 January 2011) at para 6 and in *Dongwe NO v Kinghorn NO and Another* (16773/08) [2009] ZAKZPHC 71 (3 December 2009).

[48] The principle or doctrine operates one way only i.e. when there is an anticipatory breach of an agreement, the innocent party who initially demanded performance, may, at the time of performance, elect to cancel the agreement.

[49] Brand JA, without deciding the issue finally, referred to the application of the principle as discussed in *Walker*, and said in *Merry Hill* at 550F – I:

'It is true that it was also held in Walker (at 480D - H), obiter, as it were, that a seller who has indicated an intention to claim performance of the contract can still claim cancellation at a later stage, if the purchaser persists in his or her default during the 30-days notice period, provided that another 30-day notice is given in which cancellation is signified. Whether this is so is, in my view, not necessary to decide. I say this for two reasons. First, as I understand the position regarding election, the suggested solution will operate one way only, ie where the seller threatens to demand specific performance. If, by contrast, the seller threatens to claim cancellation he will be finally bound by that choice. He will not be able to change his mind if the purchaser persists in default, whatever the position may be where he threatened to claim specific performance instead (see for example Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another (2) 2005 (6) SA 23 (C) ([2004] 1 All SA 1) paras 35 - 36; Christie The Law of Contract in South Africa 5 ed at 541).'

[50] The principle that a guilty party be afforded the opportunity to reconsider his or her position has been, as accepted by Hopley J in 1910 in *De Wet v Kuhn* 'well established' and has been applied for more than one hundred years.

[51] I am of the view that the repentance principle has become part of our law.

'Die oorweging dat persone regte kon verkry en verpligtinge aangegaan het in vertroue op die finaliteit van 'n vorige beslissing, is ook genoem in John Bell and Co Ltd v Esselen 1954 (1) SA 147 (A) op 154, en het toepassing gevind in Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Bpk 1972 (1) SA 761 (A). In

laasgenoemde saak is daarop gewys dat hoewel die leerstuk van die "undisclosed principal" in stryd is met die grondbeginsels van die Romeins-Hollandse reg, oor 'n lang tydperk aanvaar is - ook in twee beslissings van hierdie Hof - dat die leerstuk deel van ons reg is. POTGIETER AR het daarna die volgende gesê (op 767 - 8):

"Die aantal gewysdes waarin die beginsel erken is en wat loop oor 'n lang periode, is 'n aanduiding dat die beginsel al vir byna honderd jaar in die handelsverkeer toegepas is. Ek reken ook dat hierdie Hof kennis daarvan kan neem dat in die praktyk dit al vir byna honderd jaar toegepas is op die gebiede van agentskap en koop en verkoop, wat 'n aansienlike deel uitmaak van die alledaagse handelsverkeer. Ongetwyfeld is daar in die resente verlede talle transaksies aangegaan waar partye tot sodanige transaksies regte verkry het en verpligtinge aangegaan het as gevolg van die toepassing van dié leerstuk. Indien hierdie Hof derhalwe nou sou beslis dat dit nie geldende reg is nie, sou sodanige partye tot sulke transaksies skielik voor die feit te staan kom dat vermeende regte en verpligtinge nie meer bestaan nie. So 'n beslissing deur hierdie Hof sou retrospektiewe uitwerking hê en, anders as by 'n wetvoorskrif, kan bestaande regte en verpligtinge nie bewaar word nie. (Vgl The Mine Workers' Union v Prinsloo 1948 (3) SA 831 (A) op 852)"

Om die redes hierbo genoem is ek van oordeel dat die betrokke leerstuk so ingeburger is dat hierdie Hof verplig is om dit as geldende reg te beskou.'

Tuckers Land and Development Corporation v Strydom 1984 (1) SA 1 (A) at 16H - 17D.

[52] The plaintiff relied on the doctrine of repentance in order to exercise its rights and on the basis of this principle, the plaintiff is entitled to succeed with its claim against the defendant, based on the acceptance of the repudiation at the time when performance was due by the defendant.

Defendant's liability for damages.

[53] However, on the assumption that the plaintiff was bound by its election to keep the contract alive and that it could not change its mind, the later acceptance of the repudiation would be legally ineffective and the plaintiff would be bound to its election to keep the contract alive.

[54] A repudiation of an agreement is, of course, nothing other than a breach of an agreement, (see Kerr *supra* at 596) and where a breach of the agreement occurs, a party is entitled to claim damages.

'Soos ons reeds by die bespreking van die verskillende vorms van kontrakbreuk gesien het, kan die onskuldige party slegs onder sekere omstandighede uit die ooreenkoms terugtree, en, soos ons later sal sien, hoef hy, selfs waar hy 'n terugtrekingsreg het, nie daarvan gebruik te maak nie. 'n Eis om vervulling sal die onskuldige dus altyd hê, en waar hy nie mag terugtree nie, sal dit sy enigste middel wees. Die eis om vervulling kan egter twee vorms aanneem, nl. 'n eis om vervulling in forma specifica of 'n eis om skadevergoeding as surrogaat van die prestasie of ter

aanvulling van gebrekkige prestasie. Die vraag is nou of die onskuldige wat vervulling eis 'n keuse het tussen vervulling in forma specifica en skadevergoeding as surrogaat van die prestasie.' (My emphasis)

De Wet en Van Wyk: *Kontraktereg & Handelsreg* Vol 1 p209. In footnote 55 the learned authors explain the two forms of specific performance as follows:

'Skadevergoeding ter aanvulling van gebrekkige prestasie is maar net 'n verskyningsvorm van skadevergoeding as surrogaat van die prestasie; die vergoeding dien as surrogaat van die ontbrekende deel van die prestasie.'

See also *Unibank Savings and Loans (formerly Community Bank) v Absa Bank* 2000 (4) SA 191 W at 205A.

[55] Christie: *The Law of Contract in South Africa* 6th Ed at p 545 states:

'Our law is clear that a plaintiff is always entitled to claim specific performance and, assuming he makes out a case, his claim will be granted, subject only to the court's discretion. The locus classicus is the judgment of Innes J in Farmers' Co-op Society (Reg) v Berry 1912 AD 343 at 350:

Prima facie every party to a binding agreement who is ready to carry out his own obligation 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 KOTZE, C.J., in Thompson v Pullinger (1 O. R., at p. 301), "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 should 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 Jurisprudence, 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.'

Innes J's reference to justice being done by an award of damages is not as clear as it might have been, and sometimes gives rise to the argument that, on the facts of a particular case, specific performance should not be granted because damages would be an adequate remedy.'

[56] The view that the innocent party is entitled to recover damages upon the occurrence of the breach of a contract is also held by the learned authors in Wille's: *Principles of South African Law* 9th Ed at p868 where it is said:

'In appropriate cases the innocent party is entitled to recover damages for the breach, which are assessed in relation to the date of performance rather than the date of repudiation, but subject to the normal rule requiring him to mitigate his loss.'

[57] Courts have the discretion to award damages instead of ordering specific performance. See *Farmers' Co-operative Society*, at p350. The circumstances upon which a court would award such damages vary but, in my view, would include a case such as the present where the defendant engaged a new service provider at the end of September 2011 to render travel services to it, making an offer by the plaintiff to render such services academic.

[58] '*The innocent party in the case of a repudiation is not compelled to rescind the contract. He or she is at liberty to ignore or reject the repudiation, await the time when performance is due and then claim specific performance (or damages) from the repudiator*'. See LAWSA Vol. 5 part 1 para 486. Also see *Gilchrist and Co v Stone* (1889) 5 HCG 353 at 358; *Delany v Medefindt* 1908 EDC 200 at 205; *Machanick V Bernstein* 1920 CPD 380 at 381-382; *De Wet v Kuhn* 1910 CPD 263 at 267.

[59] Although the plaintiff did not seek specific performance in this matter, it sought the damages which it had suffered. These damages are the damages in lieu of specific performance which a court may grant. The damages are awarded as surrogate of performance (See Visser and Potgieter: *Law of Damages* 3rd Ed at p362). It is a competent claim even if its belated cancellation is ineffective.

[60] The plaintiff's position is then that it kept the contract alive but that the defendant, however, refused to deal with it after 30 September 2011 although it was obliged to do so for another year until 30 September 2012. The defendant having employed a different travel agency at that time, a court, in my view, would have exercised its discretion by not granting the plaintiff specific performance had it claimed it, but rather would have awarded damages as surrogate of specific performance.

[61] Indeed, in *Myers v Abramson* 1952 (3) SA 121 (C) Van Winsen J held that where parties are in an employer – employee relationship where personal services are being rendered to one party, the only remedy for a plaintiff when

the unjustified repudiation occurs would be to sue for damages. Van Winsen J said at 127:

'In my view this is not a case where the Court can grant specific performance. The contract was essentially one for the rendering by plaintiff of personal service. The fact that it also included certain obligations on both parties relative to the payment of travelling expenses and the payment of expenses of board and lodging does not alter the essential nature of the contract to which these latter obligations were merely accessory. Nor does the fact that plaintiff was to enjoy the additional benefit of doing post-graduate work affect the position. This right was at all times subservient to the main purpose of the contract, viz. the rendering by plaintiff to defendant and his wife of certain personal services.

In my view the only remedy open to plaintiff in this case is the remedy of damages.'

Tender to perform

[62] The plaintiff's pleadings cover a claim for damages pursuant to the defendant's repudiation. However, a claim for damages based on keeping the contract in esse must be coupled with the plaintiff's own tender to perform its obligations, which allegation is absent from the particulars of claim see *R M Van de Ghinste and Co (Pty) Ltd v Van de Ghintse* 1980 (1) SA 250 (C) at 253E-H and De Wet and Van Wyk *supra*, at p196.

[63] The tender to perform is absent from the particulars of claim, obviously, as a result of the fact that the plaintiff eventually sought damages based on the ineffective cancellation of the agreement, the latter which is incompatible with a tender to perform.

[64] Only if it can be said that the plaintiff is excused from tendering performance would it, in my view, have pleaded a sufficient case to be entitled to succeed to obtain damages in this matter.

[65] In *NKP Kunsmisverspreiders (EDMS) Bpk v Sentrale Kunsmis Korporasie (EDMS) Bpk en 'n Ander* 1973 (2) SA 680 (T) at p685, Nicholas J said:

'The purpose of a tender of performance is to enable the other party to take the necessary steps to perform his part of the contract. But if the latter expressly declares that he is under no circumstances prepared to perform, the whole purpose of a tender falls away. In my view, the first defendant by its continuing repudiation of the contract waived its right to a tender of performance by the plaintiff (cf. Van Zijl Steyn, Mora Debitoris volgens die Hedendaagse Romeins-Hollandse Reg. pp. 80 - 82).'

[66] This dictum was followed by Ackerman J in *Erasmus v Pienaar*, at pp24-26 where it was said:

'Hierdie argument is deur Regter NICHOLAS verwerp en op 685A - D sê die geleerde Regter die volgende:

"Before the plaintiff could be in a position where it was in a position to obtain orders for fertiliser, it was necessary for the plaintiff to have set up presumably at appreciable cost, a selling organisation staffed by sufficient trained sales personnel - an organisation which, in terms of the contract, would have been restricted to the marketing of the first defendant's products. If the allegations in para 5 (ii) of the plaintiff's further particulars be accepted as true (as they must be for the purpose of the present exception proceedings), the setting up of such an organisation would have been an exercise in futility, since the first defendant's attitude was that it was not bound by, and would not perform the contract. It would be surprising if the law were to be so much out of tune with common sense as to require of the plaintiff as a prerequisite to its cause of action against the first defendant that, notwithstanding its futility, it should perform the exercise.

The purpose of a tender of performance is to enable the other party to take the necessary steps to perform his part of the contract. But if the latter expressly declares that he is under no circumstances prepared to perform, the whole purpose of a tender falls away. In my view, the first defendant by its continuing repudiation of the contract waived its right to a tender of performance by the plaintiff (cf Van Zijl Steyn Mora Debitoris Volgens die Hedendaagse Romeins-Hollandse Reg op 80 - 82)."

Mnr Goldstein het gepoog om hierdie beslissing te onderskei op die basis dat eiser se eis een was vir skadevergoeding. Ek stem nie saam nie. Dit was wel 'n eis om skadevergoeding, maar een ingestel na verwerping van eerste verweerder se repudiëring van die kontrak, dit wil sê met instandhouding van die kontrak. As die regsgevolg van repudiëring deur die skuldeiser, wat nie deur die skuldenaar aanvaar word nie, die opheffing is van die skuldenaar se verpligting om daadwerklik te presteer (wat ookal die presiese juridiese regverdiging vir so 'n reël is) dan vind sodanige opheffing plaas onmiddellik nadat die repudiëring tot die skuldenaar se kennis gekom het (mits hy natuurlik nie die repudiëring aanvaar nie). Vir doeleindes van hierdie beginsel is dit irrelevant of hy daarna eis vir vervulling in forma specifica, of vir skadevergoeding of hom verweer teen 'n eis van die skuldeiser. Hierdie beslissing is na my mening ook direkte, hoewel algemene, steun vir die toepassing van die beginsel hier ter sprake in ons reg.

Origens kan die vraag gestel word of die aanvaarding van hierdie beginsel in ons reg teenstrydig sou wees met enige van die beginsels van ons eie reg of om 'n ander rede ongewensd sou wees.

A B de Villiers in sy Mora Creditoris as Vorm van Kontrakbreuk ('n ongepubliseerde proefskrif, Stellenbosch 1953) behandel op 128 ev die baie soortgelyke geval van die sogenaamde Annahmeverweigerung in anticipando, naamlik waar 'n skuldeiser vooraf, dit wil sê voor 'n aanbod ter voldoening aan hom gedoen is, sy skuldenaar op onomwonde wyse te kenne gee dat hy nie sy medewerking sal verleen in die afwikkeling van die voldoeningsproses nie. Hoewel De Villiers (op 88) daarop wys dat 'n aanbod ter voldoening gedoen moet word alvorens mora creditoris kan intree, behandel hy op 128 ev die klaarblyklike verslapping van hierdie reël in die geval van die sogenaamde Annahmeverweigerung in anticipando, waar 'n werklike voldoeningshandeling (oblatio realis) nie nodig is nie maar waar 'n aanbod of verklaring van bereidwilligheid om te presteer (oblatio verbalis) voldoende is. Van Zutphen Practycke sv " oblatie", nr V, verklaar:

"Oblatie verbaal van schult die liquijd is, is genoeg, indien den crediteur refuseert de selve te ontfangen, sonder dat in sukken ghevalle reele oblatie word gerequireert; maer indien den crediteur bereyt is om de schult te ontfangen, als dan is van noode reele oblatie, en soude verbale oblatie niet genoegh zijn."

Hierdie stelling word deur Huber Hedendaagse Rechtsgeleerdheid 3.42.3 onderskryf. De Villiers (op 133 - 139) wys daarop dat daar 'n dergelike reël in die moderne vastelandse regstelsels is. Hoe dit ookal regs wetenskaplik verklaar word (sien op 134 - 139) is dit duidelik dat De Villiers die regsreël onderskryf dat daar in so 'n geval minder van die skuldenaar verwag word ten einde die skuldeiser in mora te plaas. De Villiers (op 139 - 149) bespreek ook Wessels *The Law of Contract in South Africa* 2de uitg para 2341 (j) se stelling dat

"A tender is not necessary where the creditor in anticipation refuses to accept it."

en die dictum van Regter MURRAY in *Major's Estate v De Jager* 1944 TPD 96 op 103 - 104 dat

"If a creditor makes it clear that no tender even if in legal form will be accepted, he waives the formalities of such a tender, and the debtor is protected against costs if he has sent a cheque, or has even merely expressed his willingness to pay. If the grantor of an option repudiates in toto the claim of the person endeavouring to exercise the same, he cannot claim at the same time that such person must fulfil an obligation which is imposed as a condition precedent in the option itself: his repudiation dispenses with such fulfilment."

Hoewel De Villiers, tereg na my mening, die konstruksie van afstanddoening ("waiver") kritiseer (op 142 en 146, 147) sowel as die konstruksie van 'n "condition precedent", gaan hy blykbaar akkoord met Regter MURRAY se stelling dat dit voldoende is as die skuldenaar "expressed his willingness to pay", want op 144 verklaar hy dat

"... die Hof se beslissing... gerym kan word met, en eintlik 'n toepassing is van die reël dat 'n skuldenaar, in die geval van 'n skuldeisersweiering in anticipando, minder hoef te doen om die bekwaamheidselement wat vir 'n aanbod nodig is, daar te stel as wat hy andersins sou moes gedoen het."

Daar bestaan 'n baie nou verband tussen hierdie beginsel en die reël van die Engelse reg, wat hierbo bespreek is, met betrekking tot die verslapping van die skuldenaar se verpligting waar die skuldeiser die ooreenkoms repudieer het maar die skuldenaar nie die repudiëring aanvaar het nie. Dit toon, na my mening, dat laasgenoemde beginsel goed en gemaklik inpas by ons regsistematiek.

Nienaber (op cit) sien skynbaar geen gevaar in die aanvaarding van hierdie beginsels in ons reg nie. (Sien in die algemeen ook Nienaber "Enkele Beskouinge oor Kontrakbreuk in anticipando" 26 (1963) THRHR op 19 ev.) Weeramantry *The Law of Contract* band 2 para 699 op 674 sê sv "when tender is dispensed with" onder andere die volgende:

"In accordance with the maxim lex non cogit ad inutilia, a formal tender will not be considered necessary where the creditor has in anticipation refused to accept payment... The party whose tender is so dispensed with must, however, be prepared to make payment within a reasonable time if the creditor subsequently demands payment or signifies his readiness to accept it."

[67] I am consequently of the view that, based on the assumption that the plaintiff is bound by its election to keep the contract alive, and shorn of its ineffective cancellation, the plaintiff's particulars of claim disclose a cause of

action for damages as surrogate for performance based on the defendant's repudiation of the agreement between the parties.

The result

[68] I have set out earlier in this judgment that the parties were in agreement as to the amount of damages which the plaintiff suffered, should the plaintiff succeed in its claim.

[69] In the circumstances the plaintiff is entitled to an award for its damages as agreed and because of the agreement between the parties regarding the quantum thereof, I need not consider its computation.

[70] I grant a judgment in favour of the plaintiff for:

1. The sum of R 1,64 million;
2. Interest thereon at 15,5% per annum from date of judgment to date of payment;
3. Costs of suit.

WEPENER J
JUDGE OF THE HIGH COURT

COUNSEL FOR THE PLAINTIFF: *Adv K Ioulianou*

PLAINTIFF'S ATTORNEYS: *Ramsay Webber*

COUNSEL FOR THE DEFENDANT: *Adv SC Rorke SC*
Adv D Smith

DEFENDENT'S ATTORNEYS: *Burns Delpont Attorneys*

DATES OF HEARING: 23 and 26 November 2012

DATE OF JUDGMENT: 7 December 2012.