625/87

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ALLAN CULVERWELL — First Appellant

CULVERWELL KNYSNA PROPERTIES (PTY) LTD — Second Appellant

and

CLAUDIUS HENRY BROWN — Respondent

CORAM: CORBETT, CJ, HEFER, VIVIER, EKSTEEN, JJA, NICHOLAS AJA

HEARD: 11 May 1989

DELIVERED: 7 September 1989

J U D G M E N T

HEFER, JA

I have had the privilege of reading the judgment prepared by my brother NICHOLAS. For the reasons stated in the judgment I agree that the claim in reconvention was rightly dismissed. However, since I am unable to support my brother's finding that the plaintiff did not prove the damages to which the claim in convention related, I propose stating my own view in this regard.

The claim arose, it will be recalled, from second defendant's repudiation on 6 December 1984 of the agreement of sale. Having resold the property on 15 March 1985 the plaintiff advised the defendants on 18 March 1985 of the acceptance of the repudiation. The evidence is to the effect that the market started falling towards the beginning of 1985 with the result that, when the property was resold, it fetched R30 000 less than the price at which it had been sold to the defendants. In this court defendants' counsel did not challenge the evidence that the price fetched on resale was somewhat higher than the value of the property at the time; nor did he challenge the trial court's finding that there was no undue delay on the plaintiff's part in accepting the repudiation or in reselling the property.

The damages claimed in the claim in convention represent the difference (subject to adjustments not presently relevant) between the amount of R210 000 at which the property had been sold to the defendants and the amount of R180 000 at which it was resold. My brother NICHOLAS has come to the conclusion that the trial court should have dismissed the claim in convention since the plaintiff's damages should have been assessed in relation to the value of the property at the time of the repudiation during December 1984 and since there is no evidence of its value at that time. I agree that its value during December 1984 has not been proved but I respectfully disagree with my colleague's view that the damages are to be assessed in relation to the time of the repudiation.

The problem arises, as my brother has indicated, from the fact that the time for performance (ie the passing of transfer) has not been fixed in the agreement. Although the decision in Novick v Benjamin 1972(2) SA 842 (AD) is accordingly not in point I wish to draw attention to certain matters raised in the judgments in that case which do have a bearing on the present question. Firstly, there is the fundamental principle referred to in both judgments that the injured party should be placed, by an award of damages, as far as possible in the position he would have occupied had the agreement been fulfilled. Secondly, there is TROLLIP JA's reference at 860 E-H to the "original" rule that damages for breach of contract are assessed in relation to the time of the breach, and his explanation that the original rule

> "was, in effect, saying the same thing as 'at the time of performance', since the two then invariably coincided, it being considered that no such breach could legally occur before the time for performance had arrived."

TROLLIP JA indicated that this is no longer the case since the concept of an anticipatory breach has become established. I mention this in view of the statement in many reported judgments and in textbooks (especially the older ones) that damages for breach of contract are as a rule calculated in relation to the time of the breach. Expressing the time element in the calculation of damages in this manner is not necessarily incorrect but it does tend to obscure the fact that the appropriate time is really the time for performance. Finally I really draw attention to TROLLIP JA's observation at 860 C-D that the adverse difference between the contract price and the market value of the res vendita at the time of performance which is usually awarded to the injured party in the case of the breach of a contract of sale, represents the loss that the parties themselves normally contemplated as likely to ensue on such a breach. On this ground TROLLIP JA at 861 C-F rejected MacKeurtan's view that damages should ordinarily be measured at the time of the anticipatory breach.

Having mentioned Novick v Benjamin something should also be said about the cases referred to by the court a quo at 476 F-H of its reported judgment. I do not find the decisions in any of these cases of particular assistance to the solution of the present problem.

Bester v Visser 1957(1) SA 628 (T) and De Lange v Deeb 1970(1) SA 561 (O) were claims for damages arising from the cancellation of an agreement by one of the parties on account of the other's non-performance of his obligations. These cases were presumably referred to by the court _a quo_ by reason of the resemblance between an actual breach of contract and a repudiation, in so far as the injured party's election to terminate the agreement is concerned. That there is this resemblance cannot be denied and any discussion of the appropriate time for the assessment of damages in the one type of case may therefore be of assistance in the solution of problems relating to the other type. But there is no discussion either in _Bester v Visser_ or in _De Lange v Deeb_ and the bald statements made therein do not take the matter any further. Equally unhelpful are judgments actually dealing with repudiation but in which the appropriate time for the assessment of damages was not properly considered. _Markus & Co v Louw_ 1930 CPD 123, _Serman & Co v Brown and Others_ 1939 TPD 244, _Moyes & McKenzie v Frenkel & Co_ 1912 NPD 282 and _Cooper v Kohn's Produce Agency Ltd_ 1917 TPD 184 fall in this category. There are statements in the judgments in these cases to the effect that damages are to be assessed "as at the time of the breach" or "on the date of the repudiation", which sometimes leave one wondering at the precise meaning of the expression used (cf the remark in Novick v Benjamin (supra) at 862 A-B in regard to Moyes & McKenzie v Frenkel & Co). Statements like these contribute little to the inquiry and can hardly be regarded as authoritative pronouncements on the subject.

Celliers v Papenfus and Rooth 1904 TS 73, as my brother NICHOLAS has indicated, is another case concerning a seller's non-performance. Although in this case a reasoned judgment was delivered the issue was whether the buyer was entitled by way of damages for non-delivery to the difference between the contract price and the highest price at which the property could have been sold between the date of the contract and the date on which it was cancelled. It is with this in mind that INNES CJ said at 84:

> "In the present contract there has been no time fixed for delivery, and I think in such cases that the proper rule is that the buyer should take some action to fix the date at which his damages are to be calculated. He cannot lie by indefinitly, and then, after the lapse

> of a long period of time, go back to the high-water mark of the fluctuation in the value of the property in the interim ... As a general rule it appears to me that the general damage must be calculated at the date when the buyer elects to treat the contract as at an end."

In Whitfield v Phillips and Another 1957(3) SA 318 (AD) the seller repudiated an agreement for the sale of a pineapple farm to the plaintiffs who accepted the repudiation and sued the seller for damages in respect of (1) the loss of crops and (2) the value of the farm in excess of the purchase price. The trial court awarded damages under (1). In a minority judgment on appeal to this court , HOEXTER JA came to the conclusion that no award under (1) should have been made. The ratio of the judgment was that the plaintiffs would have been adequately compensated for their loss of crops on the basis that the spes of future crops formed part of the value of the farm but that, since its value had not been proved, the claim under (1) should have been dismissed. At 324 opposite the letter H the learned judge said:

> "As a rule the damages for non-delivery of land, in a case in which the buyer has rescinded the sale, are to be measured by the excess of the value of the land over the contract price at the time of rescission."

(From the reference both before and after this passage to Celliers v Papenfus and Rooth it is clear that it is based on the decision in that case.) At 325 G-H HOEXTER JA added:

> "In my opinion the parties contemplated that, if the defendant failed to deliver Thorn Park to the plaintiffs the latter would exercise their right of electing to enforce or to rescind the contract. If they elected to rescind, as they did in the present case, the parties contemplated that the plaintiffs would be entitled to the true or market value of the farm as at the date of the rescission."

Although these passages clearly support the respondent's argument in the instant case HOEXTER JA's observations were not made in the context of the present problem. The question of the appropriate time for the assessment of damages did not arise; the issue was whether the plaintiffs were entitled to be compensated for the loss of crops and the way in which HOEXTER JA dealt with the issue has already been described. It is interesting to note that the learned judge related the measure of damages (as TROLLIP JA later did in Novick v Benjamin (supra) to the date that the parties themselves had contemplated.

Stephens v Liepner 1938 WLD 95 is the last case mentioned in the judgment of the court a quo. In this case the plaintiff claimed damages arising from the defendant's repudiation of an agreement in terms of which the latter, without fixing a date for performance, had donated shares in a company to the plaintiff. It was alleged in the declaration that the plaintiff had accepted the repudiation and that the damages represented the value of the shares at the date of the acceptance. On exception to the declaration SOLOMON J ruled that the date of the repudiation (not the date of the acceptance thereof) was the correct date for the assessment of the damages and upheld the exception. It must be pointed out, however, that there was an allegation in the declaration that the donee had demanded delivery of the shares and that the demand had been refused by the donor who had at the same time repudiated his obligation. This being the case SOLOMON J said at 96:

> "In this case demand was made and refused. Thus the breach of contract by the defendant need not be looked for: it is apparent."

The donor had been placed _in mora_ by the demand and the case was decided on the basis of an actual breach. In an _obiter dictum_ at 98 SOLOMON J said:

> "Indeed the reasoning in (_Celliers v Papenfus and Rooth_) is strongly against the contention of the present respondent that, after repudiation of the contract by the excipient on August 20th, he had the right to withhold his acceptance of the repudiation for over two months, thereby perhaps substantially increasing the amount of his claim for damages. There is abundant authority that the court will not allow such a proceeding."

Presumably because it found itself unable to decide the present case on authority the court _a quo_ decided it on principle. For convenience I quote the relevant passage from FRIEDMAN J's judgment at 477 A-D. It reads as follows:

> "The purchaser's wrongful repudiation does not _per se_ bring the contract to an end. The seller is not obliged to accept it immediately; he has an election and may take a reasonable period of time in order to

> decide whether to accept the purchaser's repudiation. During that time i e until he has exercised his election, it is open to the purchaser to retract his repudiation and tender performance of his obligations. It is only when the seller has exercised his election to accept the repudiation that the contract is cancelled. Only when the date of cancellation has been crystallised can any question of damages arise. It would be entirely artificial in a case such as this to assess the plaintiff's damages by reference to an anterior date, viz the date of repudiation, on which date the contract was still alive and no claim for damages had yet arisen. It seems, moreover, that those cases in which it has been held that the decisive date is the date of repudiation have proceeded on the unwarranted basis that the innocent party is obliged to accept the repudiation immediately, which is clearly not so."

No fault can be found with FRIEDMAN J's exposition of the law relating to repudiation. A repudiation, as was once said, is "a thing writ in water" (per ASQUITH LJ in Howard v Pickford Co Ltd (1951) 1 KB 417 at 421; see also HMBMP Properties (Pty) Ltd v King 1981(1) SA 906 (N) at 910 B-D). It merely affords the injured party an election to terminate the agreement by accepting the repudiation (Nash v Golden Dumps (Pty) Ltd 1985(3) SA 1 (AD) at 22 D-F), and unless and until that happens the repudiator's obligation to perform and the other party's right to receive performance remain wholly unaffected. The latter is not obliged to decide whether to accept the repudiation immediately but is allowed a reasonable period of time to consider and exercise his election (Segal v Mazzur 1920 CPD 634 at 644, Potgieter and Another v Van der Merwe 1949(1) SA 361 (AD) at 372; Mahabeer v Sharma NO and Another 1985(3) SA 729 (AD) at 736 E-H).

These principles are trite and it will be noticed that my brother NICHOLAS does not question any of them. What he does question, is their relevance to the determination of the appropriate date for the assessment of damages. There is not necessarily a connection, he says, between the date of cancellation of a contract and the measure of damages for the breach of it. Moreover, immediately upon repudiation, the injured party's cause of action for damages is complete; he may immediately issue summons since the summons itself may be a binding announcement of his election to accept the repudiation.

Although there is force in my colleaque's reasoning I am, with respect, not prepared to adopt it. It is correct that there is not necessarily a connection between the date of the cancellation of an agreement and the measure of damages for its breach. But it does not follow that the date of cancellation is irrelevant to the enquiry when in a case where a time for performance has not been stipulated, the appropriate date for the assessment of damages is being sought. In such a case two dates suggest themselves for consideration - the date of the repudiation and the date of the acceptance. The court a quo preferred the latter, as I understand the judgment, not simply because that is the date on which the agreement was terminated or because the date of termination is necessarily the appropriate date, but because it would be entirely artificial to relate the assessment to a time when the agreement was still in existence and a claim for damages had not yet arisen. I agree with this view. The real thrust of the argument is the artificiality of an assessment with reference to a time when a claim for damages has not arisen. That such a claim does not arise at the time of repudiation is plain. After all, the injured party may elect to ignore the repudiation and to press for performance at the appropriate time. In that event a claim for damages can obviously not be maintained, except as an alternative to a claim for specific performance, and then only in the event of the repudiator's failure to comply with an order for performance (Custom Credit Corporation (Pty) Ltd v Shembe 1972(3) SA 462 (AD) at 469 F - 471 E). My brother NICHOLAS says that the injured party's cause of action is complete immediately upon repudiation since, although his decision to accept the repudiation is wanting at that stage, the summons itself may be an announcement of his election. There is authority for this proposition (although certan dicta in Magnet Motor Co v Bernstein 1929 TPD 431 at 434 seem to point the other way) and for the sake of the present argument I am prepared to accept it. But, even on this approach, the injured party's election is still required. It cannot be gainsaid that, as a matter of principle, a claim for damages does not arise until the repudiation is accepted.

The artificiality of an assessment which relates the damages to the time of repudiation is manifest. Indeed, bearing in mind the effect of a repudiation as described above and particularly that it does not by itself give rise to a claim for damages, it is difficult to see what relevance it has to the measure of damages. The application of the principle that the injured party is to be placed in the position he would have occupied had the agreement been fulfilled, entails a comparison between that notional position and the actual position ensuing on its non-fulfilment. What the position is immediately upon repudiation seems to be entirely irrelevant since that is not the position in which the injured party may finally find himself. His final position depends upon the way in which he exercises his election and can only be determined once he has elected to accept the repudiation. That this is so becomes plain once it is realized that the reasonable period of time that the injured party must be allowed to consider his election, may turn out to be of quite considerable duration and that substantial fluctuations in the value of the subject matter of the contract may occur in the interval between the repudiation and the acceptance. This is what happened in the present case and what may also happen in a case where the seller is the repudiator and the market is rising. Considering that the injured party's position may change dramatically after the repudiation it appears, therefore, that the comparison cannot properly be made until his final position can be assessed.

That the injured party is allowed a reasonable period of time to consider his election seems to have been overlooked in the obiter dictum in Stephens v Liepner referred to earlier. In his unpublished thesis Anticipatory repudiation in English and South African Law of Contract at 551 Dr P M Nienaber (now NIENABER J) comments as follows on the view expressed in that case:

> "Indeed, to maintain that on acceptance of the repudiation the damages are to be fixed retrospectively to the date of repudiation really amounts to this that

> the innocent party is deprived of any, let alone a reasonable time, to make up his mind whether or not to accept the repudiation because every moment he delays may prejudice him in the amount of damages recoverable."

This is indeed so. My brother NICHOLAS accepts that the injured party may temporise for a reasonable period but says that he cannot do so at the risk of the other party. But, with respect, I fail to see how effect can be given to the right to delay the decision unless the defaulting party is to bear the risk; and, even if it were possible to do so, I fail to see why the injured party should temporize at his own risk. My colleaque's objection is to the injured party being at liberty to speculate at the risk of the other party. I do not regard reasonable delay in taking a decision whilst considering the position as speculation. The injured party does not normally delay his decision with a view to await possible fluctuations in the market or to select the best possible date for accepting the repudiation; what is normally considered, is not the time of the acceptance but whether the repudiation should be accepted at all.

A further objection raised by my colleaque is that the date of acceptance is an arbitrary one within the sole control of the injured party. I agree that this is so, but the same reasoning applies to the date of repudiation which is an equally arbitrary one within the sole control of the repudiator. Dr Nienaber says appositely in his thesis (supra) at 551 about the decision in Stephens v Liepner:

> "In view of the Court's reluctance to afford the innocent party the opportunity of choosing the most propitious moment for assessing the damages, it does strike one as strange that the Court adopted the date of the repudiation, since in effect this permits the guilty party in a fluctuating market to dictate the time for the fixing of the damages."

Having carefully considered my colleague's criticism of the judgment in the court a quo and the argument addressed to us on the defendants' behalf I have not been persuaded that anything said in the passage at 477 A-D quoted above can be faulted. It seems to me that the application of the ordinary rules relating to repudiation and the acceptance thereof, coupled with the fundamental principle that the innocent party is to be placed as far as possible in the position he would have occupied had the agreement been fulfilled, inevitably leads to the conclusion that the damages cannot, in a case like the present one, be appropriately assessed in relation to the time of the repudiation.

It does not follow, however, that the assessment should in all cases of an accepted repudiation be made in relation to the time of the acceptance. In cases eg where the res vendita is resold or similar goods repurchased it would often be inappropriate to do so. In such cases the resale or the repurchase itself may, of course, be regarded as a tacit acceptance but cases do occur where it is preceded by an express acceptance. In that event, provided there is no undue delay either in the acceptance or in the resale or repurchase, it is the price fetched on resale or paid for similar goods in the market that has to be taken into account. This principle has been established in a long line of cases. It was stated as follows by DE VILLIERS CJ in Wolff & Co v Bruce, Mavers & Co

(1889) 7 SC 133 at 135:

> "If the purchaser repudiates the sale, the seller is in the position of an ordinary party to a contract which has been broken by the other party, and he may sue for damages for the breach. It would be a nugatory act for the seller to tender the thing sold after the purchaser has repudiated the sale altogether. What then is the seller to do? If he keeps the thing sold until the purchaser is willing to take it, the thing may deteriorate in quality or in price and the purchaser may become insolvent. In self-protection, therefore, he re-sells the thing in order to avert the risk of loss from deterioration, fall in the market, or insolvency. Such a re-sale cannot debar him from recovering damages which he has sustained through the purchaser's breach of contract. If the nett price realised by the sale exceeds the original price, he, of course, sustains no damage, but, if it be less, the difference represents the loss sustained by him, and the difference he is, in my opinion, entitled to recover. After crediting the purchaser with the proceeds of the re-sale, the seller really recovers no more than the purchase price, but he recovers it by way of damages for breach of a contract which the seller has repudiated."

There are many other cases in which the injured party's right to resell or to buy similar goods was recognised. (See eg Dennill v Atkins & Co 1905 TS 282 at 289, Oellermann v Natal Indian Traders Ltd 1913 NPD 337, Chapman v Dwor 1921 CPD 433, Bremmer v Ayob Mahomed & Co 1920 TPD 303 at 305,306,307, Kaplan & Co v Basel Bros 1931 CPD 457 at 463, Central Produce Co v Hirschowitz 1938 TPD 350 at 357 to mention only a few of the better known ones.) From all these cases the principle can be extracted that the difference between the contract price and the price ruling on the date that the property is resold or similar property is bought, can be recovered by way of damages provided that there is no undue delay in reselling or repurchasing. This principle is so firmly established that it was said in Cooper v Kohn's Produce Agency Ltd (supra) at 186 that

> "... the rule is that the damages are assessed according to the price ruling at the earliest date on which they could be sold."

(See also Serman & Co v Brown and Others (supra)) at 248-249).

In the present case the plaintiff resold the property and is seeking to recover the adverse difference between the contract price and the price fetched on resale. There was no undue delay on the plaintiff's part in reselling and the property was resold at a price in excess of its current market value. It is clear, in my view, that his claim was rightly allowed.

The appeal is accordingly dismissed with costs.

J J F HEFER, JA

CORBETT CJ)
VIVIER JA) Concur
EKSTEEN JA)

Case no. 625/87
/MC

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CLAUDIUS HENRY BROWN ..... Respondent

CORAM: CORBETT CJ et HEFER, VIVIER, EKSTEEN JJA et NICHOLAS AJA.

HEARD: 11 MAY 1989.

DELIVERED: 7 SEPTEMBER 1989.

J U D G M E N T

NICHOLAS AJA.

NICHOLAS AJA:

On 31 March 1984 a deed of sale was concluded between Mr Claudius Henry Brown and Mr Allan Culverwell in terms of which Brown sold to Culverwell erf 3489, Knysna. The purchase price was R210 000.00, which was payable as to R110 000.00 on 1 May 1984, and as to the balance by way of a first mortgage bond over the property to be granted by Brown. In terms of a later addendum, it was recorded that Culverwell was purchasing the property as trustee for a company to be formed and Culverwell bound himself as surety and co-principal debtor for the due performance by such company of its obligations. In pursuance of the addendum Culverwell Knysna Properties (Proprietary) Limited later became substituted as the purchaser.

The deposit was not paid by 1 May 1984, and it was agreed on 4 May 1984 that the full deposit would be paid by 15 May 1984, or by two instalments of R55 000.00 each on 15 May and 30 May 1984 respectively. No payment was made either on 15 or 30 May 1984. On 25 May 1984 the parties agreed that the deposit was to be paid as to R10 000.00 forthwith, R25 000.00 on or before 30 May 1984, and the balance of R75 000.00 on or before 18 June 1984: interest was payable by the purchaser on the balance of R100 000.00 outstanding from time to time. The R10 000.00 was not paid forthwith: two cheques for R5 000.00 each furnished by Culverwell were dishonoured. On 7 June and 21 June 1984, respectively, however, Culverwell made payments of R15 000.00 and R20 000.00. No further payments were made and on 5 September 1984 Brown issued out of the Cape Provincial Division a summons against Culverwell as first defendant and the company as second defendant claiming the balance of the deposit (R75 000.00), interest and costs.

In their plea which was dated 5 December 1984 Culverwell and the company averred that Brown had committed a breach of a material term of the agreement of sale. The company purported to cancel the agreement, and the defendants pleaded that they were not indebted to the plaintiff in the sum of R75 000.00 or at all. They accordingly prayed that the plaintiff's claims be dismissed with costs. At the same time the company filed a claim in reconvention, in which, after repeating the relevant allegations in the plea, it claimed judgment in the sum of R35 000.00 and other relief.

Brown did not replicate to the plea, but in his plea to the claim in reconvention, dated 14 June 1985, he denied that there were any grounds justifying the cancellation of the agreement by the company; and averred that the purported cancellation amounted to a repudiation of the agreement, which repudiation Brown had accepted. On the same date Brown gave notice of an amendment of his particulars of claim, the effect of which was to set up as the cause of action the alleged repudiation and the acceptance thereof, and to substitute for the existing prayers a claim for damages amounting to R21 674.94, interest thereon and costs.

On these pleadings the matter went to trial before FAGAN J on 29 May 1986. The learned judge upheld Brown's claim, and dismissed the company's claim in reconvention. Leave having been granted, Culverwell and the company appealed to the full court of the Cape Provincial Division. That court (FRIEDMAN J, with MUNNIK JP and DE KOCK J concurring) dismissed the appeal with costs (save for a correction of the amount of the damages). The judgment of the full court is reported (Culverwell & Another v Brown, 1988(2) SA 468(C)). Leave having been granted, Culverwell now appeals to this court.

In what follows, I shall refer to Brown either as "Brown" or "the plaintiff"; to Culverwell either as "Culverwell" or "the first defendant"; and to Culverwell Knysna Properties (Pty) Ltd either as "the company" or "the second defendant".

In view of the way in which the pleadings developed, it is convenient to deal first with the defendants' plea and the claim in reconvention.

In the plea, the defendants admitted the plaintiff's allegations in regard to the agreement of sale and the amendments thereto, and then proceeded to set up their defence in paragraph 6. This reads :

"<u>AD PARAGRAPH 8:</u>

6.1 The Defendants admit that the First

Defendant paid the sum of R15 000.00 to the Plaintiff on the 7th June 1984 and R20 000.00 to the Plaintiff on the 21st June 1984;

6.2 The Defendants admit that the balance of the initial deposit of R75 000.00 has not been paid by either Defendant but deny, for the reasons stated below, that any portion of the said amount is due or payable.

6.3 The following were material, express, alternatively implied, further alternatively tacit terms of the Agreement between the parties :

6.3.1 The Second Defendant was to be given occupation of Erf 3489 Knysna on the date of transfer by which date the Plaintiff or other occupiers of the said property would be obliged to vacate the said property and/or

6.3.2 The Second Defendant knew and understood that the property was let and that the agreement between the parties was subject to the rights of any tenants under any agreement of tenancy, the provisions of which had been brought to the notice of the Second Defendant by the Plaintiff prior to the parties entering into the said Agreement.

6.3.3 The Plaintiff would not enter into any new leases or amend the period of any existing leases between the date of signature of the said Agreement between the parties and the date of transfer of ownership to the Second Defendant without the knowledge and consent of the Second Defendant;

6.4 In breach of the said Agreement and on the 1st May 1984, without the knowledge or consent of the Second Defendant, the Plaintiff entered into a written Agreement of Lease in respect of a portion of Erf 3489 Knysna with one PIETER JACOBUS PRINSLOO in terms of which, inter alia, the said Prinsloo was to be entitled to occupation of a shop which is situated on the said erf for three years from the 1st May 1984 to 30th April 1987.

6.4A The aforesaid conduct of the Plaintiff constituted a material breach of the aforesaid agreement and further constituted a repudiation by the Plaintiff of the aforesaid Agreement, and in the premises the Second Defendant became entitled to cancel the aforesaid agreement on both such grounds.

6.5 The Second Defendant hereby cancels the Agreement between the parties and tenders to return to the Plaintiff any benefit which it may have received pursuant to the said Agreement against repayment of such monies as it has already paid to the Plaintiff pursuant thereto.

6.6 The First Defendant accordingly pleads that he is not indebted to the Plaintiff in the sum of R75 000.00 or any lesser amount by reason of the fact that he is a surety and the Second Defendant being the principal debtor has a defence to the Plaintiff's claim."

Paragraphs 6.3.1 and 6.3.2 are a paraphrase of clause 8 of the agreement of sale which reads as follows :

"8. (a) Occupation of the property shall be given to the Purchaser on date of transfer by which date the Seller or other Occupier shall be obliged to vacate the property; and/or

(b) The Purchaser knows and understands that the property is let and that this Offer is made subject to any tenant's rights under any agreement of tenancy and/or under any law or regulations now in force, the provisions of which have been duly brought to the notice of the Purchaser."

It was contended at the trial that the term alleged in paragraph 6.3.3 was a tacit term of the agreement of sale. FAGAN J rejected the contention and it was not raised in argument before us.

There were on erf 3489 three buildings: a many-roomed typical "onderdorp" house; a shop called "The Paint Pot", which sold paint; and a so-called café called "The Fruit Basket", which had a flat above it. The breach of contract alleged by the defendants concerned only "The Fruit Basket".

A Mr Harmse carried on the business of "The Fruit Basket" under a written lease from Brown. In February 1984 Harmse sold the business to a Mr Prinsloo. In the ordinary course Harmse would presumably have sub-let the leased premises to Prinsloo. On 7 March 1984, however, Brown's attorney, a Mr Rose-Innes, wrote a letter to Prinsloo which was headed "re: Sale Harmse to You". It stated inter alia -

> "We have had discussions with Mr Brown regarding the transfer of the lease contract. Mr Brown suggests that it would be better if the whole new contract was to be entered into valid for a period of three years. This gives you a longer period."

Effect appears to have been given to this suggestion because a lease of "The Fruit Basket" premises was signed by Brown on 25 April 1984 and by Prinsloo on 1 May 1984. It was for a period of three years from 1 May 1984 to 30 April 1987, and the rental was R400.00 per month escalating to R484.00.

At the time of the conclusion of the agreement of sale, Culverwell was not aware of the negotiations for this lease. He first learned of the lease on 11 October 1984 (that is after the issue of the plaintifff's summons in September 1984) when in the course of a telephone discussion with Rose-Innes, Culverwell stated that he understood that the tenancies were monthly and Rose-Innes informed him that there were long leases, especially over the café. On 19 October 1984 Culverwell visited Rose-Innes and asked to see the Prinsloo lease. He was then told the date on which the lease was concluded. According to Rose-Innes in his evidence, Culverwell "then seemed to get very fussed about this and he said, 'This gives me a reason to cancel'. I had - it had slipped my mind that in fact the lease had been arranged and agreed to before he bought."

(On the evidence of Rose-Innes it is possible that an oral agreement of lease between Brown and Prinsloo had been concluded before the date of the deed of sale and that it was later reduced to writing. However, Rose-Innes's statement above-quoted was not taken up by counsel for either party and the matter was not further investigated, and it must, I think be assumed for the purposes of this appeal that there was no such prior oral lease.)

At the trial FAGAN J found that there had been no breach of clause 8 of the deed of sale. In his judgment in the court <u>a quo</u>, however, FRIEDMAN J disagreed. He said at 474 G that "by entering into a lease which extended beyond the period of an existing lease, plaintiff imposed a greater restriction on the purchaser's right to obtain vacant possession than that embodied in clause 8(b) and so breached clause 8."

I respectfully agree with FRIEDMAN J's conclusion. In terms of clause 8, Brown was obliged to give occupation of the whole property (including "The Fruit Basket") on the date of transfer, subject to the rights of any tenant under any agreement of tenancy subsisting at the date of the agreement of sale. The Prinsloo lease was concluded after the date of the agreement of sale. By entering into that lease, Brown disabled himself from performing in terms of clause 8: he put it out of his power to give occupation as provided by that clause. A breach of clause 8 when the time came to give occupation was practically inevitable. Brown's conduct accordingly constituted a breach of contract *in anticipando*. If that breach amounted to what may conveniently be termed a "repudiatory breach" (see *Johnson v Agnew*, 1980 AC 367 *passim*), or if it constituted a repudiation of the agreement, then the defendants were entitled to cancel the contract. Otherwise not.

By a repudiatory breach is to be understood one which justifies the injured party in resiling from the contract. In *Aucamp v Morton*, 1949(3) SA 611 (A) at 619

WATERMEYER CJ said :

> "We are dealing in this case with a contract involving reciprocal obligations of which several, of varying importance, rest upon the appellant, and it is usually laid down with regard to such cases that a breach by one party of one of the obligations resting on him will only give the other a right to treat the contract as discharged if the breach is one which evinces an intention on the part of the defaulter no longer to be bound by the terms of the contract for the future, or if the defaulter has broken a promise, the fulfilment of which is essential to the continuation of the contractual tie."

In Swartz & Son (Pty) Ltd v Wolmaransstad Town Council, 1960(2) SA 1(T) at 4 F-G HIEMSTRA J said that the test is one

> "... for which various expressions have been used, such as whether the breach 'goes to the root of the contract', or affects a 'vital part' of the obligations or means that there is no 'substantial performance'. It amounts to saying that the breach

> must be so serious that it cannot reasonably be expected of the other party that he should continue with the contract and content himself with an eventual claim for damages."

The test whether conduct amounts to repudiation of a contract is similar. In Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou, 1978(2) SA 835 (A) at 845 A-C, RABIE JA referred with approval to statements by WILLIAMSON J in Street v Dublin, 1961(2) SA 4(W) at 10 B :

> "The test as to whether conduct amounts to such a repudiation is whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound."

and by LEWIS J in Schlinkman v Van der Walt and Others 1947(2) SA 900 (E) at 919 :

> "Repudiation is in the main a question of the

intention of the party alleged to have repudiated. As was said by Lord COLERIDGE LCJ in Freeth v Burr (1874) LR 9 CP at 214:

> 'the true question is whether the acts or conduct of the party evince an intention no longer to be bound by the contract',

a test which was approved by the House of Lords in Mersey Steel Co v Naylor 9 AC 434."

The court *a quo* held (at 475 A-B) that the company failed to establish that by entering into the Prinsloo lease Brown committed a material breach entitling it to cancel the contract; and (at 475 D) that Brown's action in concluding a lease with Prinsloo did not amount to a repudiation of the contract of sale.

It is clear in my opinion that Brown's conduct in entering into the Prinsloo lease did not evince an intention not to be bound by the agreement of sale. The negotiations for that lease had been in progress at least since March 1984 and Brown signed it on 25 April 1984. The agreement of sale was concluded on 31 March 1984, that is, during the course of the negotiations. After Prinsloo signed the lease on 1 May 1984 (when the deposit of R110 000.00 was payable), Brown agreed on 4 May 1984 to grant an extension of time for the payment of the deposit. If the facts had been known to Culverwell at the time, he could not reasonably have believed that it was Brown's intention no longer to be bound by the agreement of sale.

Furthermore, it is clear from the evidence on record that the breach itself was not one which went to the root of the contract or affected a vital part of the contract.

Mr Vowles, an attorney and appraiser in Knysna, who gave expert evidence on the value of the property, described "The Fruit Basket" building as consisting of a basement, a shop with a wooden floor which is just a fruit shop (what is called a café) and on top a not very salubrious flat. The basement was merely a storeroom with a concrete floor and no windows, in which there were empty Coca-Cola bottles.

The estate agent who negotiated the sale of erf 3489 (a Mrs Bickle) said that she took Culverwell to the property on 31 March 1984. His interest was in the house, which he intended to occupy personally as a sort of annexe to his yacht which he would moor in the Knysna lagoon. He had no interest in the other two buildings apart from their rent-producing capacity which could contribute to bond repayments. "The Fruit Basket" she described as "a very cramped little café that sells bait and other things". Culverwell was not interested in seeing copies of the leases nor in learning their duration. All he wanted was an assurance that the house was let on a monthly tenancy: his sole concern was to get occupation of the house. He did not suggest that he was interested in running the café business himself or getting occupation of the flat.

Rose-Innes, Brown's attorney, said that on 19 October 1984, when Culverwell came to the office about the Prinsloo lease, Culverwell told him that occupation of "The Fruit Basket" was important to him. Asked why it was important, Culverwell said, according to Rose-Innes :

> ".... I had plans for that café .... I was going to put my old parents in there and they were going to run the café."

Rose-Innes added :

> "Well I was quite dumbfounded because I mean to say, to put a person, parents of the standard of life of Mr Culverwell, to put them in a crummy café of that kind was quite - it was like a fantasy to me, - it was quite ridiculous ..."

Until 19 October 1984, Culverwell had never, at his meetings with Rose-Innes, asked for any details regarding leases or for copies of them.

In his evidence Culverwell said that it had been his intention to improve the appearance of the café and redecorate the flat. He wanted his mother to run the café as a hobby and to live in the flat.

The trial judge said that he had no hesitation in accepting Mrs Bickle's evidence that Culverwell's interest lay in the house and not in the shop and the café. He was satisfied that Culverwell did not, at the time the contract was concluded, intend using the càfé as a retirement hobby for his mother. This appeared to have been an afterthought.

Those findings are undoubtedly correct. Moreover, although the Harmse lease had been disclosed by the plaintiff and was available to counsel for the defendants, no attempt was made to put details of that lease before the trial court, in order to show to what extent the Prinsloo lease would have prejudiced the company. The persona of the lessee of "The Fruit Basket" was a matter of indifference to Culverwell: it could not have mattered to him whether the lessee was Harmse or Prinsloo. The replacement of the Harmse lease by the Prinsloo lease was a mere matter of machinery - from Culverwell's point of view it was no concern of his whether Prinsloo occupied "The Fruit Basket" as a sub-lessee from Harmse or as a lessee from Brown. What might have been of importance was the duration of the Harmse lease, and from the fact that this information was not placed before the trial court, the inference is that it was of no importance.

It was in my opinion clearly established that the conclusion of the Prinsloo lease did not constitute a repudiatory breach by Brown and that consequently it did not entitle the company to terminate the agreement of sale.

It follows that the trial judge was correct in finding against the second defendant on the claim in reconvention.

I turn to the plaintiff's claim in convention. As originally framed, it was for payment by the defendants of the balance of the deposit, amounting to R75 000.00, and other relief. After the plea had been filed, the plaintiff served a notice of amendment, in terms of which the original prayers were deleted, and prayers for payment of R21 674.94 as damages and other relief, were substituted. The new cause of action was set out in the following new paragraphs in the particulars of claim:

"10. Second Defendant has repudiated the aforesaid agreement by purporting to cancel same although there are no grounds justifying such cancellation. The purported cancellation appears from paragraph 6.5 of Defendants' Plea, dated 5 December 1984, in this matter.

11. Plaintiff has accepted Second Defendant's aforesaid repudiation.

12. As a consequence of Second Defendant's repudiation Plaintiff has suffered damages amounting to R21 674.94 calculated as follows:

(a)	Loss suffered on the resale of the property	R30 000.00
(b)	Agent's commission paid	R 8 100.00
(c)	Loss of interest on the balance of the purchase price due by Second Defendant, calculated until 23 May 1985	R18 574.94
		R56 674.94
(d)	Amounts paid by Second Defendant	R35 000.00
	TOTAL	R21 674.94"

On 15 March 1985 Brown had resold the property for R180 000.00 to a Mr Meterlerkamp on behalf of a company, Tourists' Mecca. On 18 March 1985 he had informed the defendants that he accepted the repudiation of the contract.

Counsel for the plaintiff very properly conceived it to be his duty to draw our attention to the case of Mobil Oil Southern Africa (Pty) Ltd v Mechin, 1965(2) SA 706 (A). In terms of that decision, he thought, the onus in regard to the claim in convention was on the plaintiff to prove that there were no grounds justifying cancellation of the agreement of sale by the defendants.

The facts in the Mobil Oil case were very different, and I do not think that there is to be extracted from it any legal principle which is applicable in the present matter.

Here the plaintiff's cause of action is based on an accepted repudiation of the agreement by the defendants. I am inclined to think that it was not for the plaintiff to show that there was no ground for the repudiation: the plaintiff's allegation to that effect was surplusage and it was for the defendants to justify the repudiation. But, however that may be, the question is academic. As appears from what is stated above when dealing with the defendants' plea, it was in my view established affirmatively that the breach of contract committed by the plaintiff was not a repudiatory breach and hence the defendants were not entitled to cancel the agreement.

In their plea the defendants unequivocally took up the attitude that they were not going to carry out the contract. This amounted to a repudiation of the contract - it manifested an intention not to be bound by it. Of course that repudiation did not in itself put an end to the contract. When it occurred the plaintiff had a right of election. He might "accept the repudiation" (thereby terminating the contract) and sue for damages for breach of contract; or he might refuse to accept it, in which event the contract would remain in full effect. Having once made his election, the injured party was bound by it - the choice of one remedy necessarily involves the abandonment of the other inconsistent remedy. He cannot both approbate and reprobate. Quod semel placuit in electionibus amplius displicere non potest.

Plainly, where a party elects to terminate the contract, he cannot thereafter change his mind: the contract is gone. But if the injured party elects to abide by the contract and obtains a decree of specific performance, and the defaulting party refuses or fails to comply with the order, what is the plaintiff to do with the property? Is he to hold it indefinitely at his disposal? The answer is no. In such a case it would be competent for the plaintiff to ask in another action in lieu of that decree, for cancellation of the contract and damages. And there is no reason in law why the plaintiff in an action should not claim specific performance, and ask alternatively (should there not be performance within the time fixed by the court) for an order cancelling the contract and directing the defaulting party to claim damages (cf Ras and Others v Simpson 1904 TS 254 at 256 and see Johnson v Agnew (supra) at 398 E-G). 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.

It has frequently been said that election must be made within a reasonable time (see Bowditch v Peel & Magill 1921 AD 561 at 572-573; Armstrong v Magid & Another 1937 AD 260 at 273; Schuurman v Davey, 1908 TS 664 at 671; Frankfurt v Rand Tea Rooms Ltd & Sheffield, 1924 WLD 253 at 257). It does not, however, follow that if the election to cancel the agreement is not exercised within a reasonable time, the right to elect is lost without more. The position was stated by HEFER JA in Mahabeer v Sharma NO & Another, 1985(3) SA 729 (A) at 736 D as follows:

> "Apart from the law relating to prescription, there is no principle of South African law of which I am aware that justifies a conclusion that a right may be lost through mere delay to enforce it and no reason exists for holding otherwise in the case of the right to cancel an agreement."

He continued (at 736 G-I):

> "Depending on the circumstances, such a failure may ..... justify an inference that the right was waived or, stated differently, that the party entitled to cancel has elected not to do so ...., or it may open the door to some other defence. In such cases the lapse of an unreasonably long time forms part of the material which is taken into account in order to decide whether the party entitled to cancel should or should not be permitted to assert his right. But per se it cannot bring about the loss of the right ..."

In the present case the plaintiff elected to cancel and notified the defendants of his election on 18 March 1985. Although that was more than 3 months after the date of repudiation it was not contended either in the court a quo or in this court that there was an unreasonable delay.

The plaintiff was accordingly entitled to recover such damages as he proved. The question which remains therefore is whether the plaintiff did prove the amount of his damages. The main facts in this regard may be briefly repeated.

The plaintiff's action for payment of the sum of R75 000.00, being the balance of the initial deposit which was due and payable and had not been paid, was instituted on 5 September 1984. In the plea, which was filed on 5 December 1984, the second defendant purported to cancel the agreement of sale. On 15 March 1985 the plaintiff sold the property to Tourists Mecca, and on 18 March 1985 informed the defendants that he accepted the repudiation. On 14 June 1985 the plaintiff served a notice of amendment, in terms of which there was substituted for the previous claim for payment of the balance, a claim for damages.

Expert evidence as to the value of the property was given by Vowles. He referred to the deed of sale dated 15

March 1985, in terms of which erf 3489 was sold for a purchase consideration of R180 000.00 to Meterlerkamp, in his capacity as a director of Tourists Mecca. Vowles said that this price was higher than he would have expected. Asked in cross-examintion what the value of the property was in December 1984, he said that it would have been "somewhat higher" because as from the beginning of 1985 there was a "dramatic fall in the value of properties": in the Knysna area in particular "there was a dramatic fall in the value of properties - it was noticeable". It got progressively worse each month from the beginning of 1985.

There was therefore no evidence before the trial court as to the value of the property on 5 December 1984, the date of repudiation; the only evidence was as to the value of the property in the middle of March 1985, the time of the plaintiff's acceptance of the repudiation.

The Court _a quo_ held (see the judgment of FRIEDMAN J at 477 F - 478 A) that the correct date for the determination of the value of the property was the date on which the plaintiff elected to accept the repudiation; that the finding of the trial judge that the resale price of R180 000.00 represented the fair market value of the property on 15 March 1985 was justified; and that that was the correct figure to use for the calculation of the plaintiff's damages.

It is the contention of the appellants that the appropriate date was 5 December 1984 and not 15 March 1985, and that because there was no evidence as to the value of the property on the former date, the plaintiff failed to prove his damages and should have been non-suited.

This Court considered a related problem in _Novick v Benjamin_ 1972(2) SA 842 (A). One of the questions for decision was the correctness of the trial judge's finding, in a case of anticipatory breach of a contract, that

> "the proper time with reference to which plaintiff's damages are required to be calculated is the date of the breach of the contract"
> (leaving open the question
> "whether the date of the acceptance of the repudiation or the date of the repudiation itself is the relevant date").

(See 850 C-D). Two judgments were delivered: one by JANSEN JA, with RUMPFF JA, BOTHA JA and MULLER JA concurring; and the other by TROLLIP JA, with BOTHA JA and MULLER JA concurring. JANSEN JA held (858 D) that the true rule in our law is that, "in the case of an accepted anticipatory breach, the damages are to be assessed in relation to the date of performance (subject to the mitigation rule)". TROLLIP JA agreed (860 H - 861 A) "that the correct rule is the time of performance". He had said (860 A-D):-

"A fundamental principle of our law is that for a breach of contract the sufferer should be placed by an award of damages in the same position as he would have occupied had the contract been performed, so far as that can be done by the payment of money, provided (a) that the sufferer is obliged to mitigate his loss or damage as far as he reasonably can, and (b) that the parties, when contracting, contemplated (actually or presumptively) that that loss or damage would probably result from such a breach of contract (see Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines, Ltd, 1915 AD 1 at p 22; Lavery & Co. Ltd v Jungheinrich, 1931 AD 156). Where the contract is one of purchase and sale of a marketable commodity which is broken by non-performance (i e non-delivery by the seller, or non-acceptance by the purchaser), effect is ordinarily given to that principle by awarding the sufferer the adverse difference (if any) between the contract price and the market price or value of the commodity at the proper time and place of performance. That is the general, working rule by which his loss or damage is ordinarily measured, the adverse difference in prices being regarded as representing the loss or damage that the parties usually contemplate is likely to ensue on such a breach ..."

(My emphasis).

At 854 A-C JANSEN JA quoted three paragraphs dealing with anticipatory repudiation from Wessels, Law of Contract, 2nd ed, including -

"5173 It is submitted that according to the Civil Law, and therefore according to our law, the date on which damages ought to be assessed in the case of a breach of contract is prima facie the date of performance, because it is at that date that the buyer is entitled to receive delivery of the goods and to sell them on the market so as to take his profit, if any is to be made. If the court can ascertain on the day of the trial what damages the injured party suffered on the day on which the contract ought to have been fulfilled, then he is entitled to the amount so ascertained."

At 857 F-H the learned judge of appeal said :-

> "The rule proposed by Wessels, namely that in the case of an accepted anticipatory breach damages should ordinarily be assessed in relation to the time of performance, is squarely based on the fundamental principle of our law that the innocent party should be placed in the position he would have occupied had the contract been performed (cf Victoria Falls & Transvaal Power Co., Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1 at p 22). This criterion necessarily relates to the date of performance and one can but agree with Williston, on Contracts, revised ed. vol 5, para 1397, that in principle 'anticipatory breach does not change the nature of the contract'. It seems, however, to follow, also on principle, that the party accepting the repudiation, and thus freeing himself from any obligation to effect performance in terms of the contract, should at the same time be subject to a 'duty' to mitigate his loss, a

'duty' well recognized in our law of damages generally."

In a passage immediately following that from the judgment of TROLLIP JA which is quoted above the learned judge of appeal said (860 E-F) that "at the time of performance" was the usual, present way of expressing that element of the rule. Originally (scilicet before the concept of an anticipatory breach had become well established in English and South African law) the rule was expressed to relate to the time of the breach of the contract. That was in effect, saying the same thing as 'at the time of performance', since the two invariably coincided, it being considered that no such breach could legally occur before the time for performance had arrived.

In a case of anticipatory breach, of course, the time of the breach does not coincide with but is prior to the time of performance, so that it is not correct to say in such a case that the date of the breach is the appropriate date.

The actual decision in Novick v Benjamin related to a case of anticipatory repudiation. The principle on which it was based is however one of general application, flowing as it does from a fundamental principle of our law of damages.

There is a strong body of authority in South Africa that the relevant date for the assessment of damages for breach of contract is the date of performance (or, as it is more frequently expressed in the cases, the date of breach). See for example Serman & Co v Brown & Others 1939 TPD 244 at 247 per BARRY JP :-

> "... the appellant repudiated the entire contract of sale, and the usual measure of damages is the difference between the contract price and the value of the thing sold at the date of the breach. The general principle is put as follows by Wessels, Law of Contract (vol 2, sec 3392): 'the measure of

damages in case of a breach of contract of sale is by our law the same in principle whether the sale is one of land or goods. Some small distinctions do, however, exist owing to the inherent difference between land and movables. In all cases of breach of contract of sale the usual measure of damages, both for the seller and for the purchaser, is the difference between the value of the thing sold at the time of the breach and the contract price."

See also Moyes & McKenzie v Frenkel & Co 1912 NPD 282; Cooper & Kohn's Produce Agency Ltd 1917 TPD 184; Bremmer v Ayob Mahomed & Co 1920 TPD 303; Kameel Tin Co (Pty) Ltd v Brollomar Tin Exploration Ltd 1928 TPD 726; and Markus & Co v Louw 1930 CPD 123 at 128 *in fin*.

The rule in England is the same. It is sufficient to quote from Johnson v Agnew (*supra*) at 400 H per LORD WILBERFORCE :-

> "..... The general principle for the assessment of damages is compensatory, i.e., that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of breach - a principle recognised and embodied in section 51 of the Sale of Goods Act 1893."

Cf Treitel, The Law of Contract, 7th ed p 739.

In the judgment of the court *a quo*, reasons were given for the conclusion that the correct date for the determination of the value of the property in the present case was the date on which plaintiff elected to accept the repudiation (see 476 B - 477 G). I do not think, with respect, that those reasons were sound.

FRIEDMAN J said (at 476 F) that the cases differ as to the decisive date for the purpose of calculating damages and cited cases in which it was held that the correct date was the date of repudiation, and other cases in which the date of acceptance of the repudiation was said to be the correct date. The latter cases require examination.

The first one, that of Celliers v Papenfus & Rooth, 1904 TS 73, does not on analysis provide support for the proposition that the date of acceptance of the repudiation is the correct date for the assessment of damages. There the plaintiff sued the defendants for payment of the purchase price of a farm purchased by the latter, tendering transfer of 62 morgen. The defendants refused to pay the price on two grounds: first, that the plaintiff's tender of transfer was too late; and second,that it was in any event insufficient in that the whole amount of the ground which formed the subject-matter of the contract was not tendered. The plaintiff's claim in convention failed. The defendant's claimed damages in reconvention. The court held that the proper rule was that the measure of damages should be the difference between the contract price and the real or market value. INNES CJ said at 84:

> "It is not generally possible in the case of land to go into the market and buy other land exactly equivalent, and an ordinary purchaser has to prove what the real value of the land is upon the date on which he founds, and claim the difference between the contract price and that value. At what time, then, should the value of the thing sold be calculated in a case of this kind? In the present contract there has been no time fixed for delivery, and I think in such cases that the proper rule is that the buyer should take some action to fix the date at which his damages are to be calculated. He cannot lie by indefinitely, and then, after the lapse of a long period of time, go back to the high-water mark of the fluctuations in

> value of the property in the interim. If he does not desire to claim specific performance of the contract he must inform the seller that he repudiates it on the ground of non-delivery, and that he claims damages for breach of contract. He must repudiate upon a certain date, and as at the date his damages must be assessed."

In this passage it was the innocent purchaser who had to inform the seller that he repudiated. The word "repudiate" was there used as a synonym for lawfully rescind or cancel and not as connoting a wrongful breach of contract, which is the usual meaning of the word. (Cf: Kahn, <u>Contract and Mercantile Law</u>, 2nd ed, Vol I p 679 note (a); Kerr <u>The Principles of the Law of Contract</u> 3rd ed pp 340 <u>in fin</u> to 341.)

In <u>Celliers'</u>s case the learned Chief Justice was not concerned with the question of which of two dates was the appropriate date for the computation of damages. The case was explained, in my respectful opinion correctly, by SOLOMON J in Stephen v Liepner 1938 WLD 95 at 97-98:

> "The judgment is seeking for a date on which it can be said 'The vendor has broken his contract', and in the circumstances of the case finds it on the day when the purchaser says to the vendor, 'You have kept me waiting so long for the land that I now refuse to buy it.' In Celliers' case the seller, being bound by no contractual date, simply failed to give delivery. He neither refused to deliver nor repudiated the contract. If the buyer no longer wished to purchase the land but wished to claim damages, he was bound to terminate the contract by notice to the seller, the date of whose breach of contract thereupon became defined. There is no departure here from the ordinary rule which I have quoted for measuring damages against a seller for non-delivery."

That rule had been stated at 97:

> "....the ordinary measure of damages in an action for non-delivery of shares is the difference between the contract price ... and the market price at the date of the breach."

Celliers's case is, therefore, no authority for the proposition that the ordinary measure of damages is the difference between the contract price and the value on the date when the plaintiff accepted the defendant's repudiation of the contract.

The second case referred to by FRIEDMAN J was Moyes & McKenzie v Frenkel & Co, 1912 NPD 282. In Novick v Benjamin (supra), TROLLIP JA said (at 862A) that it was not a very clear case. LAURENCE AJP was however explicit at 299, where he said :

> "....in view of the fact that the contract was

> broken in July, and the plaintiffs thereupon announced their intention of claiming damages for the breach, I think, applying the principles of both the Civil and the English Law, as set forth above, to the case of a contract of this description, where there was no definite time fixed for delivery, we must look rather to the price at the time of the breach as affording the true measure of damages."

The case is therefore against, and not in favour of, the proposition.

In the next case, Whitfield v Phillips & Another 1957(3) SA 318 (A), the plaintiffs had purchased a farm from the defendant. They alleged in their particulars of claim that the defendant had on 15 October 1953 wrongfully and unlawfully repudiated the agreement and that they had on 30 October 1953 elected to accept the repudiation and claim damages. As part of their claim for damages, the plaintiff had included

> "1(C) Difference in cost of acquiring a farm of similar value, or alternatively, the difference between the purchase price of the farm and its value at that time, namely £45,000 - £5,000."

In a minority judgment HOEXTER JA said at 324 F that the words "at that time" must refer to the date on which the plaintiffs accepted the repudiation of the contract and cited in support Celliers v Papenfus & Rooth, supra at p 84. He said at letter H -

> "As a rule the damages for non-delivery of land, in a case in which the buyer has rescinded the sale, are to be measured by the excess of the value of the land over the contract price at the time of rescission."

See also p 325 G-H.

It would seem that this dictum is obiter - during the trial the plaintiffs had abandoned their claim under (C) - and in my respectful opinion it should not be followed. It was based on a case which in my respectful view does not support it (see above); and it is against the current of authority.

The last case referred to by FRIEDMAN J was De Lange v Deeb 1970(1) SA 561 (O).) There the plaintiff sold to the defendant a house on deed of sale: monthly instalments of R100 each were payable. The defendant fell into arrear with the instalments. Clause 8 of the contract provided:

> "Indien die koper versuim om die terme en voorwaardes hiervan stiptelik na te kom, sal die verkoper die reg hê om hierdie ooreenkoms te kanselleer ...."

The seller gave notice to the purchaser requiring him to make payment of the arrears as prescribed but the purchaser neglected to do so. The seller accordingly cancelled the contract of sale on 4 March 1968 and resold the property on 23 March. He claimed damages for the difference (amounting to R900.00) between the original purchase price and the purchase price on resale. The magistrate granted judgment as prayed. An appeal was noted against the judgment mainly on the ground that the seller had failed to prove his damages. In the judgment on appeal, SMIT JP said at 564 B-D :

> "(Counsel for the purchaser) does not dispute that the resale price of the house could in proper circumstances be <u>prima facie</u> proof of its value ... (The Seller) had to prove the fair market value at the time of the cancellation of the contract (<u>Broughton v Davis</u>, 1921 TPD 409). This was 4th

March and the house was sold on 23rd March. The lapse of time was reasonable in the circumstances ... there was no undue delay and appellant was not in any way prejudiced by the delay."

FRIEDMAN J said in the judgment a quo that the "reference in this judgment" (sc. De Lange v Deeb) to'the time of cancellation' is in the context a reference to the time of the acceptance of the repudiation". I am, with respect, unable to agree. The 'time of cancellation' was stated to be 4 March. It does not appear from the judgment that there was a prior repudiation - there was no more than a failure to pay arrear instalments. And according to the headnote in Broughton v Davis 1921 TPD 409 on which SMIT JP relied,

"Where a sale of landed property is repudiated the measure of damages is the difference between the contract price and the current market value at the date of repuđiation ...."

De Lange's case does not therefore provide authority for the proposition.

It was not on authority, however, that FRIEDMAN J relied for his conclusion. He approached the matter on principle. He said at 477 A-B that the purchaser's wrongful repudiation does not per se bring the contract to an end; that the seller is not obliged to accept it immediately - he has an election and may take a reasonable period of time in order to decide whether to accept the purchaser's repudiation; and it is only when the seller has exercised his election to accept the repudiation that the contract is cancelled. All that is no doubt true, but in my respectful opinion it is not ad rem. There is not necessarily a connection between the date of cancellation of a contract and the date which is applicable for the calculation of damages for the breach of it. Consider cases such as Novick v Benjamin and Bremmer v Ayob Mahomed & Co which are referred to above. It is not correct that "only when the date of cancellation has been crystallised can any question of damages arise" (at 477 C). Immediately upon repudiation, the injured party's damages can be calculated; all that is wanting to his cause of action is his decision to cancel, and issue of summons may in itself be a binding announcement of his election. (See Jowell v Behr 1940 WLD 144 at 146 in fin.) Although the injured party is not obliged to accept repudiation immediately and he may if he chooses temporize for a reasonable period, he cannot temporize at the risk of the defaulting party. The date of acceptance of repudiation is an arbitrary one in the sense that its selection is within the sole control of the injured party. To regard that as the date for the calculation of damages would, to adapt some observations by INNES CJ in the Celliers' case, (supra) at 89, lead to extraordinary results: it would mean that the injured party may sit still and await the fluctuation of the market, and if the market price receded then accept the repudiation and obtain damages on the footing of the low price on the date of acceptance. It cannot be right that a seller should be at liberty thus to speculate at the risk of the purchaser. In Jamal v Moolla, Dawood, Sons & Co 1916(1) AC 175(JC) (referred to in Frankel & Co v Michalowsky & Another 1921 CPD 696 at 699) which was a case relating to a share transaction, the Privy Council held that the loss to be ascertained was the loss on the date of the breach, and that

> "...if the seller retains the shares after the breach, the speculation as to the way the market will subsequently go, is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market

falls, nor is liable to the purchaser for the profit if the market rises."

It was authoritatively decided in Novick v Benjamin (supra) the relevant time for the assessment of damages for breach of contract is the time of performance. To that the date of cancellation is irrelevant - indeed, when repudiation is accepted, the rights and obligations of the parties in regard to further performance of the contract come to an end. See Nash v Golden Dumps (Pty) Ltd 1985(3) SA 1(A) at 22 F.

The contract of sale did not fix the time when the purchaser was obliged to accept transfer of the property. It provided for payment of the initial deposit, and for the registration of a mortgage bond, securing the balance of the purchase price (R100 000.00), which should run for the period of two years from the date of registration of transfer. Before that stage was reached, the purchaser repudiated the contract, indicating unambiguously that he did not intend performing his obligations at any time, and thereby placing himself _ipso facto_ _in mora_ (Cf Wessels, _op cit_, para 2898). The date of repudiation is therefore to be taken as the time of performance.

In _Johnson v Agnew_ (_supra_) LORD WILBERFORCE said at 410 A that the rule there stated was not an absolute rule, and that, if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances. I do not think that in the present case the application of the rule gives rise to injustice. The plaintiff's failure to prove his damages resulted solely from a failure to appreciate the legal position.

In my opinion, therefore, the appellants' submission in regard to the proof of damages is well-founded.

I would make the following order:

The appeal is allowed with costs. The order of the Court _a quo_ is set aside and there is substituted therefore the following order:

"The appeal is allowed with costs and the following order is substituted :

(a) On the plaintiff's claim in convention, the defendants are absolved from the instance with costs.

(b) The second defendant's claim in *reconvention* is dismissed with costs."

H.C. NICHOLAS AJA.