



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 30 April 2025

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Twenty-Third Century Systems (Pty) Ltd and Another v SAP Africa Region (Pty) Ltd (172/2023) [2025] ZASCA 51 (30 April 2025)

Today the Supreme Court of Appeal (the SCA) handed down a judgment in which it dismissed the appellants' appeal against an order of the Gauteng Division of the High Court, Johannesburg (the high court).

The appellants, Twenty-Third Century Systems (Pty) Ltd (Systems) and Twenty-Third Century Systems Global (Global), lodged an action against the respondent, SAP Africa Region (Pty) Ltd (SAP), in the high court, wherein Systems claimed payment of about \$68 million, alleging loss of profit after SAP allegedly repudiated their agreement. SAP raised two special pleas, namely a limitation of damages clause which excludes liability for loss of profit; and a time bar clause requiring claims to be brought within one year of knowledge of the facts giving rise to the claim. The high court upheld these special pleas and dismissed the claims.

Before the SCA, the appellants contended that if SAP were allowed to rely on those two clauses after it had repudiated the agreement, this would constitute approbation and reprobation. They contended that the high court failed to engage with the doctrine of approbation and reprobation and that, had it done so, it would have dismissed the special pleas. SAP, on the other hand, contended that it was not seeking to approbate and reprobate, but merely to rely on obligations that survived the termination of the agreement. Nonetheless, SAP submitted that the appeal must nevertheless fail, because of the express provisions of the exclusion of damages clause and the time bar clause.

The central issue in this appeal was whether SAP can, to avoid liability, rely on the exclusion of damages clause and the time bar clause, despite having repudiated the agreement.

The SCA found that SAP was entitled to rely on the exclusion of damages clause and the time bar clause. The SCA held that when Global accepted the repudiation, it brought the primary obligations of the parties to perform under the agreement to an end and activated the secondary obligations. In the circumstances, the exclusion of the damages clause and the time bar clause were not purposes of the contract. They were secondary obligations of the agreement. As such, they survived the termination of the agreement. That this was so, was clear from the terms of the agreement, which indicated that these clauses survived termination. The survival clause referred to several clauses in the agreement, including the limitation of liability clause. It expressly stated that these clauses '... will survive any termination of any part of this [a]greement'. The SCA held further that this can only be sensibly

interpreted to mean all types of termination, including termination as a result of a repudiation. If the parties intended to exclude termination, they would have simply provided expressly for such an exclusion.

The SCA concluded that the limitation of damages clause and the time bar clause survived the termination of the agreement. As such, SAP was entitled to rely on them as a defence to claims for loss of profit, which claims were instituted more than one year from the date when the appellants knew or should have known, after reasonable investigations, of the facts giving rise to the claims.

As a result, the SCA made an order in which it dismissed the appellants' appeal with costs, such costs to include the costs of two counsel, where so employed.

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