IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 2/99

In the matter between :

DATACOLOR INTERNATIONAL (PTY) LIMITED Appellant

and

INTAMARKET (PTY) LIMITED Respondent

CORAM : Vivier, Nienaber, Scott, Zulman JJA, Mthiyane AJA

HEARD : 16 November 2000

DELIVERED : 30 November 2000

Summary :
Anticipatory breach of contract - objective test for repudiation - whether certain letters amounted to an unlawful repudiation or merely to an offer to negotiate a termination - election to cancel by conduct - not communicated to the guilty party by the innocent party but by a third party

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JUDGMENT

NIENABER JA :

[1] Repudiation has sometimes been said to consist of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary, "accepting" and thus completing the breach. So for example Winn LJ remarked in *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699 at 731F-732A:

> "Where A and B are parties to an executory contract, if A intimates by word or conduct that he no longer intends, or is unable, to perform it, or to perform it in a particular manner, he is, in effect, making an offer to B to treat the contract as dissolved or varied so far as it relates to the future. If B elects to treat the contract as thereby repudiated, he is deemed, according to the language of many decided cases, to 'accept the repudiation' and is thereupon entitled (a) to sue for damages in respect of any earlier breach committed by A *and* for damages in respect of the repudiation, (b) to refrain from himself performing the contract any further."

Both the analogy and the language of offer and acceptance, a legacy from England,

have on occasion been deprecated by this court. The better view is that repudiation is a breach in itself (*Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 653B-G per Jansen JA); that the "intention" does not in truth have to be either deliberate or subjective (*Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) at 845A-846G per Rabie JA) but is simply descriptive of conduct heralding non- or malperformance on the part of the repudiator; and that the so-called "acceptance", although a convenient catchword, does not "complete" the breach but is simply the exercise by the aggrieved party of his right to terminate the agreement (*Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 953E-H per Jansen JA). This case, and the outcome of the appeal, is concerned with both "parts" of repudiation: whether the appellant improperly repudiated the agreement between the parties (par 16 to 25 below) and if so whether the respondent, in response, properly cancelled it (par 26 to 34 below). It also demonstrates how a wrong perception of the true nature

of repudiation might lead to false conclusions (par 36 below).

[2] During 1987 the parties concluded a distributorship agreement. The appellant, then known as Instrumental Colour Systems Ltd or ICS, was a company based in the United Kingdom. It appointed the respondent, a South African company based in Sandton, as its exclusive distributor for the sale of computerised equipment for the matching, measuring and dispensing of colour. I shall refer to the appellant as the plaintiff and to the respondent as the defendant. In terms of the agreement the plaintiff was entitled to resell the defendant's products in certain specified areas in Southern Africa and Mauritius. The plaintiff also provided the defendant with a certain Colour Match Prediction System which was to be used as a demonstration system.

[3] For a number of years the arrangement worked well and both parties prospered from it. But in 1991 the plaintiff, then known as ICS-Texicon Limited, was taken over by a Swiss conglomerate sometimes referred to as the Eichoff

Group. The Eichoff Group eventually also took over another concern operating in competition with the defendant in Southern Africa, known as ACS-Datacolor, whose managing director was one Bill Gosling. The Eichoff Group was intent on restructuring and rationalising its interests in Southern Africa. It had to decide upon a distributor. The person designated to make that decision was a certain Willi Cornelius.

[4] During early June 1991 a director of the defendant, one Steve Mayer, travelled to Frankfurt to meet him. Mayer put the defendant's case to Cornelius and was informed by him that a decision would be taken within a week or so as to whether the defendant or Gosling's company would be appointed as the local distributor of the plaintiff's products. Mayer stated in evidence that he was not sanguine about the outcome of his meeting with Cornelius. His apprehension proved to be well-founded. On 17 June 1991 Cornelius telephoned Mayer to inform him that the decision had gone against the defendant. He was told that the

defendant would in due course receive an official notification to that effect.

[5] On 25 June 1991 the defendant received two telefaxes, both signed by one Hill. They arrived at more or less the same time. Since the outcome of the appeal in large measure turns on the impression conveyed by these two documents they are quoted in full. The one dated 24 June 1991, RW8, was a telefax from "Datacolor-ACS-ICS", the text of which reads:

> "RE: Termination of Distributorship Agreement with ICS Texicon
> Dear Steve,
> Along with this fax is an official letter of termination of our Distributorship Agreement with Intamarket. The original is being sent by registered post.
> As it has been found necessary to take this unfortunate decision I would have thought you would like to terminate the Agreement as soon as possible. With this in mind I feel sure we can agree a mutually convenient date in the near future and come to some arrangement regarding the stocks you hold (including the demo., unit).
> Let me have your thoughts on this matter at your earliest convenience.
> Kind regards,
> (sgd) Barry Hill"

The other, RW9, seemingly the "official letter", was from ICS-Texicon Limited and

dated 25 June 1991. It read:

> "Dear Sirs
>
> Distributorship Agreement with ICS-Texicon Limited
>
> Further to your discussion with my colleague, Mr Cornelius, I regretfully have to confirm the termination of the Distributorship Agreement between Intamarket (Pty) Limited and ICS-Texicon Limited.
>
> We would like to thank you for your support in the past and wish your organisation success in the future.
>
> Yours faithfully
>
> (sgd)
>
> Barry R T Hill
>
> Operational Controller."

[6] Significantly neither of these two communications contained any reference to clause 16 of the agreement of 1987 which read:

> "16. <u>TERM AND TERMINATION</u>
>
> (a) This Agreement shall commence on the date of its execution and shall (subject as herein provided) remain in force for a period of three years from that date and shall continue thereafter unless or until terminated by either party giving not less than twelve months written notice to terminate to the other party expiring on or at any time after the expiry of the said three year term.

PROVIDED THAT the Company shall have the right to terminate this Agreement by notice in writing upon the happening of any of the following events:-

(i) If the Distributor fails to make any payment due hereunder or is guilty of any breach, non-observance or non-performance of its obligations hereunder or any of them and does not remedy the same (if it is capable of remedy) within thirty days of notice of such failure or breach being given by the Company.

(ii) If the Distributor ceases to carry on business or is unable to pay its debts in the ordinary course of business or enters into liquidation (other than for the purpose of reconstruction or amalgamation) or has a receiver or manager appointed over the whole or any part of its assets.

(iii) If the Distributor comes directly or indirectly under the control of a company competing with the Company.

(iv) If the Distributor is in breach of any clause within this Agreement.

(b) Upon termination of this Agreement by the Company the Distributor subject to its contractual obligations for maintenance shall have the option to sell to the Company and the Company shall be willing to purchase from the Distributor all the Distributor's stock of the products including stock for demonstration trial and exhibition purposes and peripherals and spare parts for repairing and maintaining the Products ("The Inventory"). The price to be paid by the Company to the

Distributor for the Inventory:

(i) ...

(ii) ...

(c) The termination of this Agreement for any reason shall be without prejudice to the rights and obligations of the parties accruing up to and including the date of such termination."

[7] The defendant did not immediately respond to these letters. What it did was to put out, within a few days, a circular which it distributed to its own clientele entitled "Important agency announcement" (hereinafter referred to as "the agency announcement"). It read as follows:

> "Following the acquisition of ICS-Texicon by the Eichoff Group last year, (this group now controls ACS-Datacolor and ICS-Texicon) a programme of rationalization is taking place within the Group. One result of this is that Intamarket has decided to no longer represent ICS-Texicon and feels that the long term monopolistic situation which has developed as a result of this takeover, is not in the long term interest of our company or the South African market.
>
> We are instead pleased to announce that we now have been appointed official distributors for Spectrum International Limited of Calne, Great Britain.
>
> Spectrum was founded some 7 years ago by its present Managing Director, John van Zwietering, who was formerly MD of

ICS. It is therefore hardly surprising that many of the principles upon which ICS was based, survive and flourish at Spectrum.

Intamarket will now be in a position to respond rapidly to any of your colour requirements at prices substantially below those of ICS with the added advantage of more user-friendly software. At the same time there will be no compromise on quality and service.

...

We wish to confirm that Intamarket will continue to support all of our valued maintenance customers and that absolutely no problems are expected in this regard.

Furthermore it will be no problem to support existing customers on their present level of CS based software.

Demonstration systems will be available for your evaluation in the near future and in this regard we wish to advise that Keith Parrott, formerly of ICS-Texicon, will be spearheading the launch of the Spectrum International products on the South African market during his visit to this territory in July.

We would like to take this opportunity of expressing our sincerest thanks to you, one of our valued customers, for your past support and wish to re-confirm our continued commitment in the area of total colour management in the future."

[8] The reference to Spectrum was a reference to a rival company of the plaintiff's which operated in the United Kingdom. Spectrum was anxious to enter into a relationship with the defendant for the distribution of its products in South

Africa. Approaches to the defendant had been made by Spectrum from about May 1991 but it was told by Mayer that the defendant had a commitment to the plaintiff and that the defendant was accordingly not free to enter into a relationship with Spectrum until its agreement with the plaintiff had come to an end. When the plaintiff's letters of termination were received the defendant immediately turned to Spectrum. Wachsberger and Mayer, the defendant's directors, testified that they were confident of cementing a new relationship with Spectrum. They were obliged to approach Spectrum, so they explained, as they needed a lifeline for the continued existence of the defendant. According to both of them an agreement with Spectrum was only finalised after the agency announcement had been circularised. This led to the first order being placed with Spectrum in early July 1991.

[9] The agency announcement contained a number of factual misstatements and can rightly be described as disingenuous. Both the defendant's witnesses were constrained in evidence to admit as much. Their attempted justification was that it

would seriously have harmed their business to have admitted that they had been "fired" and that it was necessary for them to reassure their customers that the defendant would continue to serve them.

[10] A copy of the agency announcement was forwarded to the plaintiff by Gosling (and not by the defendant) and received by it on 28 June 1991. The plaintiff thereupon suspended execution of all further orders to the defendant. On 19 July 1991 the plaintiff reacted to the agency announcement. Its letter of that date reads:

> "Dear Sirs
>
> Re: Distributorship Agreement dated 18th September 1987 and made between (1) Instrumental Colour Systems Limited and (2) Intamarket (Pty) Limited ("the Agreement")
>
> We wrote on 25th June, 1991 giving you the requisite twelve months notice of termination pursuant to clause 16(a) of the Agreement.
>
> We are now in receipt of a letter dated 25th June, 1991 from you to a customer of ICS-Texicon and entitled "IMPORTANT AGENCY ANNOUNCEMENT". It is stated therein that (a) you have decided no longer to represent ICS-Texicon and (b) that you have been appointed distributors in South Africa for Spectrum International

Limited. We are advised that by reason of this letter and by your conduct you have:

1. wrongfully and in breach of the Agreement evinced an intention to be no longer bound by the Agreement. This constitutes a clear repudiation by you of the Agreement which we are entitled to, and hereby do, accept; and
2. that you are clearly in breach of express conditions of the Agreement. We refer you in particular to clause 9 (a) and (b) of the Agreement.

We accordingly, notwithstanding that the Agreement has determined by reason of your repudiation, hereby give you notice pursuant to clause 16(a)(iv) of the Agreement terminating the Agreement, with immediate effect. We also give you notice that we reserve all our rights to recover from you damages for your breach of contract.

We must remind you that on termination of the Agreement certain restrictions remain on your selling and distributing products in the territory for the period of one year after the date of termination of the Agreement. We refer you to clause 19 of the Agreement. If we do not receive your immediate confirmation that you will (a) stop soliciting customers of ICS-Texicon and (b) you will cease acting as a distributor for Spectrum International Limited, we will take vigorous steps to protect our rights and to enforce the terms of clause 19 of the Agreement. We, in the meantime, reserve all our rights against you in this regard.

Please acknowledge receipt of this letter.

Yours faithfully

(sgd)

B R T Hill
Operational Controller
for and on behalf of ICS-Texicon Limited."

The first paragraph of the letter is controversial. There is no mention in the earlier telefaxes of clause 16 of the agreement. It is an issue in this case whether the clause was simply taken for granted by the plaintiff or whether the telefaxes, RW8 and RW9, were sent either in ignorance or in deliberate disregard of the clause. (Clause 9(a) of the agreement, referred to in the letter, prohibits the importation, selling or promotion of products similar to those of the plaintiff; clause 9(b) is not apposite; and clause 19 contains a restraint clause.)

[11] The plaintiff's letter was immediately followed up by a letter from its attorneys, Clifford Chance, dated 22 July 1991, which was sent by pre-paid airmail post as required by clause 23 of the agreement.

[12] The defendant's attorneys eventually responded on 12 September 1999 *inter alia* as follows:

"2.1 our client denies that your client's letter of 25 June 1991 ("the termination letter") gave our client the requisite 12 months' notice of termination as required by clause 16(a) of the agreement;

2.2 clause 16(a) of the agreement expressly provides that the agreement can be terminated by either party giving not less than 12 months' written notice to terminate to the other party;

2.3 the termination letter of 25 June 1991 merely confirms your client's termination of the agreement and makes no reference whatsoever to the requisite 12 months' notice of termination;

2.4 the original of the termination letter was preceded by a telefax dated 24 June 1991 from our client to which was attached a copy of the termination letter. In the telefax your client described the termination letter as 'an official letter of termination of our distributorship agreement with Intamarket' and went on to state the following -

> "As it has been found necessary to take this unfortunate decision I would have thought you would like to terminate the agreement as soon as possible. With this in mind I feel sure we can agree a mutually convenient date in the near future and come to some arrangement regarding the stocks you hold (including the demo. unit)";

2.5 your client's aforementioned correspondence to our client constituted a wrongful and unlawful repudiation by your client of the agreement, which repudiation our client accepted and as a result our client cancelled the agreement and reserved its right

to recover damages from your client, alternatively our client hereby accepts your client's wrongful and unlawful repudiation of the agreement and hereby cancels the agreement and reserves its right to recover damages from your client as a result thereof;

2.6 it was only after receipt of your client's letters dated 24 and 25 June 1991 wherein they repudiated the agreement that our client prepared and distributed the letter of 25 June 1991 which was entitled "IMPORTANT AGENCY ANNOUNCEMENT" to which you make reference;

2.7 your client's letter of 19 July 1991 is clearly a contrived effort on the part of your client to endeavour to remedy and overcome its wrongful and unlawful repudiation of the agreement constituted by its letters of 24 and 25 June 1991."

[13] The plaintiff, known at the outset of the proceedings as ICS-Texicon Limited but finally transformed as Datacolor International (Pty) Limited, instituted action against the defendant in the Witwatersrand Local Division of the High Court for the payment of the purchase price of goods sold and delivered up to June 1991. The claim was conceded in substance but was met on the pleadings by a counterclaim for damages in an amount exceeding the plaintiff's claim. The focus of the case

accordingly shifted to the defendant's counterclaim for damages for breach of contract. With the consent of all concerned the question of the quantum of the counterclaim stood over until after the determination of liability.

[14] The matter came before Heher J. He concluded that the two letters, properly construed, did not

> "exhibit a deliberate or unequivocal intention to bring the agency agreement to an immediate end. Put another way, the plaintiff did not act in such a way as to lead the reasonable person to the conclusion that it did not intend to fulfill its part of the contract ...";

moreover, and in any event, that the defendant had not properly "accepted" the repudiation; and finally, that the defendant, by its own wrongful conduct in entering into an agreement with, and in importing goods from Spectrum while its agreement with the plaintiff remained extant, had committed breaches of contract entitling the plaintiff to cancel it, thereby disqualifying itself from "accepting" the plaintiff's repudiation (if such it was) on 12 September 1991. In the result the

defendant's counterclaim was dismissed with costs.

[15] The defendant took Heher J's judgment on appeal to the full bench of the Witwatersrand Local Division of the High Court. Three judgments were delivered. Flemming DJP and Lewis AJ upheld the appeal and issued a declarator in the following terms:

> "It is found that the plaintiff repudiated the contract as alleged in paragraph 7 of the counterclaim and that the defendant was accordingly entitled to cancel the contract, which it did in fact do. The plaintiff is ordered to pay the costs of the proceedings before Heher J."

Willis AJ dissented. He would have upheld the appeal with costs. With special leave granted by this court the matter now comes before it.

Whether the plaintiff by its letters of termination repudiated the agreement.

[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). This is the conventional exposition of the operation of the doctrine of repudiation leading to rescission with its emphasis on the guilty party's intention and the innocent party's acceptance. 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

Metalmil (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.

[17] As such a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.

[18] The conduct from which the inference of impending non- or malperformance

is to be drawn must be clearcut and unequivocal, i e not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is "a serious matter" (cf *Ross T Smyth & Co Ltd v T D Bailey, Son & Co* [1940] 3 All ER 60 (HL) at 72B; *Metalmill (Pty) Ltd v AECI Explosives and Chemicals Ltd, supra,* at 685B-C), requiring anxious consideration and - because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments - not lightly to be presumed.

[19] Since the test is objective and the matter is to be approached from the vantage point of the innocent party (in this case the defendant) it follows that evidence of Hill, the author of the letters RW8 and RW9, as to what the plaintiff had in mind when he drafted them, would have been irrelevant. By the same token the evidence of the defendant's witnesses, Wachsberger and Mayer, as to what they understood by, and how they reacted to, the letters was not irrelevant. But such evidence, although relevant, would not be conclusive since the approach is

that a court, faced with the enquiry of whether a party's conduct amounted to a repudiation, must superimpose its own assessment of what the innocent party's reaction to the guilty party's action should reasonably have been.

[20] Consistent with that approach it further follows that a court in making its assessment must take into account all the background material and circumstances that should have weighed with the innocent party. Such circumstances would in the present case include:

i) the rumours that were current at the time that ICS had been taken over by the Eichoff Group; that a restructuring and rationalisation of its commercial interests in Southern Africa was imminent; and that there was a realistic possibility that the defendant's distributorship might be terminated;

ii) the meeting which Mayer had with Cornelius in Frankfurt early in June 1991 which left Mayer with the uneasy feeling that the defendant might have missed the boat;

iii) the telephonic conversation which Cornelius had with Mayer on 17 June 1991 when the latter was informed that the decision had been taken "to go" with Gosling's company and that the defendant would in due course be formally notified of that decision. No mention was made in the course of that conversation of a period of notice;

iv) and finally the two crucial letters, RW8 and RW9, quoted earlier, which were telefaxed to the defendant, the one dated 24 June 1991 and the other 25 June 1991, both signed by Hill, both reaching the defendant at more or less the same time, probably on 25 June 1991, and then forwarded by the plaintiff by registered post in compliance with clause 23 of the agreement.

[21] Much debate was devoted in both courts below and in this one as to the sense of, and the correlation between, these two letters. RW9 was "an official letter of termination". It was so described in the other letter, RW8 (addressed to "Dear Steve"). As such RW9 would have been accorded, in the eyes of a reasonable

person standing in the defendant's shoes, at least some precedence, in keeping with the plaintiff's own ranking thereof. Reading it on its own both its formal tone and its contents would have conveyed the message that the agreement between the parties, far from continuing into the future for at least another twelve months, has been brought to an abrupt end. But of course the reasonable reader would not have read the letter in isolation. He would have taken account of RW8 as well. RW8 is written in an entirely different style and tone. While I agree that the two letters must be read together, each conveying its own separate impression, I do not agree with the submissions of plaintiff's counsel that they must be conflated into a single letter with a reconstructed sequence of sentences. Ultimately it remains a question of what the reasonable reader in the defendant's position would have made of it; of the collective and cumulative impression created when the two letters are read in tandem.

[22] Various constructions have been placed on the two letters when read in

conjunction with one another. These may be grouped together as follows:

i) In terms of the letters "the plaintiff gave notice to the defendant terminating the agreement with immediate effect". That was the construction placed on them by the defendant in its counterclaim which was initially admitted by the plaintiff in its plea thereto. During the cross-examination of the defendant's witnesses the plaintiff, however, sought an amendment which despite opposition was eventually granted. It is quoted in the next sub-section.

ii) "The plaintiff avers that the letters 'RW8' and 'RW9' were intended to terminate the agreement as provided for in clause 16(a) with the requisite twelve months notice". This amendment was in line with the construction earlier placed on RW8 and RW9 by the plaintiff in its letter of cancellation of 19 July 1991, quoted in para 10 above.

iii) The letters served as due notice of twelve months but with an open invitation to the defendant to negotiate a reduced period if that would suit

its convenience. That would seem to have been the interpretation favoured by Heher J.

iv) The letters "confirmed" the plaintiff's decision not to continue with the

defendant as its chosen distributor; otherwise they represented nothing more than an invitation to the defendant to negotiate a premature termination of the agreement. As such the plaintiff did not repudiate the agreement. That was the interpretation advanced on behalf of the plaintiff in argument before this court.

v) The letters purported to terminate the agreement forthwith, with the consequence that no further orders would be executed by the plaintiff; the plaintiff was nevertheless prepared to allow the defendant time to close down their common business and to tie up loose ends such as the return of stock and the demonstration model still in the defendant's possession. That was essentially the effect of the evidence of Mayer and was the interpretation advanced on behalf of the defendant

in argument.

[23] Counsel for the plaintiff advisedly did not seek to support the assertion in the plaintiff's own amended pleadings that the letters constituted due notice in terms of clause 16(a). In none of the prior conversations between Cornelius and Mayer, nor in the letters themselves, was there any mention of the clause. The clause, moreover, did not provide for a notice period of twelve months but for a notice period of not less than twelve months. RW8 and RW9 are entirely silent as to what the notice period was supposed to be and when it was supposed to expire. The view advanced in the plaintiff's own pleadings and correspondence that due notice was given can accordingly be dismissed as fanciful.

[24] The alternative submission advanced on behalf of the plaintiff in argument can, in my view, also not be upheld. The argument went as follows: the official letter RW9 refers back to the discussion with Cornelius. In that conversation Cornelius informed Mayer that the defendant was not the chosen distributor. That

simply meant that the defendant's distributorship would have to come to an end. The official letter, RW9, confirms that fact. But it is silent, as was the prior notification of Cornelius, as to how and when the distributorship would be formally terminated. This aspect is dealt with in the accompanying letter, RW8. It expresses, first, the sentiment that the defendant, now that the decision had been taken to end the distributorship, would doubtless prefer it to happen sooner rather than later; and then it proceeds to invite the defendant's suggestions, in order to achieve an amicable and mutually satisfactory resolution to their relationship, as to the date when the termination should take effect. The two letters, far from constituting a repudiation, were accordingly simply an invitation to negotiate some date in the future upon which the distributorship was to come to an end. As such, so it was contended, it was comparable to the terms of the letter discussed in *Inter Maritime Management SA v Companhia Portuguesa de Transportes Maritimos EP* 1990 (4) SA 850 (A) at 858G-I:

> " ... in this respect we would welcome your proposal as regards the best course of action in this respect, namely the timing, payment of disbursements connected with PISC commitments as well as repayment of stock capital to IMM and CTM, in order to safeguard the interests of all parties involved."

I have to disagree. The two situations are by no means comparable. The supposed parallel ignores the official letter, RW9. If the plaintiff was merely intent on an open-ended invitation to negotiate the end of their relationship, why send two letters? Why mark the one the "official letter"? Why thank the defendant for its support in the past and wish it well for the future? Mayer expected, after the telephone conversation with Cornelius on 17 June 1991, a notice in terms of clause 16(a). Instead he received the official letter (initially sent by telefax and thereafter by registered post) and its companion piece, neither of which referred to the clause. Both Mayer and Wachsberger testified that they understood the letters to be a termination, to take effect forthwith, without further notice. That is why, as a matter of urgent priority, they immediately turned to Spectrum to preserve their client base.

According to Mayer the first sentence of the second paragraph of RW8 made little sense to him; the second sentence referred to a time for the disposal of stocks (including the demonstration model) and such like matters. Whatever doubts he may have had on reading RW8, so he said, were dispelled by the terms of the official letter, RW9, which made it perfectly plain that their relationship had come to an end. In my view that is precisely how a reasonable reader of the correspondence would have interpreted the letters. The dominant notion which the letters convey was that the distributorship had been irrevocably terminated and that no further orders for the plaintiff's products would be executed; only the actual winding-up of their affairs remained open for discussion. Much was made of the sentence in RW8 "... I would have thought you would like to terminate the agreement as soon as possible ...". Of course, the termination of the agreement was not a matter for determination by the defendant. The reasonable reader would in my opinion regard that sentence as an expression of the author's belief that the

defendant would be pleased, rather than displeased, now that the "unfortunate decision" had been taken to terminate the defendant's distributorship, that their relationship be brought to a prompt end. The following sentence makes it plain that the plaintiff is nevertheless prepared to be accommodating towards the defendant if the latter should need more time to attend to matters that are still outstanding, such as the disposal of unsold stock. There is not the slightest hint that the plaintiff was considering giving the defendant due notice in terms of clause 16(a) should the defendant fail to come up with acceptable counter-suggestions.

[25] In my opinion the two letters, read together against the background of the prior exchanges between the parties, would convey to the reasonable person looking at the matter from the perspective of the defendant that the termination of distributorship was a *fait accompli* and that no notice in terms of clause 16(a) would be forthcoming, regardless of how the defendant responded to the invitation contained in RW8. The clear impression is that the plaintiff was indifferent to, and

did not propose to comply with, clause 16(a). The dominant message which the two letters conveyed was that the defendant would not enjoy at least a further twelve months before the agency agreement with the plaintiff was brought to a conclusion. In my view that was tantamount to an unequivocal intimation on the part of the plaintiff that it did not propose to perform its part of the agreement for the remainder of the stipulated notice period. As such it was a wrongful repudiation of sufficient seriousness as to justify cancellation of the agreement by the defendant.

Whether the defendant properly and timeously exercised its election to cancel the agreement

[26] The defendant did not for the time being reply to the letters of repudiation of 25 June 1991. Instead it directed all its energies in an effort to contain the damage done to its business (by the plaintiff's decision) by commandeering Spectrum to its cause and by circulating the agency announcement to its customers. This

announcement was brought to the plaintiff's attention almost immediately by Gosling on 28 June 1991. Hill agreed in evidence that upon receipt of it he considered the distribution agreement to be at an end. He instructed his staff to hold back all prior orders placed by defendant. The plaintiff thereupon seized upon the agency announcement as a repudiation in itself entitling it to cancel the agreement. This it purported to do by its letter of 19 July 1991 which was followed up by a formal letter from its attorneys dated 22 July 1991. The defendant's response was a lengthy letter, dated 12 September 1991, from its attorney, reiterating that the letters RW8 and RW9 constituted a repudiation

> "which repudiation our client accepted and as a result our client cancelled the agreement and reserved its right to recover damages from your client, alternatively our client hereby accepts your client's wrongful and unlawful repudiation of the agreement and hereby cancels the agreement and reserves its right to recover damages from your client as a result thereof".

In addition a number of other issues relating to the dispute between the parties and

its *sequelae* were aired.

[27] The plaintiff's reading of the situation may be summarised as follows: on the hypothesis that the letters RW8 and RW9 constituted a repudiation, it denied that the agency announcement qualified as an "acceptance" thereof; instead it was itself a repudiation which the plaintiff in turn "accepted", thereby pre-empting the defendant from "accepting", by means of its attorney's letter of 12 September 1991, the plaintiff's own earlier repudiation. This argument was accepted in substance by Heher J but rejected by the majority in the court *a quo*. I agree with the majority for the reasons that follow.

[28] The innocent party to a breach of contract justifying cancellation exercises his right to cancel it a) by words or conduct manifesting a clear election to do so b) which is communicated to the guilty party. Except where the contract itself otherwise provides, no formalities are prescribed for either requirement. Any conduct complying with those conditions would therefore qualify as a valid exercise

of the election to rescind. In particular the innocent party need not identify the breach or the grounds on which he relies for cancellation. It is settled law that the innocent party, having purported to cancel on inadequate grounds, may afterwards rely on any adequate ground which existed at, but was only discovered after the time (cf *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and other related cases* 1985 (4) SA 809 (A) at 832C-D).

[29] In *Jaffer v Falante* 1959 (4) SA 360 (C) at 362F-G it was stated:

> "Communication to the buyer of the seller's election would appear to be desirable so as to crystallise the rights and position of the parties to the contract. For it to suffice for the seller merely to decide to cancel the contract without notifying his decision would leave the buyer in an invidious position. It seems to me both on principle and on authority that this is not the law."

This statement has been approved by this court in *Swart v Vosloo* 1965 (1) SA 100 (A) at 105F-H and reiterated in *Miller and Miller v Dickinson* 1971 (3) SA 581 (A) at 587H-588A in the following terms:

> "In this Court it was not disputed on behalf of the appellants that in law, in the absence of an agreement to the contrary, a party to a contract who exercises his right to cancel must convey his decision to the mind of the other party and that cancellation does not take place until that happens."

These *dicta* may create the impression that the decision to cancel must of necessity be addressed by the innocent party to the guilty party. That would doubtless be the usual situation. The point in the cases cited was not whether the communication was conveyed by the innocent party himself but whether it reached the guilty party. None of these cases was therefore concerned with the somewhat less typical situation where an unmistakable election to treat the agreement as at an end is made by the innocent party but is conveyed to the guilty party, perhaps coincidentally, by someone else who is not the innocent party's agent. Until the innocent party's election is brought to the attention of the guilty party there will be no finality and hence uncertainty. Such uncertainty is in any event inherent in the reasonable *spatium deliberandi* given to the innocent party. Once he has declared

his decision to cancel it is, of course, in his own interest to ensure that it is brought to the attention of the guilty party lest the latter may retract his repudiation, if that is his breach, thereby pre-empting any purported cancellation on his part (cf De Wet & Van Wyk, *Die Suid-Afrikaanse Kontraktereg en Handelsreg*, 5th ed, Vol 1, 216). But he is not obliged to do so. Since the election to cancel, provided that it is unambiguous, need not be explicit but may be implicit, and since the cause for cancellation need not be correctly identified and stated, it follows that the actual communication of the decision to cancel, once made and manifested, may be conveyed to the guilty party by a third party. In the instant case the defendant, by circulating the agency announcement, made its attitude plain for all the world to see. It regarded its agreement with the plaintiff as having come to an end. That decision and the defendant's conduct pursuant thereto were bound to come to the plaintiff's attention. On the facts of this case it is accordingly of no significance that the agency announcement was not sent to the plaintiff by the defendant but by Gosling.

[30] A similar approach is apparent in England. Thus it was said by Lord Steyn in *Vitol SA v Norelf Ltd* [1996] AC 800 (HL) at 810G-811B:

> "My Lords, the question of law before the House does not call for yet another general re-examination of the principles governing an anticipatory breach of a contract and the acceptance of the breach by an aggrieved party. For present purposes I would accept as established law the following propositions. (1) Where a party has repudiated a contract the aggrieved party has an election to accept or to affirm the contract: *Fercometal S.A.R.L. v. Mediterranean Shipping Co. S.A.* [1989] A.C. 788. (2) An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that that aggrieved party is treating the contract as at an end. (3) It is rightly conceded by counsel for the buyers that the aggrieved party need not personally, or by an agent, notify the repudiating party of his election to treat the contract as at an end. It is sufficient that the fact of the election comes to the repudiating party's attention, e.g. notification by an unauthorised broker or other intermediary may be sufficient."

And again at 812D-E:

> "Similarly, in the different field of repudiation, a failure to perform may sometimes be given a colour by special circumstances and may

> only be explicable to a reasonable person in the position of the repudiating party as an election to accept the repudiation."

[31] According to the trial court the agency announcement did not qualify as "an acceptance" of the plaintiff's presumed repudiation. Several reasons were advanced. The first was that the announcement did not purport to be a reaction to the plaintiff's own repudiation. Secondly, the defendant did not intend

> "that the circular should serve as a means of communication of any standpoint which it may have adopted in relation to the plaintiff's conduct in unlawfully terminating the agreement. In the circumstances it is mere sophistry to contend that the defendant informed the plaintiff through the medium of circular that it accepted the repudiation."

In the third place the agency announcement only came to the plaintiff's attention by chance. And finally it was said:

> "I do not agree that communication of 'an acceptance' by an unauthorised third party can be effective where the acceptor has not intended that result actually or constructively."

The authority relied on is *Read Bros (South Africa) Ltd., v Fischer Bearings Co.*

Ltd., 1943 AD 232 at 241 which was a case dealing not with the "acceptance" of a repudiation but with the acceptance of an offer.

[32] Counsel for the plaintiff on being pressed advanced a not dissimilar argument. To qualify as "an acceptance of repudiation" the conduct (if I may paraphrase the submission) must have been an act of communication calculated to come to the attention of the guilty party and must have been recognisable as a response to the repudiation.

[33] In my view both the approach of the trial court and the comparable argument of counsel for the plaintiff sought to graft the requirements of an acceptance of an offer onto the "acceptance" of a repudiation. The analogy has been stated in *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 952E-954B to be false. The approach, moreover, cannot be reconciled with the established law that the manifestation of the election to cancel may consist of conduct and need not correctly identify its cause.

[34] Counsel for the plaintiff readily acknowledged that if the additional requirements for cancellation formulated on by him and described in paragraph 32 above were not part of the law, the agency announcement would qualify as a competent act of cancellation. That concession, in my view, was properly made. The agency announcement was at odds with a continuation of the agreement by the defendant. As such it constituted, to the knowledge of the plaintiff, a clear and unequivocal manifestation by the defendant of its attitude that, in response to the plaintiff's letters of termination, the contract was finally at an end.

[35] In my opinion it must be accepted that the plaintiff repudiated the agreement by its two letters, RW8 and RW9, and that the defendant in retaliation elected to treat the agreement as having come to an end. Those two conclusions effectively dispose of the appeal.

Whether the defendant was precluded from cancelling the agreement in terms of its letter of 12 September 1991

[36] I propose nevertheless to add a few words about the conclusion reached by the trial court, supported by counsel for the plaintiff, that the defendant (on the assumption that RW8 and RW9 did constitute a repudiation and that a reasonable time for its "acceptance" had not yet elapsed by 12 September 1991) was precluded from exercising its assumed right of cancellation. The reasoning, in a nutshell, was this: on that postulate the defendant failed to "accept" the plaintiff's repudiation by 19 July 1991 when the plaintiff lawfully cancelled the agreement; consequently the defendant's purported cancellation in September 1991 was out of time and out of order. The plaintiff's letter of 19 July 1991 was a lawful cancellation (so it was contended) because the defendant, having failed to "accept" the plaintiff's prior repudiation, itself committed breaches of that agreement entitling the plaintiff to cancel it. Those breaches were, first, the agency announcement, secondly, the deal which the defendant struck with Spectrum and thirdly, the importation of goods early in July in contravention of clause 9(a) of the

agreement. The short answer to the entire line of reasoning is of course that the defendant did not fail to "accept" the repudiation: the agency announcement qualified as such, for all the reasons mentioned in paragraphs 26 to 34. But even assuming in favour of the plaintiff that the defendant, subsequent to the plaintiff's repudiation, itself breached the contract in a manner which would have entitled the plaintiff to cancel it, it is not the complete answer which the plaintiff is seeking. One party, having repudiated a contract, cannot retroactively nullify it as a potential cause of action by taking advantage of the opposite party's later breach and cancelling the contract before the opposite party thought of doing so. Assuming for the moment that the defendant's agency announcement constituted not an act of cancellation but a wrongful breach in itself, the plaintiff's cancellation on 19 July 1991, bringing the contract to an end, would undoubtedly have foiled any attempt by the defendant to cancel it on 12 September 1991. There was no longer a contract in existence capable of cancellation. The defendant would have lost the

right to cancel but would it have affected either party's cause of action for damages arising from the other's breach? I would have thought not. As it was said in *State Trading Corporation of India Ltd v M Golodetz Ltd (Now Transcontinnental Affiliates Ltd)* [1989] 2 Lloyd's Rep 277 (CA) at 287:

> "On the assumption that both parties were in breach of condition, so that each of them could have treated the other as having wrongfully repudiated, neither lost its right to claim damages for breaches by the other irrespective of which of them brought the contract to an end."

Elusive issues of causation may of course arise but those can best be left for another case, another court and another day. Even on that basis, one that is perhaps the most generous to the plaintiff, the defendant would not have been non-suited. The defendant would only have been non-suited if the act of repudiation were wrongly assumed to be an offer of breach requiring an acceptance to complete it as a cause of action. But that, as has been stated earlier, cannot be regarded as a sound proposition of law.

The appeal is dismissed with costs.

.....
P M NIENABER
JUDGE OF APPEAL

Concur :
Vivier JA
Zulman JA
Mthiyane AJ

SCOTT JA:

[1] I have had the privilege of reading the judgment of my brother Nienaber. I agree with the legal principles set out therein but regret that I am unable to agree with the construction he places on the two letters said by the respondent to constitute a repudiation of the contract between the parties. As this is a minority judgment I shall state the reasons for my dissent as shortly as possible.

[2] The essential nature of the inquiry is clear enough. Do the letters, which it is common cause must be read together, fairly interpreted exhibit a deliberate and unequivocal interpretation no longer to be bound? (See for *eg OK Bazaars* (1929) *Ltd v Grosvenor Buildings (Pty) Ltd and Another* 1993 (3) SA 471 (A) at 480 I - 481C.) By the time the letters were written the contract between the parties had been in force for more than three years. In terms of clause 16 (a) either party therefore had the right to terminate it subject only to the requirement of giving not less than 12 months written notice. An unequivocally expressed intention to terminate the contract would not on its own amount to a repudiation. It would have to be clear that the intention was to terminate the contract in breach of its provisions, i e without written notice of not less than 12 months, or for that matter a shorter period agreed upon by the parties.

[3] It is convenient to quote both letters which were telefaxed to the respondent at about the same time. They are dated respectively 24 and 25 June 1991. I shall refer to the first as the "covering letter" and the second as the "official letter".

"24 June 1991

RE: Termination of Distributorship Agreement with ICS Texicon

Dear Steve,

Along with this fax is an official letter of termination of our Distributorship Agreement with Intamarket. The original is being sent by registered post.

As it has been found necessary to take this unfortunate decision I would have thought you would like to terminate the Agreement as soon as possible. With this in mind I feel sure we can agree a mutually convenient date in the near future and come to some arrangement regarding the stocks you hold (including the demo., unit).

Let me have your thoughts on this matter at your earliest convenience.
Kind regards "

"25 June 1991

Dear Sirs

Distributorship Agreement with ICS-Texicon Limited

Further to your discussion with my colleague, Mr Cornelius, I regretfully have to confirm the termination of the Distributorship Agreement between Intamarket (Pty) Limited and ICS - Texicon Limited.

We would like to thank you for your support in the past and wish your organisation success in the future.
Yours faithfully"

[4] The respondent's contention was that the official letter had to be

construed as expressing an intention to terminate the contract with immediate effect. The letter, of course, does not say this. It confirms the termination but makes no reference to the date from which the termination will take effect. Had the writer's intention been to terminate the contract immediately one would ordinarily have expected this to be stated expressly. After all, expressions such as "we hereby terminate" or "the agreement is terminated forthwith" or "with immediate effect" are commonplace and are used by lawyers and laymen alike.

[5] The word "confirm" in the official letter is, furthermore, clearly a reference to what was said in the course of a telephone conversation between Mr Cornelius representing the appellant and the respondent's Mr Mayer which took place about a week earlier, probably on 17 June 1991. It is common cause that on this occasion Mr Cornelius advised Mr Mayer that the appellant had decided that it would not continue with the respondent as its distributor in view of a Swiss company having taken over the appellant. Mr Cornelius said he would confirm the

decision in writing. There was no mention of when the termination would take effect; the official letter did no more than confirm what had been said before. [6]

Thus far I have referred only to the official letter. If the two letters are read together, as it is common cause they must, then it is immediately apparent why no reference is made in the official letter to when the termination is to take effect. The reason is that this is dealt with in the covering letter. An ordinary reading of the covering letter makes it clear, I think, that what the writer was doing was simply inviting the reader to agree a date upon which the termination would take effect.

(7) If an analysis of the covering letter is necessary to justify my understanding of it, I venture the following. In the second paragraph the writer says: "... I would have thought you would like to terminate the Agreement as soon as possible. With this in mind I feel sure we can agree a mutually convenient date in the near future ...". The final paragraph reads "Let me have your thought on this matter at your earliest convenience". In my view there can be no doubt that the

reference to the "mutually convenient date *in the near future*" (my emphasis) is a reference to a date on which the termination would take effect. This is wholly in conflict with the construction that the agreement had been terminated forthwith or that the official letter confirmed a termination that had already taken effect. In order to meet this point counsel for the respondent was compelled to argue that the reference to "a mutually convenient date in the near future" refers only to an arrangement regarding the stocks held by the respondent. The argument is founded on the words "and come to some arrangement regarding the stocks you hold ..." which follow the words "in the near future" in the sentence quoted above. Such a construction, I think, is contrived. It ignores the opening words of the sentence "with this in mind" which refer to the words in the previous sentence "you would like to terminate the agreement as soon as possible."

[8] A further argument advanced on behalf of the respondent is that the need to come to an arrangement regarding the stocks would be unnecessary if the

contract was to run another year. But this ignores what would be the obvious object of the covering letter, namely to invite the respondent to agree on an earlier date for the termination to take effect. In the event of an earlier date being agreed upon an arrangement regarding the stocks would have to be made.

[9] I am also unable to agree with the suggestion that the letters convey an unequivocal intention to terminate the agreement "forthwith" but subject to some sort of winding-down period during which the contract would in effect continue to operate. Such a construction, I think, would involve reading into the covering letter something which is simply not there. It would, in any event, be in conflict with the express terms of the letter. As I have attempted to show, the "mutually convenient date *in the future*" is an obvious reference to the date of termination. That being so, I can see no basis for construing the letter as communicating an intention to terminate the contract with immediate effect (or confirming that it has already been terminated) but subject to a sort of winding-down period.

[10] On behalf of the respondent much was made of the fact that the letters make no reference to a notice period. It was pointed out that as clause 16 (a) of the contract provides for "not less than 12 months" written notice there was no basis for construing the letters as giving notice as no notice period can be gleaned from either letter. Accordingly, so it was emphasized, the letters could not constitute the written notice contemplated in the contract. This, I think, is correct; but it does not follow that the letters therefore constituted a repudiation. The communication of an unequivocal intention to terminate coupled with an invitation to negotiate an earlier effective date of termination does not in my view amount to a repudiation. If, of course, no agreement was reached and the appellant insisted on a shorter notice period the position would be otherwise. It is also true that in a subsequent letter dated 19 July 1991 the appellant contended that it had given the requisite 12 months notice in its official letter. That it was wrong in this assertion is of no consequence. The interpretation of the letters is a question of law involving an

objective test. (See for *eg Highveld 7 Properties (Pty) Ltd and Others v Bailes* 1999 (4) SA 1307 SCA at 1315 at E - G.)

[11] Finally it is necessary to observe that the letters in question contain no assertion of misconduct or a breach on the part of the respondent. In other words, no reason or purported reason is advanced for what would otherwise be a total disregard for the terms of the contract. In one of the judgments of the majority in the Court below it was suggested that the appellant may well have chosen deliberately to repudiate the agreement rather than have to put up with a disappointed distributor serving out a notice period. There is no basis for such a suggestion. Furthermore, the consequence of the appellant acting in bad faith in this way would be to deprive it of the benefit of the restraint of trade clause (cl 19) in the contract. This would be true both in England (where the contract was concluded) and in South Africa (*Reeves and Another v Marfield Insurance Brokers CC and Another* 1996 (3) SA 766 (A) at 773 C, 775 C - D) and such a motive

cannot lightly be ascribed to the appellant.

[12] It follows that in my view the letters in question did not amount to a repudiation of the contract. I would accordingly have upheld the appeal with costs.

D G SCOTT