THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 172/2023

In the matter between:

TWENTY-THIRD CENTURY SYSTEMS (PTY) LTD	**FIRST APPELLANT**
TWENTY-THIRD CENTURY SYSTEMS GLOBAL (PTY) LTD	**SECOND APPELLANT**

and

SAP AFRICA REGION (PTY) LTD	**RESPONDENT**

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

Coram: MOCUMIE, KGOELE and KATHREE-SETILOANE JJA and WINDELL and BLOEM AJJA

Heard: 14 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand down is deemed to be 30 April 2025 at 11h00.

Summary: Law of contract – whether a contracting party can rely on the terms of a contract after the termination of the contract – distinction between primary and secondary terms of a contract after the acceptance by the innocent party of the repudiation (breach) of the contract – interpretation of the contract – effect of survival clauses in a contract – whether the doctrine of approbation and reprobation applies.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Manoim J, sitting as court of first instance):

1 The appeal is dismissed.

2 The first appellant shall pay the respondent's costs, such costs to include the costs of two counsel, where so employed.

JUDGMENT

Bloem AJA (Mocumie, Kgoele and Kathree-Setiloane JJA and Windell AJA concurring):

[1] The appellants issued summons against the respondent in the Gauteng Division of the High Court, Johannesburg (the high court), wherein the first appellant claimed payment of the combined sum of US $68 034 351.49, interest thereon and costs from the respondent. The respondent raised two special pleas to the appellants' particulars of claim. The high court (Manoim J) upheld the special pleas and dismissed the claims against the respondent. It is with the leave of this Court that the appellants appeal against the high court's order.

[2] The first appellant is Twenty-Third Century Systems (Pty) Ltd (Systems), a company incorporated in Zimbabwe, where it has its principal place of business. The second appellant is Twenty-Third Century Systems Global (Pty) Ltd (Global), a company incorporated in Botswana, where it has its principal place of business. Global is wholly owned by Systems. I shall refer to them collectively

as the appellants. The respondent is SAP Africa Region (Pty) Ltd (SAP), a company registered and incorporated in South Africa, with its principal place of business in Gauteng.

[3] SAP is a prominent international provider of information technology services. Over the years, Systems entered into agreements with SAP in terms of which Systems was appointed as a service provider of SAP's products in certain territories. This entailed selling various information technology services offered by SAP to its customers. Systems developed a customer base for SAP's products across various territories in Sub-Saharan Africa, excluding South Africa.

[4] This appeal concerns a suite of three written agreements which Global and SAP concluded simultaneously on 30 May 2016. For purposes of this appeal, the three agreements will be treated as a single agreement (the agreement). Of relevance to this appeal is the portion of the agreement termed the 'SAP PartnerEdge'. It consists of three sections. The first section consists of 'Definitions and Interpretations'. The second section consists of Part 1, being the general terms and conditions of the SAP PartnerEdge. Part 1 has 17 Articles. The third section consists of Part 2, being the country specific terms and conditions of the SAP PartnerEdge. Part 2 has 12 Articles.

[5] Between 1 and 22 July 2019, SAP and the appellants (and later their respective attorneys) exchanged letters regarding the termination of the agreement. In a letter dated 1 July 2019, SAP informed Global that 'SAP herewith terminates the Agreements for good cause'. SAP also advised its customer base that neither Systems nor Global was accredited to sell, service or maintain SAP software because neither of them was a SAP licensee. In a letter dated 15 July 2019, Global's attorneys informed SAP's attorneys that, through its conduct, SAP had repudiated the agreement, which Global accepted. It was

accordingly common cause that the agreement had ended, albeit that the parties did not agree on who breached the agreement.[1]

[6] On 30 November 2020, the appellants instituted an action against SAP in the high court for loss of profit arising from its (SAP's) repudiation of the agreement. Although it is only Systems which claims relief against SAP in the action, Systems cited Global as the second plaintiff, now the second appellant. It appears that Systems joined Global because its case is that, when the agreement was concluded and thereafter, Global, to SAP's knowledge, acted as its (Systems') agent.

[7] It is undisputed that the agreement precludes a claim for damages for loss of profit and that it limits the period within which to institute a claim to one year, where such a claim arises out of or relates to any part of the agreement. The one-year period runs from the date when a partner knew or should have known, after reasonable investigations, of the facts giving rise to the claim(s).

[8] Except for denying liability to Systems in its plea, SAP also raised two special pleas. In the first special plea SAP alleged that the loss of profit claim is precluded by clause 2 of Article 1 of Part 2 of the agreement. In the second special plea SAP, relying on clause 4 of Article 1 of Part 2, alleged that the loss of profit claim is time barred, and that Systems was precluded from instituting the claim against it at that late stage.

[9] Clause 2*(b)* of Article 1 of Part 2 of the agreement deals with SAP's right to collect fees owed under or in connection with any part of the agreement. The relevant parts of clause 2*(b)* read as follows:

[1] It needs to be emphasised that the parties did not agree to terminate the agreement.

'Exclusion of Damages; Limitation of Liability. Anything to the contrary herein notwithstanding, except for:

a) …; or

b) …,

under no circumstances and regardless of the nature of any claim will SAP, its licensors or partner be liable to each other or any other person or entity … or be liable to any amount for special, incidental, consequential, or indirect damages, loss of good will or profits, work stoppage, data loss, computer failure or malfunction, attorneys' fees, court costs, interest or exemplary or punitive damages.'

[10] Clause 4 of Article 1 of Part 2 of the agreement reads as follows:

'Time bar. Partner must initiate a cause of action for any claim(s) arising out of or relating to any part of this Agreement and its subject matter within one year from the date when Partner knew, or should have known after reasonable investigations, of the facts giving rise to the claim(s).'[2]

[11] In their replication, the appellants denied that SAP was entitled to rely on either the exclusion of damages clause or the time bar clause. They alleged that, because SAP had repudiated the agreement, SAP was precluded from relying on the limitation of liability clause. They contended that SAP cannot breach the agreement and, thereafter, rely on the very same breached agreement to draw a benefit from it, by precluding them from pursuing their claims for loss of profit (the doctrine of approbation and reprobation). The appellants also denied that they knew or ought reasonably to have known of the facts giving rise to their loss of profit claims one year prior to the service of the summons in this action.

[2] In terms of the agreement, the term "Partner", as used in the SAP Partner Code of Conduct, comprises all Technology-, Solution-, Service- (for example, consulting, implementation, system integration, hosting and education), Channel- (value added reseller, distributor and other reseller) and all other Partners collaborating with SAP; and being part of any Partner program of SAP after having been offered global or local partnership by SAP in any strategic business area or for any customer need in all market segments; and then being nominated as Partner by SAP. The term Partner also includes a Partner's employees. The appellants were at all times material hereto SAP's partners.

[12] The high court found that the two clauses in question survived the termination of the agreement, upheld both special pleas and dismissed the claims against SAP. In this Court, the parties agreed that, for purposes of the appeal, it must be accepted that the high court determined the special pleas on the assumption that SAP had repudiated the agreement. The appeal was argued before us on that same basis.

[13] 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.[3] 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 is whether SAP can, to avoid liability, rely on the exclusion of damages clause and the time bar clause, despite having repudiated the agreement.

[14] The issue of whether a contracting party who has repudiated a contract is entitled to rely on a clause of the repudiated contract was raised in *Johannesburg Municipal Council v D Stewart & Co (1902) Ltd and Others.*[4] Lord Shaw took the view that it did not appear 'to be sound law to permit a person to repudiate a contract, and thereupon specifically to found upon a term in that contract which he has thus repudiated'.

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[3] Although this Court was dealing with waiver in *Hlatshwayo v Mare and Deas* 1912 AD 242, the principle in the following statement at 259 is the same insofar as approbation and reprobation is concerned, namely, that '. . . no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate'.

[4] *Johannesburg Municipal Council v D Stewart & Co (1902) Ltd and Others* [1909] UKHL 20 (06 July 1909); 47 ScotLR 20, [1909] UKHL 20.

[15] In *Heyman and Another v Darwins Limited* (*Heyman*),[5] which was also concerned with whether an arbitration clause survives termination, Lord Macmillan did not agree with the above statement by Lord Shaw. His view is essentially that repudiation does not terminate the contract, although it may relieve the innocent party of any further obligation to perform what he, for his part, has undertaken in the contract. In this regard, he drew a distinction between the arbitration clause in a contract and the executive obligations undertaken by each party to the other.

[16] What is clear from *Heyman* is that, although the performance of obligations to each other under the contract may cease, repudiation does not terminate the contract. It therefore stands and the innocent party still has his right of action for damages under the contract which has been breached. The terms of the contract which provide the measures of those damages survive the breached contract. This could, for example, be an arbitration clause which has nothing to do with the performance of obligations under the contract but rather provide a mechanism to address the consequences of the failed contract. In this regard, Lord Macmillan stated that a contract, where the innocent party has accepted the repudiation, '…survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract'.[6]

[17] *Heyman* was applied by this Court in *Scriven Bros v Rhodesian Hides & Produce Co Ltd and Others* (*Scriven*)[7] where a contract contained an arbitration clause. This Court did not sustain the submission of Scriven Bros that, since

[5] *Heyman and Another v Darwins Limited* [1942] 1 All ER 337 (HL).
[6] Ibid at 373-374.
[7] *Scriven Bros v Rhodesian Hides & Produce Co Ltd and Others* 1943 AD 393.

Rhodesian Hides & Produce Co Ltd repudiated the contract, it was not entitled to avail itself of the arbitration clause. It found that the repudiation of a contract does not destroy the efficacy of the arbitration clause, as its purpose was to provide suitable machinery for the settlement of disputes arising out of or in relation to the contract. That being the purpose of the arbitration clause, this Court found that it was reasonable to infer that the contracting parties intended the arbitration clause to operate after the contract had come to an end. The arbitration clause accordingly survived the repudiation of the contract by one of the parties.

[18] This Court was again confronted with the same issue in *Atteridgeville Town Council and Another v Livanos t/a Livanos Brothers Electrical.*[8] It was submitted that, because both parties claimed that the other party had repudiated the agreements, the legal relationship between them had been dissolved, and the arbitration clause had fallen away. Smalberger JA did not sustain that submission. He drew a distinction between primary and secondary obligations of a contract and the effects of repudiation or the acceptance of the repudiation on those obligations.

[19] Smalberger JA followed the reasoning in *Scriven* that the real purpose of the arbitration clause was to provide suitable machinery for the settlement of disputes between Livanos and the Council arising from the agreements and that it was reasonable to infer that the parties intended the provisions of the arbitration clause to operate even after their primary obligations to perform had come to an end. The arbitration clause was consequently found to have survived the repudiation of the agreements. The distinction between primary and secondary obligations of the agreement is thus important in the enquiry whether a party is

[8] *Atteridgeville Town Council and Another v Livanos t/a Livanos Brothers Electrical* 1992 (1) SA 296 (A); [1992] 1 All SA 274 (A) (*Atteridgeville Town Council)*.

entitled to rely on a provision of a contract where the repudiation has been accepted.

[20] Lord Diplock drew a distinction between primary and secondary obligations under a contract in *Photo Production Ltd v Securicor Transport Ltd.*[9] Primary obligations are those obligations that are directed at the discharge of performance under the contract. For example, in the case of sale, it is the primary obligation of the seller to deliver the merx to the purchaser; and the purchaser has the primary obligation to pay for the merx. Secondary obligations under a contract, are activated when primary obligations are not performed. In such a case, the party who breached the contract might have a duty to make restitution and, for instance, pay damages.

[21] This Court stated in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*[10] that the better approach to viewing repudiation is that it is a breach of the contract in question. The acceptance of the repudiation does not complete the breach but is simply the exercise by the innocent party of his right to terminate the contract. In other words, when the innocent party accepts the repudiation, he brings an end to the primary obligations of the parties to perform in terms of their contract and activates certain secondary obligations.

[22] Based on the above authorities, the established law is that, when a party repudiates a contract, he breaches that contract. The repudiation of the contract does not terminate the contract. The innocent party has a choice of keeping the contract alive and enforcing it, or of cancelling it by accepting the repudiation. If he accepts the repudiation, he manifests an intention neither to accept further

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[9] *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556; [1980] AC 827; [1980] UKHL 2.
[10] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA); [2001] 1 All SA 581 (A) para 1.

performance under the contract from the party who repudiated the contract, nor to further perform his own obligations under the contract, thereby resiling from it. By accepting the repudiation, the innocent party brings to an end the duty of the parties to perform their primary obligations under the contract. The effect of bringing an end to the primary obligations is the activation of certain secondary obligations.[11]

[23] The application of the above contractual principles to the facts of this case sustains a finding that SAP is entitled to rely on the exclusion of damages clause and the time bar clause. 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.

[24] In the circumstances, the exclusion of damages clause and the time bar clause are not purposes of the agreement. They are secondary obligations of the agreement. As such, they survived the termination of the agreement. That this is so, is clear from the terms of the agreement, which indicated that these clauses survived termination. Article 17(13) itself, when read in context of the entire agreement, makes this clear.

[25] Article 17(13) provides for the survival of certain provisions of the agreement after the termination of the agreement. It reads as follows:

'Survival. Part 1 – Article 2 (Confidentiality), Part 1 – Article 9 (Audit), Part 1 – Article 11 (Effects of Termination), Part 1 – Article 17 no. 1 (Retention of data), Part 1 – Article 17 no. 4 (Partial Invalidity), Part 1 – Article 17 no. 10 (Waiver of Jury Trial), Part 2 – Article 1 (Limitation of Liability), Part 2 – Article 2 (Third Party Claims), Part 2 – Article 3 (Performance Warranty), Part 2 – Article 4 (Reservation of title, rights and interest), Part 2 –

[11] *Atteridgeville Town Council* at 304B-D.

Article 12 (Governing Law and Jurisdiction) will survive any termination of any part of this Agreement.'

[26] The survival clause refers to several clauses in the agreement, including the limitation of liability clause. It expressly states that these clauses, '. . . will survive any termination of any part of this Agreement'. 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, there would have been no need to include the word 'any' in Article 17(13). They would have simply provided expressly for such an exclusion.

[27] There is accordingly no merit in the appellants' submission that the survival clause only applies where the agreement is terminated on 'good cause' in terms of Article 10(2) thereof and not when it is repudiated. This much is evident from Articles 10 and 11 of the agreement. In terms of Article 10(1)*(a)* a party may terminate the agreement if the other party does not make payment on the due date. Article 10(2) gives either party the right to terminate the agreement for 'good cause' (however, without limitation) for all the reasons cited in *(a)* to *(f)* thereof, including amongst others, repeated non-payment, material breach, insolvency, change of control, etc.

[28] Article 11 then deals specifically with the effect of termination. Articles 11(2) and (3) provide for the consequences that might follow on the parties' rights in relation to, amongst others, thee use of intellectual property and confidential information if an SAP PartnerEdge Model 'is terminated, rescinded or ended in any other way'. Properly construed, the words 'terminate' and 'rescind' mean at the instance of either party. The words 'ended in any other way' mean for every other conceivable end to the agreement. This would not be at

either party's instance but rather, should it be found to be unenforceable because it is unlawful, void, etc.

[29] Article 11(4) provides that termination does not relieve SAP's partners from their obligation to pay any fees that remain unpaid. Termination in this context is clearly intended to include every termination, no matter how it occurs. This would include 'ended in any other way'. As I see it, if the appellants' submissions are correct, namely, that a party cannot rely on any term of the agreement once it has been terminated and that the termination of the agreement can happen only for good cause, it would render Article 11 meaningless.

[30] The appellants' contentions cannot be sustained for the further reason that, to interpret the agreement restrictively, as suggested by them, would undermine the purpose of Articles 10, 11 and 17(13) or lead to unbusinesslike results. It could not have been the intention of the parties that a partner would, after the termination of the agreement, for instance, be entitled to use SAP's trademarks, documentation, other materials or confidential information. They specifically agreed that those clauses would operate after the termination of the agreement. The purpose of those clauses was to regulate what would happen to SAP's products, logos and other trademarks and other material after the termination of the agreement.

[31] To reiterate, in Article 17(13) of Part 1, the survival clause, the parties specifically agreed, inter alia, that Article 11 and the limitation of liability provisions, inclusive of the concerned clauses, '. . . will survive any termination of any part of this Agreement'. Against the above interpretation of Articles 10, 11 and 17(13) of Part 1, I conclude, therefore, that the limitation of damages clause and the time bar clause survived the termination of the agreement. Since these clauses survived the termination of the agreement, SAP was entitled to rely on

them as a defence to claims for loss of profits, 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. In the circumstances, the appeal must fail.

[32] There is no reason why costs should not follow the result. Both parties employed two counsel. Regard being had to the amount claimed and the issues raised in the appeal, the employment of two counsel was a reasonable precautionary measure taken by the parties.

[33] For the reasons set out above, the following order is made:

1 The appeal is dismissed

2 The first appellant shall pay the respondent's costs, such costs to include the costs of two counsel, where so employed.

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G H BLOEM
ACTING JUDGE OF APPEAL

Appearances

For the appellants:	A E Bham SC and I S Cloete
Instructed by:	Stein Scop Attorneys Inc, Sandton
	Honey Attorneys, Bloemfontein
For the respondent:	M du P van der Nest SC and E van Heerden
Instructed by:	Nortons Inc, Parkhurst
	McIntyre van der Post, Bloemfontein