THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1075/2016

In the matter between:

PRIMAT CONSTRUCTION CC **APPELLANT**

and

NELSON MANDELA BAY METROPOLITAN

MUNICIPALITY **RESPONDENT**

Neutral Citation: *Primat Construction v Nelson Mandela Bay Metropolitan Municipality* (1075/2016) [2017] ZASCA 73 (1 June 2017)

Coram: Lewis, Tshiqi, Saldulker and Swain JJA and Molemela AJA

Heard: 11 May 2017

Delivered: 1 June 2017

Summary: Where a party to a contract repudiates it, the aggrieved party has an election to abide by the contract and enforce its performance: if that election is exercised, but the defaulting party nonetheless persists in the breach by evincing an unequivocal intention not to remedy the breach, the aggrieved party, after affording the defaulting party the oportunity to repent of the repudiation, may change the election and cancel the contract and claim damages.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Lowe and Chetty JJ and Ndzondo AJ sitting as court of appeal).

(a) The appeal is upheld with costs including those of two counsel where so employed.
(b) The order of the full court is set aside and replaced with the following:
'The appeal is dismissed with costs including those of two counsel where so employed.'

JUDGMENT

Lewis JA (Tshiqi, Saldulker and Swain JJA and Molemela AJA concurring)

[1] This appeal, against a decision of a full court on appeal (in the Eastern Cape Division before Lowe and Chetty JJ and Ndzondo AJ) turns on whether a party to a contract, who has elected not to accept a repudiation of the contract by the other party, may, in the face of the persistent and unequivocal intention of the other not to be bound, change its stance and cancel and sue for damages for breach of contract. The trial court (Revelas J) had held that where the repudiation had continued, the innocent party was entitled to change its election and cancel the contract. The full court, reversing this decision, held that there had to be another manifest act of repudiation before the innocent party could change the election, and upheld the appeal. The appeal to this court is with its special leave.

[2] In 2010, the appellant, Primat Construction CC (Primat), concluded a contract, pursuant to a tender, for the upgrade of roads in Motherwell, Port Elizabeth, with the respondent, the Nelson Mandela Bay Metropolitan Municipality (the Municipality).

Primat was required to reconstruct roads and supply materials. When sued by Primat for damages for breach of contract, the Municipality pleaded that it had repudiated the contract and that Primat had elected not to accept the repudiation and to abide by it, demanding specific performance. Primat, it alleged, was bound by its election and could not subsequently cancel the contract and claim damages. At their pre-trial conference, the parties agreed that only the questions whether there had been a repudiation of the contract by the Municipality, and whether Primat was bound by its election not to accept the repudiation, should be determined at trial. The determination of quantum, if the Municipality were liable for damages, would be determined later. An order to that effect was made in terms of Uniform Court Rule 33(4).

[3] Despite a lengthy trial, the facts were largely undisputed. The project was managed by Iliso Consulting (Pty) Ltd for the Municipality. Mr A White of Iliso was appointed as the engineer to supervise the construction. The contract was covered by the standard terms in the industry, embodied in the Special Conditions of Contract and the General Conditions of Contract for Construction Works (2004) issued by the South African Institute of Civil Engineering. The work was scheduled to commence in April 2010 and to end in November 2010. Primat was required to submit guarantees for the completion of the work from a bank or insurance company. Coface South African Insurance Co Ltd furnished guarantees for ten per cent of the contract cost (some R15.5 million) to the Municipality.

[4] There were numerous delays in the progress of the work, caused by a number of factors. These included severe storm damage, and the late payment of an insurance claim to Primat for the damage. But delays were also caused by non-payment by the Municipality against monthly payment certificates. The completion date was extended to November 2011. On 10 November 2011, Primat wrote a letter to the Municipality advising that it was unable to proceed with the works until its financial difficulties were resolved. It undertook to resume the works when that occurred.

[5] On 24 November 2011, White of Iliso wrote to Mr J Cola, the sole member of Primat, stating that Primat was in breach of the contract because of the slow pace of the work, and work stoppages. He continued that the Municipality might, after giving 14 days' notice in writing to Primat, terminate the contract. On 22 December 2011, Mr S Agherdien of the Municipality, wrote to Primat requesting certain information by 16 January 2012, and asking what remedial measures would be put in place to increase the work rate.

[6] On 17 January 2012, Agherdien wrote to Primat purportedly terminating the contract with immediate effect in terms of various clauses of the contract. It is common cause that the letter did not constitute a proper termination and thus amounted to a repudiation of the contract by the Municipality. On the same day, Cola's attempts to gain access to the site were denied.

[7] Primat responded to the purported notice of termination on 19 January 2012, pointing out that it was 'procedurally incorrect' and thus lacked validity. Cola for Primat continued: 'Primat Construction will remain servicing the contract until this matter is finalized'. Agherdien responded on 25 January, repeating that the contract was terminated and requiring Primat to vacate the site with immediate effect.

[8] Primat in turn wrote to the Municipality on 27 January explaining that it was entitled to rectify any alleged breaches by it after being given the requisite notice, and that since Primat had not been given notice, the termination was ineffective. Cola, for Primat, advised that it had again been denied access to the site on the day before, and that the Municipality itself was in breach of the contract.

[9] On 2 February 2012, a representative of Coface met representatives of the Municipality in an attempt to reach agreement that Coface was entitled to 'step in' and mitigate its damages in terms of the guarantee that it had given the Municipality. Agherdien refused the request and advised Coface that it had already appointed four

new contractors to finish the works. Coface confirmed this in a letter to the Municipality written on 8 February 2012.

[10] The last communication by Primat itself to the Municipality was sent on 3 February 2012 after the meeting Coface had had with Agherdien. Cola requested the Municipality to remedy its own breaches, and asked for immediate access to the site. Cola said that unless the Municipality agreed to meet in order to reach an amicable solution to the impasse before 8 February 2012, Primat would have no choice but to 'approach court to interdict you from putting other contractors on site and/or alternatively start proceedings against you to recover damages based on your repudiation'. As the Municipality argues, this letter showed again that, at that stage, Primat elected not to accept the repudiation. Primat did not approach a court to obtain the interdict threatened.

[11] On 9 February 2012 the attorneys Adams & Adams, representing Primat, wrote to the Municipality advising that the purported termination by it of the contract constituted a repudiation. The attorneys referred also to the 'further repudiation' by the Municipality in appointing other contractors and in not permitting Coface to mitigate its damages. They stated that the 'Contractor hereby gives notice of its election to now accept such repudiation and hereby cancels the contracts in question'. They advised also that the letter constituted notice, in terms of s 3(1)*(a)* of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, to the Municipality, as an organ of state, that Primat intended to sue for damages in the sum of R22 million.

[12] As I indicated earlier, the Municipality, when sued for damages, pleaded that once Primat had elected not to accept the repudiation, it was precluded from changing its election: it could not therefore cancel and claim damages. Revelas J in the trial court held that Primat was entitled to change its election. It was thus not barred from claiming cancellation and damages. She relied in this regard on the decision in *Sandown Travel (Pty) Ltd v Cricket South Africa* 2013 (2) SA 502 (GSJ), in which the court had considered the principles underlying the doctrine of election.

There, Wepener J had held that while, ordinarily, a party had to choose which remedy to pursue on breach by the other of a contract, and was bound by the choice, there is authority for the view that the innocent party could change that election after giving the party in breach the opportunity to perform. If he or she persisted in the repudiation, thus failing to repent, the innocent party could change his or her election and choose to treat the contract as at an end. The term 'repent' was used by the court in *Cohen v Orlowski* 1930 SWA 125 and adopted by Wepener J in *Sandown Travel*. I shall return to the case law in due course.

[13] On appeal to the full court, relying on a passage discussing *Sandown Travel* in 2013 *Annual Survey of South Africa Law* pp 570-572, Lowe J held that in order for the aggrieved party to change his or her election, there had to be a further act of repudiation after the election had been made. Only then could a new election be made.

[14] In *Sandown Travel*, the travel agency had agreed to make travel arrangements for Cricket SA over a period of two years. The contract would be renewed automatically if neither party gave written notice to terminate six months before the expiry of the two-year period. After the six month period had elapsed, but before the expiry of the contract, Cricket SA gave notice to terminate to Sandown Travel, which refused to accept the late termination. After the expiry date, Cricket SA employed another travel agency and Sandown Travel then elected to treat the contract as cancelled and sued for damages. Wepener J held that it had been entitled to change its earlier decision when the time for performance had arrived and the defaulting party had failed to repent of the repudiation.

[15] Lowe J found that the Municipality had acted consistently since first repudiating the contract. After each repudiation, Primat had elected to keep the contract alive and was bound by its election. It was not entitled to change its stance, on 9 February 2012, after accepting the last repudiation by the Municipality on 2 February, referred to in the letter written by Coface on 8 February 2012.

[16] In commenting on *Sandown Travel* in the 2013 *Annual Survey*, above, Professor Robert Sharrock pointed out that the 'repentance' principle was well-established as far back as *De Wet v Kuhn* 1910 CPD 263 at 264, and had been approved by this court, albeit in a dissenting judgment, in *Culverwell & another v Brown* 1990 (1) SA 7 (A). (The majority judgment did not take issue with the principles expressed in the passage below.) Nicholas AJA said (at 17B-F):

'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 pay damages. . . . 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.'

Nicholas AJA cited *Cohen* (above) in support of this proposition.

[17] Sharrock, in his comment on *Sandown Travel,* put a gloss on this principle. He said (op cit) p 571:

'The notion of "persisting in the repudiation" requires clarification. Repudiation consists of words or non-verbal conduct which indicate an intention not to be bound by the contract. Each separate statement or act indicating an intention not to be bound, is a separate instance of repudiation. It makes no difference whether the guilty party has said or done the same thing before. Where a court speaks of persisting in the repudiation, what it is effectively referring to is the commission of a further repudiation which is the same as or similar to, an earlier one, not simply a failure by the guilty party to retract his or her initial repudiation. It follows that where the innocent party, having initially elected not to cancel the contract, elects to do so because the guilty party has "persisted in the repudiation", the innocent party is not simply changing his or her election regarding the earlier repudiation, but

making a fresh election based on a new repudiation. The innocent party is given the right to do this because of the guilty party's continued display of bad faith.'

[18] Sharrock considered (ibid) that in *Sandown Travel* Cricket SA had 'clearly committed an additional repudiation by treating the contact as cancelled after the expiry date'. Cricket SA was thus entitled to cancel despite its earlier decision to abide by the contract.

[19] Lowe J, following the approach advocated by Sharrock, concluded in the appeal to the full court that each time the Municipality confirmed its repudiation of the contract, Primat had elected to abide by the contract. There was no new act of repudiation, after 2 February 2012, that entitled Primat to make a fresh election. The claim for damages was thus not permitted.

[20] Primat argues on appeal to this court that the full court erred in requiring an additional act of repudiation before it was entitled to make a new election and claim cancellation and damages. The requirement is not one relied upon in any of the cases that have applied the repentance principle and makes little sense.

[21] I do not propose to reconsider any of the older cases. They are discussed fully in *Sandown Travel*. In my view, one must have regard to the nature of repudiation, and to the principles applicable to the doctrine of election, in determining whether an aggrieved party to a contract can change his or her election.

[22] In *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22D-H Corbett JA explained that a repudiation occurred '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'. When there is a repudiation the aggrieved party may elect to cancel and sue for damages, in which case he or she will inevitably be bound by that election, or elect to abide by the contract and claim performance. Once the contract is cancelled it cannot be revived.

[23] The aggrieved party must choose between these different remedies and is bound by his or her election. As Friedman J said in *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C) at 542E-F:

'The remedies available to the innocent party are inconsistent. The choice of one necessarily excludes the other, or, as it is said, he cannot both approbate and reprobate. Once he has elected to pursue one remedy, he is bound by his election and cannot resile from it without the consent of the other party.'

The statement was approved and applied by this court in *Merry Hill (Pty) Ltd v Engelbrecht* 2008 (2) SA 544 (SCA) para 15.

[24] But if the aggrieved party elects to abide by the contract and claim performance from the party who has repudiated, as *Culverwell* shows, he or she may claim performance, and in the alternative, cancellation and damages. This is the so-called double-barrelled procedure sanctioned in *Custom Credit (Pty) Ltd v Shembe* 1972 (3) SA 462 (A), by virtue of which the aggrieved party may claim in one action, first performance, and in the alternative, if that is not forthcoming, cancellation and damages. The double-barrelled procedure was sanctioned by Innes CJ in *Ras & others v Simpson* 1904 TS 254 and is a useful procedural device.

[25] But as Nicholas AJA observed in *Culverwell*, after referring to *Ras v Simpson*, even where the aggrieved party has elected to abide by the contract, in the face of persistent breach despite the opportunity to relent, the aggrieved party may elect to cancel. Where the defaulting party is clearly determined not to purge the breach, and shows an unequivocal intention not to be bound by the contract, the aggrieved party may abandon his or her futile attempt to claim performance and change the election, claiming cancellation and damages. This is the view taken by G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) p 639 where it is suggested that 'persistence' should be understood 'as a further indication of intention to repudiate after having been given an opportunity to reconsider' in which case 'what is involved is an election to cancel based on repeated breach rather than a change of mind'.

[26] The requirement of a new and independent act of repudiation by the Municipality before Primat could change its election and exercise its right to cancel and claim damages is not one mentioned in any of the earlier authorities. And, as Primat submits, it makes no sense because it would allow the defaulting party who steadfastly refuses to comply with the contract to keep the contract alive until it commits another act of repudiation.

[27] The Municipality argues, on the other hand, that to allow a change of election would negate the fundamental principle that on breach, an aggrieved party must make an election and is then bound by it. The argument fails to take into account the fact that the doctrine of election is not inviolable: the double-barrelled procedure, sanctioned as early as *Ras v Simpson,* allows the aggrieved party to claim in the same action specific performance, and in the event of non-compliance, cancellation and damages. The repentance principle does just that. The aggrieved party gives the defaulting party the opportunity to repent of the breach, and to perform. If the defaulting party continues to refuse or fail to perform, the aggrieved party should then be entitled to change its election, and cancel and claim damages.

[28] In my view, the Municipality persisted in its repudiation. It refused Primat access to the site, appointed new contractors and said that the contract was terminated. The objective construction of that conduct showed an unequivocal intention on the part of the Municipality no longer to be bound. That was how Primat reasonably perceived it.

[29] In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) Nienaber JA (para 16) observed that in determining whether there was an unequivocal intention not to fulfill contractual obligations, 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.’

[30] There is no doubt that after 3 February 2012, Primat's reasonable perception was that the Municipality persisted in its repudiation: it showed in no uncertain terms that it would not comply with its obligations and would not allow Primat to continue to perform. No further act of repudiation was necessary. Any contention that there must be yet another act manifesting that intention is, in my view, artificial. The intention continued. As Primat submits, it makes no sense to say that Primat had to wait to change its election until the Municipality committed another act of repudiation. It was sufficient that Primat reasonably perceived that the Municipality would not repent of its breach, despite the opportunities given to it to do so and then to change its election, as it did. In the circumstances the appeal against the judgment of the full court must be upheld, the effect of which will be that the order of the trial court is reinstated.

[31] Accordingly:

(a) The appeal is upheld with costs including those of two counsel where so employed.

(b) The order of the full court is set aside and replaced with the following:

'The appeal is dismissed with costs including those of two counsel where so employed.'

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C H Lewis

Judge of Appeal

APPEARANCES

For the Appellant:	P Ellis SC (with him P Ellis Jr)
Instructed by:	Adams & Adams Attorneys c/o Dold & Stone Inc, Grahamstown
	Stander & Partners, Bloemfontein
For the Respondent:	S C Rorke SC (with him G J Gajjar)
Instructed by:	Brown Braude & Vlok Inc c/o Whitesides Attorneys, Grahamstown
	McIntyre & Van der Post, Bloemfontein