Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **10019/2013**

In the matter between:

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| **PETER DAYTON HODGKINSON** | Plaintiff / Respondent |
| vs | |
| **K2011104122 (PTY) LTD** | First Defendant |
| **OLGA CORNELIA MARIA VAN DER WEERD** | Second Defendant / Excipient |

Hearing: 13 February 2019
Judgment: 5 March 2019

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**JUDGMENT**

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De Waal AJ:

[1] This Judgment deals with an exception taken by the Second Defendant against claims for post-cancellation and *mora* damages contained in the Plaintiff's amended particulars of claim, dated 2 October 2018. It is not

disputed that, if upheld, the disposal of these claims by way of exception will result in a significant saving of time and costs at trial. It is accordingly appropriate to rule on the exception even though it does not relate to all the Plaintiff's claims.

[2] The matter has a long history and it is necessary to briefly sketch the background in order to place the present round of litigation in context.

[3] On or about 18 November 2011, First Defendant and the Plaintiff entered into a so-called "*green book agreement*" which governed the rights and obligations of the parties in respect of the addition of a new floor to the Plaintiff's existing dwelling in Camps Bay for the contract sum of R1 254 343.77 including VAT. I shall refer to this agreement as "**the project agreement**" and when appropriate to the Plaintiff and the First Defendant in context of that agreement as, respectively, "**the employer**" and "**the contractor**". The contractor was required to remove the existing roof of Plaintiff's house; manufacture wooden modules and to install these as the second floor; and to construct and install internal walls and a new roof system.

[4] Subsequent to the conclusion of the project agreement, Second Defendant executed a performance guarantee in terms of which she guaranteed First Defendant's performance subject to the limitation of her liability to R250 000.00. The performance guarantee was granted on 16 April 2012.

[5] The project commenced a little more than a week earlier, on 7 April 2012. At that time, the parties agreed to a revision of the initial construction program which resulted in an extended completion date of 6 July 2012. The Plaintiff

made interim payments to the First Defendant in accordance with the timelines set in the first revision.

[6] The first extension proved to be insufficient. On 1 August 2012, the parties agreed to adjust the timelines again. In terms of the second revision, the date for the completion of the modular system in the First Defendant's factory was set at 31 August 2012 and installation had to commence on site by 3 September 2012.

[7] By 31 August 2012, First Defendant had allegedly failed to acquire all the materials needed and to provide any supervision, labour, plant, materials and equipment required to produce the modular system.

[8] On 7 September 2012, the Plaintiff delivered a written notice ("**the first notice**") to the First Defendant recording First Defendant's defaults and informing First Defendant that unless it took practical steps to remedy those defaults, the Plaintiff would cancel the project agreement. The wording of the first notice is of importance in the present matter and will be dealt with in detail below. A 7-day period was set for the First Defendant to remedy the defaults.

[9] First Defendant failed to take the required practical steps to remedy its defaults within the 7-day period.

[10] On 17 September 2012, i.e. ten days after the first notice was sent to the First Defendant, the Plaintiff notified the latter that he was cancelling the project agreement ("**the second notice**"). On 1 October 2012, Second Defendant

was also notified of the cancellation and the intention to institute court proceedings against her.

[11] Plaintiff then appointed another contractor to complete the works.

[12] On 26 June 2013 the Plaintiff issued summons against the First and Second Defendants, claiming damages under various heads.

[13] The subject matter of the exception is damages in the form of the additional expenses incurred by the Plaintiff to bring the construction project to completion. These damages allegedly amount to R448 521.48.

**The Rule 33(4) application for a separation of issues**

[14] The First Defendant folded its cards relatively early. Judgment by default in the amount of R530 489.89 was granted against it on 29 January 2016.

[15] This left the claim against Second Defendant arising from the performance guarantee. Second Defendant could of course avail herself of any defence which First Respondent had.[1]

[16] Second Defendant pleaded and thereafter brought an application in terms of Uniform Rule 33(4) in terms of which she sought a separation of issues. In the latter she requested that the question of whether the Plaintiff validly cancelled the project agreement be decided upfront.

[1] A surety is generally entitled to raise any defence that the principal debtor could raise. See *Paulsen v Slip Knot Inv 777 (Pty) Ltd* 2014 (4) SA 253 (SCA) at para 23.

[17] The Plaintiff opposed the application *inter alia* on the basis that it would deprive him of his right to lead evidence to establish facts to support an alternative ground of cancellation, namely that the First Defendant's conduct amounted to the repudiation of the agreement. If there was repudiation, the Plaintiff contended, he did not have to invoke the *lex commissoria* or strictly comply with its terms in order to cancel the project agreement.

[18] Second Defendant, on the other hand, contended that the separation would be beneficial because if the Plaintiff did not validly cancel the project agreement, he was not entitled to post-cancellation damages and there would be no need for extensive and expensive expert testimony at trial concerning the quantum of those damages.

**The Judgment of Samela J, dated 16 August 2017**

[19] The Rule 33(4) application was argued before Samela J on 19 and 20 June 2017.

[20] I was informed from the bar at the hearing of the present matter by Mr Quixley, who appeared for the Second Defendant, that there was an agreement reached at the hearing before Samela J in terms of which the learned Judge would not only determine whether there should be a separation, but also deal with the merits of the dispute on whether the project agreement was validly cancelled. Mr Walther, who appeared for the Plaintiff, accepted that there was such an agreement but disputed that it extended to the validity of cancellation on any and all grounds. Mr Walther contended that the issue before Samela J was whether the *lex commissoria* was properly

invoked and not whether the project agreement could be cancelled on the basis of repudiation or whether damages could be claimed on other grounds such as *mora*. I shall revert to this aspect below when dealing with Second Defendant's exception on the basis that the matter before me is *res judicata*.

[21] Samela J held that where a contract lays down a procedure for cancellation, it must be followed for the cancellation to be effective. The learned Judge further held that in order for the innocent party to succeed, he has to show that he complied strictly with the peremptory provisions of the *lex commissoria* in question. In applying the principle to the facts of the matter, Samela J held that the provisions of clause 12.1 of the project agreement were peremptory and that the cancellation notice did not comply with those provisions. In particular, the First Defendant was not afforded the contractually agreed time period within which to remedy the alleged breach (it was afforded 7 days instead of 14) and the purported cancellation by the Plaintiff was consequently premature and ineffective.[2]

**The Judgment of the Full Bench, dated 16 May 2018**

[22] The Judgment of Samela J went on appeal to the Full Bench. Parker J authored the Judgment of the Full Bench, with Bozalek J and Fortuin J concurring.

[23] The issue before the Full Bench was defined in exactly the same terms as in Samela J's Judgment, namely whether the Plaintiff had validly cancelled the project agreement in accordance with that agreement. The Full Bench

[2] Judgment of Samela J at para 14

confirmed the Judgment of Samela J. I deal below with the extent to which the Full Bench can be said to have dealt with cancellation on grounds of repudiation.

**The amendment of the particulars of claim**

[24] Subsequent to the Judgment of the Full Bench, the Plaintiff gave notice of his intention to amend his particulars of claim.

[25] In the amendments, the Plaintiff firstly made clear that he contends that by 31 August 2012 there had already been "*material*" breaches of the undertaking to complete the modular system in First Defendant's factory.

[26] In the amendments, the Plaintiff further sought to overcome the rejection of his reliance on the *lex commissoria* by pleading that the project agreement was cancelled on one of the following two grounds:

26.1. The first is that the First Defendant did not take any practical steps to remedy its default within the 7-day period stipulated in the first notice, nor within the 14-day period stipulated in clause 12.1 of the project agreement. Insofar as the latter period may be held to be applicable, it does not matter that the first notice was defective because the contractor in any event failed to remedy the defaults within the contractually stipulated 14-day period.

26.2. The second (alternative) ground for cancellation is that First Defendant's "*failure to remedy the defaults set out in the breach notice, taken together with his failure to secure or procure the funds*

*required and/or to satisfy Plaintiff that it possessed such funds exhibited a deliberate and unequivocal intention not to be bound by the project agreement which conduct constituted repudiation of the agreement*". The second notice "*constituted an election by the Plaintiff to terminate the agreement following First Defendant repudiation thereof*".

[27] It is apparent that the Plaintiff, having all along contended that his failure to strictly follow the provisions of the *lex commissoria* was not fatal, changed tack in the amended particulars and now contends *inter alia* that repudiation justified cancellation.

[28] The Plaintiff also introduced a second, and different, basis for claiming the damages to bring the project to completion. This ground is that since time was of the essence, First Defendant's breach of its undertakings by 31 August 2012 placed it in *mora* automatically. It is then contended that a party in *mora* is liable for any "*actual patrimonial loss suffered by the opposing party*", as a result of the breach. Such damages would include the R448 521.48 to bring the project to completion.

[29] In the amendments, the Plaintiff further sought to increase the claim against Second Defendant by claiming interest at the rate prescribed by law on the sum of R250 000.00 or such lesser amount as the Court may grant judgment on, calculated from date of service of summons to the date of final payment.

**Second Defendant's notice of exception in terms of Rule 23(1)**

[30] Second Defendant excepted to the amended particulars of claim on the grounds that they did not sustain a cause of action. Four grounds of exception are raised:

30.1. The first is that the Plaintiff's conduct as pleaded is inconsistent with the alleged repudiation. Plaintiff elected to follow the *lex commissoria* rather than to rely on First Defendant's repudiation and the Plaintiff is bound by that election.

30.2. The second is that the placing of First Defendant in *mora* did not absolve the Plaintiff from following the *lex commissoria*. Unlike repudiation, *mora* is not a separate basis for cancelling the project agreement outside the *lex* cancellation clause.

30.3. The third is that the introduction of repudiation as a ground for cancellation would undermine and indeed be subversive of the Judgment of Samela J and the Full Bench.

30.4. The fourth is that the claim for interest is impermissible as the performance guarantee limits the Second Defendant's total liability to R250 000.00.

[31] It is convenient to deal with the third ground of exception first. I deal with this aspect under the heading "*res judicata*".

***Res judicata***

[32] The question is essentially whether Samela J or the Full Bench dismissed the possibility of post-cancellation damages on the basis of repudiation.

[33] In paragraph 2 of his Judgment, Samela J defined the issue before him as whether the Plaintiff validly cancelled the project agreement as defined in the Plaintiff's particulars of claim in accordance with its terms. This indicates that the only issue before Samela J was whether Plaintiff's cancellation notice complied with the time periods and other requirements set in the *lex commissoria* and not whether the Plaintiff did or could have cancelled the project agreement on the basis of repudiation.

[34] The Full Bench recorded in its Judgment that it was only at the stage of opposing the separation application, that the Plaintiff raised the issue of anticipatory breach (repudiation). The Plaintiff, the Full Bench further recorded, claimed that he was entitled to raise this issue because of the decision of the SCA in *Data Colour International (Pty) Ltd v Inta Market (Pty) Ltd* 2001 (2) SA 284 (SCA). According to the Plaintiff, *Data Colour* stands for the proposition that a party is allowed to rely on an alternative ground of cancellation not overtly raised in a letter of demand. The Full Bench rejected this contention, holding that although the Plaintiff had gone through the process of placing the First Defendant in *mora,* this was done in a manner which was non-compliant with the strict cancellation provisions and that "*this*

*act is clearly inconsistent with the [Plaintiff] having relied on cancellation of the contract pursuant to an alleged repudiation*".[3]

[35] There are indications in the Full Bench Judgment that it decided that the Plaintiff could not rely on repudiation as an alternative justification for cancellation. For instance, the Full Bench:

35.1. Listed the requirements that an innocent party has to allege in its pleadings, and ultimately prove, in order to succeed with a claim based on cancellation for repudiation.[4] The Full Bench then stated that the Appellant's conduct was not consistent with the requirements for repudiation and that in its view "*the alternative argument of repudiation in the form of anticipatory breach by the First Defendant is not sustainable*".[5]

35.2. Held that the Judgment of Samela J was final in effect because it "*irreversibly disposed*" of Plaintiff's claim to being entitled to rely upon the cancellation of the agreement in order to claim post-cancellation damages in the action.[6] The Full Bench held that this aspect is *res judicata*.[7]

35.3. Held that the Judgment of Samela J on the issue of a separation of issues was sound because the "*validity or otherwise of the*

[3] Full Bench Judgment at para 2.10
[4] Full Bench Judgment at para 54
[5] Full Bench Judgment at para 55
[6] Full Bench Judgment at para 12
[7] Full Bench Judgment at para 12

*cancellation of the project agreement would be dispositive of the trial or at least a substantial part thereof*".[8]

[36] The above seems to indicate that the Full Bench regarded a separation to be convenient as it would dispose of the issue of whether the Plaintiff was entitled to post-cancellation damages. It is also logical to assume that the parties would not have gone through the trouble of arguing the matter twice merely for the purpose of determining of whether *one* ground for cancellation (the invocation of the *lex commissoria*) should be eliminated.

[37] Whilst the matter is not free from doubt, I nevertheless find, for the reasons set out below, that the Full Bench did not decide the issue of whether cancellation was justified on the ground of repudiation. I reach this conclusion on the basis of the following statements in the Full Bench Judgment:

37.1. The Full Bench stated that the Plaintiff was "*not necessarily precluded from subsequently trying to convince the Court to uphold its claim based on the alternative ground of cancellation*".[9]

37.2. The Full Bench further held that it was not convinced that on the facts of the case it was possible to infer repudiation from the pleadings.[10]

37.3. Whilst the Full Bench stated that it agreed that the alternative argument of cancellation due to repudiation is "*wholly untenable*", it

[8] Full Bench Judgment at para 26
[9] Full Bench Judgment at para 28
[10] Full Bench Judgment at para 51

went on to hold that "*the repudiation was neither pleaded nor proved*".[11]

[38] In my view, the true basis for the Full Bench's Judgment was that repudiation was not pleaded properly and that the claim on this basis could not succeed on the pleadings as they stood at the time.

[39] It follows that I do not believe that the claim for post-cancellation damages based on repudiation was a matter that was decided by Samela J or the Full Bench and the Plaintiff could accordingly introduce such a claim by way of an amendment to the particulars of claim.

**First ground for cancellation: the first notice matured into effectual cancellation**

[40] It will be re-called that the amended particulars of claim seek to introduce two "*new*" grounds of cancellation which are pleaded in the alternative.

[41] The first is that the First Defendant failed to take any practical steps to remedy its defaults within 7 days of receipt of the breach notice and within the 14-day period contemplated in clause 12.1 of the project agreement. As I understand it, the argument is that it does not matter that the First Defendant was afforded only 7 days to remedy the defaults instead of the 14 days prescribed by the *lex commissoria,* because the breach was in any event not remedied within the latter period or at all.

[42] Unlike the issue of repudiation, this aspect was pertinently dealt with in the Judgment of the Full Bench.[12] In the Full Bench Judgment the contention is

[11] Full Bench Judgment at para 53

described as a "*premature cancellation*" which had, in time, "*matured into a perfectly effectual cancellation*".[13] In dealing with this contention, the Full Bench distinguished the present matter from situations where there were two cancellations: a premature (unlawful) one and then a second (lawful) cancellation. The latter would stand even if the former is bad. In the present matter there was no such further fresh cancellation and, at the time that the Plaintiff cancelled (on 17 September 2012) he was not entitled to cancel (at least not in terms of the *lex commissoria*).[14]

[43] To this one can add that First Defendant would have been quite within its rights to disregard the first (defective) notice, and to await a further proper notice giving it the required 14-day period to remedy its defaults. The innocent party cannot expect the guilty party to read the notice as if it contained the correct time period and to rectify within that period. If the notice is defective, the guilty party is entitled to require the innocent party to reboot the procedures for invoking the *lex commissoria* from scratch or find another ground of cancellation.

[44] This disposes of the first new ground for cancellation introduced by the amended particulars of claim.

**Repudiation**

[45] The alternative ground for cancellation is that the First Defendant's failure to remedy the defaults set out in the breach notice, taken together with its failure

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[12] Full Bench Judgment at para 42
[13] *Ibid*
[14] Full Bench Judgment at para 48

to secure or procure the funds required and/or to satisfy Plaintiff that it possessed such funds, exhibited a deliberate and unequivocal intention not to be bound by the project agreement, which conduct constitute repudiation of the project agreement.

[46] The facts which gave rise to repudiation can be divided into two categories:

46.1. The first is that by 31 August / 3 September 2012 it became apparent that the First Defendant did not have the funds to manufacture the modular system for the second floor. The First Defendant did not utilise the funds provided for purposes of constructing the modular system and this rendered it impossible for it to perform.

46.2. The second is that the response to the first notice, or rather the lack of a proper response thereto, in itself confirmed that First Defendant had no intention to perform its obligations under the project agreement. In this regard, reference was made to an email and sms from First Defendant in which it promised that its attorneys would provide a response to the first notice, which response never saw the light of day.

[47] I should emphasise that I am not called upon to decide whether the requirements for repudiation were met by 31 August or by 7 September or by 17 September 2012. If the exception fails, the issue of whether there was at any stage conduct or omissions which displayed an unequivocal intention on the part of First Defendant no longer to be bound by the project agreement,

will be decided at the trial. I must assume that the requirements for repudiation have been met.

[48] The question before me is a narrow one. It is whether the Plaintiff forfeited his entitlement to rely on repudiation as a ground for cancellation because he elected to invoke the *lex commissoria*.

[49] The *lex commissoria* in the contract agreement provides as follows:

> "***Default by Contractor***
>
> *12.1 If the Contractor abandons the Works, refuses or fails to comply with a valid instruction of the Employer or fails to proceed expeditiously and without delay, or is, despite a written complaint, in breach of the Contract, the Employer may give notice referring to this Sub-Clause and stating the default.*
>
> *12.2 If the Contractor has not taken all practicable steps to remedy the default within 14 days after the Contractor's receipt of the Employer's notice, the Employer may issue a second notice given within a further 7 days [to] terminate the Contract."*

[50] It is apparent that clause 12 needs to be followed even if the contractor abandons the works; or fails to adhere to instructions; or delays or otherwise remains in breach despite written complaint.

[51] What did the Plaintiff do when the 31 August / 3 September 2013 deadlines set in the second revision were not met? In order to consider this aspect it is unfortunately necessary to consider rather lengthy passages from the first and second notice.

[52] The first notice was a letter from the Plaintiff's attorneys which stated *inter alia* the following (my underlining):

> *"22. Our client met with your Mr Van der Weerd at your factory on 14 August 2012 and recorded in a written complaint in terms of clause 12.1 of the agreement that, in further default of the agreement and your final programme, you had failed to expeditiously proceed with the agreement, your instructions and commitments in that, amongst other defaults you had not made sufficient progress on the modular system and would not be in a position to order windows, doors and roof cladding and deliver and install the modular system as per your final programme.*
>
> *23. In a desperate attempt to mitigate loss and assist in completing the works, our client provided additional funding by paying an amount of R30,217.77 on 27 August 2012, directly to a supplier (Somerset Timbers) in respect of materials delivered to your factory for construction of the modular system. Our client provided this additional funding in reliance on your representative to our client that you had secured funding which would be received into your bank account before the end of August 2012 which, in turn, would enable you to expediently implement and meet the times in your final programme.*
>
> *24. You have failed to take all practical steps to remedy your default within 14 days of our client's aforesaid notice and multiple, subsequent notifications and instructions insisting on compliance and evidence of progress during August.*
>
> *25. You remain in default in that you have failed to inter alia:*
>
> *25.1 Sufficiently construct or deliver the modular system to the site;*

25.2 *Procure or deliver materials required for the construction of the walls, roof beams, roof boxes, insulation, mag board, windows and doors;*

25.3 *Produce or furnish a Structural Certificate from an, or propose an ECSA Registered Structural Engineer for your specialist timber design in order to comply with the City of Cape Town plan approval condition.*

26. *Our client and his family are simply no longer in a position to condone further delays and defaults. Time is of the essence. Our client must be in a position to move back into his house and complete the works as a matter of urgency.*

27. *From the history of this matter and your communications regarding your financial position, it would appear that it is impossible for you to complete the works within your revised schedule, or at all.*

28. *Our instructions are to notify you, pursuant to provisions of clause 12.1 of the agreement, as we hereby do, that you that you are required you to sufficiently catch up with and implement your final programme.*

29. *Should it not be evident, within seven days of delivery of this notice, that:*

29.1 *You have secured sufficient cash to procure materials and labour and complete and deliver the modular system, and*

29.2 *You have taken demonstrable, practical steps which will reasonably satisfy our client that you will have caught up with the items and time lines in your final programme to the extent that the completed modular*

*system has been delivered to the site and that you have properly paid for related materials and services in accordance with suppliers terms and that it is likely that our client will be able to move back into the site on or about 12 October 2012; and*

*29.3 You have committed to furnishing a Structural Certificate as per paragraph 25.3 above,*

*our client will terminate the agreement without further notice.*

*30. In regard to the aforegoing, our client is securing estimates from other contractors who have indicated they would be prepared to continue with the partially complete modular system and materials which are owned by our client, stored at your factory and in respect of which you have both ceded and waived any lien.*

*31. You are advised that, should the agreement be cancelled, it would be in your interests to mitigate further damages to our client by handing over the materials and all partially constructed modular systems and components, on which materials, components and systems a value can be placed in reduction of restitution of the amount overpaid by our client.*

*32. All of our client's rights in respect of penalties and damages occasioned by your default, and in general, are expressly reserved."*

[53] The second notice stated *inter alia* as follows:

*"2. We acknowledge receipt of your Mr Van der Weerd's email dated 13 September 2012, in respect of our letter of 07 September 2012.*

3. *In addition, our client acknowledges receipt of your Mr Van der Weerd's sms communication received by him on 14 September 2012 at 13h18 pm.*

4. *In your email dated 13 September 2012, you indicated that you would be consulting your attorney in order to "officially" comment on our letter dated 07 September 2012. In your sms you stated that your "official reply" would be delivered per email on 14 September 2012.*

5. *Neither we, nor our client, have received the "official" reply you undertook to provide.*

6. *Insofar as you have failed to produce any concrete indications or assurances, as required in paragraph 29 of our letter dated 7 September 2012, your breach has not been remedied and the agreement is terminated."*

[54] Second Defendant's exception is based on the contention that it is clear from the above that the Plaintiff elected to invoke clause 12, i.e. the *lex commissoria*, and that he is bound by that election. As only 7 days were given to remedy the defaults, the Plaintiff did not comply with the requirements of clause 12 and the cancellation in the second notice was accordingly defective, as was also found by Samela J and the Full Bench.

[55] Ordinarily, when faced with repudiation or any other circumstances which allows him to cancel, an innocent party has to elect whether he wishes to

enforce the contract or cancel. He is not allowed to approbate and reprobate the contract; he cannot blow hot and cold.[15]

[56] It is not in dispute that the Plaintiff conveyed his election not to cancel in the first notice. It is further apparent that the First Defendant was afforded an opportunity to remedy the defaults, although within a shorter period than that required by the *lex commissoria*.

[57] The Plaintiff however contends for a different reading of the first notice with reference to the Judgment of the Supreme Court of Appeal in *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 (5) SA 420 (SCA). In that matter, the SCA held that a party entitled to cancel on the ground that there was repudiation, is allowed to afford the guilty party an opportunity to "*relent*" or "*repent*" and then, if the response is unsatisfactory, change his election and cancel the agreement. The reasoning is that one cannot expect an innocent party who gives the guilty party a chance to repent then wait for an entirely new and fresh act of repudiation before cancelling – if there is persistent breach, the innocent party must be allowed to change his election and cancel based on the first act of repudiation.

[58] The passages relief upon by the Plaintiff from *Primat Construction* are the following (my underlining):

> *[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*

[15] *Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Ltd* 2018 (3) SA 405 (SCA) at para 14: "*It follows that a contracting party, when faced with a breach of the contract by the other party, must elect whether to terminate or to enforce the contract. Once an election is made, the party is bound by it. Whether or not there has been such an election to cancel is a factual issue.*"

*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 GB Bradfield in Christie's Law of Contract in South Africa 7 ed (2016) at 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 to 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."*

[59] With reference to this authority, the Plaintiff contends that first notice was, on a proper construction thereof, not a notice in terms of the *lex commissoria*, but rather an invitation to the First Defendant to repent.

[60] The Plaintiff's arguments in this regard can be summarised as follows:

60.1. The part of the first notice which states that "*it would appear that it is impossible for [the First Defendant] to complete the works within your revised schedule, or at all*", records that there had already been repudiation.

60.2. The contention in the first notice that First Defendant had misappropriated Plaintiff's money and that First Defendant was the author of its own inability to perform if it was unable to secure alternative finance of its own, indicates that First Defendant could not perform and had repudiated.

60.3. Plaintiff sought to convey in the first notice that it wanted the First Defendant to complete the contract but did not believe that the latter was or would be in a position to do so.

60.4. The first notice asked the First Defendant to "*show me the money so I can be sure that you're not wasting valuable time*". Without the money there could be no hope of any breach being remedied.

60.5. Given that it was an opportunity to repent (and not to invoke clause 12) it mattered not how long the First Defendant was given to remedy the defaults.

60.6. It was further clear from the failure of the First Defendant's attorney to provide the promised response, that First Defendant did not intend to comply with its obligations under the contract.

*60.7.* There is no reference in the second notice (the cancellation letter) to the *lex commissoria* which means that the cancellation was on a different basis than clause 12.

[61] The Plaintiff further stressed the well-established principle that an exception cannot succeed unless it is shown that upon any construction of the pleadings no cause of action is disclosed. Plaintiff's argument is that the question of whether the first notice constituted an invocation of the *lex commissoria* or an invitation to repent is a factual one which must be determined at trial.

[62] In my view, the Plaintiff's arguments raise the following two questions:

62.1. Whether *Primat Construction*, and the possibility of a change in election, applies to contracts which contain a *lex commissoria*?

62.2. In which manner should the election to afford a guilty party an opportunity to repent should be conveyed by the innocent party in cases where a contract contains a *lex commissoria*?

[63] The cases that established the principle that a *lex commissoria* need not be followed in the case of repudiation are premised on the idea that the invocation of a cancellation clause would be "*an exercise of futility*" in the case of repudiation. The reasoning was that it would be absurd to require an innocent party to afford the repudiator an opportunity to remedy her breach when the latter already unequivocally indicated that she no longer intends to be bound by the contract.[16] *Primat Construction* now allows the innocent party to afford the guilty party an opportunity to "*repent*", even in the case of repudiation. Arguably, the parties to a contract must now be allowed to remove any possibility for contestation and dispute by agreeing expressly that all forms of breach are covered by a *lex commissoria*. And the provisions of a lex commissoria may have to be interpreted to determine whether this much was not agreed by necessary implication. Take, for example, the terms of the clause 12.1 of the project agreement. It provides *inter alia* that the *lex commissoria* must be followed even if the contractor "*abandons the works*".

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[16] See, in this regard: *SA Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at para 37:

> *"The answer to York's argument is in my view to be found in those cases where it was held that the requirement of notice prior to cancellation contemplated in clause 28.1 of the contracts does not apply where the breach of contract complained of was in the form of anticipatory breach or repudiation (see eg Taggart v Green 1991 (4) SA 121 (W) at 124D - 126I; Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd 1994 (3) SA 673 (A) at 683G - I)."*

But *Taggert* is premised on the idea that one cannot have contract which says that, notwithstanding repudiation, the innocent may do nothing until he has gone through a process of entreating the guilty to repent. See p. 126H-I. Both *Taggert* and *AECI* are further premised on the notion that the guilty part must elect whether to insist on performance or accept the repudiation and cancel.

The Full Bench held that it is trite that the *lex commissoria* did not apply to repudiation. See para 50 of the Judgment. But the implications of *Primat Construction* for this principle were not raised by the parties at the time and accordingly not considered.

That indicates that conduct which would almost certainly amount to repudiation is nevertheless covered by the *lex commissoria* in some instances. Clause 12.1 also has a "*catch-all*" provision, requiring a complaint and then the invocation of the *lex commissoria* for all forms of breach not specifically referred to in the clause. At least arguably, this kind of *lex commissoria* was intended to "*occupy the entire field*" as far as cancellation is concerned.

[64] In *Primat Construction* it made sense to allow the innocent party to design and implement his own repentance regime because there was no cancellation clause in the contract in question. A guilty party can hardly complain about being given an opportunity to save the day by repenting in such a situation. But the reasoning has less force when there is a *lex commissoria*. An innocent party who then wants to give the guilty party a chance to make amends has the choice to avoid any confusion by following the clear route to cancellation prescribed by the *lex commissoria*. This was one of the main points made by Mr Quixley on behalf of the Second Respondent at the hearing.

[65] The answer to the first question may be fact dependant. In other words, if the *lex commissoria* covers only a limited number of well-defined forms of breach, then one can easily imagine a repentance regime operating side by side with the *lex commissoria*. However, in the case of a very widely worded *lex commissoria*, such as the one under consideration in the present matter, the cancellation clause may oust any possibility of a parallel repentance regime.

[66] However, after some reflection, I decided to refrain from deciding the first question. For the reasons set out below, it is not necessary to do so. Moreover, the parties argued the matter on the basis that the *lex commissoria* did not have to be followed if there was repudiation. In the circumstances it is not appropriate to consider the first question.

[67] I shall accordingly assume that clause 12 the project agreement does not oust the possibility of a repentance regime. Turning to the second question, in my view, in cases where a contract contains a *lex commissoria*, the election by the innocent party to implement his own repentance regime must be communicated clearly and in a manner which leaves the guilty party in no doubt as to what is required of her. Put in another way, the innocent party cannot send mixed messages to the guilty party in a case such as the present one as it would leave the latter in an intolerable position as to what is required of her. The guilty party cannot be expected to guess whether the *lex commissoria* is being invoked or not. This will almost invariably be the case when there is a reference to the cancellation clause in the notice, such as in the present matter, but the notice does not comply with the time periods stipulated in that clause.

[68] It is not a question of interpreting the first notice. As a matter of law, the first notice had to stipulate clearly that the First Defendant was given the opportunity to repent and that clause 12 of the project was not invoked. But the first notice, at best for the Plaintiff, conveyed a mixed message, which was compounded by the conduct of the Plaintiff afterwards and more particularly the insistence of the Plaintiff that the notice substantially complied with the

requirements of the *lex commissoria*. Against this background, it would be untenable to allow the Plaintiff to now introduce a fall-back position to the effect that the notice contained a repentance regime with reference to *Primat Construction.*

[69] In the circumstances, the exception against the introduction of repudiation as ground for cancellation is upheld.

**<u>*Mora* damages</u>**

[70] This part deals with the different basis for claiming the damages incurred to bring the contract to completion. It is contended that, because time was of the essence, the breach of various undertakings by the First Defendant by 31 August 2012 (completion of the modular system in the factory) and by 3 September 2012 (commencement of installation on site) automatically placed the First Defendant in *mora*. This entitled the Plaintiff to damages including the costs incurred in having the work completed, less the balance of the contract price which would have had to be paid under the contract if the defaulting party had timeously completed the work.

[71] In my view, this ground for claiming damages has no merit. First Defendant fell in *mora* on 31 August 2012 and cancellation followed 17 days after on 17 September 2012. Plaintiff's damages claim does not relate to damages caused by the 17-day delay but to the costs of employing a different contractor to finish the works, i.e. cancellation damages.

[72] Late completion is in any event specifically dealt with in clause 7.4 of the project agreement, which provides as follows:

> *"If the Contractor fails to complete the project within the Time for Completion, the Contractor's only liability to the Employer for such failure shall be to pay the amount stated in the Appendix for each day for which he fails to complete the Works."*

[73] The Appendix provides for payment of R1 000.00 per day for delay. In the particulars, Plaintiff contends that the project was delayed by 72 days and that this entitles him to claim R72 000.00 in damages. No exception was raised against this claim and it will be decided at trial. In the absence of cancellation, the Plaintiff's claim for damages due to delay is in my view limited to the above amount.

[74] Any claim for *post-cancellation* damages based on *mora* would in any event run into the same difficulties as Plaintiff's claim for such damages based on repudiation, and more. It is of course so that when time for performance is fixed and the debtor fails to perform by that time, the latter is in breach and the creditor may then cancel in circumstances where time is of the essence.[17] But I fail to see how this can ever be the case where the very same contract specifies the amounts which may be claimed per day for delay (clause 7.4) and where delay may be a ground for cancellation (clause 12). The very existence of the *lex commissoria* already indicates that the parties

[17] I am not making a finding on the facts that time was not of the essence in respect of the second revised deadlines of 31 August and 3 September 2012. This issue cannot be decided on exception. I however have grave doubts as to whether the Plaintiff would ever be able to show that performance by 31 August / 3 September 2012 became of the essence when there had already been two revisions of the timelines; when the only reason for urgency was the desire of the Plaintiff to move back into his house; when one is dealing with what appears to be an ordinary building project which was delayed; and when there was a clause which allowed the Plaintiff to claim R1 000.00 for every day of delay.

contemplated that the right to cancellation only accrues, in the case of delay, after the guilty party was given an opportunity to remedy its defaults within a certain period of time.

[75] But even if this is not so, cancellation based on *mora* / time is of the essence suffers from the same shortcoming as that based on repudiation. If the first notice was an attempt to invite the First Defendant to repent and not to invoke clause 12, then this should have been clearly conveyed, which was not done in the present matter.

[76] In the result, the exception against the claim for damages on the basis of *mora* / time is of the essence, must also be upheld.

**The R250 000.00 limit in the performance guarantee**

[77] In terms of the amended particulars of claim, the Plaintiff introduced a prayer for interest a *tempore morae* on the capital amount of R250 000.00 which the Plaintiff claims is owed to him by the Second Respondent, based on the performance guarantee.

[78] On this aspect, the Plaintiff contends that interest is recognised as a form of damages suffered by the creditor if there is no payment on the due date, and such interest becomes payable by operation of law, in particular, the Prescribed Rate of Interest Act 55 of 1975.

[79] The Prescribed Rate of Interest Act deal with three issues. The first is the rate of interest applicable in cases where the parties have not agreed on such a

rate; the second is interest on a judgment debt; and the third is when interest starts running in respect of unliquidated debts.

[80] In respect of the third aspect, the Act provides as follows:

> ***"2A Interest on unliquidated debts***
>
> *(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1.*
>
> (2) *(a) Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 (Act 34 of 2005) the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.*

[81] Section 2A(1) records that interest on liquidated debts run at the prescribed rate. Section 2A(2)(a), on the other hand, abrogates the common law, in terms of which a defendant cannot be in *mora* in respect of a claim for unliquidated damages until the quantum has been determined by Court. In terms of section 2A(2)(a), regardless of the common law, interest on unliquidated damages runs from demand or summons, whichever is the earlier.

[82] None of this is disputed by the Second Defendant.

[83] The Second Respondent's objection is rather that the Prescribed Rate of Interest Act does not have the effect of increasing the overall amount of liability which was fixed by the parties when the performance guarantee was granted.

[84] In terms of the performance guarantee, Second Defendant guaranteed and bound herself jointly and severally as guarantor and co-principal debtors to the employer for the due and faithful performance by contractor of all the terms and conditions of the project agreement subject to certain conditions. The relevant condition provides as follows:

> *"This guarantee shall be limited to the payment of a sum of money"*
>
> *"The guarantor's total liability shall not exceed the sum of R250 000.00."*

[85] In my view, the exception should be upheld as the Second Defendant's overall liability, whether it be for damages or interest or penalties, was capped by performance agreement at R250 000.00. The amended particulars of claim disregard the overall cap on Second Respondent's liability.

**Conclusion**

[86] In the circumstances, the following orders are made:

(a) The exceptions against the amendments to paragraphs 20, 21 and 23 of the particulars of claim and the insertion of a new prayer 2 after the existing prayer 1 are upheld, with costs.

(b) The Plaintiff is granted leave to amend his particulars of claim within 20 days of the date of this order.

**H J DE WAAL AJ**
**Acting Judge of the High Court**
Cape Town
5 March 2019

## APPEARANCES

**Plaintiff / Respondent's counsel: Adv S Walther**
**Plaintiff / Respondent's attorneys: Andrew De Vos & Associates**

**Second Defendant / Excipient's counsel: Adv G Quixley**
**Second Defendant / Excipient's attorneys: Maurice Phillips Wisenberg**