**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, JOHANNESBURG**

**CASE NO: 2020/40953**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO

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**SIGNATURE** **DATE:** 16 May 2022

**Y)** **FIRST PLAINTIFF**

**L**
**(PTY) LTD** **SECOND PLAINTIFF**

And

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

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# JUDGMENT

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**MANOIM J**

[1] This case requires me to decide an important principle of contract law that has been raised by way of two special pleas.

[2] In this matter, the plaintiffs sue for loss of profits. The defendant seeks to avoid liability by relying on two provisions in the since cancelled agreement.

[3] The question is, under what circumstances a party who has repudiated a contract can still rely on certain provisions of that contract against the other party which accepted the repudiation.

[4] Expressed differently; do all the terms of a contract die with it on termination or do some terms survive and if so, which type.

## Background

[5] Over the years the second plaintiff, TTCS, and its predecessors, have entered into agreements with the defendant, SAP.[1] The essence of these agreements was that TTCS was appointed as a service provider of SAP products in certain territories. This entailed selling various information technology services offered by SAP to its customers.

[6] SAP is a prominent international provider of these products. TTCS in turn developed a customer base for SAP products in various territories in Sub-Saharan Africa, excluding South Africa. Most of these customers are public sector organisations.

[7] This case concerns their most recent agreement which comprises a suite three of contracts that the parties entered into, in May 2016. It is common cause that they can be treated together as one agreement for the purpose of this decision.

[9] On 1 July 2019 SAP purported to cancel the agreement. SAP then proceeded to advise TTCS' customer base that TTCS was no longer one of its licensees and

[1] The second plaintiff is the wholly owned subsidiary of the first. The plaintiffs contend that in entering the contract the second plaintiff acted as agent of the first, something the defendant denies. However, both parties agree that this issue is not relevant to my deciding the special pleas. I will therefore refer simply to the second plaintiff as TTCS from now on and the defendant as SAP

hence it was no longer accredited to sell, service or maintain SAP software. TTCS claims that as a result, these customers ceased their business relationship with it and diverted this business to SAP Africa.

[10] However, the 1 July 2019 letter of cancellation erroneously referred to a September 2009 agreement between SAP and TTCS. But no such agreement between the two parties had ever been concluded. This was pointed out to SAP by TTCS' attorneys.[2] This precipitated a further letter from SAP to TTCS' attorneys, dated 10 July 2019.

[11] In this letter SAP now states that it had issued the notice to terminate in respect of the agreement of May 2016. It then went on to state that although it was not obliged to give reasons for invoking the termination it nevertheless alleged that TTCS was no doubt aware that "…*significant corruption allegations*" against TTCS: "…*have been publicly reported"* SAP went on to allege that there had been multiple violations of SAP's Partner Code of Conduct: *"… including involvement in improper payments and handling of confidential information."*[3]

[12] SAP further alleged that: "Due to the severity and pervasiveness of these actions, it is SAP's view that these breaches are incapable of remedy."[4]

[13] TTCS's attorneys wrote back on 15 July 2019 alleging that it was SAP that had repudiated the agreement but significantly they stated: "…our client accepts such repudiation given the extent of the damage that your client has caused our client by making false statements as to the cancellation of your client's relationship with our client."

[14] On 30 November 2020, the plaintiffs instituted the present action. In it, the plaintiffs claim damages from SAP for loss of profits as a result of the repudiation of the agreement, which cumulatively amounted to USD$ 68 034 351 .49.

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[2] See letter dated 3 July 2019 Case Lines 001-45. They alleged the notice of termination was "… *premature and likely ineffectual.*"

[3] Case Lines 001-49. It is not necessary for me to go into the further allegations contained in the letter as the reasons are not germane to the current proceedings.

[4] Case Line 001-51

[15] SAP in response has raised two special pleas. The first is that the claim is time barred as it has been brought more than one year after the repudiation was made known to the plaintiffs. This time bar plea emanates from one of the clauses in the agreement. The second special plea is that another term of the agreement precludes either party from making a claim for loss of profits against the other.

[16] In its replication TTCS alleged that SAP could not both repudiate the agreement and then seek to rely on some of its terms to escape liability.

[17] The parties then agreed that this latter issue – the special pleas and the replication thereto, should be a separated issue and heard first. On 30 September 2021 I made an order to this effect at the request of the parties.

[18] On 16 February 2022 I heard argument from both parties in relation to the separated issue.

## Clauses in the agreement

[19] The exclusion of liability clause is contained in clause 2 of the Partner Edge General Terms and Conditions for the Africa Region (Partner Edge GTCS)

[20] It is lengthy so I will confine myself to the essential language. In a section entitled: " *Exclusion of damages; Limitation of liability: Anything to the contrary herein notwithstanding except for:* ( there follow a list of exceptions not relevant here) but it then goes on to state: *"Under no circumstances and regardless of the nature of any claim will SAP, its licensors or partners be liable to each other or any other person or entity …or be liable in any amount for special, incidental, consequential, or indirect damages, loss of goodwill or profits work stoppage, data loss, computer failure or malfunction, attorneys fees, court costs, interest or exemplary or punitive damag*es."

[21] Put simply, this clause operates to exclude TTCS from bringing its claim for loss of profits. There is no dispute that if this clause is still binding on the parties this is what its effect is.

[22] The same reliance is placed on the time bar clause. Here the clause says a partner must initiate a cause of action within *"…one year of the date the Partner knew or should have known after reasonable investigations of the facts giving rise to the claim."*

[23] According to SAP, the plaintiffs knew of the facts giving rise to their claim from at least July 2019. First, this is apparent from the letter of complaint from their attorneys dated 3 July 2019. But certainly, this would have been put beyond doubt by the letter from SAP to the plaintiffs' attorneys dated 10 July 2019 where SAP sets out its basis for alleging that TTCS had breached the agreement. As it happened the action was only brought in November 2020, thus over a year later, and hence, according to the terms of the agreement, was time barred. On the facts as pleaded I accept that the plaintiffs did acquire this knowledge by at least 10 July 2019 and thus if the clause is indeed still binding the claim is time barred.

## Legal Issues

[24] There is no serious dispute that the terms of the agreement;

a. Preclude a claim for damages for loss of profits;
b. Limit the time period for bringing an action within one year.

[25] What is in dispute is whether the defendant can still rely on some of its terms to avoid liability after having repudiated the contract. The plaintiffs case is that it cannot.

[26] The plaintiffs argument can be summarized in the well-known phrase that 'a litigant cannot both approbate and reprobate'. More simply it cannot blow hot and cold at the same time- deny the contract whilst for other purposes seeking to rely on it.

[27] The defendant's contention is that despite repudiation, certain clauses survive termination, and, in this case, they are the exclusion of claims for damages for loss of profits and the one-year time limitation. The defendant also maintains that it was entitled to repudiate as TTCS was in breach of the agreement.

[28] Both parties are able to find some case law to support their respective contentions but none of the cases are directly in point.

[29] This case turns on which line of authority is most persuasive to the current case.

## Case Law on termination of contracts

[30] Van Huysteen makes the general point that, a contract is a bundle of obligations. Termination does not mean that the entire contract dissolves. Rather, certain of the obligations may cease whilst others may survive. That is the difference between a contract that is void and one that is cancelled.[5]

[31] Since it is common cause this contract was cancelled voidness does not arise.

[32] The next question is whether it makes a difference to the survival of certain clauses as to whether the party which caused the breach is entitled nevertheless to invoke them.

[33] In an early English case, **Johannesburg Municipal Council v Stewart**, Lord Shaw observed:

> *"It does not appear to me 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."*[6]

[34] Viscount Haldane followed the approach of Lord Shaw a few years later in **Jureidini v National British and Irish Millers Insurance Co., Ltd** where he remarked*:*

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[5] Van Huysteen et al, *Contract, General Principles* volume 6 paragraph 12.95 onwards.
[6] [1909] S.C. (H.L.) 53; 2 Digest 335 a

*"…. when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up the repudiation can be entitled to insist on a subordinate term of the contract still being enforced."*[7]

[35] The *Johannesburg* case had concerned whether an arbitration clause in the agreement could still be relied upon if the contract had been terminated. Lord Shaw and Viscount Haldane had answered this question in the negative. But in a later case, **Heyman and Another v Darwins Ltd**, which also concerned whether an arbitration clause survives termination, the speeches of the law lords indicate that they took a different view to that of their predecessors. Viscount Simon expressed this in no uncertain terms:

*"I do not agree that an arbitration clause expressed in such terms as above ceases to have any possible application merely because the contract has " come to an end," as, for example, by frustration. In such cases it is the performance of the contract that has come to an end. "*[8]

[36] In another of the speeches in *Heyman,* Lord Macmillan alluded to the earlier decisions:

*"There still remains the difficulty raised by the dicta of Lord Shaw and Viscount Haldane which I have quoted above. It is said to be wrong to allow a party to a contract, who has refused to perform his obligations under it, 'at the same time to insist on the observance of a clause of arbitration embodied in the contract. The doctrine of approbate and reprobate is said to forbid this. I appreciate the apparent dilemma but, with the greatest respect, I venture to think it is based on a misapprehension. The key is to be found in the distinction which I have endeavoured to draw between the arbitration clause in a contract and the executive obligations undertaken by each party to the other. I can see nothing shocking or repugnant to law in one business man saying to another that he regrets he finds himself unable to go on with his deliveries under a contract between them, and at the same time asking the other to join with him in a*

[7] [1915] A.C. 499 at p. 505
[8] March 1942 All ER annotated page 343 H

*reference under an arbitration clause in their contract in order to ascertain what compensation is to be paid for his default. The parties have both agreed that all questions between them shall be settled by their own tribunal. The question of the consequences which are to follow from a breach, including a total breach, of the obligations undertaken by one of the parties is just, such a question as both parties have agreed should go to arbitration. It is not a case of one party refusing to perform the obligations he has undertaken in favour of the other and at the same time insisting that obligations in favour of himself shall continue to be performed. The arbitration clause, as I have said, is not a stipulation in favour of either party. I am accordingly of opinion that the doctrine of approbate and reprobate does not apply to prevent a party to a contract who has declined to proceed further with the performance of his obligations to the other party from invoking an arbitration clause in the contract for the purpose of settling all questions to which his declinature has given rise. In all this I have assumed that the arbitration clause in its terms is wide enough to cover the dispute."*[9] (My emphasis)

## The Shaw approach

[37] The approach of Lord Shaw in *Johannesburg,* notwithstanding its later disavowal in *Heyman*, has nevertheless been followed in some South African cases that the plaintiff relies on.

[38] Thus, in **Erasmus v Pienaar** the court held after quoting from Lord Shaw that:

'It does not appear to me to be sound law to permit a person to repudiate a contract, and thereupon specifically found upon a term in that contract which he has thus repudiated."[10]

[9] Speech of Lord Macmillan, *Heyman* op. cit. pages 347-8
[10] 1984 (4) SA 9 (T) at 24B-C.

[39] This approach in Erasmus v Pienaar was followed in a later case, **Taggart v Green**. Most recently it was followed again in the case of **Discovery Life Ltd v Hogan and Another**.[11]

[40] Moreover, the language of not being entitled to approbate and reprobate was expressly used by the court in **Vromolimnos and Another v Weichbold and Another**[12]

[41] Thus, as the plaintiff argues, it cannot be said that this approach of Lord Shaw has not been followed on several occasion by our courts notwithstanding its rejection in Heyman.

## Heyman approach

[42] On the other hand, Heyman has been followed in other South African cases such as **Atteridgeville Town Council**.[13] In Atteridgeville the court upheld an arbitration clause despite the fact that both parties were in agreement that the contract had been cancelled. But the court distinguished the situation where both parties have agreed to cancel an agreement by mutual consent, with one where they are only in agreement that the contract has been cancelled but each seeks to claim damages from the other.

"Here each party accepts that the opposite party no longer has a duty to perform his or their primary obligations under the agreements. To that extent they are ad idem. At the same time each seeks to claim damages from the other arising from an alleged unlawful repudiation. There can be no question of consensual cancellation, or anything akin to it. The two situations differ toto caelo. That the parties to a contract individually hold the same view as to the consequences that

[11] 2021(5) SA 456 (SCA) at paragraph 20

[12] 1991(2)SA 157(C). Here the court held " *A repudiator is not entitled to be given an opportunity to retract his repudiation before it is accepted by the innocent party and he cannot rely, as in this case on the provisions of a general forfeiture clause in the contract. He is not entitled to approbate and reprobate* ."9 at 163 C-D

[13] *Atteridgeville Town Council and another v Livanos t/a Livanos Brothers Electrical* 1992 (1) SA 296 (A).

will flow from a repudiation cannot be equated with the meeting of their minds necessary for consensual cancellation. The mere stating of the proposition highlights its untenability."[14]

[43] What then distinguishes those cases following Heyman where courts have held that on termination some contractual clauses survive and others, following the Lord Shaw approach, state that the repudiating party cannot rely on them?

[44] The cases in South Africa following the approach of Lord Shaw, have been cases where the repudiating party has attempted to rely on a notice clause in the contract despite evincing a clear intention (as for instance was said by the court in the Discovery case) intention to repudiate.

[45] In that line of cases, it is not surprising that the courts would not allow the repudiator to both approbate and reprobate.

[46] But in the cases following Heyman the clause at issue has been an arbitration clause. Here courts have upheld these clauses post termination seemingly because parties have agreed in advance a dispute settling mechanism and hence, they should be held to this even after termination. (The only exception as noted in Atteridgeville is where cancellation is brought about by mutual consent. That is not the case *in casu*)

[47] The question then in this case is whether the clauses at issue in this case are more analogous to arbitration clauses which survive or notice clauses which do not.

[48] In my view they are more analogous to arbitration clauses. The parties in contracting out of damages for loss of profits and limiting time periods for any claim do so in clear contemplation that one party may be in breach of the contract and agreeing what rules should then apply. Thus, they are similar to the situation where parties agree on arbitration in anticipation of any dispute they may have.

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[14] Ibid, 304-305

[49] The question is what does the agreement tell us about the parties intentions in the event of cancellation? As Van Huysteen remarks:

"Of particular importance is the question whether the parties intended that the provision that gave rise to the particular right should be in force after cancellation."[15]

[50] The clear terms of the agreement are that these clauses survive termination. For instance, in the Partner Edge section there is a section headed "Survival" This section refers to several clauses in the agreement including the limitation of liability clause and then states that they: "... will survive any termination of any part of this agreement." [16]

[51] This is then reinforced by the following provision:

"The provisions of this Agreement allocate the risks as between SAP and Partner [TTCS]. The fees paid by the Partner reflect this allocation of risk and the limitation of liability herein. It is expressly understood and agreed that each and every provision of this agreement which provides for a limitation of liability, disclaimer of warranties or exclusion of damage, is intended by the Parties to be severable and independent of any other provision and to be enforced as such."[17]

[52] Moreover, these clauses are reciprocal.[18] Either party would have been entitled to rely on them in the event of a breach by the other. This distinguishes them from some of the breach cases where the notice period or provision existed to the advantage only of the party in breach. Lord MacMillan in Heyman in the passage I underlined earlier had remarked on the significance of reciprocity in coming to this conclusion.

[53] I have not been asked to consider the point as to whether, despite the clauses creating reciprocal rights, they are nonetheless asymmetrical, in the sense that

[15] Van Huysteen, op. cit., paragraph 12.108.

[16] See clause 13 in Article 17, Part1 of the Partner Edge Agreement

[17] See clause 2(b) in Article 1, Part 2 of the Partner Edge Agreement

[18] Ibid

despite their notional equality, *de facto* they operate to favour one party over the other. That is not raised in the papers and would in any event require evidence to be led.

[54] Thus, both textually and in terms of a purposive approach to the application of the common law the special pleas should by upheld.

## Public Interest Grounds

[55] The plaintiffs also rely on a public interest ground for holding that these two provisions do not survive termination when it is the result of a breach by one of the parties.

[56] The plaintiffs argue that a party should not be allowed to seek refuge in the provisions of a contract that it seeks to reject because of the harsh consequences on the innocent party. This argument although clothed in constitutional language adopts the same line of reasoning as Lord Shaw did in relation to approbation and reprobation. I do not consider this posits a novel constitutional argument not already recognised in the common law.

[57] Moreover, the Constitutional Court has made clear that whilst constitutional arguments can be raised in contractual cases the bar to doing so is high. In **Boadicea** one of the case the plaintiff relies on the court nevertheless posed this question:

> "Have the applicants discharged the onus of demonstrating that the enforcement of the renewal clauses would be contrary to public policy in the particular circumstances of this case? A party who seeks to avoid the enforcement of a contractual term is required to demonstrate good reason for failing to comply with the term." [19]

[58] The plaintiffs in this case have not discharged this onus.

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[19] *Beadica 231 CC AND Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC) at paragraph 91.

## Conclusion

[59] I have considered both the common law and public interest arguments raised by the plaintiffs in this case. I consider that notwithstanding these, the two relevant clauses have survived the termination of the contract. The plaintiffs in this case chose not to sue for specific performance instead choosing to accept the repudiation and cancel. In so doing they had to accept that the consequences of the clauses, which they had agreed upon *ex ante*, is that they survive termination.

[60] Accordingly, the special pleas are upheld and consequently the claim falls to be dismissed.

# ORDER

1. The special pleas are upheld.

2. The plaintiffs' claim is dismissed.

3. The plaintiffs are liable for the costs of the defendant including the costs of two counsel.

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**N MANOIM**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, JOHANNESBURG**

*This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 16 May 2022.*

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| Date of Hearing: | 16 February 2022 |
| Date of Judgment: | 16 May 2022 |

## Appearances:

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| Counsel for the Plaintiff: | Advocate A. Bham SC |
| Instructed by: | Stein Scop Attorneys Inc |

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| Counsel for the Defendant: | Advocates M. Van der Nest SC and C. Vetter |
| Instructed by: | Nortons Inc |