**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

REPORTABLE
Case No: 757/2013

In the matter between:

**B BRAUN MEDICAL (PTY) LTD** **APPELLANT**

**and**

**AMBASAAM CC** **RESPONDENT**

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| **Neutral citation:** | *Braun Medical (Pty) Ltd v Ambasaam CC* (757/13) [2014] ZASCA 199 (28 November 2014). |
| **Coram:** | Ponnan, Shongwe, Swain JJA and Mathopo and Meyer AJJA |
| **Heard:** | **19 November 2014** |
| **Delivered:** | **28 November 2014** |

**Summary: Repudiation of contract – demand for performance – reasonable person not perceiving demand as an indication of repudiation – interpretation of contract – extraneous evidence to be used as conservatively as possible – appeal upheld.**

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## ORDER

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**On appeal from:** North Gauteng Trial Court, Pretoria (Van der Byl AJ, sitting as court of first instance):

1 The appeal succeeds with costs.
2 Paragraphs 1 and 3 of the order of the trial court are set aside and replaced with the following order:
'The plaintiff's claim is dismissed with costs.'

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## JUDGMENT

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**Swain JA (Ponnan, Shongwe JJA and Mathopo and Meyer AJJA concurring):**

[1] The sole issue for determination in this appeal is whether a demand for performance by the appellant, B. Braun Medical (Pty) Ltd (Braun), directed to the respondent, Ambasaam CC (Ambasaam), constituted a repudiation by the former of its obligations in terms of a contract of carriage, which entitled Ambasaam to cancel the agreement and claim damages from Braun.

[2] The North Gauteng Trial Court (Van der Byl AJ) held that Braun had repudiated the agreement which, so it was put, Ambasaam had subsequently validly cancelled. The court a quo granted the following order:

'1. THAT it be declared that the defendant be liable to the Plaintiff for such damages as maybe proved by the plaintiff consequent upon the defendant's repudiation of the agreement concluded between the parties on 8 December 2008.
2. THAT the defendant's counterclaim for payment by the plaintiff of R120 000 be dismissed.
3. THAT the defendant be ordered to pay the plaintiff's costs.'

Braun did not appeal against paragraph 2 of the order. Consequently, only paragraphs 1 and 3 are the subject of this appeal.

[3] At the heart of the dispute are two letters of demand written by Braun's attorney to Ambasaam dated respectively 9 March 2011 and 14 March 2011. The letter dated 9 March 2011 concluded 'our client shall proceed to cancel the AOC without further notice to Ambasaam CC and to claim damages from Ambasaam CC, in the event that Ambasaam CC does not timeously adhere to the aforementioned demands'. Ambasaam's attorney had replied to these letters stating '. . . that the allegations levelled against our client objectively leads a reasonable person to the conclusion that your client does not intend to honour the terms of the agreement. Our client regards these actions as repudiation by your client, of the agreement. However, our client will afford your client up to and including 1 April 2011 to withdraw unconditionally, all the allegations and demands made in the two letters under reply. Should your client not avail himself of this opportunity, our client will accept the repudiation and regard the contract as cancelled.'

[4] In response Braun's attorney stated that it 'does not intend to withdraw any allegation and/or demand made by it' and that 'under the prevailing circumstances the defendant (Braun) confirms that annexure A has been cancelled with effect from 2 April 2011'. In the result Ambasaam subsequently pleaded in its summons that 'whether by an accepted repudiation or a purported cancellation, the plaintiff (Ambasaam) and the defendant (Braun) are both of the view that annexure A has come to an end'. Accordingly, so Ambasaam alleged, 'the defendant (Braun) breached the agreement by levelling, inter alia, false allegations and accusations against the plaintiff (Ambasaam) and indeed repudiated the agreement . . ..'

[5] Braun in its plea, whilst admitting the wording of the letters written by its attorney, denied that it had repudiated the agreement, It alleged: 'Under the circumstances we confirm that your client has cancelled the agreement of carriage with effect from 2 April 2011'. Braun asserted that Ambasaam had cancelled the agreement in circumstances where it was not entitled to do so.

[6] In a request for particulars for trial Braun asked Ambasaam to specify whether Ambasaam would rely at trial upon a repudiation of the agreement, or a breach of the agreement by Braun. The reply was 'the repudiation of the agreement by the defendant, which is an anticipatory breach of the contract'.

[7] The single issue which thus arose on the pleadings and which was correctly identified by the court a quo as calling for a decision, was whether Braun repudiated the agreement. The court a quo having referred to decisions of this court dealing with the concept of repudiation[1] then embarked on an extensive and detailed analysis of the evidence in relation to each of the 'breaches' and 'complaints' upon which Ambasaam relied as set out in the letters of Braun's attorney. The court a quo concluded that Braun's allegations were 'unfounded and unsubstantiated', were made with the intention not to continue with the agreement, as it had 'elected to get out of the agreement' and had 'indeed repudiated the agreement'. It added that Braun 'objectively created without lawful excuse a perception which placed' Ambasaam 'in a position to conclude that proper performance of the agreement will not be forthcoming'. In the result Ambasaam 'was placed in the inevitable position to accept such repudiation and to cancel the agreement'.

[8] Before considering the correctness of those conclusions, it may first be opportune to reiterate what this court said in *Datacolor* concerning the requirements for a finding that a party has repudiated its contractual obligations:[2]

'Conceivably it could therefore happen that one party, in truth intending to repudiate (as he later confesses), expressed himself so inconclusively that he is afterwards held not to have done so; conversely, that his conduct may justify the inference that he did not propose to perform even though he can afterwards demonstrate his good faith and his best intentions at the time. The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be

[1] *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A); *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA).
[2] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd supra* 294E-H.

forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.'

[9] What is immediately apparent is that the court a quo, having referred to the principles in this passage, did not apply them to the facts of the case. Central to the court a quo's reasoning was that Braun possessed the subjective intention 'to get out of the agreement' and in order to do so, made unfounded and unsubstantiated allegations against Ambasaam which constituted a repudiation of the agreement.

[10] There are a number of problems in the reasoning of the court a quo. Firstly, emphasis was placed upon the subjective intention of Braun whereas the correct enquiry should have been how would a reasonable person in the position of Ambasaam have perceived those letters. Secondly, it decided that Ambasaam justifiably perceived that proper performance of the agreement by Braun would not be forthcoming, whereas the correct test is not subjective, but an objective one. Simply put, the court a quo approached the issue of repudiation as a matter of subjective intention and not one of perception, contrary to the principle laid down in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd supra.*

[11] The perception of a reasonable person placed in the position of Ambasaam could never be that proper performance by Braun of its obligations in terms of the contract would not be forthcoming. The court a quo failed to appreciate that the letters demanded performance from Ambasaam of its obligations. Nowhere in those letters was there an intimation by Braun that it was unwilling to perform its own contractual obligations. A reasonable person having received the letters of demand from Braun's attorney would not have thought that they amounted to a deliberate and unequivocal intention on the part of Braun not to be bound by the agreement. Even if the demands made by Braun were unjustified, this could never have led to the objective conclusion that Braun did not intend to perform its obligations. The court a quo thus misconceived the situation that in those circumstances the letters could have constituted a repudiation.

[12] Ambasaam's case on the pleadings and before the court a quo that Braun repudiated the agreement was never based upon an unjustified cancellation of the

agreement, nor upon an unjustified threat by Braun to cancel the agreement. Ambasaam's cause of action of a repudiation of the agreement by Braun, was based solely upon the allegation that Braun had levelled false accusations and allegations against it. However, before us counsel for Ambasaam sought to argue that the terms of the demands set out in paragraph 4 above, meant that if Ambasaam did not comply, the contract should be regarded as having been cancelled. Counsel also described this as an 'automatic cancellation'. There is no basis for this contention. Clause 9.2 of the contract of carriage provided for seven days written notice to a party in default to rectify the breach. If the breach was not rectified within that period, the aggrieved party was entitled to cancel the agreement and claim damages. Any decision to cancel would have to be conveyed to the party in default for it to take effect.[3]

[13] The demand for performance by Braun constituted compliance with the notice requirements of clause 9.2 of the contract. In the event that Ambasaam did not comply with the demand Braun would have had an election whether to cancel the agreement or not. Braun in stating that it 'shall proceed to cancel the AOC without further notice' conveyed no more than its intention to cancel as at the time of the demand, in the event that Ambasaam did not comply with the demand in the future. There is no basis for interpreting the demand to mean that Braun had exercised its election to cancel, or that the agreement was automatically cancelled. That Ambasaam never understood the demand to convey an automatic cancellation of the agreement in the event of its failure to comply with the demands, is indicated by Ambasaam's reply. Braun was invited by Ambasaam to withdraw the demands failing which Braun's conduct would be regarded as a repudiation of the agreement. There is accordingly no basis for this submission. Counsel for Ambasaam correctly conceded that if this argument failed, the appeal should succeed.

[14] A great deal of inadmissible evidence was led before the court a quo concerning the parties' intention in concluding and their interpretation of the terms of the contract of carriage. As pointed out by this court:

'[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was

[3] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd supra* 299E.

intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) paras 33 - 64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd* 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, "one must use it as conservatively as possible" (*Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455B - C). The time has arrived for us to accept that there is no merit in trying to distinguish between "background circumstances" and "surrounding circumstances".

The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms "context" or "factual matrix" ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) ([2002] 4 All SA 331) paras 22 and 23, and *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another* B 2008 (6) SA 654 (SCA) para 7.)'

[15] It is therefore clear that 'interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses'. In addition 'to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, "one must use it as conservatively as possible".'[4] I do not understand anything stated in later decisions of this court to constitute a departure from those principles.[5]

[16] I make the following order:

1 The appeal succeeds with costs.

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[4] *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39.
[5] *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA); *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA); *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA).

2 Paragraphs 1 and 3 of the order of the trial court are set aside and replaced with the following order:

‘The plaintiff’s claim is dismissed with costs.’

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K G B SWAIN
JUDGE OF APPEAL

APPEARANCES:

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| For the Appellant: | A R G Mundell SC<br>Instructed by:<br>D J Greyling Incorporated<br>Roodepoort<br>c/o Honey Attorneys<br>Bloemfontein |
| For the Respondent: | M P van der Merwe<br>Instructed by:<br>Couzyn Hertzog & Horak Attorneys<br>Pretoria<br>c/o Hill McHardy & Herbst Attorneys<br>Bloemfontein |