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## CASE NOTE:

### TWENTY-THIRD CENTURY SYSTEMS (PTY) LTD AND ANOTHER V SAP AFRICA REGION (PTY) LTD (172/2023)

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#### REPUDIATION: THE AFTERMATH

##### Factual Background

In the decision of *Twenty-Third Century Systems (Pty) Ltd and Another v SAP Africa Region (Pty) Ltd (172/2023)*, the Supreme Court of Appeal was required to adjudicate on the legal consequences which follow the repudiation of a contract by a contracting party, specifically with reference to the extent to which such repudiating party may rely on the terms of the repudiated contract.

On or about 30 March 2016, Twenty-Third Century Systems Global (Pty) Ltd (“**Twenty-Third Century**”) and SAP Africa Region (Pty) Ltd (“**SAP**”) concluded a suite of three written agreements, in terms of which Twenty-Third Century offered and sold various information technology services offered by SAP to its customers (“**the Agreement**”). The Agreement contained the following key clauses:

- (a) An exclusion of damages clause, which precluded a claim for damages for loss of profit; and
- (b) A time-bar clause, which limited the period within which to institute a claim to 1 (one) year, where such claim arises out of the Agreement.

##### (“**the Limitation Clauses**”)

On 01 July 2019, SAP informed Twenty-Third Century of its termination of the Agreement. Subsequently, Twenty-Third Century informed SAP that, by way of its conduct, SAP had repudiated the Agreement, which repudiation Twenty-Third Century confirmed acceptance of. In light of this, Twenty-Third Century proceeded to institute an action against SAP for loss of profit resulting from SAP’s repudiation of the Agreement. In response, SAP raised two special pleas and alleged that Twenty-Third Century was precluded from instituting its claim, as a result of the terms of the Limitation Clauses.

Twenty-Third Century took issue with SAP’s reliance on the Limitation Clauses to escape liability and raised the contention that a party who has repudiated a contract may not seek to draw a benefit from a clause contained in that repudiated contract.

### Primary vs Secondary Obligations

The Court highlighted the importance of distinguishing between primary and secondary obligations in a contract, particularly in the context of determining which provisions survive the termination of an agreement following the acceptance of a repudiation.

Primary obligations are those essential to the discharge of performance under the contract, while secondary obligations are those obligations that come into play when the primary obligations are not performed.

### The Legal Effect of Repudiation

The repudiation of a contract and subsequent acceptance thereof by the non-repudiating party does not terminate the contract, however, ceases the parties' performance of their primary obligations to one another.

This results in the activation of certain secondary obligations, which are not directly linked to the parties' performance obligations, however, provide mechanisms for an innocent party to respond to the consequences which have resulted from a breached and/or failed contract.

### Conclusion

In light of the above, the Court held that when Twenty-Third Century accepted SAP's repudiation of the Agreement, only the parties' primary obligations to each other were brought to an end, thus giving rise to the activation of the secondary obligations such as those contained in the Limitation Clauses. Accordingly, SAP was entitled to rely on the Limitation Clauses as a defence against Twenty-Third Century's claim for loss of profit.

This judgment illustrates how important it is for contracting parties to have a clear understanding of which of their obligations remain intact following the termination of a contract, as well as the consequences of those obligations.

Further, it serves to highlight that the repudiation of a contract constitutes a breach and not a termination thereof. It is the non-repudiating party's election following such breach which determines what becomes of the parties' primary obligations.

Link to Judgment:

<https://www.saflii.org/za/cases/ZASCA/2025/51.html>