

Repudiation: A "thing writ in water"?



By [Liuba Stansfield](#)

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Our law recognises that, where a party to a contract has repudiated that contract, the innocent party may elect to cancel or keep the contract alive.

In the latter case, its own obligations continue to exist but it may refrain from performing them as long as the repudiating party maintains its position. This principle was recently explored by the Supreme Court of Appeal in *Comwezi Security Services (Pty) Ltd & Another v Cape Empowerment Trust Ltd*.

A settlement agreement was concluded between the first appellant, Comwezi Security Services (Pty) Ltd, and the respondent, Cape Empowerment Trust Ltd (CET), in terms of which CET was entitled to take up shares in Comwezi in settlement of monies due to it, after conducting a comprehensive due diligence investigation into Comwezi's affairs.

Comwezi undertook to co-operate with CET and to make all relevant documentation available for inspection. CET was obliged to complete its investigation within a three-month period, failing which the settlement agreement would lapse. It was expressly recorded that CET would be entitled to extend that period prior to its lapsing.

Order was upheld

Following Comwezi's failure to co-operate with the due diligence investigation and provide necessary documentation, CET successfully obtained a court order compelling Comwezi to do so, prior to the expiry of the three-month investigation period, as extended by CET from time to time. Such order was upheld on appeal.

CET was, however, unable to execute the court order as Comwezi argued that the time period in which CET was to conduct its investigation had lapsed in the time it took to finalise the court application and appeal and accordingly the settlement agreement had lapsed.

In a further high court application, CET obtained an order declaring that the agreement remained valid. In an appeal against the said decision, Comwezi conceded its own repudiation by refusing to co-operate with the investigation and by insisting without justification that the agreement had lapsed.

However, it contended that, having elected not to accept the repudiation, CET was obliged to continue extending the time period in order to keep the agreement alive, which it had failed to do. Can a party who repudiates a contract avail itself to a provision of the very contract it has repudiated?

SCA's finding

The Supreme Court of Appeal (SCA) held that, provided the innocent party is willing and able to perform its obligations, repudiation may excuse the innocent party from performing - or at least suspend its obligation to perform - until the repudiating party indicates its willingness to give effect to the contract.

Dismissing the appeal, the court found that it would be inequitable to allow Comwezi to rely on its own unaccepted repudiation to take advantage of CET's alleged failure to comply with the agreement's terms, where such failure was attributable to Comwezi's own repudiation.

CET was clearly willing and able to comply with its obligations, but Comwezi's refusal to co-operate prevented it from completing its investigation within the requisite time period. It would have been futile for CET to continue to extend the time period in light of Comwezi's repudiatory conduct and CET's contractual obligation had been suspended as a result.

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