

EMPLOYMENT ALERT

IN THIS ISSUE

THE ELECTION DICTATES THE REMEDY – THE EFFECT OF REPUDIATION AND THE REMEDIES AVAILABLE TO AN INNOCENT PARTY

In the case of *Septoo v City of Johannesburg* (2018) 39 ILJ 580 (LAC), Ellense Septoo (the Appellant) was employed as a senior human resources manager on a five-year contract in terms of which she would receive an annual remuneration of R550,000 (the initial contract).

THE ELECTION DICTATES THE REMEDY – THE EFFECT OF REPUDIATION AND THE REMEDIES AVAILABLE TO AN INNOCENT PARTY

The Appellant accepted the offer which gave rise to the second employment contract. She did however reserve her rights in respect of the initial contract.

At the close of the Appellant's case, the court a quo granted absolution from the instance in that she had failed to establish a cause of action entitling her to relief.

In the case of *Septoo v City of Johannesburg* (2018) 39 ILJ 580 (LAC), Ellense Septoo (the Appellant) was employed as a senior human resources manager on a five-year contract in terms of which she would receive an annual remuneration of R550,000 (the initial contract). Approximately one month after the conclusion of the initial contract, the Appellant was advised that the person who had contracted with her on behalf of the City of Johannesburg (Respondent) did not have the authority to offer her remuneration exceeding R435,296 per annum. On this basis, a new offer of employment was made, on the same terms set out in the initial contract, only at a reduced remuneration of R435,296 per annum. The Appellant accepted the offer which gave rise to the second employment contract. She did however reserve her rights in respect of the initial contract.

On 7 December 2009, the Appellant instituted proceedings against the Respondent, seeking an order for specific performance on the grounds of repudiation of the initial contract. Throughout the pre-trial conference and the proceedings in the court a quo, it was argued by the Appellant that whilst she had accepted the cancellation of the initial contract and consequently the terms of the second offer, she had nonetheless reserved her rights in respect of the initial contract. At the close of the Appellant's case, the court a quo granted absolution from the instance in that she had failed to establish a cause of action entitling her to relief.

On appeal, the Labour Appeal Court (LAC) had to determine the effect (if any) a reservation of rights would have on the cancellation of a contract and the remedies applicable. Despite the Appellant's submissions, the LAC found that rights cannot be reserved for the purposes of enforcing a contract that a party elects to cancel. The LAC noted that in the case of a repudiation, an innocent party has an election to either accept the repudiation, cancelling the contract and later seek damages or may elect to refuse the repudiation, thereby seeking to enforce the contract through an order of specific performance. Such an innocent party



CHAMBERS GLOBAL 2014 - 2018 ranked our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2018 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2018 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2017 - 2018 in Band 4: Employment.

Gavin Stansfield ranked by CHAMBERS GLOBAL 2018 in Band 4: Employment.

THE ELECTION DICTATES THE REMEDY – THE EFFECT OF REPUDIATION AND THE REMEDIES AVAILABLE TO AN INNOCENT PARTY

CONTINUED

In this case, the Appellant should have pleaded damages in the alternative, but she had failed to do so.



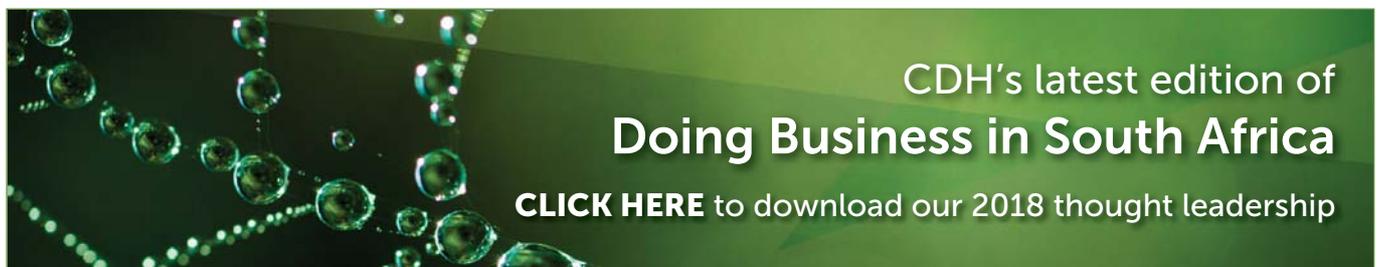
must make this election at the time of the repudiation and cannot both approbate and reprobate the contract. Therefore, the choice to either accept or reject the repudiation is mutually exclusive and cannot be exercised simultaneously.

The LAC held that an election to accept the repudiation and cancel the contract, as the Appellant had done, by implication excludes the remedy of specific performance. In this case, the Appellant should have pleaded damages in the alternative, but she had failed to do so. On this basis, the relief sought by the Appellant for the payment of damages was inconsistent with the claim for specific performance. The appeal was dismissed.

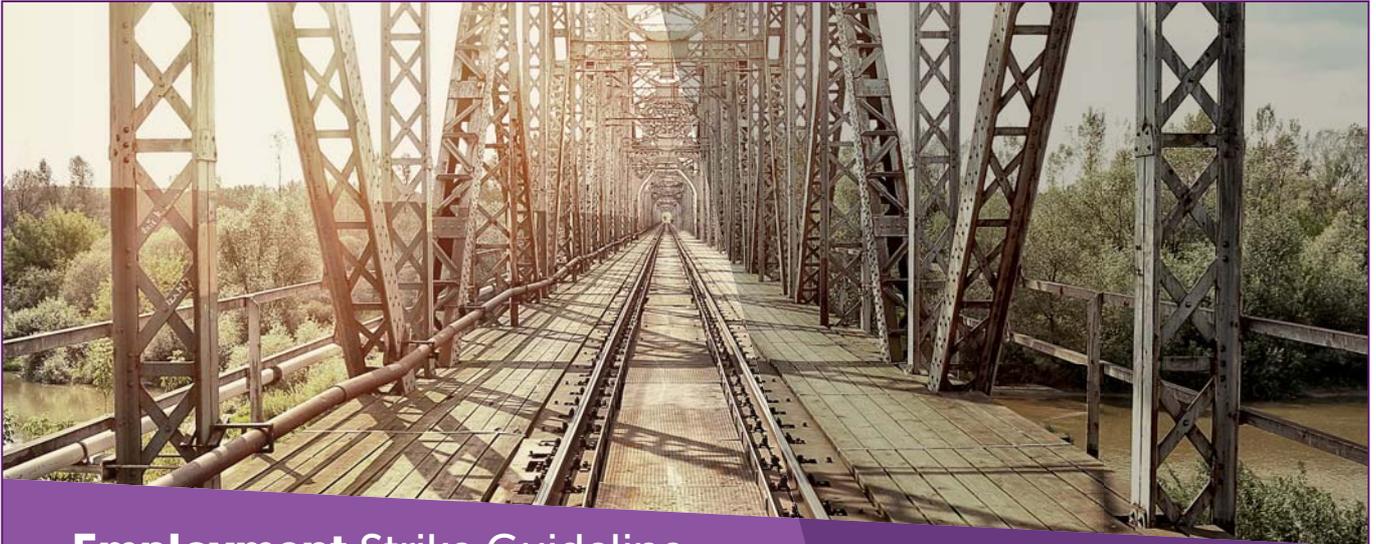
This judgment demonstrates that a reservation of rights, although necessary in the protection of a client's interests, cannot be used to circumvent and vary the common-law contractual remedies available to parties at the time of an alleged breach or repudiation of a contract. Regardless of the intentions of the party, should they elect to accept repudiation of a contract, such party's rights are limited to a claim for damages consequent upon an agreement in respect of its cancellation.

*Gavin Stansfield and
Khensani Hlongwane*

Michael Yeates was named the exclusive South African winner of the ILO Client Choice Awards 2015 – 2016 in the category Employment and Benefits as well as in 2018 in the Immigration category.



CDH's latest edition of
Doing Business in South Africa
CLICK HERE to download our 2018 thought leadership



Employment Strike Guideline

Find out what steps an employer can take when striking employees ignore court orders.

 [Click here to find out more](#)



Best Lawyers 2018 South Africa Edition

Included 53 of CDH's Directors across Cape Town and Johannesburg.

Recognised Chris Charter as Lawyer of the Year for Competition Law (Johannesburg).

Recognised Faan Coetzee as Lawyer of the Year for Employment Law (Johannesburg).

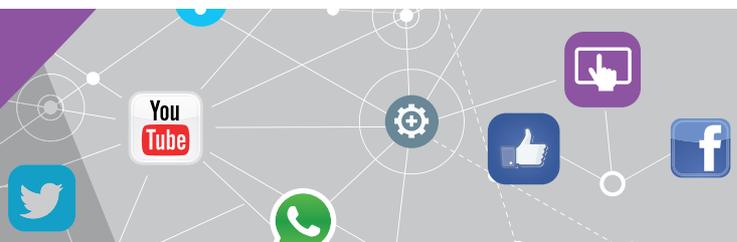
Recognised Peter Hesseling as Lawyer of the Year for M&A Law (Cape Town).

Recognised Terry Winstanley as Lawyer of the Year for Environmental Law (Cape Town).

Named Cliffe Dekker Hofmeyr Litigation Law Firm of the Year.

Named Cliffe Dekker Hofmeyr Real Estate Law Firm of the Year.

 **CLICK HERE**
FOR THE LATEST SOCIAL
MEDIA AND THE WORKPLACE
GUIDELINE



OUR TEAM

For more information about our Employment practice and services, please contact:



Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Kirsten Caddy
Director
T +27 (0)11 562 1412
E kirsten.caddy@cdhlegal.com



Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Nicholas Preston
Director
T +27 (0)11 562 1788
E nicholas.preston@cdhlegal.com



Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Samiksha Singh
Director
T +27 (0)21 481 6314
E samiksha.singh@cdhlegal.com



Gavin Stansfield
Director
T +27 (0)21 481 6313
E gavin.stansfield@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Ndumiso Zwane
Director
T +27 (0)11 562 1231
E ndumiso.zwane@cdhlegal.com



Steven Adams
Senior Associate
T +27 (0)21 481 6341
E steven.adams@cdhlegal.com



Anli Bezuidenhout
Senior Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Anelisa Mkeme
Senior Associate
T +27 (0)11 562 1039
E anelisa.mkeme@cdhlegal.com



Sean Jamieson
Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com



Devon Jenkins
Associate
T +27 (0)11 562 1326
E devon.jenkins@cdhlegal.com



Precness Mohlahlo
Associate
T +27 (0)11 562 1875
E precness.mohlahlo@cdhlegal.com



Zola Mcaciso
Associate
T +27 (0)21 481 6316
E zola.mcaciso@cdhlegal.com



Prinoleen Naidoo
Associate
T +27 (0)11 562 1829
E prinoleen.naidoo@cdhlegal.com



Bheki Nhlapho
Associate
T +27 (0)11 562 1568
E bheki.nhlapho@cdhlegal.com



Nonkululeko Sunduza
Associate
T +27 (0)11 562 1479
E nonkululeko.sunduza@cdhlegal.com



Siyabonga Tembe
Associate
T +27 (0)21 481 6323
E siyabonga.tembe@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2018 2484/JULY

