

# DISPUTE RESOLUTION ALERT

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### CLIFFE DEKKER HOFMEYR WELCOMES NEW DISPUTE RESOLUTION DIRECTOR

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### ON-DEMAND GUARANTEES: COMPLIANCE – HOW MUCH IS REQUIRED?

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### BREACH OF AGREEMENT - REPUDIATION AND ELECTION: PERSISTENCE IS KEY

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**ZAAKIR MOHAMED**  
New Director  
Dispute Resolution

*Leading South African law firm Cliffe Dekker Hofmeyr (CDH) is proud to welcome Zaakir Mohamed as a Director in its Dispute Resolution practice in Johannesburg. He will be joining the firm's growing Corporate Investigation sector.*

Zaakir specialises in white collar crime, forensic investigations, cybercrime and corporate governance. He also has extensive experience in fraud prevention and detection, money laundering, regulatory compliance, working with law enforcement authorities and providing watching briefs in criminal matters.

"Zaakir is a welcome addition to our team and will further solidify our position as a leading South African commercial law firm. His considerable knowledge in anti-corruption investigation will greatly benefit our clients," says Tim Fletcher, Director and National Head of CDH's Dispute Resolution practice.

Prior to joining CDH, Zaakir obtained his LLB degree from the University of South Africa in 2007 and, thereafter, began his career with Werksmans Attorneys as a Candidate Attorney in 2008. In 2013, he was appointed as a Senior Associate at Werksmans Attorneys before joining ENS as a Director of Forensics in 2014.



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# ON-DEMAND GUARANTEES: COMPLIANCE – HOW MUCH IS REQUIRED?

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*The bank denied liability for payment of this sum alleging that the demand was not compliant with the requirements of the guarantee.*

In the recent English judgment of *MUR Joint Ventures BV v Compagnie Monégasque De Banque* [2016] EWHC 3107 (Comm) [25], the Commercial Court considered the standard of compliance required for the enforceability of a demand made in terms of an on-demand guarantee. This judgment follows a strong trend from a slew of case law, both South African and English, which confirms the position that compliance shall be determined on a case-by-case basis, subject to the requirements in terms of the wording of the guarantee itself.

In this case, MUR Joint Ventures made demand for the sum of \$500,000 plus interest under a guarantee issued by Monégasque de Banque, a Monégasque Bank. The bank denied liability for payment of this sum alleging that the demand was not compliant with the requirements of the guarantee because, among other things, it was not sent by registered post as required in terms of the guarantee.

The court made reference to the English Appeal Court judgment of *IE Contractors v Lloyd's Bank* (1990) 51 Build LR 1 in which it was decided that the level of compliance required under a performance bond was either "strict or not so strict" depending on the actual construction of the bond itself.

While the text of the guarantee in the *MUR* case required the demand to be sent by registered mail, as an apparent condition precedent for the demand to be effective, the court held that such provision was not mandatory in nature but directory. The guarantee essentially required 'effective presentation' of the demand – which had been sent via courier and various other means to the bank prior to the demand itself.

The court considered the rationale behind the requirement that the guarantee be sent by registered mail and concluded that the purpose - being to ensure that the bank received the demand - was effectively served as none of the other means of delivery undertaken were disputed.

In terms of the South African position, the Supreme Court of Appeal in the cases of *State Bank of India v Denel SOC Limited and Others* (947/13) [2014] ZASCA 212 and *Compass Insurance Company Limited v Hospitality Hotel Developments (Pty) Limited* (756) [2011 ZASCA 149] had previously left open the issue of the degree of compliance required in terms of an on-demand guarantee but held that in a case where a demand is completely non-compliant with the terms of a guarantee, a beneficiary will not be entitled to rely on it.

The *MUR* judgment is consistent with two recent South African judgments relating to on-demand guarantees, being *University of the Western Cape v Absa Insurance Company Ltd* (100/2015) [2015] ZAGPJHC 303 and *Kristabel Developments (Pty) Ltd v Credit Guarantee Insurance Corporation of Africa Limited (Pty) Ltd* 1178/2015 (GJ) in which the High Court similarly reasoned that the standard of compliance required by a demand, made in terms of a guarantee, is different to the standard required in terms of a letter of credit. Unlike a guarantee, in terms of a letter of credit the bank itself shall be in the position to evaluate the claim, as it shall already enjoy possession of all the relevant documents and relevant information. However, the High Court did not definitively find on the issue of

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whether a beneficiary wishing to rely on the guarantee must ensure strict compliance with its terms.

The *MUR* case therefore takes great strides in cementing the implicit findings of the court in *Kristabel and ABSA Insurance Company*, that strict compliance with the terms of a performance bond will only be required when the wording of the bond itself is explicitly clear on the expectations on the parties. Based on the recent case law discussed above, it is clear that any lack of clarity in terms of the wording of the performance bond may result in the terms of that bond being interpreted far wider than anticipated by the parties.

In summary, whether strict compliance will be required is a question of construction. Should the bond be precise regarding the expectations on the parties, strict compliance with the terms of the agreement ought to remain a requirement. However, should the performance bond be unclear or ambiguous, the court may lower the compliance threshold to one of only effective compliance. While such issues shall be determined on a case-by-case basis, parties to a performance guarantee should pay special attention to the wording of such bonds to ensure clarity in terms of the expectations on the parties as well as to mitigate against unpredictable results and uncertainty.

*Joe Whittle and Shikara Singh*

CHAMBERS GLOBAL 2017 ranked us in Band 1 for dispute resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2017 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2017 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 in Band 2 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016–2017 in Band 4 for construction.



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# BREACH OF AGREEMENT - REPUDIATION AND ELECTION: PERSISTENCE IS KEY

*The general rule is that if the innocent party elects to reject the repudiation and enforce performance, they cannot change their mind, unless a new ground for breach arises.*

*The court a quo held that Primat was not entitled to change its election and cancel the agreement as there was no new act of repudiation that entitled them to do so.*



In terms of South African law of contract, there are two types of breaches that can occur where a party defaults in terms of its obligations. The first is what can be referred to as a “normal” breach, where a term, agreed to and set out in the agreement is breached by one of the parties either not performing at all or performing defectively. The second is a breach referred to as “anticipatory breach”, also known as repudiation. Repudiation takes place before performance is due and may take the form of a statement that the party concerned is not going to carry out the agreement.

Where a party to an agreement breaches its obligations by repudiating its obligations, the innocent party has an election to either reject the repudiation and enforce the performance thereof or accept the repudiation and cancel the agreement.

The general rule is that if the innocent party elects to reject the repudiation and enforce performance, they cannot change their mind, unless a new ground for breach arises. But what happens if the defaulting party persists in its first breach?

This is what occurred in a recent matter before the Supreme Court of Appeal (SCA) and now finally decided in *Primat Construction v Nelson Mandela Bay Metropolitan Municipality* (1075/2016) [2017] ZASCA 73 (1 June 2017). The appellant, Primat Construction CC (Primat), concluded an agreement with the respondent, the Nelson Mandela Bay Metropolitan Municipality (Municipality) for the upgrade of roads in Port Elizabeth.

The Municipality sent a notice of cancellation purporting to terminate the agreement with immediate effect relying on various clauses of the agreement (Purported Cancellation). It was not in dispute that this letter did not constitute a proper termination and thus amounted to a repudiation of the agreement by the Municipality. Primat rejected the

repudiation and requested specific performance from the Municipality in terms of the agreement. In addition to the Purported Cancellation, the Municipality breached its obligations in terms of the agreement further by appointing contractors other than those used by Primat and did not allow Primat's contractor to mitigate its damages. This conduct constituted a further breach by the Municipality, and Primat, hereafter, gave notice of its election to accept such repudiation and cancelled the agreement in question.

The court *a quo* held that Primat was not entitled to change its election and cancel the agreement as there was no new act of repudiation that entitled them to do so. On appeal to the SCA, Primat argued that the court *a quo* erred in requiring an additional act of repudiation before the innocent party is entitled to exercise a further election, and claim cancellation and damages. Primat also argued that there is authority for the view that the innocent party could change its election after giving the party in breach the opportunity to perform. If the defaulting party persisted in its repudiation, thus failing to repent, the innocent party could change their election and choose to treat the agreement as at an end. This is known as the repentance principle.

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*Lewis JA held that any contention that there must be another act manifesting an intention from the defaulting party, not to comply with its obligations in terms of the agreement, is artificial.*



In the SCA, the Municipality continued to rely on its argument before the court *a quo*, relying on the doctrine of election and argued that once Primat had elected not to accept the repudiation, it was precluded from changing its election.

Lewis JA, handing down the judgment in the SCA, referred to earlier decisions and went on to say that where there was an unequivocal intention not to fulfill contractual obligations, 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, but perception. The perception is that of a reasonable person placed in the position of the innocent party.

The learned judge further held that the requirement of a new and independent act of repudiation by the Municipality before Primat could change its election and exercise its right to cancel and claim damages is not one mentioned in any of the earlier authorities and, as Primat submitted, it is nonsensical, because it would allow the defaulting party, who persistently refuses to comply with the agreement, to keep the agreement alive until it commits another act of repudiation.

Deciding in favour of Primat, Lewis JA held that any contention that there must be another act manifesting an intention from the defaulting party, not to comply with its obligations in terms of the agreement, is artificial. The intention from the Municipality continued and Primat did not have to wait to change its election until the Municipality committed another act of repudiation. It was sufficient that Primat reasonably perceived that the Municipality would not repent its repudiation, despite the opportunities given to it to do so, and then for Primat to change its election, as it did.

Accordingly, if you are an innocent party to an agreement and the defaulting party has repudiated and you elected to reject the repudiation and demand specific performance, you can change such election when the due date for performance arises. This remedy would be available to the innocent party where the defaulting party persists with such repudiation, irrespective of the amount of acts of repudiation that follow the first breach.

*Lucinde Rhoodie and Mari Bester*



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### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 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.

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