

University Of Cape Town

Remedies for Anticipatory Breach of Contract

LLM Thesis

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1 ORIGIN AND DEVELOPMENT OF ANTICIPATORY BREACH OF CONTRACT

This first chapter will discuss the origin and development of anticipatory breach of contract in South African law, leading up to the decision in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*.¹ This decision is generally regarded as the culmination of the development of a 'new approach'² to repudiation, as a form of anticipatory breach of contract, in South African law and is the focus of the second chapter, where this 'new approach' and other aspects of the decision will be discussed in detail. The third chapter will consider cancellation as a remedy for anticipatory breach of contract and the fourth chapter will discuss alternative remedies. This will be followed by a conclusion which forms the fifth chapter of this thesis.

1.1 Actual and anticipatory breach of contract

Where a party to a contract undertakes to deliver goods or perform a service and fails to comply with the terms of the contract, by for instance failing to perform the service at the agreed upon time or delivering defective or substandard goods, they will be in breach of a contractual obligation.³ In South African law, which has a fissured concept of breach of contract,⁴ these forms of breach of contract are generally known as *mora debitoris* and positive malperformance respectively.⁵ Using as an example an agreement for the sale of a painting to be delivered on 1 December, the seller could for instance deliver the painting only on 31 December, a delay amounting to *mora debitoris*, or deliver the painting timeously but in a damaged state, constituting positive malperformance.⁶

In addition to breach of contract by a person owing the obligation, the debtor, South African law recognises breach of contract by the person to whom the obligation is owed, the creditor. This can only occur where the debtor requires the creditor's cooperation in order to perform their contractual obligation.⁷ Using our above example, the buyer could fail to make herself or himself available in order to accept the tender of delivery by the seller on 1 December. A delay by the

¹ *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA).

² SWJ (Schalk) Van der Merwe *et al Contract General Principles* 4 ed (2012) 359 ff; Dale Hutchison 'Forms of Breach' in Dale Hutchison and Chris-James Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 224 ff; A D J Van Rensburg *et al 'Contract'* (2014) in W A Joubert (founding ed) *The Law of South Africa vol 9 Third Edition* 408 ff; JC De Wet & AH van Wyk *Kontraktereg en Handelsreg* 5 ed (1992) 168 ff.

³ See generally the discussion of breach of contract in Van der Merwe *et al et al op cit* note 2 325 ff; Hutchison *op cit* note 2 278 ff; Van Rensburg *et al op cit* note 2 408 ff; AJ Kerr *The Principles of the Law of Contract* 6 ed (2002) 575 ff; RH Christie & GB Bradfield *The Law of Contract in South Africa* 6 ed (2011) 534 ff; P M Nienaber 'Kontraktbreuk in anticipando in retrospek' (1989) *South African Law Journal* 1.

⁴ A Cockrell 'Breach of Contract' in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 303; E Clive & D Hutchison 'Breach of Contract' in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 176; Tjatie Naudé & Gerhard Lubbe 'Cancellation for "Material" or "Fundamental" Breach: A Comparative Analysis of South African Law, the UN Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts' 12 (2001) *Stellenbosch Law Review* 371; Tjatie Naudé 'The Typology of Breach of Contract: JC de Wet's Contribution in Comparative Perspective' in Jacques Du Plessis & Gerhard Lubbe (eds) *A Man of Principle: The Life and Legacy of JC De Wet* (2013).

⁵ Van der Merwe *et al op cit* note 2 291, 301.

⁶ This and the fivefold classification discussed below, which would appear to be based on the work of JC De Wet & JP Yeats *Kontraktereg en Handelsreg* (1947), would appear to be quite generally, if not universally, accepted. See Naudé (2013) *op cit* note 4 for a thorough discussion.

⁷ Van der Merwe *et al op cit* note 2 371-8.

creditor in providing the required cooperation is known as *mora creditoris*.⁸ Delay by a creditor is distinguished from delay by the debtor on the basis that any obligation of the creditor to cooperate is of an accessory nature and has no function or purpose independent of the primary obligation of the debtor.⁹

A person's interest in the performance for which they have contracted may be infringed by the other party in further ways. The other party to a contract may, instead of failing to comply with a contractual obligation, instead inhibit their ability to perform an obligation or indicate an unwillingness to perform an obligation. Referring back to our earlier example of the sale of the painting, a seller, prior to delivering the painting, could sell and deliver the painting to a third party, destroy it or simply state that they will not deliver the painting or even deny the existence of the contract.

Anticipatory breach of contract in South African law is generally divided into three categories which correspond with the three examples given above.¹⁰ These are known as absolute prevention of performance, relative prevention of performance and repudiation respectively.¹¹ Broadly speaking, absolute prevention of performance occurs when a contracting party makes their performance entirely impossible, such as where the painting is destroyed. Relative prevention of performance occurs where, although the performance is still possible, the breaching party has seriously impeded her or his ability to perform, as in our example where she or he sells and delivers the painting to a third party. Lastly, a party repudiates a contract where she or he unequivocally indicate that she or he will not perform the contract, for example by stating that she or he will not deliver the painting.

1.2 Nomenclature

The discussion that follows is complicated by a degree of ambiguity that surrounds the terminology used to describe anticipatory breach of contract in South African and English law. In English law the term repudiation has historically been used to describe a number of different concepts. It has meant the 'legitimate denial of the existence or validity of a contract'. But this usage would now seem to have been overridden in English law by use of the term 'rescission', and which is consistent with the usage of the term rescission in South African law.¹² It has also been used to describe 'lawfully putting a contract to an end', now more often referred to as termination in English law and cancellation in South African law, although repudiation is still used in certain contexts in English law as being synonymous with termination.¹³

Repudiation is also used as a synonym for renunciation, in English law an expression of an intention not to go on with the contract and thus corresponding with the traditional use of repudiation in

⁸ *Ibid.*

⁹ De Wet & Yeats (1947) *op cit* note 6; Van Rensburg *et al op cit* note 2 387; although see Cockrell *op cit* note 4 310-2 who questions whether the duty qua creditor is in fact distinguishable from the duty qua debtor.

¹⁰ Whether or not this label is appropriate to a breach of contract consisting of a repudiation or prevention of performance occurring after the agreed time for performance is discussed below.

¹¹ See Van der Merwe *et al op cit* note 2; Hutchison *op cit* note 2; Van Rensburg *et al op cit* note 2; Naudé (2013) *op cit* note 4.

¹² Qiao Liu *Anticipatory Breach* (2011) 39-43; H G Beale (ed) *Chitty on Contracts* Volume 1 31 ed (2012) 24-001-2; Jack Beatson, Andrew Burrows & John Cartwright *Anson's Law of Contract* 29 ed (2010) 524; Van der Merwe *et al op cit* note 2 343.

¹³ *Freeth v Burr* (1874) LR 9 CP 208 214; Anson's 514 *op cit* note 12; Liu (2011) 39-41 *op cit* note 12.

South African law. This would seem to have shifted and the term 'repudiation' is now normally used in a more general sense to encompass all forms of anticipatory breach, or even mean any serious contractual wrong giving rise to a right to cancel the contract, whereas renunciation is reserved for where a party has manifested an expression of an intention to not go along with the contract.¹⁴ Further, as in South African law, there is an historical distinction (now being challenged) in English law between renunciation and disablement occurring before the time for performance and after the time for performance, with the former being referred to as anticipatory breaches of contract or anticipatory repudiation.¹⁵ However, the general usage of repudiation in English law would seem to correspond with how anticipatory breach of contract is defined below, that is encompassing renunciation, disablement and 'impure anticipatory breach',¹⁶ although still often distinguishing between anticipatory and non-anticipatory repudiation.¹⁷

This confusion is luckily mitigated by a number of factors. Firstly, because the mechanism through which a party disables (prevents) themselves from being able to perform their contractual obligations usually manifests itself by conduct, a party is usually able to rely on this conduct as a reflection of an unwillingness to perform their obligations, which is known as repudiation in South African law and renunciation in English law. It would seem therefore that more often than not an aggrieved party will be relying on this unwillingness to establish the breach.¹⁸ Secondly, when establishing whether or not there has been a breach there is no distinction made between circumstances where the breach occurs before the time for performance and after the time for performance.¹⁹

Finally, and most significantly, as is discussed in more detail below, anticipatory breach of contract rather than consisting of an actual breach of the obligation to perform, by delay in performing or defective performance, instead consists of conduct which predicts a future breach of such performance obligation. It is argued below that this has the effect of collapsing the distinction between repudiation and prevention of performance and, because it is the predictive nature of the breach which give anticipatory breach of contract its 'anticipatory' character, that all such breaches are anticipatory breaches. The principles relating to the specific categories of anticipatory breach of contract are therefore often relevant to anticipatory breach of contract generally and identifying the

¹⁴ *Heyman v Darwins Ltd* [1942] AC 356, 397; Chitty 24-017, 24-042 *op cit* note 12; Anson's 513 *op cit* note 12; Liu (2011) *op cit* note 12 41-2.

¹⁵ For South African law see for instance Sir J W Wessels *Law of Contract in South Africa* Volume 2 (1937) at 2925 which can be contrasted with Van der Merwe *et al op cit* note 2 308; for English law contrast Liu (2011) *op cit* note 12 43 with Chitty *op cit* note 12 24-022 and Edwin Peel *Treitel Law of Contract* 13 ed (2011) 840-1 (Peel restricts the use of renunciation and disablement to anticipatory breaches and recognises a refusal to perform and incapacitating oneself at or after the time for performance as forms of actual breach).

¹⁶ This term, originating from M Mustill 'Anticipatory Breach' in J Mustill and W Lorenz *Butterworth Lectures 1989-90* (1990) 38 54, is used to refer to the non- or malperformance of an obligation in a contract (usually an instalment contract) which suggests that future obligations will also not be performed correctly and was dealt with as a repudiation as in *Freeth v Burr*; see also Liu (2011) *op cit* note 12 52-6; Treitel *op cit* note 15 17-087.

¹⁷ This is the definition that Liu adopts and argues is consistent with the existing case law on repudiation (Liu (2011) *op cit* note 12 43 and 64-5).

¹⁸ Chitty *op cit* note 12 at 24-030; Cockrell *op cit* note 4 317.

¹⁹ Chitty *op cit* note 12 at 24-027; Treitel *op cit* note 15 844; Van der Merwe *et al op cit* note 2 307; Hutchison *op cit* note 2 297.

specific category of the anticipatory breach being discussed is often not relevant. Liu presents essentially the same argument in respect of the English law.²⁰

Nonetheless, in the discussion below I will attempt, especially when discussing South African sources, to follow the South African convention of referring to a refusal to perform as repudiation and an impediment created by a party as prevention of performance, with anticipatory breach of contract being the general category into which these forms of breach fall. Unfortunately, because of the inconsistency in usage, some degree of confusion when discussing the historical development of anticipatory breach of contract is inevitable and, as noted above, when discussing English sources repudiation will generally refer to anticipatory breach of contract more generally.

1.3 Origin

Roman and Roman-Dutch law recognised certain instances where a party who had entirely prevented themselves from performing as a breach of contract which could give rise to an immediate action for damages, even where such breach occurred prior to the time set for performance.²¹ It would however seem doubtful that this was a generalised recognition of prevention of performance as a form of breach of contract as the Roman-Dutch texts 'fail to provide us with any detailed exposition of the legal rules.'²² It is also uncertain whether relative prevention of performance was recognised as a form of breach of contract at all and it is clear that the Roman-Dutch law did not recognise repudiation as a form of breach.²³

The recognition of repudiation as a form of breach of contract in South African law can be traced back to English law,²⁴ with the decision of *Hochster v De la Tour*²⁵ being of particular importance. This decision is recognised as the first decision by an English court that allowed a claim based on a refusal to perform the contract prior to the time at which the contract was to be performed.²⁶ The plaintiff had been engaged by the defendant to accompany him on a tour to commence on 1 June 1852.²⁷ On 11 May 1852 the defendant then wrote to the plaintiff declining his services and refused to pay compensation, with the action being instituted by the plaintiff on 22 May 1852, before the tour was due to commence.²⁸

²⁰ Liu (2011) *op cit* note 12 39-43.

²¹ Theodore Mommsen, Paul Krueger and Alan Watson (eds) *The Digest of Justinian* (1985) D. 45.1.91; 45.1.51; 44.7.1.4; 44.7.1.5; 18.3.4 pr; 19.2.24.2; 19.2.55.2; 19.1.54 pr; 19.2.13.5; Hugo De Groot *Jurisprudence of Holland* translated by RW Lee (1926) at 3.19.11, 3.20.7; Johannes Voet *Commentary on the Pandects* translated by T Berwick (1902) at 19.1.14; P M Nienaber *Anticipatory Repudiation in English and South African Law of Contract* (Unpublished PhD Thesis, Cambridge) (1961) 101-7; P M Nienaber 'Enkele Beskouinge oor Kontraktbreuk in Anticipando' (1963) 19 *Tydskrif vir die Hedendaagse en Romeinse Reg* 29; Cockrell *op cit* note 4 317.

²² Cockrell *op cit* note 4 317; see also *McCabe v Burisch* 1930 TPD 261 268.

²³ P M Nienaber (1963) *op cit* note 21; Nienaber (1961) *op cit* note 21 107-110.

²⁴ *Ibid*; *Novick v Benjamin* 1972 (2) SA 842 853.

²⁵ *Hochster v De la Tour* (1853) El & Bl 678.

²⁶ Nienaber (1961) *op cit* note 21 5; Mustill *op cit* note 16 38 ff; Liu (2011) *op cit* note 12 14; Djakhongir Saidov 'Anticipatory Non-Performance and Underlying Values of the UNIDROIT Principles' (2006) 11 *Uniform Law Review* 795.

²⁷ *Hochster supra* note 25 678-9.

²⁸ *Ibid*.

Despite being faced with two earlier dicta by Parke B in cases dealing with a refusal at the time set for performance,²⁹ which indicated that a refusal to perform before the time stipulated was a nullity, the court nonetheless upheld the claim.³⁰ The court, in examining a number of earlier cases on disablement, found that where a party was to perform at some future date there was an implied promise that in the meantime the party would not do anything to prejudice the contractual relationship.³¹ So, flying in the face of criticisms being levelled at allowing an action before the time at which the contractual obligation became due, the doctrine of anticipatory breach was accepted and continued to be applied by the English courts and soon spread to other common law jurisdictions.³²

Liu and Mustill, both engaging in a detailed examination of the case law relating to renunciation and disablement which preceded *Hochster*, suggest that the 'implied promise' relied on by Campbell CJ in *Hochster* had a rather precarious historical basis.³³ Without questioning the practical effectiveness of the doctrine both authors suggest that the general 'implied promise that a party would do nothing inconsistent with the relationship constituted by the contract' which Campbell CJ relied on is not supported by the earlier case law. Liu suggests that the majority of these earlier decisions either restricted the implication of the promise to specific circumstances or were based on the reasoning employed in *Sir Anthony Main's Case*.³⁴ In that case, the court found that since the self-disablement prevented the fulfilment of a condition precedent, the condition precedent should be exempted, making the disabling party immediately liable under the contract.³⁵

Both Liu and Mustill agree with Nienaber's position that the English courts' approach to disablement laid the foundations for the recognition of a repudiation occurring before the time set for performance as a breach of contract.³⁶ However both stress that the 'implied promise' provided by Campbell CJ as a unified basis for renunciation and disablement as forms of anticipatory breach of contract was not fully supported by the earlier case law and Liu and Mustill suggest that the absence of any firm theoretical basis for the doctrine has resulted in confusion in its development and application.³⁷

Interestingly, notwithstanding any recognition of prevention of performance that was present in the Roman-Dutch sources the South African law on prevention of performance is also rooted in English law. In *McCabe v Burisch*³⁸ Tindall J, finding little guidance in the Roman-Dutch authorities, relied on the discussion of the English cases on disablement in *Hochster* and justified their application on the

²⁹ *Phillpotts v Evans* (5 M & W 475) 477; confirmed in *Ripley v M'clure* (4 Exch. 359) 355; Liu (2011) *op cit* note 12 10; Nienaber (1961) *op cit* note 21 7.

³⁰ *Hochster supra* note 25.

³¹ *Ibid* 690.

³² Liu (2011) *op cit* note 12 1; Nienaber (1961) *op cit* note 21 8 – 10.

³³ As noted above, the terms renunciation and disablement as generally used in English law correspond with the equivalent concepts of repudiation and prevention of performance in South African law; Liu (2011) *op cit* note 12 14-21; Mustill *op cit* note 16 43.

³⁴ Liu (2011) *op cit* note 12 14-21; *Sir Anthony Main's Case* (1596) 5 Co Rep 20b.

³⁵ *Ibid*.

³⁶ Liu (2011) *op cit* note 12; Mustill *op cit* note 16 43; Nienaber (1961) *op cit* note 21 8 – 10.

³⁷ Liu (2011) *op cit* note 12 26; Mustill *op cit* note 16 43; Nienaber (1961) *op cit* note 21 8 – 10; L Vold 'The Tort Aspect of Anticipatory Repudiation of Contracts' (1928) 41 *Harvard Law Review* 340.

³⁸ *McCabe v Burisch op cit* note 22.

basis that the principles are such as one would expect in 'any rational system of law'.³⁹ It is clear that the English principles on repudiation and anticipatory breach of contract provided the justification and basis for the recognition of breach in the form of prevention of performance in South African law.⁴⁰

1.4 Breach going to the 'root' of the contract and the acceptance requirement

The later 19th century English cases on repudiation highlighted a further issue that could arise, whether a party could be entitled to cancel the entire contract on the basis of a repudiation which related to only a part of the contract or related to a single instance of performance in an ongoing contract.⁴¹ In *Freeth v Burr*⁴² the parties had entered into a contract for the sale of pig iron to be delivered in a series of parcels. The buyers withheld payment for the first delivery claiming an entitlement to set off payment against the costs incurred because of the late delivery of the iron. At the same time the purchasers urged timeous delivery of the second parcel. The sellers treated this as a repudiation. Coleridge CJ found that:

'[t]he question is whether the fact of the plaintiff's refusal to pay for the 125 tons delivered was such a refusal on the part of the purchasers to comply with their part of the contract as to set the seller free and to justify his refusal to continue to perform it.'⁴³

Coleridge CJ went on to find that the buyers had not repudiated the contract, expressing the test for whether a party had repudiated a contract as:

'whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether refuse performance of the contract. The true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract.'

This confirmed an implicit aspect of the reasoning in *Hochster*, that in order to amount to a repudiation at all it was necessary for the offending party's conduct to go to 'the root of the whole and substantial consideration',⁴⁴ that is it had to be sufficiently serious so as to warrant cancellation.⁴⁵

Quite soon after *Hochster*, Campbell CJ would once again influence the development of the doctrine of repudiation through two similar dicta appearing in *Avery v Bowden*⁴⁶ and *Reid v Hoskins*⁴⁷ (later jointly decided on appeal)⁴⁸ in which he noted that the repudiation was only completed by 'putting

³⁹ *McCabe v Burisch* op cit note 22 268; *Cockrell* op cit note 4 317; see also *Wessels* op cit note 63 at 2930.

⁴⁰ *Ibid.*

⁴¹ It should be noted that this question is distinct from the question of whether obligations can be considered to be severable from the remainder of the contract, thus entitling a party to partially cancel a contract. For a discussion of this issue see *Van der Merwe et al* op cit note 2 351 relying on *Walker's Fruit Farms Ltd v Sumner* 1930 TPD (for South African law) and *Anson's* op cit note 12 520, *Chitty* op cit note 12 24-046, *Treitel* op cit note 15 17-031 (for English law).

⁴² *Freeth v Burr* (1874) LR 9 CP 208.

⁴³ *Ibid* 213.

⁴⁴ *Mersey Steel and Iron Co v Naylor, Benzon and Co* (1884) 9 App 434.

⁴⁵ *Hochster* supra note 25 685 and 693-4.

⁴⁶ *Avery v Bowden* (1855) 5 El & Bl 714.

⁴⁷ *Reid v Hoskins* (1855) 5 El & Bl 729.

⁴⁸ *Avery v Bowden; Reid v Hoskins* (1856) 6 El & Bl 953.

an end to the contract.⁴⁹ Although the basis of the decisions, which was confirmed on appeal, was that the defendant's conduct did not amount to a repudiation, it was the requirement that the aggrieved party accept the repudiation that was reported as the *ratio* of both decisions.⁵⁰

The requirement would actually appear to originate from cases dealing with a claim on a *quantum meruit*, where such cancellation was necessary in order to found a claim.⁵¹ In *Hochster Campbell CJ* had rather explicitly rejected the 'offer to rescind' theory put forward by counsel.⁵² Nonetheless, a subsequent finding in *Frost v Knight*⁵³ confirmed this aspect of the decisions in *Avery* and *Reid*.⁵⁴ It therefore became necessary to act on the repudiation and cancel the contract in order to convert it into a breach.⁵⁵ This has been referred to as the 'principle of election' or the requirement for acceptance by English commentators.⁵⁶

It was this doctrine, that repudiation consists of a breach going to the root of the contract that must be accepted in order to become complete, approved by the House of Lords in *Mersey Steel and Iron Co v Naylor, Benzon and Co*,⁵⁷ which was imported into South African law⁵⁸ where it has come to be labelled the 'offer and acceptance model'.⁵⁹

1.5 Reception into South Africa

The English law on repudiation provided the foundation for the South African law on repudiation and prevention of performance and established the doctrine of anticipatory breach of contract in South African law. It has continued to play a prominent role in the development of the doctrine and references to English decisions can be found throughout the modern South African case law.⁶⁰

The South African law has followed or mirrored English authorities in developing the test as expressed in *Freeth v Burr* and finding that a party does not have to have an actual intention to abandon the contract or refuse performance in order to repudiate the agreement.⁶¹ The test has

⁴⁹ Liu (2011) op cit note 12 22; *Avery supra* note 46 722; *Reid supra* note 47 738.

⁵⁰ Liu (2011) op cit note 12 22.

⁵¹ *Ibid.*

⁵² *Hochster supra* note 25 684-5.

⁵³ *Frost v Knight* (1872) LR 7 Ex 111.

⁵⁴ *Avery v Bowden; supra* note 46 and *Reid v Hoskins supra* note 47.

⁵⁵ *Frost v Knight supra* note 53; Liu (2011) op cit 12 22-5; Nienaber (1961) op cit note 21 87.

⁵⁶ Liu (2011) op cit note 12; *Chitty op cit* note 12 at 24-011; *Mustill op cit* note 16 43-5.

⁵⁷ *Mersey Steel supra* note 44.

⁵⁸ Nienaber (1961) op cit note 21 112; *Atwell & Co v Logan* (1884-1885) 3 SC 107; *Wolff & Co v Bruce, Mavers & Co* (1889-1890) 7 SC 133; *Evans v Stranack* (1890) 11 NLR 12 22; *Bacon v Hartshorne* (1899) 16 SC 230; *Legate v Natal Land and Colonization Co.* (1906) 27 NLR 439; *Cotton v Arnold & Co.* (1906-1909) 3 Buch AC 162; *Frenkel & Co v Johannesburg Municipality* (1909) TH 260; *Dickinson & Fisher v Arndt & Cohn* (1909) 30 NLR 172; *Damont v Gevers* 1914 CPD 140; *Kameel Tin Co (Pty) Ltd v Brollomar Tin Exploration Ltd* 1928 TPD 726; *Aucamp v Morton* 1949 (3) SA 611 (A).

⁵⁹ Nienaber (1961) op cit note 21; Van der Merwe *et al* op cit note 2; *Hutchison op cit* note 2.

⁶⁰ *Schlinkmann v Van Der Walt and Others* 1947 (2) SA 900 (E); *Van Rooyen v Minister Van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A); *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A); *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A); *Culverwell and Another v Brown* 1990 (1) SA 7 (A); *Metamil (Pty) Ltd v AECL Explosives and Chemicals Ltd* 1994 3 SA 673 (A); *Highveld 7 Properties (Pty) Ltd and Others v Bailes* 1999 (4) SA 1307 (SCA); *Datacolor supra* note 1.

⁶¹ *Schlinkmann v Van Der Walt supra* note 60 919; *Van Rooyen supra* note 60 845 – 6; *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) 387; *Metamil (Pty) Ltd v AECL Explosives and Chemicals Ltd* 1994 3 SA 673 (A) 685; *Datacolor supra* note 1 at [1], [16].

been developed in two ways, firstly, by finding that a party's conduct may amount to a repudiation where their intention is to perform the contract, but in a manner other than what was agreed or conditional upon a term that did not form part of the contract.⁶² A party therefore does not require a deliberate intention to repudiate a contract in order for their conduct to amount to an anticipatory breach. Secondly, where a party conducts themselves in a manner that would lead a reasonable person to conclude that they do not intend to perform the contract correctly, despite actually intending to do so, this may also constitute a repudiation.⁶³

There has been a tendency to use the first development, where a party repudiates a contract despite not having a deliberate intention to do so, as justification for the proposition that the test for repudiation is an objective test.⁶⁴ This is then used as support for the second development, that a party may repudiate the contract even where they intend to perform correctly but where a reasonable person would infer from their conduct that they are not going to perform correctly.⁶⁵

These two developments are rather distinct. The first development still examines a party's actual intention. Where the party actually intends to perform the contract but in a manner inconsistent with its terms, this will amount to a breach. This development would seem to be derived from the test in *Freeth v Burr* where it was found that a party commits a breach where she or he 'evinces an intention no longer to be bound by the contract' rather than repudiation only being found where there is an intention to 'abandon' the contract.⁶⁶

The second development is rather a break from the test in *Freeth v Burr* and represents the application of an objective standard, as the repudiating party does not have to have any actual intention at all. As expressed in *Universal Cargo Carriers v Citati* '[t]he test of whether an intention [to repudiate] is sufficiently evinced by conduct is whether the party renouncing has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract.'⁶⁷

1.6 Offer-Acceptance model

The South African label of the 'offer-acceptance model', noted above, which would seem to originate in Nienaber's work, is perhaps somewhat misleading.⁶⁸ Although the English law at the time clearly required an 'acceptance' of the repudiation, that is the cancellation of the contract by

⁶² *Evans v Stranack supra* note 58; *Damont v Gevers supra* note 58; *Schlinkmann v Van Der Walt supra* note 60 919 where reliance was placed on *In Re Rubel Bronze and Metal Co and Vos* (1918) 1 KB 322; *Van Rooyen supra* note 60.

⁶³ *Ponisammy supra* note 61 387 and *Tuckers supra* note 60 653 both relying on *Universal Cargo Carriers Corporation v Citati*, (1957) 2 QB 401; *Metamil supra* note 60 685; *Forslind v Bechely Crundall* 1922 SC (HL) 173 which is given as authority for this proposition in *Wessels Law of Contract in South Africa* Volume 2 (1937) at 2923 and is discussed below.

⁶⁴ See for instance *Metamil supra* note 60 685 which relies on *Van Rooyen supra* note 60; Nienaber (1961) *op cit* note 21 257-67.

⁶⁵ *Ibid.*

⁶⁶ *Schlinkmann v Van Der Walt supra* note 60; *Van Rooyen supra* note 61.

⁶⁷ *Universal Cargo Carriers supra* note 63 436.

⁶⁸ Nienaber (1961) *op cit* note 21; Nienaber (1963) *op cit* note 21. Reference to this construction can be found throughout the writing on anticipatory breach of contract and would appear to be uniformly attributed to Nienaber, see *Van der Merwe et al op cit* note 2; *Hutchison op cit* note 2; *Van Rensburg et al op cit* note 2; *E Clive & D Hutchison op cit* note 4.

the aggrieved party, the construction of the repudiation as an offer can be doubted. In *Hochster* Campbell CJ rejected counsel's submission that the repudiation was nothing more than an offer to rescind,⁶⁹ and Crompton J, in colloquy, although drawing an analogy with an offer, specifically contrasts the situation in *Hochster* with such an offer.⁷⁰

Nienaber relies on three later English cases, *Morgan v Bain*,⁷¹ *Johnstone v Milling*⁷² and *Bradly v Newsom*,⁷³ to support his contention that repudiation was framed as an offer to rescind.⁷⁴ Although it may have been possible to argue the facts in *Morgan v Bain* as supporting a repudiation by the plaintiff as a defence to the action, the defendants rather relied on a contention that both parties had the intention to rescind the contract, which the court accepted.⁷⁵ The language of offer and acceptance was therefore entirely appropriate.

In *Johnstone*⁷⁶ Escher MR found that:

'Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission.'⁷⁷

The use of the phrase 'agree to the contract being put to an end' by Escher MR does provide some support for Nienaber's contention. However Bowen LJ rather notes 'that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract'⁷⁸ and Cotton LJ that 'the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract'.⁷⁹ From this language and Escher MR's reliance on similar language in *Frost v Knight*⁸⁰ one would infer that Escher MR was, as is consistent with his finding, merely trying to emphasise the point that a party could not unilaterally terminate the contract. The repudiation, rather than being an offer open to acceptance, gave the aggrieved party the option to accept the breach, terminate the contract and claim damages. Similarly, little support for using the 'offer-acceptance' model label can be found in the early South African case law.⁸¹

The construction of repudiation as being based on an 'offer and acceptance' model finds its strongest support in *Bradly v Newsom*.⁸² Lord Wrenbury first notes that 'consensus created the

⁶⁹ *Hochster supra* note 25 686.

⁷⁰ *Ibid* 685.

⁷¹ *Morgan v Bain* (1874) LR 10 CP 15.

⁷² *Johnstone v Milling* (1886) 16 QBD 460.

⁷³ *Bradly v Newsom* (1919) AC 16.

⁷⁴ Nienaber (1961) *op cit* note 21 87.

⁷⁵ *Morgan v Bain supra* note 71.

⁷⁶ *Johnstone v Milling supra* note 72.

⁷⁷ *Ibid* 467.

⁷⁸ *Ibid* 470.

⁷⁹ *Ibid* 472-3.

⁸⁰ *Frost v Knight supra* note 53.

⁸¹ *Executors Evans v Stranack supra* note 58; *Bacon v Hartshorne supra* note 58; *De Wet v Kuhn* 1910 CPD 263 266; *Kameel Tin Co supra* note 58 732-3; *Walker's Fruit Farms supra* note 41 400-1.

⁸² *Bradly v Newsom supra* note 73.

contract, and consensus may determine it⁸³ and then goes on to find that the aggrieved party 'may say 'I take you at your word; I accept repudiation of your promise, and will sue you for breach.'⁸⁴ 'This is really no addition to, but a particular application of, the principle first above stated.'⁸⁵

Subsequent English⁸⁶ and South African⁸⁷ cases have drawn an analogy between the acceptance of a repudiation and the acceptance of an offer, incorporating notions of consent into the doctrine of repudiation. However, in the face of criticism of this approach they cannot be seen as being representative of the general approach to repudiation.⁸⁸ Certainly construing a repudiation as any form of offer to rescind the contract would seem to be far-fetched, necessitating as it would that such an offer would need to include some further mechanism on which damages for breach of contract could be claimed.⁸⁹

Although it would seem clear that the acceptance requirement in English law is not based on any notions of consent, it is not entirely clear how far this requirement should extend. Certainly the finding by Asquith LJ in *Howard v Pickford Tool Co*⁹⁰ that 'a[n] unaccepted repudiation is a thing writ in water and of no value to anybody'⁹¹ has drawn criticism as being an oversimplification⁹² but is still quoted as good authority,⁹³ albeit with these criticisms noted.

The finding that an unaccepted repudiation has no effect would appear to be inconsistent with the Privy Council finding in *Khatijabai Jiwa Hasham v Zenab*⁹⁴ where an unaccepted repudiation founded a claim for specific performance. The statement is also inconsistent with the decision in *British Electrical and Associated Industries Cardiff Ld v Patley Pressings Ld*⁹⁵ where the court found that a

⁸³ *Ibid* 51.

⁸⁴ *Ibid*.

⁸⁵ *Ibid* 52.

⁸⁶ *Denmark Productions Ltd v Boscobel Productions Ltd* (1968) 3 All ER 513 (CA).

⁸⁷ *Myers v Abramson* 1952 (3) SA 121 (C) 123; although *Swart v Vosloo* 1965 (1) 105 is given by Jansen JA as an example of such in *Stewart Wrightson v Thorpe supra* note 60 the finding is rather directed to the requirement that notice of the cancellation of the contract be given to the breaching party.

⁸⁸ See for English law *Moschi v Lep Air* [1973] AC 331 (HL) 349-350 where Diplock LJ finds it 'quite erroneous' to draw such an analogy; Liu (2011) *op cit* note 12 119 -120 and in South African law *Stewart Wrightson v Thorpe supra* note 60 953; it should be noted that the analogy drawn in *Denmark Productions* is approved in M P Furmston *Furmston Cheshire & Fifoot's Law of Contract* 15 ed (2007) 688. However, the other leading English textbooks (Chitty *op cit* note 12 at 24-012-3; Treitel *op cit* note 15 841-2 and *Anson's* 507-12 *op cit* note 12) do not provide the same support and it would be very difficult to reconcile this construction with the rule that an aggrieved party's acceptance of the repudiation can be effective even where the reason given is wrong or inadequate if a good reason existed at that time (paraphrasing the argument in *Stewart Wrightson v Thorpe supra* note 88).

⁸⁹ Nienaber (1961) *op cit* note 21 87 114-33.

⁹⁰ *Howard v Pickford Tool Co* 1951 1 KB 417.

⁹¹ *Ibid* 421.

⁹² Michael Furmston (ed) *The Law of Contract* 4 ed (2010) 1618; Liu (2011) *op cit* note 12 30 and Nienaber (1961) *op cit* note 21 136, 139, both rely on an earlier article by Herbert R Limburg 'Anticipatory Repudiation of Contracts' (1924-1925) 10 *Cornell Law Quarterly* 135 140; Liu 'Claiming Damages upon an Anticipatory Breach: Why should an Acceptance Be Necessary?' (2005) 25 *Legal Studies* 559; Mustill *op cit* note 16 61-2.

⁹³ Chitty *op cit* note 12 24-023.

⁹⁴ *Khatijabai Jiwa Hasham v Zenab (As Legal Representative of HG Harji)* [1960] AC 316 (PC Eastern Africa).

⁹⁵ *British Electrical and Associated Industries Cardiff Ld v Pateley Pressings Ld* [1953] 1 WLR 280 (QB) 280.

breach by the resellers was caused by an earlier repudiation by the sellers despite such earlier repudiation not having been accepted by the resellers at the time of their breach.⁹⁶

Additionally, the logic of the proposition that the breach arises not based on the wrongful conduct of the repudiating party but rather on the conduct of the aggrieved party in accepting the breach has been called into question.⁹⁷ An unaccepted repudiation is not without effect,⁹⁸ and the requirement that a party accept a repudiation in order to complete the breach would appear to be both inconsistent with other aspects of the doctrine of anticipatory breach, 'illogical, historically ill-founded, and detrimental to certainty and economic efficiency.'⁹⁹

However, Liu notes that the acceptance requirement does not necessarily imply that a repudiation only becomes a breach of contract on acceptance of such.¹⁰⁰ Rather Liu distinguishes between the rule that a repudiation is only completed upon acceptance, which he labels the 'breach conversion' rule, and a rule which recognises the repudiation as an immediate breach but with the damages claim being conditional upon the acceptance of the repudiation, that is the cancellation of the contract, which he labels the 'conditional damages claim' rule.¹⁰¹ Liu suggests that the 'conditional damages claim' rule is consistent with the decided cases and, in promoting finality and consistency, is the better statement of English law.¹⁰²

Although earlier cases, relying on English authorities, repeated the requirement that a repudiation required acceptance in order to be completed,¹⁰³ South African law has subsequently departed from the English approach. In *Stewart Wrightson*, Jansen JA found that a right to terminate the contract arose as a result of the breach of the contract and that the language of offer and acceptance had no place.¹⁰⁴

Importantly the rejection of the acceptance requirement in *Stewart Wrightson* was founded on a rejection of the notion that a repudiation arose out of some form of consent.¹⁰⁵ The possibility of construing the acceptance requirement as a 'conditional damages claim' rule was not considered. As discussed above, it would seem clear that the acceptance requirement in English law was never premised on any notion of consent and rather arose from the requirement to cancel the contract in order to claim on a *quantum meruit* and was used later to emphasise that the repudiating party could not unilaterally terminate the contract.

Confusing the issue further, despite the clear finding in *Stewart Wrightson* that the breach of contract arose as a result of the repudiating party's wrongful conduct and not from the acceptance of the repudiation by the aggrieved party, the acceptance requirement continued to be applied in

⁹⁶ *Ibid* 286.

⁹⁷ Liu (2011) *op cit* note 12 28; Liu (2005) *op cit* note 92; P M Nienaber 'Anticipatory Repudiation: Principle and Policy' (1962) *Cambridge Law Journal* 213 221.

⁹⁸ *Ibid*; Anson *op cit* note 12 509.

⁹⁹ Anson *op cit* note 12 560.

¹⁰⁰ Liu (2011) *op cit* note 12 121-3; Liu (2005) *op cit* note 92 560-1.

¹⁰¹ *Ibid*.

¹⁰² *Ibid*.

¹⁰³ *De Wet v Kuhn supra* note 81 267; *Kameel Tin Co supra* note 58 731; *Walker's Fruit Farms supra* note 41 401; *Myers v Abramson supra* note 87 452.

¹⁰⁴ *Stewart Wrightson v Thorpe supra* note 60.

¹⁰⁵ *Ibid* 952-3.

some South African cases.¹⁰⁶ It was only in *Datacolor*, which is the focus of the next chapter, that Jansen JA's position in *Stewart Wrightson* was authoritatively confirmed.¹⁰⁷

It is not immediately clear what basis the acceptance requirement would find in the Roman-Dutch principles of contract law applied in South Africa, which has never had to grapple with the problematic English phrase 'discharge by breach'.¹⁰⁸ Nonetheless the basis on which the acceptance requirement was rejected was unsatisfactory as it failed to consider a construction of the rule that did not require the flawed application of any notions of consent.

1.7 Basis

As noted above, the validity of Campbell CJ's reliance in *Hochster* on earlier case law to support the implication of a promise 'that neither will do anything to the prejudice of the other inconsistent with that [contractual] relationship'¹⁰⁹ has been called into question. Further criticisms have been levelled at the desirability of this construction and commentators have provided a number of alternative bases for anticipatory breach of contract,¹¹⁰ including that it should rather be viewed as something analogous to tort (or delict as such is labelled in South African law).¹¹¹ Although construction of anticipatory breach of contract as a tort has never found favour,¹¹² the 'implied promise' basis for anticipatory breach of contract, despite strong criticism,¹¹³ has never been formally rejected as the foundation of anticipatory breach of contract in English law.¹¹⁴

These various constructions have been strongly disputed by Nienaber.¹¹⁵ Nienaber convincingly argues that such a duty could not be based on any consensus between the parties nor does it meet the requirements for a term implied by law.¹¹⁶ Nienaber suggests that anticipatory breach of contract rather arises as a result of a breach of an *ex lege* duty that is an incident of the duty to render performance in terms of the contract.¹¹⁷ This was accepted in part in *Tuckers Land and Development Corporation v Hovis* where Jansen JA, referencing Nienaber, found that a repudiation was an immediate breach of an obligation flowing from the *bona fides* underlying contractual relations in South African law.¹¹⁸

This decision, on the basis that it is a firm departure from any construction of repudiation as being based on notions of offer and acceptance, was welcomed by Nienaber.¹¹⁹ Nienaber however criticised the decision on the basis that anticipatory breach should not be seen as a breach of a duty

¹⁰⁶ *Culverwell v Brown supra* note 60 28; *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) 22.

¹⁰⁷ *Datacolor supra* note 1 at [1]

¹⁰⁸ *Wessels op cit* note 63 at 2912-3; *Christie and Bradfield op cit* note 3 515; *Chitty op cit* note 12 at 24-001-3; *Anson's op cit* note 12 507-12.

¹⁰⁹ *Hochster supra* note 25 689.

¹¹⁰ Liu (2011) *op cit* note 12 25-33; Nienaber (1961) *op cit* note 21 114 *ff*; *Saidov op cit* note 26 796-800.

¹¹¹ *Vold op cit* note 37.

¹¹² Liu (2011) *op cit* note 12 25-33; Nienaber (1961) *op cit* note 21 183-9;

¹¹³ *Ibid.*

¹¹⁴ Liu (2011) *op cit* note 12 33.

¹¹⁵ Nienaber (1961) *op cit* note 21 214-6; Nienaber (1963) *op cit* note 21; Nienaber (1989) *op cit* note 3; Nienaber (1963) *op cit* note 218.

¹¹⁶ Nienaber (1961) *op cit* note 21; Nienaber (1963) *op cit* note 21; similar and equally convincing arguments are made by Liu (2011) *op cit* note 12 27-9 in respect of English law.

¹¹⁷ Nienaber (1961) *op cit* note 21 214-24; Nienaber (1963) *op cit* note 21; Nienaber (1989) *op cit* note 3 8.

¹¹⁸ *Tuckers supra* note 60 651-2.

¹¹⁹ Nienaber (1989) *op cit* note 3 8.

not to repudiate but rather as being a breach of the primary duty to perform in terms of the contract.¹²⁰

In the context of positive malperformance and *mora* there is no separate *ex lege* duty not to perform incorrectly or duty to not delay or fail to perform respectively.¹²¹ To clarify, a contracting party's obligation to perform correctly can be expressed in the negative as being a duty not to perform the specific contractual obligations incorrectly. This is not the same as a general *ex lege* duty to not malperform but rather just an alternative expression of the contracting party's duty to perform. Similarly, in the context of anticipatory breach, there is no general duty not to commit an anticipatory breach. Nienaber notes that it is the aggrieved party's interest in the promised performance which is infringed and that breach of contract, as a matter of positive law, is defined by the wrongfulness of such infringing conduct.¹²²

Throughout his work Nienaber stresses the essential connection between the conduct in question and the promised performance.¹²³ It is conduct which predicts that such promised performance will not be rendered consistently with the terms of the contract which is recognised as being an anticipatory breach of contract. Nienaber draws on the construction of anticipatory breach given by Devlin J in *Universal Cargo Carriers*:

'So anticipatory breach means simply that a party is in breach from the moment that his actual breach becomes inevitable. Since the reason for the rule is that a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, it must follow that the breach which he anticipates is of just the same character as the breach which would actually have occurred if he had waited.'¹²⁴

As such, it is the nature and extent to which the promised performance will be compromised which should ultimately define whether or not conduct by a contracting party amounts to an anticipatory breach.¹²⁵

Although Nienaber uses the phrase 'conduct by a contracting party which predicts a non- or malperformance' to define anticipatory breach of contract, a consequence of basing anticipatory breach on the predicted non- or malperformance is that such breach need not consist of conduct by the breaching party.¹²⁶ Where repudiation derives its basis from an implied promise or the *ex lege* duty suggested by Jansen JA, the repudiating party must engage in some conduct which would breach such promise or duty. However, because the conclusion that a party will commit a breach need not be based on conduct by that party, where the basis for anticipatory breach rests in the predicted breach, an anticipatory breach need not consist of conduct by the party in question. An anticipatory breach could then consist of a failure by a contracting party to act so as to ensure that their contractual obligations will be correctly performed.¹²⁷ Whether anticipatory breach can

¹²⁰ *Ibid.*

¹²¹ *Ibid* 9.

¹²² *Ibid.*

¹²³ Nienaber (1961) *op cit* note 21; Nienaber (1963) *op cit* note 21; Nienaber (1989) *op cit* note 3 8.

¹²⁴ Nienaber (1963) *op cit* note 21 34; *Universal Cargo Carriers supra* note 63 437.

¹²⁵ Nienaber (1989) *op cit* note 3 8.

¹²⁶ Nienaber (1961) *op cit* note 21; Nienaber (Nienaber (1963) *op cit* note 21; Nienaber (1989) *op cit* note 3 8.

¹²⁷ Van der Merwe *et al op cit* note 2 307.

nonetheless be accurately defined as consisting of ‘conduct by a contracting party’ is discussed in more detail below.¹²⁸

This construction of repudiation, and breach of contract more generally, has been accepted by Van der Merwe *et al.*¹²⁹ Van der Merwe *et al* qualify Nienaber’s position on breach of contract only by suggesting that breach of contract may not always be explained as an infringement of the right to claim performance as it would be difficult to construe a breach by a creditor consisting of *mora creditoris* as an infringement of the right to claim performance.¹³⁰ They therefore suggest that breach should be described as the infringement of a contractual obligation.¹³¹ The authors provide further support for Nienaber’s contention with the argument that the construction used in *Tuckers Land and Development Corporation* comes too close to equating repudiation with positive malperformance.¹³²

Jansen JA’s construction in *Tuckers Land and Development Corporation* gives no actual content to the *ex lege* duty not to repudiate. It rather begs the question what would constitute a repudiation of the contract. This runs the risk of becoming a mechanism for ‘sanctioning the termination of a contract in whatever circumstances the courts think fit.’¹³³ Unlike other forms of breach of contract, where the party’s contractual obligations inform the content of what constitutes a breach, what constitutes a repudiation would inform the content of the party’s contractual obligations. Viewed in this way repudiation would then not run the risk of becoming equated with positive malperformance. It would rather run the risk of losing all similarity with the other accepted forms of breach of contract. The better approach, as advocated by Liu and Nienaber, is to examine the anticipated consequences in order to determine whether conduct constitutes an anticipatory breach.

Liu, writing on English law, makes very similar arguments in favour of using the predicted malperformance to determine whether an anticipatory breach has occurred, and labels this the ‘inferential breach analysis’.¹³⁴ In terms of this approach an anticipatory breach is distinguishable from an actual breach on the basis that rather than consisting of a malperformance it consists of conduct which supports an inference that such malperformance will occur.¹³⁵ Like Nienaber, Liu stresses the connection between the future actual breach and the present anticipatory breach.¹³⁶ What would constitute an anticipatory breach of contract, consistent with positive malperformance and *mora*, is determined by the content of the contractual obligation to perform.¹³⁷

¹²⁸ See section 2.3 *The predicted breach* below.

¹²⁹ Van der Merwe *et al op cit* note 2 283, 307-11.

¹³⁰ *Ibid.*

¹³¹ *Ibid* 283.

¹³² *Ibid* 310; *Tuckers supra* note 60.

¹³³ Liu (2011) *op cit* note 12 6.

¹³⁴ Liu (2011) *op cit* note 12 33-9.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ This would also seem to hold true in the case of *mora creditoris*. Whether conduct constitutes *mora creditoris* is also dependent on the content of the performance obligation. That is whether the debtor requires the creditor’s cooperation in order to perform in terms of the contract and the time when such performance is due.

A common objection to this construction of anticipatory breach, as being an infringement of a contracting party's right to receive the promised performance, is that at the time an anticipatory breach occurs the obligation to perform may not yet have become due and so would not be capable of being breached.¹³⁸ This essentially mirrors the objections to recognition of anticipatory breach of contract as a breach at all that were raised by Parke B in the early 19th Century which were noted above.¹³⁹ Liu however notes that there is 'nothing in principle or reason that compels the conclusion that a breach of contract must be an actual breach.'¹⁴⁰

The right to the performance is an existing right that is capable of transfer by cession and it would seem to be unproblematic to recognise that an infringement of this right, consisting of a repudiation or by making it impossible to perform, could be recognised as a breach of contract.¹⁴¹ This would not consist of a what is often labelled actual breach, consisting of a malperformance. It would consist of conduct which predicts an actual breach with sufficient certainty that it immediately infringes the aggrieved party's interest in her or his right to the performance.

1.8 A breach justifying cancellation

A further consequence of the rejection of the 'offer acceptance model' in *Stewart Wrightson* and the construction of repudiation as rather being a violation of an *ex lege* duty in *Tuckers Land and Development Corporation* was the possibility that a party's conduct could be recognised as a repudiation even where it was not sufficiently serious as to warrant cancellation of the contract.¹⁴² If a repudiation is rather a breach of an *ex lege* duty it is no longer necessary to restrict repudiation to circumstances where the refusal to perform contractual obligations correctly relates to the contract as a whole, or a severable portion thereof.¹⁴³ Again, this idea would seem to originate in Nienaber's work where he noted that:

'From a purely doctrinal point of view, then, repudiation would reach its ultimate stage of development if it is recognized that a promisor repudiates the contract if he so conducts himself as to lead a reasonable person to believe that some form of actual breach will be committed however trivial.'¹⁴⁴

This statement summarises Nienaber's position on the two interrelated issues of what forms the basis for recognising an anticipatory breach of contract (discussed above) and what conduct constitutes an anticipatory breach. Recognising not just serious infringements of a contracting party's rights, those that would justify cancellation, as conduct which could constitute an anticipatory breach of contract has the advantage of affording an aggrieved party a remedy in circumstances where they are faced with, for instance, a refusal to perform the contract correctly, but in a manner that would not justify cancellation of the contract. Under the 'traditional approach' to repudiation, this refusal would not constitute a breach and the aggrieved party would have to wait until such malperformance actually arose before they could act upon it.

¹³⁸ Liu (2011) *op cit* note 12 33-9.

¹³⁹ See section 1.3 *Origin* above at note 29.

¹⁴⁰ Liu (2011) *op cit* note 12 35.

¹⁴¹ Van der Merwe *et al* *op cit* note 2 385 *ff*; Hutchison *op cit* note 2 365 *ff*.

¹⁴² Nienaber (1989) *op cit* note 3; Van der Merwe *et al* *op cit* note 2 365.

¹⁴³ *Ibid*.

¹⁴⁴ Nienaber (1961) *op cit* note 21 277.

Here however Nienaber's label of the 'offer acceptance model' can be criticised again. As noted above the 'offer acceptance model' or 'traditional approach' actually consists of two separate propositions. The first proposition is that a repudiation must consist of a breach that goes to the 'root' of the contract, that is a breach justifying cancellation, in order to amount to a repudiation at all, what is often labelled a 'fundamental' or 'material' breach.¹⁴⁵ The second proposition is that a repudiation must be accepted in order to be completed. The requirements are complementary to the extent that the second requirement, the 'principle of election', even in the form of an acceptance requirement as described by Liu, necessitates the application of the first requirement, that the breach must go to the root of the contract. This is because the acceptance of the repudiation is effected by cancelling the contract. The repudiation must then logically relate to either the entire contract or a severable portion thereof in order to constitute a repudiation. As such in order to constitute a repudiation the breach must be sufficiently serious so as to justify cancellation.¹⁴⁶

The issue that arises is that contrary to Nienaber's assumption, the requirement that a repudiation must justify cancellation neither originates from, nor is implied by, the requirement that a repudiation must be accepted. As was noted above, the requirement that a breach must justify cancellation can be traced back to *Hochster*, thus originating before the acceptance requirement which was established in *Avery*,¹⁴⁷ *Reid*¹⁴⁸ and *Frost v Knight*.¹⁴⁹ Further such a requirement has an independent justification. The provision of a remedy prior to the time for performance, as the doctrine of anticipatory breach does, can be best justified on the grounds that it avoids waste and promotes efficiency.¹⁵⁰ Importantly however this only occurs where 'the inferred breach is so serious as to deprive the victim of substantially all the benefit intended to be acquired under the contract.'¹⁵¹

As was noted above, the extent to which repudiation was ever construed as consisting of an offer and an acceptance can be questioned. Further doubt can be cast on Nienaber's reasoning on the basis that it assumes that the requirement that a repudiation must justify cancellation originates from and is justified on the basis that the repudiation must be accepted when in fact the reverse would appear to be true.¹⁵²

As attractive as Nienaber's position might be it is difficult to reconcile with Jansen JA's reasoning. In *Stewart Wrightson*, Jansen JA considered the origin in English law of a right to cancel a contract in the face of 'a "repudiation" in the sense of a fundamental breach'.¹⁵³ It was in reconciling this right with South African legal principles that he found that such right did not arise from 'any application of

¹⁴⁵ See for example Liu (2011) op cit note 12 70; T Naudé & G Lubbe op cit note 4. The use of 'material' breach would seem to be more prevalent in South African legal writing and so will generally be preferred in this thesis. It is intended to refer to a breach of contract that is sufficiently serious so as to justify the aggrieved party being afforded a right to cancel the contract.

¹⁴⁶ Nienaber (1989) op cit note 3; Van der Merwe *et al* op cit note 2 365.

¹⁴⁷ *Avery supra* note 46.

¹⁴⁸ *Reid supra* note 47.

¹⁴⁹ *Frost v Knight supra* note 53.

¹⁵⁰ Saidov op cit note 26 789-9; Liu (2011) op cit 12 37.

¹⁵¹ Liu (2011) op cit note 12 37.

¹⁵² Nienaber (1961) op cit note 21 277.

¹⁵³ *Stewart Wrightson v Thorpe supra* note 60 953.

a theory of offer and acceptance.¹⁵⁴ Jansen JA explicitly restricts recognition of anticipatory breach of contract to conduct which amounts to a 'fundamental breach'.¹⁵⁵

Similarly in *Tuckers Land and Development Corporation*, Jansen JA, in giving content to the *ex lege* duty, the violation of which constituted a repudiation, found that the test was whether a party 'acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract'. This would again seem premised on the position that in order for conduct to constitute a repudiation it must justify cancellation of the contract by the aggrieved party. Nonetheless the position that conduct heralding any actual breach, and not just a breach justifying cancellation, could amount to a repudiation would come to be endorsed in *Datacolor* and has been recognised as a feature of the 'new approach' to anticipatory breach of contract.¹⁵⁶

Accordingly, in terms of the 'new approach', which was given authoritative recognition in *Datacolor*,¹⁵⁷ anticipatory breach of contract rather than consisting of an actual breach of the obligation to perform, by delay in performing or defective performance, instead consists of conduct which predicts a future breach of such performance obligation.¹⁵⁸ The provision of a remedy for this anticipated actual breach of contract forms the basis for the label of anticipatory breach and it is this prospective element which distinguishes anticipatory breach from direct or actual breaches of contractual obligations.¹⁵⁹

Therefore, following the 'new approach', even when occurring at or after the time agreed for performance, a breach taking such a form remains 'anticipatory'.¹⁶⁰ This is in contrast to the earlier approach in South African law which clearly distinguished between repudiation and prevention of performance occurring before the time for performance and the same conduct which occurred after the time for performance, with only the former being 'anticipatory' breach of contract.¹⁶¹ This position, that repudiation and prevention of performance occurring at or after the time for performance are nonetheless forms of anticipatory breach, has not been universally endorsed by South African writers but, as discussed below, would appear to be a consequence of the adoption of the 'new approach'.¹⁶²

¹⁵⁴ *Ibid.*

¹⁵⁵ This term would appear to originate in English law and is considered to be no more than another way of referring to breaches which justify cancellation see Chitty *op cit* note 12 at 24-042.

¹⁵⁶ *Datacolor supra* note 3 at [17]; Van der Merwe *et al op cit* note 2 307; Hutchison *op cit* note 2 298-9.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ Wessels *op cit* note 63 860 ff.

¹⁶² See 2.3 *The predicted breach* below; also see the writers listed in note 2 above. Van der Merwe *et al op cit* note 2 307 and Van Rensburg *et al op cit* note 2 at 408 support this construction however Hutchison *op cit* note 2 297-8 is more equivocal in his support and Christie & Bradfield *op cit* note 3 539 still draw a distinction between repudiation and prevention of performance occurring before and after the time for performance.

2 DATACOLOR INTERNATIONAL V INTAMARKET

The discussion in the first chapter was largely directed at the introduction of the doctrine of anticipatory breach of contract into South African law and its development leading up to the decision in *Datacolor*.¹⁶³ This second chapter will be directed at an in depth analysis of the *Datacolor* judgment and the findings made by Nienaber JA in the majority judgment.

2.1 *Datacolor International v Intamarket*

In *Datacolor*, the appellant (Datacolor), a company based in the United Kingdom, had concluded a distributorship agreement with the respondent (Intamarket) in terms of which it appointed Intamarket as its exclusive distributor for the sale of computerised equipment for the matching, measuring and dispensing of colour. This continued for a number of years until, in 1991, the appellant was taken over by a Swiss conglomerate. In the ensuing restructuring Intamarket was advised, by means of a telephone call and two letters, that their distributorship agreement was being terminated. Importantly, although the agreement contained a clause providing for the termination of the agreement by either party on not less than 12 months written notice, none of the communications by Datacolor to Intamarket contained any reference to this clause.¹⁶⁴

Intamarket's response to this was to contact their clients advising them that they would no longer be distributing products on behalf of Datacolor and would instead be distributing products on behalf of a rival company, Spectrum. A copy of this announcement was eventually sent by one of Intamarket's clients to Datacolor who then suspended execution of all further orders to Intamarket. Datacolor advised Intamarket that it was terminating the agreement as a result of Intamarket's breach of the exclusivity provisions in their agreement.¹⁶⁵

Nienaber JA, writing for the majority, ultimately found that the letters sent by Datacolor to Intamarket constituted a repudiation of the agreement on the basis that a reasonable person would conclude that they were intended to immediately terminate the agreement without providing for the notice stipulated in the termination clause.¹⁶⁶ The announcement of the change in supplier by Intamarket, upon Datacolor being made aware of it, therefore constituted notice of termination of the agreement.¹⁶⁷ Scott JA, agreeing with the legal principles set out by Nienaber JA, differed only on the interpretation of the letters, which Scott JA found did not constitute a repudiation.¹⁶⁸ This was on the basis that the letter did not convey an intention that the contract was to be terminated immediately without compliance with the terms of the cancellation clause.¹⁶⁹

It is however Nienaber JA's discussion of the legal principles on which his decision was based that is of particular interest. As noted above, the *Datacolor* judgment is generally regarded as the culmination of the 'new approach' to repudiation in South African law and is given as authoritative

¹⁶³ *Datacolor supra* note 3.

¹⁶⁴ *Ibid* at [2]-[13].

¹⁶⁵ *Ibid*.

¹⁶⁶ *Ibid* at [25].

¹⁶⁷ *Ibid* at [35].

¹⁶⁸ *Ibid* at [37] – [45].

¹⁶⁹ *Ibid*.

confirmation of the approach adopted by Jansen JA in *Tuckers Land and Development Corporation*¹⁷⁰ and *Stewart Wrightson*.¹⁷¹ What does not appear to have received much attention is that *Datacolor*, in addition to confirming these earlier cases, goes considerably further than the line of cases on which it is based.¹⁷² If these developments are accepted in their entirety they will necessitate that the law on repudiation be significantly reconceptualised. This chapter will examine the findings in *Datacolor* and whether they represent desirable developments of the South African law of repudiation and anticipatory breach of contract.

As part of his analysis of the legal principles on which repudiation is based, Nienaber JA makes a number of important findings regarding the law on repudiation. Nienaber JA's discussion of repudiation can be reduced to four primary findings on the nature of repudiation:

- (1) 'the test for repudiation is not subjective but objective';¹⁷³
- (2) 'the so-called "acceptance", although a convenient catchword, does not "complete" the breach but is simply the exercise by the aggrieved party of his right to terminate the agreement';¹⁷⁴
- (3) 'a repudiatory breach may be typified as an intimation ... that all or some of the obligations arising from the agreement will not be performed according to their true tenor';¹⁷⁵ and
- (4) '[w]hether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.'¹⁷⁶

The first two findings represent fairly well established principles forming part of the law on repudiation, although subject to some equivocation and confusion in the South African case law.¹⁷⁷ The significance of these findings in *Datacolor* is therefore to confirm and clarify the application of these principles rather than representing novel developments of the law. The discussion below will also briefly examine the further implications of applying these findings together, something which has gone largely unexamined. The scope of the third and fourth findings is considerably less clear and their significance is largely determined by the interaction between these two findings. As a result they will be discussed together below.¹⁷⁸

2.2 Development of an objective test

An important aspect of the court's decision in *Datacolor* was that although Nienaber JA queried whether *Datacolor*'s representatives had intended to comply with the contract's cancellation clause, no finding was made on this issue. This meant that the court made no finding as to what subjective intention, if any, *Datacolor*'s representatives had held.¹⁷⁹ Nor were the representatives insisting on

¹⁷⁰ *Tuckers supra* note 60.

¹⁷¹ *Stewart Wrightson v Thorpe supra* note 60; *Van der Merwe et al supra* note 2 308-11; *Van Rensburg et al supra* note 2; *Hutchison supra* note 2 299-302; *Christie & Bradfield supra* note 3 539-40.

¹⁷² *Van Rooyen supra* note 60; *Tuckers supra* note 60; *Stewart Wrightson v Thorpe supra* note 60; *Metamil supra* note 60.

¹⁷³ *Datacolor supra* note 1 at [1].

¹⁷⁴ *Ibid* at [1].

¹⁷⁵ *Ibid* at [17].

¹⁷⁶ *Ibid*.

¹⁷⁷ Contrast, for instance, *Stewart Wrightson v Thorpe supra* note 60, *Tuckers supra* note 60 and *Culverwell v Brown supra* note 60; *Van der Merwe et al op cit* note 2 307 ff; *Hutchison op cit* note 2 298-9.

¹⁷⁸ See section 2.4 *Repudiation is a material breach* below.

¹⁷⁹ *Datacolor supra* note 1.

performing the contract in a manner other than had been agreed upon. Therefore the only basis on which Intamarket could establish that Datacolor had repudiated the contract was by showing that their conduct would have led a reasonable person to the conclusion that Datacolor did not intend to do perform the contract correctly.

Nienaber JA's finding that Datacolor had repudiated the contract was therefore contingent on the court confirming that the test for repudiation was an objective test. Drawing support from a number of earlier cases Nienaber JA emphasised this point.¹⁸⁰ However, because of the confusion between the rule that a party does not require a deliberate intention in order to repudiate a contract and an objective test, which was discussed above,¹⁸¹ support for this proposition is perhaps not as strong as the judgment makes out. Further, merely labelling the test applied in *Datacolor* as being an objective test cloaks the further development that occurred in Nienaber JA's judgment which is labelled as point three above. For these reasons it becomes necessary to discuss the development of the objective test in South African law prior to the *Datacolor* judgment and the decisions which Nienaber JA relied on.

In *Freeth v Burr*¹⁸² the court was required to decide a matter where the conduct alleged to constitute a repudiation was not a clearly expressed refusal to perform the entire contract, as had occurred in *Hochster*,¹⁸³ but rather a breach relating only to a single part of an instalment contract. Coleridge CJ in determining whether such breach amounted to a repudiation expressed the test for repudiation as being whether the conduct amounts 'to an intimation of an intention to abandon and altogether refuse performance of the contract' or such as to 'evince an intention no longer to be bound by the contract.'¹⁸⁴ In both *Freeth v Burr* and the *Mersey Steel and Iron Company*,¹⁸⁵ where the *Freeth* test was approved, the court considered the subjective desire of the buyer (the breaching party) to continue with the contract as supporting the conclusion that the buyer had not repudiated the contract.¹⁸⁶

The first quoted test in *Freeth v Burr* 'an intention to abandon ...' would seem to connote that an element of deliberateness in the conduct is required in order to constitute a repudiation.¹⁸⁷ However, in terms of the second expression of the test in *Freeth v Burr*, a party repudiates a contract where they 'evince an intention no longer to be bound by the contract', which would allow for a finding that a party had repudiated the contract without deliberately intending to do so.¹⁸⁸ As noted above,¹⁸⁹ this is not an objective test as it is dependent on the subjective intention of the potentially breaching party. The test however does not require an intention to repudiate the contract, rather only an intention to perform in a manner inconsistent with the agreed upon terms of the contract.

¹⁸⁰ *Ibid* at [1] and [16].

¹⁸¹ See 1.5 *Reception into South Africa Law* above.

¹⁸² *Freeth v Burr supra* note 42

¹⁸³ *Hochster supra* note 25.

¹⁸⁴ *Freeth v Burr supra* note 42 213.

¹⁸⁵ *Mersey Steel supra* note 44.

¹⁸⁶ *Ibid*; *Mersey Steel supra* note 44 443, 445, 446; Liu (2011) op cit note 12 53.

¹⁸⁷ Liu (2011) op cit note 12 52-3.

¹⁸⁸ *Freeth v Burr supra* note 42 213; Liu (2011) op cit note 12 52-4.

¹⁸⁹ See section 1.5 *Reception into South African law* at note 63 above.

The second test from *Freeth v Burr*, which does not require a deliberate intention, was applied in *Schlinkman v Van der Walt*,¹⁹⁰ where it was argued that the plaintiff 'endeavoured to 'force upon the defendants' a lease containing unusual terms'. The court did not consider whether the plaintiff had deliberately repudiated the contract but rather whether the plaintiff evinced an intention no longer to be bound by the contract.¹⁹¹ This was by no means the first application of the test for repudiation in this manner in South African law and there is nothing to suggest that courts considered this anything other than a standard application of the subjective test set out in *Freeth v Burr*.¹⁹²

Using a party's subjective intention provided a basis for determining whether the conduct complained of was a sufficiently serious infringement so as to justify cancellation, and thus whether the conduct constituted a repudiation. This test was able to deal with circumstances where the repudiation did not relate to the entire contract, where there was an insistence on performing the contract in a manner otherwise than had been agreed and with circumstances where there was not an explicit refusal but rather conduct which suggested a reluctance to perform the contractual obligations.

This reliance on the infringing party's subjective intentions is however not without difficulties. In *Forslind v Bechely Crundall*,¹⁹³ a Scottish case decided by the Privy Council, the respondent, a timber merchant, had bought eleven lots of growing timber. In terms of the agreement the purchasers were however only entitled to fell trees on up to four of those lots at a time.¹⁹⁴ The appellant entered into an agreement for the purchase of the timber from one of these lots. Because the respondent was at the time busy felling timber on four of the lots he was unable to commence felling the timber for the appellant and repeatedly delayed commencing cutting the timber.¹⁹⁵

The issue that arose was that it would seem that the respondent's conduct did not amount to a clearly expressed refusal to perform but rather a sustained failure to perform correctly. This failure suggested that the respondent did not intend to perform correctly at all. Lord Dunedin noted that

'the respondent assumed such a shilly-shallying attitude in regard to the contract that the appellant was entitled to draw the inference that the respondent did not really mean to fulfil his part of the contract timeously, although he might, if he found it suited him.'¹⁹⁶

Absent a clearly expressed refusal, adopting an approach which considered the subjective intention of the potentially breaching party would mean that if that party showed that she or he did actually intend to perform correctly, as was possibly the case in *Forslind*, then her or his conduct would not constitute a breach. The aggrieved party, by acting on the purported repudiation and cancelling the contract, would then be committing a breach.

This would operate particularly inequitably when an aggrieved party, who had been led to believe by the other party's conduct that they did not intend to perform, was in fact committing a breach by

¹⁹⁰ *Schlinkman v Van der Walt supra* note 60 919.

¹⁹¹ *Ibid* 918-9.

¹⁹² See *Estate Nathan v Estate Grix* (1911) 32 NPD 262; *Legate v Natal Land and Colonization supra* note 58; *Damont v Gevers supra* note 58.

¹⁹³ *Forslind v Bechely Crundall supra* note 63.

¹⁹⁴ *Ibid* 174-6.

¹⁹⁵ *Ibid*.

¹⁹⁶ *Ibid* 190.

cancelling the contract on the basis of the apparent repudiation. The difficulties posed by the facts of *Forslind* are illustrated by the approaches adopted by the different judges. Viscount Finlay, in the minority, required the appellant to show something clearly amounting to a refusal to perform the contract, which in his opinion the appellant failed to do.¹⁹⁷

On the other hand Viscount Haldane found that '[i]n order to establish such a repudiation it was not necessary for the appellant to prove any express, or even conscious, intention on the respondent's part.'¹⁹⁸ Viscount Haldane then expressed the test for repudiation as rather being whether the potentially repudiating party had '... behaved in such a way that a reasonable person would properly conclude that he does not intend to perform the obligations he has undertaken'.¹⁹⁹ As is evident from the quotation from his judgment above, Lord Dunedin looked at the respondent's conduct more generally in order to support his agreement with Viscount Haldane.

A party then commits a breach when their conduct would indicate that they do not intend to perform their obligations correctly. This reliance on the apparent intention, rather than the actual intention, of the party is generally referred to as the objective, as opposed to the subjective, test for repudiation. Lord Shaw, acknowledging how entrenched Lord Coleridge's language in *Freeth v Burr* with its emphasis on intention was, found himself inclined to go further.²⁰⁰ Lord Shaw does this by casting doubt on the use of intention at all.²⁰¹ His reasoning is founded on the basis that a party's intention may be very difficult to analyse or may lack clarity and not amount to any specific intention one way or the other and that the emphasis should rather be placed on whether the conduct would 'fundamentally affect the fair carrying out of the bargain as a whole'.²⁰² The significance of this view is discussed in more detail below.²⁰³

Despite what would seem to be the obvious advantages of an objective test, and the recognition of this approach in academic writing, the South African and English courts continued to apply the test set out by Coleridge CJ in *Freeth v Burr* throughout the earlier half of the 20th century.²⁰⁴ An explanation for this can perhaps be found in the analysis conducted by Nienaber, where he found that although the South African and English courts stated the test as being subjective, their approach was in general equally consistent with the application of an objective test.²⁰⁵ It would seem that in most cases the apparent intention of the potentially breaching party either reflected their actual intentions or, as Nienaber suggests, the courts were merely paying lip service to the subjective test while actually applying an objective test.²⁰⁶

A full half century after the decision in *Forslind v Bechely-Crundall*, in *Ponisammy and Another v Versailles Estates*²⁰⁷ Muller JA quoted Devlin J's expression of the *Forslind* test in *Universal Cargo*

¹⁹⁷ *Ibid* 185.

¹⁹⁸ *Ibid* 179.

¹⁹⁹ *Ibid*.

²⁰⁰ *Ibid* 191.

²⁰¹ *Ibid*.

²⁰² *Ibid*

²⁰³ See 2.3 *The predicted breach* below.

²⁰⁴ For reference to *Forslind* see Wessels *op cit* note 63 at 2923; for application of the test in *Freeth v Burr* by courts see note 61 above.

²⁰⁵ Nienaber (1961) *op cit* note 21 267.

²⁰⁶ *Ibid*.

²⁰⁷ *Ponisammy supra* note 61.

Carriers Corporation v Citati.²⁰⁸ The dispute in *Ponisammy* concerned the sale of a portion of the farm Versailles from Mrs Ponisammy to the respondent, a company incorporated for the purpose of acquiring the farm and represented by a Mr Pienaar. The buyer encountered some difficulties in furnishing the required banker's guarantee and after a number of delays phoned the seller to ask for a further extension. The seller rejected this proposal and summarily cancelled the contract and sold the portion of the farm to a third party.

Importantly, as the contract did not contain a cancellation clause and it was clear from the contract that 'time was not of the essence of the contract' the seller was not entitled to cancel the contract without notice. The seller therefore argued that the buyer's conduct, in requesting an extension, had amounted to a repudiation of the contract. As a result, it was as authority for the proposition that a repudiation could be established on the basis of conduct that Muller JA relied on the statement by Devlin J from *Universal Cargo Carriers v Citati* that:

'A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renouncing must 'evinced an intention' not to go on with the contract. The intention can be evinced either by words or by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renouncing has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract.'²⁰⁹

Despite including Devlin JA's expression of the objective test from *Forslind* in the quotation Muller JA did not rely on this in order to come to the conclusion that the buyer had not repudiated the contract. Rather, Muller JA would appear to have accepted that Mr Pienaar's words and conduct were consistent with his actual intention, that being to arrange for an extension of time within which the buyer could perform.²¹⁰

In deciding whether this constituted a repudiation the focus of Muller JA's analysis was not on Mr Pienaar's intention, apparent or actual, but rather on the consequences that were predicted by Mr Pienaar's conduct. Muller JA ultimately found that the indication that:

'the plaintiff company would not be able to furnish the banker's guarantee by 23rd January, 1971, cannot be regarded as an intimation that the said company would also be unable to do so within a reasonable time after that date. On the contrary, it must have been clear to [the seller's representative] that the very object of Mr. Pienaar's visit was to obtain a further extension of time so as to enable the plaintiff company to perform its obligation.'²¹¹

The specific relevance of making the predicted consequences the focus of the enquiry, over the breaching party's intentions, is discussed below.²¹²

The Appellate Division's subsequent finding in *Van Rooyen v Minister van Openbare Werke*²¹³ that a subjective intention to bring the contract to an end is not required, although suggesting a shift to an objective approach, again rather dealt with the question of whether a repudiation had to be

²⁰⁸ *Ibid* 387; *Universal Cargo Carriers supra* note 63.

²⁰⁹ *Universal Cargo Carriers supra* note 63 436.

²¹⁰ *Ponisammy supra* note 61 387.

²¹¹ *Ibid*.

²¹² See section 2.3 *The predicted breach* below.

²¹³ *Van Rooyen supra* note 60.

deliberate. It was therefore only in *Tuckers Land and Development Corporation v Hovis*²¹⁴ that the court based its determination on the apparent, rather than actual intention, of the breaching party.

In *Tuckers Land and Development Corporation*, another dispute concerning the sale of land, the appellant, a township developer, had sold two plots to the respondents. The agreement was suspended until such time as the proposed township in which the plots were situated had been approved by the relevant authority. The appellant, running into difficulties in obtaining such approval, submitted a revised plan which omitted the plots in question. Jansen JA, noting that '[w]hat the proper test to be applied to the promisor's conduct [was] not obvious', used the decisions in *Van Rooyen* and *Ponisammy* as justification for applying the test from *Mainline Cargo Carriers v Citati*.²¹⁵

Without any finding as to what the appellant's actual intention may have been, Jansen JA concluded that the appellant's conduct would have led a reasonable person to the conclusion that the appellant no longer intended to deliver the plots in question and had therefore repudiated the contract.²¹⁶ Despite this, and causing some confusion, the same court then went on to state and apply the test for repudiation in subjective terms in *Nash v Golden Dumps*²¹⁷ and *Culverwell v Brown*.²¹⁸

This position was clarified with the subsequent statements in *O K Bazaars (1929) Ltd v Grosvenor Building (Pty) Ltd and Another*²¹⁹ and *Metamil (Pty) Ltd v AECl Explosives and Chemicals Ltd*²²⁰ that the test for repudiation is objective. It is however noteworthy that in each of these cases the statement was used to justify a finding that the breaching party had repudiated the contract despite not having a deliberate intention to repudiate the contract. This is evident as in each case the court based its decision on a finding that the breaching party intended to perform the contract in a manner inconsistent with the contract's objective interpretation. It was only in the case of *Highveld 7 Properties (Pty) Ltd and Others v Bailes*²²¹ that the court based its reasoning on what a reasonable person in the position of the aggrieved party would have concluded.

It should be noted that as the apparent intentions of the parties in *Nash*, *Culverwell*, *O K Bazaars* and *Metamil* were consistent with their actual intentions, application of the objective test would have yielded the same outcome as was reached using the breaching party's actual intention. It is nonetheless significant that in each case the court considered the actual intention of the parties, even where, as in *O K Bazaars* and *Metamil*, the test was stated in objective terms. Although the objective test was given judicial approval in a number of cases at the level of the Supreme Court of Appeal, the court went on to justify a finding that a party was in breach on the basis of the party's actual intentions (applying a subjective test) as often as it based its finding on the party's apparent intentions (applying the test in a truly objective manner).

²¹⁴ *Tuckers supra* note 60.

²¹⁵ *Ibid* 653.

²¹⁶ *Ibid*.

²¹⁷ *Nash supra* note 106.

²¹⁸ *Culverwell v Brown supra* note 60.

²¹⁹ *O K Bazaars (1929) Ltd v Grosvenor Building (Pty) Ltd and Another* 1993 (3) SA 772 (A).

²²⁰ *Metamil supra* note 60.

²²¹ *Highveld 7 Properties (Pty) Ltd and Others v Bailes* 1999 (4) SA 1307 (SCA).

These cases are indicative of a reluctance to move away from using a party's actual intention as a basis for determining whether or not they have committed a repudiatory breach. At a minimum, these cases speak to a failure to clearly state that the finding that a party had breached the contract was based on what a reasonable person would have concluded the breaching party's intentions were. It would seem fairly uncontroversial that an objective test is preferable to a subjective test and as such this somewhat equivocal stance certainly justifies Nienaber JA's reiteration and explanation of the objective test in *Datacolor*.²²²

2.3 The predicted breach

The emphasis that has been placed on the objective nature of the test for repudiation means that there has been less emphasis placed on Nienaber JA's other significant finding regarding the test. Nienaber JA first confirms that 'repudiation is not a matter of intention, it is a matter of perception', the perception being that of a reasonable person.²²³ This is reflected in his characterization of repudiation as being

'an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor.'²²⁴

Significantly however Nienaber JA also found that:

'The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.'²²⁵

and that:

'Whether the innocent party will be entitled to rescind from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.'²²⁶

The question addressed by Nienaber JA here is not whether or not it would appear that a potentially breaching party is going to commit a breach but rather whether or not such impending breach would justify the aggrieved party cancelling the contract.

The test for repudiation formulated in *Freeth v Burr*, that a party must 'evinced an intention no longer to be bound by the contract' in order to repudiate the contract does not explicitly address what conduct would amount to an expression of intention to no longer be bound by the terms of the contract. Regardless of whether a party's intention is assessed subjectively or objectively it must still be determined whether the conduct is such as to demonstrate this intention to no longer be bound.

In the English case of *Johnstone v Milling*²²⁷ the lessor covenanted to repair the premises after the end of the first four years at the option of the lessee. Before the elapse of the first four years the

²²² See in particular the explanation given in paragraph [16]; the importance of using an objective approach has been recently restated in the decision of *B Braun Medical (Pty) Ltd v Ambasaam* CC 2015 (3) SA 22 (SCA) discussed in detail in section 3.5 *Cancellation for anticipatory breach of contract in South African law* below.

²²³ *Datacolor supra* note 1 at [16].

²²⁴ *Ibid* at [17].

²²⁵ *Ibid* at [16].

²²⁶ *Ibid* at [17].

²²⁷ *Johnstone supra* note 72.

lessor repeatedly told the lessee that he would be unable to obtain the money necessary in order to have the premises repaired. Lord Esher, although finding that it was not necessary to decide the point, found that as the covenant in question did not go to the whole consideration of the lease that an anticipatory breach of such covenant would not entitle the lessee to cancel the contract.²²⁸

This issue was again considered by the House of Lords in *Mersey Steel and Iron Co v Naylor, Benzon and Co*²²⁹ where the different judges took different approaches. Lord Selborne found that ‘you must examine what the conduct is, so as to see whether it amount to a renunciation, to an absolute refusal to perform the contract’.²³⁰ This focus on the intentions of the party can be seen again in the judgment of McCaig J in the English case of *In Re Rubel Bronze and Metal Company v Vos*²³¹ where he found that:

“In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and on the general circumstances of the case.”²³²

Liu labels this focus on intention as the ‘renunciation approach’ contrasting it with an approach that instead focuses on the consequences of the repudiation, rather than the party’s intentions.²³³

This focus on the consequences of the breach can be seen in Lord Blackburn’s judgment in *Mersey Steel* where, unlike Lord Selborne, he built on Lord Esher’s findings in *Johnstone*, and distinguished between terms the breach of which entitles the other party to cancel the contract, a breach which goes to ‘the root of the whole and substantial consideration’, and those which do not.²³⁴ This focus on the consequences of the breach, whether the breach will ‘deprive [the aggrieved party] of substantially the whole of the consideration’ or amounts to a ‘fundamental breach’, Liu labels the ‘fundamental breach approach’.²³⁵

Liu uses two decisions of the House of Lords, *Federal Commerce & Navigation Ltd v Molena Alpha Inc*²³⁶ and *Woodar Investment Development Ltd v Wimpey Construction*,²³⁷ to illustrate this ‘patent dichotomy’ in approach.²³⁸ Briefly, in *Federal Commerce* the dispute concerned a charterparty agreement where the charterers, in response to a ‘disastrous slump’ in the shipping market operating to the disadvantage of the charterers, had made a number of deductions from the hire due under the charter.²³⁹ The owners, taking exception to such deductions, instructed the master of the ship not to sign any bill of lading endorsed ‘freight prepaid’. The House of Lords, focusing on the

²²⁸ *Ibid* 468.

²²⁹ *Mersey Steel supra* note 44.

²³⁰ *Ibid* 439.

²³¹ *In Re Rubel Bronze supra* note 62.

²³² *Ibid* 322.

²³³ Liu (2011) *op cit* note 12 50.

²³⁴ *Mersey Steel supra* note 44 at 443.

²³⁵ Liu (2011) *op cit* note 12 49 from *Federal Commerce & Navigation Ltd v Molena Alpha Inc* [1979] AC 757 (HL).

²³⁶ *Federal Commerce supra* note 235.

²³⁷ *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 (HL).

²³⁸ Liu (2011) *op cit* note 12 48.

²³⁹ *Federal Commerce supra* note 235 774-5; *Federal Commerce and Navigation Ltd v Molena Alpha Inc and others The Nanfri, The Benfri, The Lorfri* [1978] 3 All ER 1066 1071-5.

severe consequences for the charterers which would arise if such instruction had been carried out, found that the owner's conduct would have deprived the charterers of 'substantially the whole benefit of the contract.'²⁴⁰

Woodar, decided just one year later with Lord Wilberforce, Lord Scarman and Lord Russell being present on the bench in both cases, involved a dispute concerning the sale of land. The purchasers, responding to a falling market, purported to cancel the agreement in terms of a special condition contained in the contract.²⁴¹ The sellers correctly rejected such cancellation as being unfounded and cancelled the contract on the basis of the purchasers' repudiation and resold the property to a third party. Although involving a sale of land rather than a charterparty in both cases a party took steps which pointed to a future breach of contract. Yet the approach of the court in *Woodar* was not to focus on this predicted breach, but rather on the intention of the purchaser.²⁴²

The majority's focus on intention in *Woodar* is illustrated by the findings which they used to support the conclusion that the buyers had 'manifested no intention to abandon, or to refuse future performance of or to repudiate the contract.'²⁴³ These included that the sellers were relying on their solicitor's advice, that the notice of cancellation was a neutral document merely invoking one of the contract's terms and that as the notice was being disputed by the buyers that it was not an absolute refusal but rather conditional upon the court's decision.²⁴⁴ This would suggest that whether an aggrieved party is entitled to cancel a contract is based on the seriousness or absoluteness of the other party's refusal.

These two approaches can also be seen in the South African case law. For instance Lewis J, in his judgment in *Schlinkman v van der Walt*,²⁴⁵ quoted the same finding of McCardie J's from *In Re Rubel Bronze and Metal Company* as is quoted above.²⁴⁶ Two years later we see Watermeyer CJ in *Aucamp v Morton* quoting from Lord Blackburn's judgment in *Mersey Steel and Iron Co v Naylor, Bazon and Co*.²⁴⁷ Even more clearly, *Alfred Molena* and *Woodar* were considered alongside each other by Streicher JA in *Highveld 7 Properties*.²⁴⁸ The respondent in this case, the seller of a piece of land, relied on *Woodar* to argue that like the seller in *Woodar* they had intended the validity of their assertions to be tested in court and as such they did not amount to a repudiation.²⁴⁹ It is unsurprising then that Streicher JA drew on *Alfred Molena* for support of his finding against the respondents.²⁵⁰ The tension between these two decisions has led to the perhaps overly polite finding that the decisions are 'highly fact sensitive' and as such are difficult to reconcile.²⁵¹

²⁴⁰ *Ibid*.

²⁴¹ *Woodar supra* note 237.

²⁴² Liu (2011) *op cit* note 12 9-50.

²⁴³ Liu (2011) *op cit* note 12 49; *Woodar supra* note 237 283, 295.

²⁴⁴ Liu (2011) *op cit* note 12 50.

²⁴⁵ *Schlinkman supra* note 60.

²⁴⁶ See note 230 above.

²⁴⁷ *Aucamp v Morton supra* note 58.

²⁴⁸ *Highveld 7 Properties supra* note 221.

²⁴⁹ *Ibid* at [23]-[28].

²⁵⁰ *Ibid* at [31].

²⁵¹ *Eminence Property Developments Ltd v Heaney* [2011] 2 All ER (Comm) 223 at [62]; Chitty *op cit* note 12 at 24-020.

However, it is not clear that these findings represent two entirely distinct approaches by South African courts with either intention or the consequences being emphasised. Certainly the South African courts use the language of the 'renunciation approach' co-extensively with a discussion of consequences typical of the 'fundamental breach approach'. In *Ponisammy* Muller JA noted that a repudiation can be made by words or conduct provided that they 'must evince a clear intention not to perform the obligation due under the contract'.²⁵² After this Muller JA supports his decision with the finding that the buyer's representative's communication to the seller that it would not be able to perform by the agreed date could not be regarded as indicating that the buyer would also be unable to perform within a reasonable period after that date.²⁵³

In circumstances where a party has given a clear indication that they do not intend to perform the contract in its entirety the renunciation approach is not without merit.²⁵⁴ More often than not where a party's intentions are to not perform the contract at all or to perform it in a manner that is substantially at odds with their actual obligations one would expect that she or he will be able to give effect to their intention. It follows that once such an intention has been established that party should be found to have repudiated the contract.

We therefore see that where a party has exhibited an intention to not perform the contract in its entirety, or at least the significant part thereof, courts would seem to follow what is the orthodox and predominant approach in English law, the 'renunciation approach'.²⁵⁵ In such cases the consequences are generally obvious, the breaching party will not perform their agreed obligations and thus will entirely compromise the aggrieved party's interest in the contract.

*Metamil v AECI*²⁵⁶ provides an example of such a situation, where it was the breaching party's intention which was going to be determinative of the eventual outcomes. The dispute concerned a contract for the supply of scrap copper.²⁵⁷ The respondent had undertaken to source all of its objective needs for scrap copper from the appellant. The respondent, taking the incorrect view that it was entitled to do so, instead sourced copper from a third party. The respondent had a clear intention to perform the contract in a manner that was inconsistent with the terms of the contract. The focus of the judgment on the repudiating party's intention rather than on the consequences of their attitude can easily be attributed to the fact that the breach which had occurred (ordering scrap copper from a third party instead of the appellant), and the further breaches which were predicted, were entirely determined by the respondent's attitude to the contract.²⁵⁸

By contrast, in cases where the breach threatened by a party is not as conclusive as a complete repudiation of the contract, a court is required to delve into what consequences would flow from such breach. This is well illustrated by the facts of *Ponisammy*, where the buyer's conduct indicated that a breach in the form of a delay was going to occur but gave no indication that the buyer would not be able to perform within a reasonable period after the due date.

²⁵² *Ponisammy supra* note 61 387.

²⁵³ *Ibid* 387-8.

²⁵⁴ For more recent examples see for instance *Tuckers supra* note 60; *Nash supra* note 106; *Culverwell v Brown supra* note 60; *Datacolor supra* note 1.

²⁵⁵ *Van Rooyen supra* note 60; *Metamil supra* note 60.

²⁵⁶ *Metamil supra* note 60.

²⁵⁷ *Ibid*.

²⁵⁸ *Ibid* 681.

It is also necessary to examine the consequences where a party's intentions are unclear. In *Tuckers Land and Development Corporation*,²⁵⁹ the facts of which are discussed above, it was uncertain what the land developer's intentions were and Jansen JA focused on the predicted consequences of its actions, being the non-delivery of the properties which were the subject of the sale agreement.²⁶⁰ Courts are not often required to emphasise the consequences of the breach as cases involving repudiation frequently involve conduct that indicates a complete unwillingness to perform, such as arising from the invalid cancellation of an agreement.²⁶¹

Prior to *Datacolor*, the South African courts continued to make use of the test for repudiation set out in *Freeth v Burr*, being whether a party demonstrates 'an intention no longer to be bound'²⁶² without giving explicit content to what would amount to such an intention. We therefore see decisions where the court has had recourse to the predicted consequences of the potentially repudiating party's conduct and also decisions where the enquiry seems to be restricted to the intention and attitude of the potentially repudiating party's conduct.²⁶³ Nonetheless this does not demonstrate the 'patent dichotomy' found by Liu in the English case law. South African courts would, in general, appear to consider the consequences of the potentially breaching party's conduct where this is not a complete or substantial denial of their obligations or where their intentions are not clear.²⁶⁴ Certainly Streicher JA in *Highveld Properties* was quick to emphasise the consequences predicted by the seller's conduct in response to an argument by counsel based on the decision in *Woodar*.²⁶⁵

Where the decision in *Datacolor* differs from these earlier cases is that it makes an explicit connection between the remedies available to the aggrieved party and the predicted breach. In terms of the decision in *Datacolor* whether or not an aggrieved party will be entitled to cancel the contract is determined with specific reference to the predicted consequences of the offending party's conduct. This would suggest a two stage approach with the consequences predicted by the offending party's conduct first being determined and then these consequences assessed to determine whether such breach justifies cancellation.²⁶⁶

As is illustrated above, an approach which considers the consequences of the offending party's conduct, rather than merely their intentions and attitude, is well established in the South African

²⁵⁹ *Tuckers supra* note 60.

²⁶⁰ *Ibid* 653.

²⁶¹ *Culverwell v Brown supra* note 60; *Metamil supra* note 60,

²⁶² *Van Rooyen supra* note 60 845; *Street v Dublin* 1961 (2) SA 4 (W) 10; *Inrybelange v Pretorius* 1966 (2) SA 416 (A) 427; *Ponisammy supra* note 61 387; *Tuckers supra* note 60 650; *Culverwell v Brown supra* note 60 14; *O K Bazaars supra* note 219 480; *Highveld supra* note 221 318.

²⁶³ For examples considering the predicted consequences see *Ponisammy supra* note 61; *Tuckers supra* note 60 650; *O K Bazaars supra* note 219; *Highveld Properties supra* note 60; for intention and attitude see *Nash supra* note 106; *Culverwell v Brown supra* note 60; *Metamil supra* note 60.

²⁶⁴ *Ponisammy supra* note 61; *Tuckers supra* note 60; *O K Bazaars supra* note 219; *Highveld supra* note 221.

²⁶⁵ *Highveld Properties supra* note 60 at [23]-[29].

²⁶⁶ Van der Merwe *et al op cit* note 2 307, 315; Hutchison *op cit* note 2 298-9, although this two stage approach is qualified in respect of repudiation relating to the entire contract, the basis and merit of such qualification is discussed in the following chapter; a two stage approach would also be consistent with the position in transnational instruments such as the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980) Article 72 (the CISG), the Principles of European Contract Law (2002) (the PECL) Art 8:304 and the *UNIDROIT Principles of International Commercial Contracts* (2010) (the PICC) discussed below.

case law. Nienaber JA's finding nevertheless represents a significant shift in the law as it makes it necessary to consider what consequences are predicted by a party's conduct.

The test set out in *Datacolor* provides a mechanism for determining whether the conduct complained of by the aggrieved party justifies the cancellation of the contract. It does this with reference to the 'non- or malperformance' predicted by the offending party's conduct. This is consistent with the position that a right of action arises from an anticipatory breach on the basis that the breaching party's actions have compromised the aggrieved party's interest in the promised performance which is discussed above.²⁶⁷ If it is the anticipated breach of the promised performance that gives rise to an anticipatory breach then the extent of this effect should determine whether a right to cancel arises.

The combination of an objective test for repudiation and the requirement that whether a party will be entitled to cancel the contract be determined with reference to the predicted breach has the further effect of requiring that the predicted outcomes should not be determined with reference only to the offending party's objectively determined intentions.²⁶⁸ That is, the predicted 'non- or malperformance' should be determined by looking at what outcome the offending party's conduct predicts, an entirely objective test, rather than only what their apparent (objective) intention predicts.²⁶⁹

This fairly subtle distinction is required because an objective intention may not be determinative of the likely outcome. This can occur where a party has no particular intention one way or the other or where they are not likely to be able to bring about what they intend to occur.²⁷⁰ Interestingly these shortcomings of an approach which focuses on the breaching party's intentions, are exactly those identified by Lord Shaw in *Forslind v Bechely-Crundall* which were noted above.²⁷¹

Nienaber JA's judgment in *Datacolor* does not make it entirely clear whether or not he considered, and intended this implication, that an entirely objective test should be used, as he continues to use the 'inferred intention' as the basis for determining the threatened breach.²⁷² However, the test that is implied by a purely objective approach is essentially what Nienaber JA sets out in *Datacolor*, being that:

'a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.'

Nienaber's academic writings would also suggest that he did consider and intended the entirely objective test set out above. There he notes that 'as soon as emphasis is placed not on the actual

²⁶⁷ See section 1.6 *Basis* above.

²⁶⁸ This is discussed more fully by Martin Fischer 'Conduct Constituting Anticipatory Breach of Contract' unpublished LLB research paper UCT (2011).

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Forslind v Bechely-Crundall supra* note 63 191.

²⁷² *Datacolor supra* note 1 at [1], [16] and [17].

animus of the repudiator, but on the effect of his conduct on the mind of a reasonable person, the animus falls away²⁷³ and that as soon as an inferred intention is used the test is objective.²⁷⁴

Further, in his academic writing Nienaber distinguishes between repudiation, relative prevention of performance and absolute prevention of performance on the basis of the certainty with which they predict a breach.²⁷⁵ He therefore groups repudiation and relative prevention of performance as they predict a breach with relative certainty and distinguish these categories from absolute prevention of performance, which predicts a breach with absolute certainty. Importantly Nienaber does not use the more traditional basis for distinguishing these forms of breach on the basis that a repudiation consists in positive expression of intent in contrast to prevention of performance which does not.²⁷⁶

If it is the predicted non- or malperformance which determines the existence of a repudiatory breach and whether a right to cancel the contract arises then it is no longer possible to distinguish between repudiation and prevention of performance on the basis that repudiation requires some positive expression of intent by the offending party.²⁷⁷ It would seem therefore that Nienaber likely intended for the test to be applied as an entirely objective test which considers whether the outcomes predicted by the breaching party's conduct would justify affording the aggrieved party a right to cancel the contract.

It should be noted that one consequence of applying a purely objective test would appear to conflict with Nienaber JA's findings in *Datacolor*,²⁷⁸ that being that an anticipatory breach need not consist of any positive conduct by the breaching party. It is possible to reach a conclusion that a party will not correctly perform their obligations without relying on any action by the contracting party. There is then no reason to limit anticipatory breach to circumstances where the conduct of the contracting party in question forms the basis for such conclusion. Where the conduct of a third party makes it clear in the circumstances that a contracting party will commit a non- or malperformance this can also amount to an anticipatory breach by that contracting party.²⁷⁹

Circumstances that could amount to an anticipatory breach would therefore go beyond a 'speaking silence',²⁸⁰ that is where 'the previous conduct of a party in refusing to perform another related contract may give rise to the inference that he will refuse to perform the contract in question'.²⁸¹ Rather, consistent with the view expressed by Devlin J in respect of prevention of performance but applying also to repudiation, a party commits an anticipatory breach 'when by his [or her] own act or default circumstances arise which render him unable [or apparently unwilling] to perform his side of the contract or some essential part thereof'.²⁸²

Drawing on the example discussed in the first chapter, where A has entered into a contract for the sale of a painting to B and B has entered into a contract of sale for the painting with C, if A

²⁷³ Nienaber (1961) *op cit* note 21 241.

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid* 223-4.

²⁷⁶ Nienaber's views can be contrasted with Van Rensburg *et al op cit* note 3 408.

²⁷⁷ Fischer *op cit* note 268.

²⁷⁸ *Datacolor supra* note 1 at [17].

²⁷⁹ Again this can be contrasted with the view expressed by Van Rensburg *et al op cit* note 3 408.

²⁸⁰ *Stocznia Gdanska SA v Latvian Shipping Co* [2002] EWCA Civ 889.

²⁸¹ Treitel *op cit* note 15 840.

²⁸² *Universal Cargo Carriers supra* note 63 441.

communicates to C that she or he will not deliver the painting to B, this could amount to an anticipatory breach of contract by B in respect of the contract between B and C (it would also be an anticipatory breach by A in respect of the contract between A and B). This is consistent with the unified approach to anticipatory breach of contract necessitated by applying a purely objective test as the same conclusion would be reached if the anticipatory breach consisted of prevention of performance rather than repudiation. Using the same example, if A destroyed the painting, making it impossible for B to deliver the painting to C, this would also amount to an anticipatory breach by B of the contract between B and C, despite there being no positive conduct by B.

This is difficult to reconcile with Nienaber JA's definition which relies on 'an intimation' by a contracting party.²⁸³ At the same time Nienaber JA reasons that it is not the repudiating party's intentions which form the basis of an anticipatory breach but the conclusion which would be drawn by a notional reasonable person in the position of the defendant.²⁸⁴ Following this reasoning there is no basis for insisting that an anticipatory breach must consist of conduct by the contracting party. If circumstances were such that a reasonable person would conclude that a party had acted in a manner that amounted to an anticipatory breach this would be sufficient to establish that a breach had occurred, even if the repudiating party had not in fact acted in this way. It is clear that the conclusion need not be based on the breaching party's conduct.

The decision in *Datacolor* is not clear on this point but it is clear that if the basis for an anticipatory breach rests in the predicted non- or malperformance and that there is no reason to limit anticipatory breach to circumstances where this prediction is based on the conduct of the breaching party. The use of the terminology of 'conduct by a contracting party' in defining anticipatory breach of contract is therefore not ideal. The 'conduct' in question could take the form of a failure to act in circumstances where absent any positive action a conclusion that the contract will not be correctly performed will be reached.

The potential problems that arise through restricting anticipatory breach to 'conduct by a contracting party' are best illustrated using the example of the first seller A destroying the painting. Where there is no course of action open to B to prevent the destruction of the painting this would nonetheless amount to an anticipatory breach of contract. It is however difficult to describe the conclusion that B will not correctly perform her or his obligations to C as being based on B's 'conduct' even if 'conduct' includes omissions. A better description would be to describe anticipatory breach as 'conduct or circumstances which predict a non- or malperformance'. Although not ideal, the use of 'conduct' as a description is not overly problematic as long as it is accepted that the conduct in question can consist of a failure or inability to prevent circumstances arising which support a conclusion that the contract will not be correctly performed. Nonetheless preference will be given to the use of 'conduct or circumstances' in this thesis where possible.

Liu proposes a substantially similar test for repudiation to the test set out in *Datacolor* for use in the English law. He characterises an anticipatory breach as an 'inferred fundamental breach' and notes that the intention based test was 'developed from and tailored for an "outright refusal" to perform', placing form over substance.²⁸⁵ By focusing on the outward expression of intent it can overlook the

²⁸³ *Datacolor supra* note 1 at [17].

²⁸⁴ *Ibid* at [16].

²⁸⁵ Liu (2011) *op cit* note 12 65-9, 73.

underlying reason why a remedy is granted, that being the anticipated breach.²⁸⁶ A further consequence of the adoption of such a test which gets the support of both Liu and Nienaber is that because anticipatory breach is defined with reference to the predicted consequences and not with reference to time set for performance, a breach will constitute an anticipatory breach even if it occurs after the time stipulated for performance.²⁸⁷ The distinction between repudiation and prevention of performance occurring before the time for performance and after the time for performance disappears. Liu further notes that a consequence of this construction is that the inference that a party will commit a fundamental breach need not be based on conduct by the party in question, as is suggested above.²⁸⁸

Because anticipatory breach of contract is established on the basis of a prediction of a future non- or malperformance it is necessary to establish the degree of likelihood which is required in order to recognise a breach. Nienaber JA's judgment addresses this issue with a finding that

'[t]he conduct from which the inference of an impending non- or malperformance is to be drawn must be clearcut and unequivocal, i e not equally consistent with any other feasible hypothesis.'²⁸⁹

Unfortunately this finding is somewhat misleading and is inconsistent with the structure of the objective test proposed by Nienaber JA in the preceding paragraphs. If an anticipatory breach is to be established on the basis of an inference of impending non- or malperformance as Nienaber JA suggests then it is the likelihood of such non- or malperformance which should be determinative of whether conduct constitutes an anticipatory breach rather than whether such conduct is 'clearcut and unequivocal'.

Where the existence of a repudiation is determined by the intentions of the potentially breaching party it is appropriate to use the clarity with which their conduct expresses an intention to repudiate as a basis for determining whether an anticipatory breach has occurred. Where an anticipatory breach is rather based on an inference of impending non- or malperformance the clarity of expression is relevant only to the extent that it provides support for such inference, the ultimate criterion must be the likelihood of a breach occurring.

That a relatively high degree of likelihood is required is established by the finding that an anticipatory breach is 'not lightly to be presumed'.²⁹⁰ This is consistent with findings in English cases that what is required is a 'firm conclusion, reasonably inferred'²⁹¹ and which distinguish between a 'possibility of breach and a reasonable probability'.²⁹² The most succinct exposition of this standard can be found in the CISG, PECL and PICC which require that it be 'clear' that a party will commit a non-performance.²⁹³ The test employed in these transnational instruments provides a standard that is consistent with basing anticipatory breach on an inferred future breach while remaining consistent

²⁸⁶ *Ibid.*

²⁸⁷ Nienaber (1961) *op cit* note 21 241; Liu (2011) *op cit* note 12 39-43.

²⁸⁸ Liu (2011) *op cit* note 12.

²⁸⁹ *Datacolor supra* note 1 at [19]

²⁹⁰ *Ibid.*

²⁹¹ *Chilean Nitrate Sale Corporation v Marine Transportation Company Limited Pansuiza Compania De Navegacion SA* [1982] 1 Lloyd's Rep 570 CA 580.

²⁹² *Maple Flock Co v Universal Furniture Products (Wembley) Ltd* (1934) 1 KB 148 157.

²⁹³ CISG Art 72 *op cit* note 266; PECL 9:304 *op cit* note 266; PICC Art 7.3.3 *op cit* note 266.

with the requirement that an anticipatory breach should not be lightly presumed. Liu draws on English case law to suggest that an anticipatory breach should be established on the normal standard of a balance of probabilities.²⁹⁴ However, this would seem to be at odds with much of the language quoted above which would suggest a higher standard than merely ‘more likely than not’.

The requirement that it be ‘clear’ that a party will commit a non- or malperformance provides a general standard for determining whether a party’s conduct sufficiently supports the inference that they will commit a breach. The standard set out by Nienaber JA that a party’s conduct must be ‘clear and unequivocal’, although still applicable where an anticipatory breach is being established only on the basis of a statement of intent by a party, as in *Datacolor*, is not adaptable to circumstances where the breaching party’s intentions are not the basis for establishing the anticipatory breach or are not likely to be determinative of the eventual outcome. The requirement that it be ‘clear’ that a party will commit a non- or malperformance is therefore preferable as it is more consistent with the purely objective test.

That Nienaber JA still applied the ‘clear and unequivocal’ standard does undermine the argument presented above that Nienaber JA intended to apply a purely objective test. The purely objective test is more consistent with Nienaber JA’s academic writing and judgment as a whole than the alternatives. It would seem that the purpose of the ‘clear and unequivocal’ standard was to stress the position that a repudiation was not to be lightly presumed, that is that a relatively high degree of probability was required, rather than to suggest that the test was subjective in nature.

The development of an objective test is consistent with the test used in transnational instruments which are again structured in a substantially similar manner to the test set out in *Datacolor*.²⁹⁵ It should be noted that the two stage approach which the test suggests, that is considering what non- or malperformance is predicted and then determining whether such breach would give rise to a right to cancel by applying the normal rules on breach of contract does give rise to some uncertainty as a result of the fissured concept of breach of contract,²⁹⁶ particularly in the case of *mora debitoris*, and this is discussed in more detail below.²⁹⁷

2.4 *Repudiation is a material breach*

As noted above the ‘traditional approach’ or ‘offer acceptance model’ in terms of which repudiation must go to the ‘root’ of the contract and is completed upon the acceptance of the repudiation by the aggrieved party was quickly established in English law as the foundation of this form of breach of contract.²⁹⁸ This ‘traditional approach’ is viewed as having been conclusively rejected by *Datacolor* and a ‘new approach’ to repudiation established.²⁹⁹ In terms of this ‘new approach’ repudiation consists of conduct intimating that ‘all or some of the obligations arising from the agreement will not be performed according to their true tenor’ and ‘the so-called “acceptance”, although a convenient

²⁹⁴ Liu (2011) *op cit* note 12 76-7.

²⁹⁵ *Ibid.*

²⁹⁶ Van der Merwe *et al op cit* note 2 315; Naudé and Lubbe *op cit* note 4 374.

²⁹⁷ See section 3.2 *Origin and development of cancellation for mora*.

²⁹⁸ *Johnstone v Milling supra* note 72; *Freeth v Burr supra* note 42; *Mersey Steel supra* note 44.

²⁹⁹ Van der Merwe *et al op cit* note 2 307.

catchword, does not “complete” the breach but is simply the exercise by the aggrieved party of his right to terminate the agreement.’³⁰⁰

Although Nienaber JA clearly endorses Jansen JA’s characterisation of the ‘acceptance’ as being the exercise of a right to cancel,³⁰¹ his position with respect to the requirement that a repudiation consists of a material breach is not as clear in his *Datacolor* judgment.³⁰² Rather than explicitly rejecting this aspect of repudiation, Nienaber JA rather provides the definition of repudiation given above, which omits the requirement that an anticipatory breach must consist of a predicted material breach. That Nienaber JA’s intention was to redefine repudiation as consisting of the intimation of any breach, and not just material breaches, and that the rejection of such material breach requirement was founded on the basis of a rejection of the ‘offer acceptance model’ has been accepted by academic authors and is clear from Nienaber’s academic writing.³⁰³

However, as was discussed above, this new construction of repudiation is open to criticism. Firstly, the rejection of the ‘offer and acceptance model’ does not necessarily entail a rejection of the requirement that the aggrieved party cancel the contract before claiming damages.³⁰⁴ As Liu notes, the ‘principle of election’ can be broken down into two separate propositions. Liu labels these the ‘breach conversion’ rule, that until acceptance a repudiation is not complete and thus no breach at all, and the ‘conditional damages claim’ rule, that a repudiation is an immediate breach however the claim for damages is conditional upon cancellation of the contract.³⁰⁵ It is clear from Nienaber’s academic writings that he does not consider retaining the ‘conditional damages claim rule’ while dispensing with the ‘breach conversion rule’ as a possibility.³⁰⁶

Secondly, contrary to Nienaber’s view, the rejection of the acceptance requirement, although allowing for conduct or circumstances predicting a non-material breach to constitute repudiation, does not require, or even support, the rejection of the ‘conditional damages claim rule’. Importantly, in *Datacolor*, the breach predicted by the respondent’s non-compliance with the cancellation provisions in the contract was complete non-performance, which would constitute a material breach.³⁰⁷ The plaintiff also communicated to the respondents an intention to cancel the contract, as did the aggrieved party in *Stewart Wrightson* from which Nienaber JA drew support.³⁰⁸ Following from this, any finding by the court that a repudiation need not consist of conduct or circumstances predicting a material breach or that cancellation of the contract is not necessary is *obiter*. These findings have also not been confirmed or supported in subsequent decisions on repudiation and are therefore open to reconsideration.³⁰⁹

³⁰⁰ *Datacolor* supra note 1 at [1], [17]; Van der Merwe *et al* op cit note 2 307; Hutchison op cit note 2 298-9.

³⁰¹ *Datacolor* supra note 1 at [1].

³⁰² *Ibid*.

³⁰³ Van der Merwe *et al* op cit note 2 307; Hutchison op cit note 2 298-9; Nienaber (1961) op cit note 21 277; Nienaber (1989) op cit note 3 2-4.

³⁰⁴ See the discussion at 1.6 *Offer-Acceptance model* above.

³⁰⁵ Liu (2005) op cit note 92 560.

³⁰⁶ Nienaber (1961) op cit note 21; Nienaber (1963) op cit note 21 222-5; Nienaber (1989) op cit note 3.

³⁰⁷ *Datacolor* supra note 1 at [5]-[8]; *Stewart Wrightson* supra note 60 653.

³⁰⁸ *Ibid* at [10].

³⁰⁹ *Bierman v Mutual & Federal Versekeringsmaatskappy Bpk* 2004 (1) SA 205 (O); *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA); *De Villiers and others v Van Zyl and another* [2005] 1 All SA 443 (NC); *Ndlovu v Santam Ltd* 2006 (2) SA 239 (SCA); *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd*

Dealing first with the ‘acceptance requirement’, it is clear that the ‘breach conversion rule’ is illogical and also at odds with decided case law and Jansen JA’s rejection of such in *Stewart Wrightson* is to be welcomed.³¹⁰ The ‘conditional damages claim rule’ does not suffer from such a flaw, as the breach of contract is immediately constituted by the offending party’s wrongful repudiation of the contract. It is only the claim for damages which is conditional on the cancellation of the contract by the aggrieved party.

Liu justifies the ‘conditional damages claim’ proposition with reference to the reasoning employed by Cockburn CJ in *Frost v Knight*.³¹¹ Cockburn CJ found that the repudiation impaired the aggrieved party’s ‘inchoate right to performance’, the ‘right to have the contract kept open as a subsisting and effective contract.’³¹² He then went on to find that as a result of the ‘contract having been thus broken by the promisor, and treated as broken by the promisee’ that the ‘eventual non-performance may therefore, by anticipation be treated as a cause of action, and damages be assessed and recovered.’³¹³ Liu submits:

‘Cockburn CJ in effect recognised that an anticipatory breach, although a present breach, was not sufficient automatically to give rise to a damages claim on its own, and a damages claim could only arise when an actual breach at the time for performance became “inevitable”.’³¹⁴

Lubbe employs similar reasoning in discussing the retraction of repudiation, a topic which will be discussed more fully below.³¹⁵ Importantly he notes that the ‘basis for cancellation ... is not the envisaged malperformance, nor the expectation of it, but the present breach of an existing duty’ and, criticising Nienaber’s reasoning, that ‘it is not clear that the right to cancel can be brought home under the element of prospectivity to the same extent as the claim for damages.’³¹⁶ Although not written in support of the conditional damages claim rule, Lubbe’s discussion of the justification for the right to cancel, which is founded on the immediate breach by the repudiator, as separate from the right to claim damages, which arises once the non-performance is made certain by the aggrieved party’s cancellation of the contract, is consistent with and would appear to support the application of Liu’s reasoning to the South African law.³¹⁷

The justification for the right to cancel is then founded in the immediate breach constituted by the repudiation itself and the claim for damages is justified by the prospective non-performance of the breaching party’s obligations, which arise from the cancellation. This construction is suggested by Cockburn CJ in *Frost v Knight* and endorsed by Liu and Lubbe. It would then seem entirely plausible

[2010] 2 All SA 295 (SCA); *MSC Depots (Pty) Ltd v WK Construction (Pty) Ltd and Others* 2011 (2) 417 (ECP); *Latib v Pro Sana Medical Scheme* [2012] ZAWCHC 234; *Ashcor Secunda (Pty) Ltd v Sasal Synthetic Fuels (Pty) Ltd* [2011] ZASCA 158; *Sandown Travel (Pty) Ltd v Cricket South Africa* 2013 (2) SA 502 (GSJ); *Food & Allied Workers Union v Ngcobo NO and Another* 2013 (5) SA 378 (SCA); *B Braun Medical (Pty) Ltd v Ambasaam supra* note 222.

³¹⁰ *Stewart Wrightson supra* note 60; Nienaber (1989) *op cit* note 3 8; Van der Merwe *et al op cit* note 2 307; Hutchison *op cit* note 2 298-9.

³¹¹ Liu (2005) *op cit* note 92 565-6.

³¹² *Frost v Knight supra* note 53 114.

³¹³ *Ibid.*

³¹⁴ Liu (2011) *op cit* note 12 160; Liu (2005) *op cit* note 92 566.

³¹⁵ Gerhard Lubbe ‘Retraction of Repudiation: A Doctrine Writ in Water?’ *Stellenbosch Law Review* (1996) 2 147; See section 4.1 *Retraction of a repudiation* below.

³¹⁶ *Ibid* 159.

³¹⁷ Lubbe *op cit* note 315 160-1; Liu (2011) *op cit* note 12 28-30; Liu (2005) *op cit* note 92 576.

that the right to cancel could arise immediately and the claim for damages arises only upon cancellation, that is after this anticipated breach had become 'inevitable'.

Liu supports this approach on the basis that it promotes finality and consistency. Prior to the cancellation of the contract by the aggrieved party the losses such party might sustain are not certain, the offending party might for instance change their mind based on the aggrieved party's insistence on holding them to the contract, and perform the contract.³¹⁸ The act of cancellation 'crystallise[s] the parties' positions in the sense that from the moment of acceptance neither party [can] change his mind and no future fluctuations of the market [will] affect the amount of damages.' The 'conditional damages claim' also requires the aggrieved party to behave consistently, they may not claim damages while also attempting to uphold the contract.³¹⁹

Liu provides two exceptions to the 'conditional damages claim' rule. The first arises where the anticipatory breach makes performance immediately impossible, restricting this to cases of 'physical impossibility', consistent with what is labelled 'absolute impossibility' in South African law.³²⁰ In these circumstances the anticipated breach is immediately inevitable without cancellation of the contract and the 'conditional damages claim' rule serves no purpose.³²¹ Interestingly this division of anticipatory breach into absolute impossibility, where performance is physically impossible, on the one hand and relative impossibility and repudiation, where performance is still possible, on the other hand is consistent with the distinction suggested by Nienaber.³²²

The second exception Liu provides is where an anticipatory breach itself causes a loss to the aggrieved party.³²³ Liu suggests that in an executory contract where the impact on the contractual relationship is sufficient to cause an immediate loss that a claim for this loss should not be contingent on cancelling the contract. In these circumstances the role of damages is to put the aggrieved party in the position she or he would have been in if the repudiation had not occurred, keeping the contractual relationship intact, rather than the position she or he would have been in if the contract had been performed correctly.³²⁴

It should be noted however that it is not clear how these circumstances could arise and what such damages could consist of and it may be that this exception is in fact devoid of content. Nienaber, who uses the possibility of immediate damages arising from a repudiation as a reason for rejecting the 'offer and acceptance model', notes only that the ability to cede the right may be compromised because the monetary value of the right could be diminished and that the aggrieved party should be entitled to claim the difference in value.³²⁵ This would however seem to be problematic as the cessionary would still be entitled to claim for damages arising from the defective performance if the latter did arise and the offending party would end up having to pay double compensation.

³¹⁸ Liu (2011) *op cit* note 12 159-60; Liu (2005) *op cit* note 92 566, 572-4.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ Liu (2011) *op cit* note 12 160 does not support making any doctrinal distinction on this basis but rather that in circumstances of 'physical impossibility' that the 'acceptance' (cancellation) of the contract should be easily inferred, with the aggrieved party's inaction being generally held to constitute an implied 'acceptance'.

³²² Nienaber (1961) *op cit* note 21 223-4.

³²³ Liu (2011) *op cit* note 12 159-60; Liu (2005) *op cit* note 92 570.

³²⁴ *Ibid.*

³²⁵ Nienaber (1989) *op cit* note 3 3.

If the 'conditional damages claim' rule is accepted, requiring a party to cancel the contract before claiming damages on the basis of an anticipatory breach, then the requirement that the anticipated breach must justify cancellation, that is it must be a material breach, follows logically. There are nonetheless independent reasons to recognise only conduct or circumstances which predict a material breach as amounting to anticipatory breaches of contract. It would seem that some of the strongest justifications for providing a remedy in the case of an anticipatory breach of contract are that it avoids wasted efforts and promotes economic efficiency.³²⁶

It allows a party to avoid the waste of engaging in potentially expensive preparations for a contractual performance that is not going to be forthcoming and instead take steps to mitigate such losses immediately. These reasons are however only compelling where the anticipated breach would deprive the aggrieved party of 'substantially all the benefit to be acquired'.³²⁷ Where a minor breach is anticipated, the aggrieved party's efforts are not wasted and there is no barrier to them engaging in efforts to mitigate the loss without taking action against the offending party. It is the uncertainty inherent in predicting the breach that ultimately justifies limiting the recognition of a breach to circumstances where a material actual breach of contract is anticipated. Further issues arise when determining what remedies would be available to an aggrieved party in circumstances where a non-material breach is anticipated, and these are discussed in Chapter 4.³²⁸

A general criticism levelled at the doctrine of anticipatory breach of contract is that it gives too much power to the aggrieved party and can accelerate liability under the contract.³²⁹ Although extending the doctrine to include non-material breaches would not allow an aggrieved party to cancel the contract, it could potentially be abused by contracting parties wishing to frustrate or impede the effective operation of the contract and accelerate liability under the contract. It could further promote uncertainty and lead to wasteful litigation. Where an action is allowed on the basis of an anticipated non-material breach, the potential for abuse is not counter balanced by the same benefits that the doctrine provides in relation to anticipated material breaches and should therefore be avoided.

An aggrieved party is able to establish that the offending party has committed an anticipatory breach on the basis of conduct or circumstances which support an inference that the offending party will commit an actual breach of contract. Anticipatory breach of contract is inherently speculative in nature and is based on the apparent rather than actual intentions and ability of the offending party. Although the standard required is high, '[t]he conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, ie not equally consistent with any other feasible hypothesis',³³⁰ it nonetheless has the possibility of disrupting a contract which would otherwise be correctly performed. The justification for intervening and providing a remedy should therefore be strong. This justification is present where it is clear that a breach is going to occur and that such breach, if it arises, would have a material impact on the aggrieved party's interest in the contract. It is the combination of a material breach and the high likelihood of such occurring which justifies granting the remedy before any actual breach has materialised.

³²⁶ Liu (2011) *op cit* note 12 36-7; Saidov *op cit* note 26 802

³²⁷ Liu (2011) *op cit* note 12 37.

³²⁸ See section 4.2 *Alternative remedies* below.

³²⁹ Saidov *op cit* note 26 802.

³³⁰ *Datacolor supra* note 1 at [18].

Restricting anticipatory breach to circumstances where an offending party's conduct or the surrounding circumstances predict a material breach and, dispensing with the 'breach conversion' rule, making the claim for damages conditional upon the cancellation of the contract, subject to the exemptions discussed above,³³¹ promotes certainty and economic efficiency. Further, it reduces the risk of abuse of contractual powers by restricting the circumstances in which it applies to those where a material breach is foreseen. This position is also consistent with the existing body of case law, both South African and Anglo-American, and is further consistent with transnational contractual instruments and the Uniform Commercial Code used in the United States of America.³³² Although Nienaber JA's judgment in *Datacolor* provides a basis for a construction of anticipatory breach of contract that does not include these requirements this development should be avoided.

2.5 Conclusion

Nienaber JA makes findings in *Datacolor* that the test for repudiation is an objective test and that whether a party should be entitled to cancel the contract on the basis of repudiation should be determined with reference to the predicted non- or malperformance. Although it had long been acknowledged that the test for repudiation was an objective test, what an objective test required had not been clearly defined. Similarly, although the nature of the predicted breach had been considered in the context of repudiation, it was only in *Datacolor* that an explicit link was made between whether or not the aggrieved party would be entitled to cancel the contract and the nature of the predicted breach. Applied together these findings clarify which forms of conduct and circumstances constitute a repudiation necessitating a more substantial shift in the conception of repudiation and anticipatory breach of contract in South African law than has previously been appreciated.

If the non- or malperformance predicted by an offending party's conduct (where 'conduct' encompasses a failure to prevent such a situation from arising) is to form the basis for determining whether the aggrieved party has a right to cancel the contract, then whether or not conduct amounts to a repudiation should be determined by examining whether or not such conduct predicts a non- or malperformance, that is an entirely objective test. Although relevant, the offending party's apparent intentions cannot be the sole basis on which the nature of such non- or malperformance is determined. Importantly, this has the effect of collapsing the basis on which repudiation and prevention of performance have been distinguished in South African law and creates a unified concept of anticipatory breach of contract.

The two further findings by Nienaber JA in *Datacolor* in relation to repudiation, that the 'acceptance' is 'simply the exercise by the aggrieved party of [her or] his right to terminate the agreement'³³³ and that a repudiation can consist of conduct predicting any, not just a material, breach of contract are not as clearly beneficial. Contrary to Nienaber's position the 'acceptance requirement' in the form of the 'conditional damages claim' rule, serves a useful function in enhancing certainty in cases of an anticipatory breach of contract.

Lastly, contrary to the test expressed in *Datacolor*, that a breach consists of conduct intimating that 'the obligations arising from the agreement will not be performed according to their true tenor',

³³¹ At note 320 above.

³³² Uniform Commercial Code § 2-610-11 (the UCC); the CISG *op cit* note 266; the PICC *op cit* note 266.

³³³ *Datacolor* supra note 1 at [1].

anticipatory breach should be restricted to conduct by a party intimating that they will commit a material breach or circumstances predicting such. Including anticipated non-material breaches within the ambit of anticipatory breach of contract would provide a remedy in circumstances where a contracting party's interest in the contract has been impaired. However, allowing a remedy in circumstances where it is only a non-material breach which is anticipated is not adequately justified. Unlike in circumstances of an anticipated material breach, it does not avoid wasted efforts and could undermine instead of enhance certainty. The opportunity for abuse by a contracting party and the possibility of engendering wasteful litigation further suggests that an anticipatory breach should only be recognised where it is clear that a material breach will be committed.

Consistent with the definition for anticipatory breach of contract given in the previous chapter, an anticipatory breach of contract then consists of conduct by a contracting party or circumstances which support a reasonable inference that such party will commit a material breach of contract. The aggrieved party's right to claim damages on the basis of such breach is contingent upon such party cancelling the contract.

3 CANCELLATION AND ANTICIPATORY BREACH OF CONTRACT

In Chapter 2 it was shown that *Datacolor* established that an aggrieved party should be afforded a right to cancel a contract where the offending party has given a clear indication that they will commit a breach of contract which justifies cancellation, that is, committed an anticipatory breach of contract. However, Nienaber JA's finding in *Datacolor* that '[w]hether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance' leaves open the question of under what circumstances a breach will justify cancellation and what forms the basis for affording a party a right to cancel.

In Chapter 2 it was suggested, departing from the findings in *Datacolor* and Nienaber's academic writing, that anticipatory breach of contract should be restricted to material breach, that is breach justifying cancellation. The issue of what forms of breach would justify cancellation was not specifically dealt with. This chapter is intended to address this issue by discussing the development of cancellation for breach of contract in South African law and how the existing law could be adapted and developed to create a model for cancellation for anticipatory breach of contract in South African law.

Roman-Dutch contract law recognised specific instances where an aggrieved party was entitled to cancel the contract, it did not however recognise a general right to cancel the contract arising from a breach of contract absent a provision in the contract allowing for such.³³⁴ The South African courts began to develop such a generalised right to cancel towards the end of the 19th century and although some of this can be traced to the development of Roman-Dutch principles and influence from Pothier's writing, it was the influence of English law, and the doctrine of anticipatory breach of contract derived therefrom, which would prove to be the decisive catalyst.³³⁵

Partly as a product of this mixed historical development, the South African law of contract does not recognise a general concept of 'material' or 'fundamental' breach and rather approaches the analysis of whether an aggrieved party should be entitled to cancel the contract on the basis of a breach of contract by using a 'pigeon-holed approach'.³³⁶ Also described as a 'fissured concept of breach', this approach means that the answer to the question posed above, what forms of breach justify cancellation, does not admit of an easy answer, as different rules are applied depending on the nature of the breach.³³⁷

Applying this 'fissured concept of breach' means that the test which is employed to determine whether a party will be entitled to cancel on the basis of an anticipatory breach will depend on which category of breach of contract the breaching party's conduct predicts. As will be discussed below, where positive malperformance is predicted this does not raise any significant issues, however where negative malperformance, or *mora*, is predicted a number of issues arise. Under the current South African law an aggrieved party is not entitled to cancel purely on the basis of a delay

³³⁴ J R Harker *The Nature and Scope of Rescission as a Remedy for Breach of Contract* (unpublished PhD thesis, University of Natal) (1981); J R Harker 'The Nature and Scope of Rescission as a Remedy for Breach of Contract in American and South African Law' (1980) *Acta Juridica* 61, 70; Cockrell *op cit* note 4; Hutchison *op cit* note 2; *Stewart Wrightson v Thorpe supra* note 60.

³³⁵ Cockrell *op cit* note 4 312 ff; E Clive & D Hutchison *op cit* note 4 200.

³³⁶ This terminology is taken from Cockrell *op cit* note 4 312.

³³⁷ *Ibid.*

by the breaching party causing material detriment.³³⁸ The aggrieved party may, in addition, be required to serve a notice on the delaying party specifying a date for performance and/or a notice making time of the essence.³³⁹ Applying the existing rules on cancellation for *mora* to anticipated delays would result in confusion and uncertainty as it is not clear how these procedural steps could operate where the delay has not yet occurred.

The focus of this chapter will then be to attempt to provide a structure for cancellation for anticipatory breach of contract which is consistent with the model of anticipatory breach of contract set out in Chapter 2. The proposed structure for cancellation for anticipatory breach requires looking at whether a party's conduct or the surrounding circumstances indicate that they will likely commit an actual breach of contract and whether this actual breach would justify cancellation. This will require considering the origins and development of cancellation for the forms of actual breach of contract recognised in South African law, being positive and negative malperformance. This chapter will also consider and draw on the English rules on cancellation for breach of contract and those used in transnational instruments which are based on the English rules.

First the development of the rules on cancellation for positive malperformance in South African law is discussed.³⁴⁰ How these rules could be applied to anticipatory breach of contract is then considered.³⁴¹ The development of the rules on cancellation for negative malperformance is then discussed and the shortcomings of these rules, which become particularly evident when attempting to apply them in the context of anticipatory breach of contract, are then considered.³⁴² The third section will attempt to provide a unitary basis for cancellation for breach, across anticipatory and actual breach, by considering cancellation for breach of contract in English law, in which the South African law on cancellation finds its roots.³⁴³ After considering the rules on cancellation for anticipatory breach of contract in certain transnational instruments, a basis and mechanism for cancellation for anticipatory breach of contract in South African law is then proposed.³⁴⁴

3.1 *Origin and development of cancellation for positive malperformance*

Some of the first references to the remedy of cancellation in South African law can be found in early cases which, referring to English authorities, recognised repudiation as a form of breach of contract in South African law.³⁴⁵ As a repudiation necessarily justified cancellation of the contract this recognition resulted in the further recognition of the English remedy of cancellation as a response to a repudiation.³⁴⁶ The discussion in *Wolff & Co v Bruce, Mavers & Co*,³⁴⁷ a dispute concerning the sale

³³⁸ Van der Merwe *et al* op cit note 2 297-300; Hutchison *op cit* note 2 281; Van Rensburg *et al* op cit note 2 393.

³³⁹ *Ibid.*

³⁴⁰ Section 3.1 *Origin and development of cancellation for positive malperformance.*

³⁴¹ *Ibid.*

³⁴² Section 3.2 *Origin and development of cancellation for mora.*

³⁴³ Section 3.3 *Cancellation for breach of contract in English law.*

³⁴⁴ Sections 3.4 *Anticipatory breach in transnational instruments* and 3.5 *Cancellation for anticipatory breach of contract in South African law.*

³⁴⁵ *Evans v Stranack* supra note 58; *Bacon v Hartshorne* supra note 58; *Atwell & Co v Logan* supra note 58; *Wolff & Co v Bruce, Mavers & Co* supra note 58.

³⁴⁶ *Ibid.*

³⁴⁷ *Wolff & Co v Bruce, Mavers & Co* supra note 58.

of shares, is of interest as De Villiers CJ distinguishes repudiation from other forms of breach, finding that:

'If the refusal to accept arises from mere inability to pay the price, different considerations: [*sic*] might arise as, for instance, whether time was of the essence of the contract, but the present case is free from difficulties of this nature inasmuch as the declaration, which is excepted to, avers that the defendant had repudiated the contract of sale.'³⁴⁸

In rather questionable reasoning De Villiers CJ avoided application of the Roman-Dutch law, which clearly did not allow for cancellation on the grounds of non-payment of the price, by making the seller's right to cancel the contract depend on whether or not delivery of the goods had occurred.³⁴⁹ Although De Villiers CJ would later confirm this in *Hiddingh v Von Schade*³⁵⁰ it can be questioned whether this held any doctrinal basis or was merely in response to the plaintiff's arguments in *Wolff* that the English law was better adapted to resolving a dispute surrounding a share transaction, a form of transaction unknown to Roman-Dutch lawyers.³⁵¹

These decisions illustrate the tension that arose as a result of the importation and establishment of the English concept of repudiation as a form of breach of contract into the South African law. Recognition of repudiation as an independent form of breach entered into a lacuna in the Roman-Dutch law, which had not recognised this form of breach. However, it also introduced cancellation as a general remedy for repudiation, something which was only available in specific circumstances under Roman-Dutch law. Whether or not an aggrieved party would be entitled to cancel a contract as a result would then depend on whether they could avoid application of the Roman-Dutch law in favour of the application of the English concept of repudiation.

By the early twentieth century repudiation had come to be recognised as an independent form of breach and it became well established that the aggrieved party could elect to either cancel the contract and claim damages or abide by the contract and claim performance.³⁵² This, and how repudiation operated in parallel to the Roman-Dutch law, is illustrated in *Dennil v Atkins & Co*³⁵³ by Innes CJ's finding that:

'Where the sale is repudiated by the buyer the vendor may elect to claim damages; whatever other remedy he may have, he has that one; he is not bound to bring the *actio venditi*. It is too late now, in view of the South African decisions, to question that position.'³⁵⁴

The tests in *Freeth v Burr*³⁵⁵ and *Mersey Steel and Iron Company v Naylor Benzom*,³⁵⁶ discussed above,³⁵⁷ had been formulated to identify when a breach, although relating to a single instalment of the contract, was nonetheless sufficiently serious as to justify cancellation of the entire contract and

³⁴⁸ *Ibid* 136.

³⁴⁹ *Ibid*; Harker *op cit* note 334 280.

³⁵⁰ *Hiddingh v Von Schade* (1899) 16 SC 128.

³⁵¹ *Ibid*; Harker *op cit* note 334 .

³⁵² *Dennil v Atkins & Co* 1905 TS 282; *Wolff & Co v Bruce, Mavers & Co* *supra* note 58; Harker *op cit* note 334 283-5; see further authorities cited under note 58 above.

³⁵³ *Dennil v Atkins & Co* *supra* note 352.

³⁵⁴ *Dennil v Atkins & Co* *supra* note 352 288.

³⁵⁵ *Freeth v Burr* *supra* note 42.

³⁵⁶ *Mersey Steel* *supra* note 44.

³⁵⁷ See 1.4 *Breach going to the 'root' of the contract* above.

hence amount to a repudiation of the contract (these are examples of ‘impure’ anticipatory breaches, as such term is used by Liu and Mustill).³⁵⁸ It is clear that these tests, whether a party has ‘evinced an intention no longer to be bound’³⁵⁹ or whether the breach ‘goes to the root of the contract’,³⁶⁰ were particularly well suited to distinguishing a repudiation, where the English law applied, from other forms of breach, where the Roman-Dutch law applied, and it would seem likely that this played a role in the adoption of these tests.

The extension of these principles into the context of positive malperformance came with the construction that such an ‘intention to no longer be bound’ could be inferred from a contracting party’s malperformance. This made it possible to construe any significant failure to correctly perform contractual obligations as being demonstrative of an intention to abandon the contract and hence a repudiation. This equation of a material breach and repudiation can be seen in *Cotton v Arnold* where De Villiers CJ found that:

‘Where there is a further delay in the payment of the price, the vendor can only cancel the sale if it can fairly be inferred from the acts and conduct of the purchaser that he no longer considered himself bound by the contract.’³⁶¹

Similarly in *Brown v Sessell*³⁶² Bristowe J found that:

‘I think that the rule, that the breach of an essential term of a contract justifies the other party in putting an end to it, depends upon the consideration that the breach of an essential term is equivalent to a refusal to carry out the contract.’³⁶³

Despite some reluctance to allow cancellation in this manner in the context of a contract of sale where there was still some insistence on the use of the *actio redhibitoria*,³⁶⁴ this construction soon became generally accepted.³⁶⁵ Although there were some attempts to introduce it, the South African law did not adopt the notorious complex English rules on cancellation for defective performance but rather extended the test for repudiation into the context of positive malperformance.³⁶⁶

The next step, separating the right to cancel for positive malperformance from the implication of an ‘intention to no longer be bound’ is illustrated by *Strachan v Prinsloo*.³⁶⁷ Here the dispute concerned an agreement in terms of which the plaintiff was to manage the defendant’s farm. After repeated absences the defendant cancelled the contract. Counsel relied on *Brown v Sessell*,³⁶⁸ and put forward

³⁵⁸ *Freeth v Burr* supra note 42; *Mersey Steel* supra note 44; see sections 1.2 *Nomenclature*, 1.4 *Breach going to the ‘root’ of the contract* and 2.2 *Development of an objective test* above.

³⁵⁹ Applied in *Strachan v Prinsloo* 1925 TPD 709 supra note and taken from *Freeth v Burr*.

³⁶⁰ Applied in *Transvaal Cold Storage Co v SA Meat Export Co Ltd* 1917 TPD 413 and taken from *Mersey Steel* supra note 44.

³⁶¹ *Cotton v Arnold* supra note 58.

³⁶² *Brown v Sessell* 1908 TS 1137 1142.

³⁶³ *Ibid* 1142.

³⁶⁴ *Weinberg v Aristo Egyptian Cigarette Co* 1905 TS 760; *Erasmus v Russell’s Executor* 1904 TS 365; Harker *op cit* note 334 286-8.

³⁶⁵ *Young v Land Value Ltd* 1924 WLD 216; Harker *op cit* note 334 292-7

³⁶⁶ Wessels’s confusing discussion of cancellation for ‘Breach by failure to perform’, which encompassed positive malperformance and drew freely on English cases with their distinction between conditions and other terms, has not been followed by the courts.

³⁶⁷ *Strachan v Prinsloo* supra note 359.

³⁶⁸ *Brown v Sessell* supra note 363.

the argument that the plaintiff's conduct was equivalent to a refusal to carry out the contract. Tindall J however found that:

'I am not sure that the two things are equivalent. And I do not think that the party rescinding must necessarily show that the other party has "evinced an intention to no longer be bound by the contract."

Tindall J then relies on Pollock's discussion of the test for cancellation set out in *Freeth v Burr* and *Mersey Steel and Iron Co*. Pollock accepts the proposition that the aggrieved party may cancel a contract on the basis of an 'evinced intention no longer to be bound'.³⁶⁹ However, he then questions whether this was the only available basis on which a party may cancel.³⁷⁰ Tindall J quotes with approval Pollock framing the question as being:

'Can it be said that the promisee got what he bargained for, with some shortcoming which damages will compensate him, or is the point of failure so vital that his expectation is in substance defeated?'³⁷¹

On this basis, writing in the context of instalment sales, Pollock suggests allowing a general right to cancel where, quoting from Blackburn J in *Bettini v Gye*, a term 'goes to the root of the matter, so that a failure to perform it would render the performance of the contract by the plaintiff a thing different in substance from what the defendant had stipulated for'.³⁷² Tindall J, finding that the plaintiff's absence from the farm constituted such a failure 'to perform a vital part of his agreement', found that the defendant was justified in cancelling the contract.³⁷³

As was discussed above, the intention based test in *Freeth v Burr* and *Mersey Steel and Iron Co* was formulated in order to deal with a breach relating to a single instalment of an instalment sale.³⁷⁴ It was necessary to determine whether the breaching party's conduct was sufficiently serious to justify cancellation and hence constitute a repudiation and their expressed or inferred intentions toward the contract provided a convenient basis for distinguishing breaches justifying cancellation from those that did not. The artificiality of construing a serious breach as inevitably expressing an intention on the part of the breaching party to abandon the contract was then abandoned and it has been accepted that a party may cancel the contract on the basis of a sufficiently serious breach without proving an intention to repudiate.³⁷⁵

³⁶⁹ Tindall J relies on the 9th (1921) edition of Sir Frederick Pollock's *Principles of Contract* 289, I was unfortunately only able to locate copies of the 8th (1911) and 10th (1936) editions of Pollock's work. However the text appears to be unchanged in these editions and the quoted portions is the same in all three editions.

³⁷⁰ *Ibid.*

³⁷¹ *Strachan v Prinsloo supra* note 359 717.

³⁷² *Ibid.*

³⁷³ *Ibid.*

³⁷⁴ See section 1.3 *Origin* above.

³⁷⁵ *Strachan v Prinsloo supra* note 359 717; Christie & Bradfield *op cit* note 2 536; Van der Merwe *et al op cit* note 2 309; this anticipated the similar development which occurred in the context of anticipatory breach of contract in the latter half of the 20th century; this equation is perhaps also the reason for the use of repudiation to include all forms of breach justifying cancellation that is suggested by some English authors (see for instance Chitty *op cit* note 12 24-042).

This right to cancel on the basis of a material positive malperformance has now been completely generalised³⁷⁶ and the test to determine when it is available has been variously expressed as being that the breach must ‘concern a vital part of the contract’,³⁷⁷ ‘amount to a failure to substantially perform’,³⁷⁸ ‘essential to the continuation of the contractual tie’,³⁷⁹ or, going back to the earlier formulation, go ‘to the root of the contract’.³⁸⁰ The underlying rationale for these test is considered by Olivier JA in *Singh v McCarthy Retail Ltd t/a McIntosh Motors*³⁸¹ with the finding that:

‘The ultimate criterion must be one of treating both parties, under the circumstances, fairly, bearing in mind that rescission, rather than specific performance or damages, is the more radical remedy. Is the breach so serious that it is fair to allow the innocent party to cancel the contract and undo all its consequences?’

This provides a generalised justification for affording an aggrieved party a right to cancel a contract on the basis of a breach by the other party and identifies the balancing of interests that would appear to be implicit in Pollock’s reasoning above.³⁸²

The development of a generalised right to cancel as remedy for breach of contract by positive malperformance in South African law was strongly influenced by the reception of anticipatory breach of contract and the accompanying remedy of cancellation. As Cockrell notes, ‘most of the tests which have been employed for “materiality” in this context can be traced back to English law, and indeed the courts have been unusually candid in acknowledging the location of their sources in the common law tradition.’³⁸³

This did not mean a wholesale reception of the complex English law on cancellation for breach of contract. A number of English concepts, including its distinction between conditions and other terms, remain foreign to the South African law.³⁸⁴ Rather, South African law drew on the ‘materiality’ criteria drawn from cases on anticipatory breach of contract, and applied them in the context of both positive malperformance and repudiation, as was discussed in Chapter 2 above, to develop a general remedy of cancellation for material breach.

As was discussed above,³⁸⁵ Nienaber JA’s findings in *Datacolor* suggest a test which considers the predicted consequences of a party’s conduct and then determines whether these would justify cancellation. That the general right to cancel for a material malperformance and the tests applied to

³⁷⁶ Cockrell *op cit* note 4 313; Naudé and Lubbe *op cit* note 4 372.

³⁷⁷ *Transvaal Cold Storage Co v SA Meat Export Co Ltd* 1917 TPD 413; *Strachan v Prinsloo supra* note 359; *Anastasopoulos v Gelderbloem* 1970 (2) SA 631 (N).

³⁷⁸ *Cedarmont Store v Webster & Co* 1922 TPD 106.

³⁷⁹ *Aucamp v Morton supra* note 58.

³⁸⁰ *Transvaal Cold Storage Co v SA Meat Export Co Ltd supra* note 377; *Gero v Linder* 1992 (2) SA 132 (O); *Oatarian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A); *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 3 SA 424 (A).

³⁸¹ *Singh v McCarthy Retail Ltd t/a McIntosh Motors* 2000 (4) SA 795 (SCA).

³⁸² This approach, of balancing of the parties’ interests, is strongly supported by the findings of Nkabinde JA in the recent Constitutional Court decision of *Botha and Another v Rich NO* 2014 (4) SA 124 (CC), see in particular at [45]-[46].

³⁸³ Cockrell *op cit* note 4 313 who gives as examples *Strachan v Prinsloo supra* note 359 and *Aucamp v Morton supra* note 58.

³⁸⁴ Harker (1981) *op cit* note 334 211; Harker (1980) *op cit* note 334.

³⁸⁵ See section 2.3 *The predicted breach* above.

determine whether such a right arises are derived from anticipatory breach of contract mean that the current tests employed in the context of positive malperformance are relatively easily adaptable to the structure suggested by *Datacolor*. This can be contrasted with the South African law on cancellation for negative malperformance, discussed below, which has been more strongly influenced by Roman-Dutch law and where difficulties arise.

3.2 Origin and development of cancellation for *mora*

The application of principles drawn from the writings of the Roman-Dutch jurists to delay in performance was established at an early stage in the development of the South African law of contract.³⁸⁶ However, the Roman-Dutch authorities again provided only limited opportunities for an aggrieved party to cancel a contract. Cancellation on the basis of a delay was only allowed where a debtor was in *mora*, that is they failed to perform by a specified date, and the contract contained a *lex commissoria*, a provision specifically providing for cancellation on the basis of delay.³⁸⁷

The Roman-Dutch jurists also distinguished between *mora ex re*, where the contract stipulated a time for performance and the rule that *dies interpellat pro homine* applied (a debtor is in *mora* from the moment when she or he culpably fails to perform), and *mora ex persona*, where no time was set and there was a need for an *interpellatio*, a notice setting a date for performance, to trigger *mora*.³⁸⁸

Again it was necessary to look to outside sources to extend these rules and the broadening of the availability of the remedy of cancellation under the influence of English law also occurred in the context of delay.³⁸⁹ This resulted in judges grafting the English rules on cancellation onto the existing Roman-Dutch rules relating to *mora debitoris* through the introduction of the English doctrine that allowed for cancellation ‘where time was of the essence of the contract’.³⁹⁰

The ‘time of the essence’ doctrine allows for cancellation of a contract on the basis of a delay where the contract expressly provides that time is of the essence or where such delay causes or is likely to cause serious prejudice to the aggrieved party.³⁹¹ Where the delay relates to a material term of the contract, a party may also unilaterally make time of the essence by giving a notice of rescission to the other party.³⁹² This notice must provide a reasonable time for the other party to perform and if the other party fails to perform the party giving notice is entitled to cancel the contract.³⁹³

The influential work of Van Zijl Steyn, although critical of the introduction of the English principles, served to cement this position in relation to *mora debitoris*.³⁹⁴ The later work of A B De Villiers and De Wet’s endorsement thereof would establish a basis for *mora creditoris*.³⁹⁵ Although not

³⁸⁶ *Thibart v Thibart* (1840) 3 Menz 472; *Kessel v Davis* 1905 TS 731; Cockrell *op cit* note 4 306-7.

³⁸⁷ *Hiddingh v Von Schade supra* note 350; I Van Zijl Steyn *Mora Debitoris Volgens die Hedendaagse Romeins-Hollandse Reg* (1929); Cockrell *op cit* note 4 306-7.

³⁸⁸ *Ibid.*

³⁸⁹ Reinhard Zimmerman *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1993) 805; Cockrell *op cit* note 4 311; Harker (1981) *op cit* note 334 72.

³⁹⁰ *Ibid.*

³⁹¹ *Chitty op cit* note 12 at 21-11 and 24-047.

³⁹² *Nel v Cloete* 1972 (2) SA 150 (A) 160, 173; *Sweet v Ragerguhara* 1978 (1) SA 131 136-7; Naudé and Lubbe *op cit* note 4 372.

³⁹³ Van der Merwe *et al op cit* note 2 293 ff; Hutchison *op cit* note 2 280 ff.

³⁹⁴ Van Zijl Steyn *op cit* note 387; Cockrell *op cit* note 4 306-312; Naudé (2013) *op cit* note 4 277-281.

³⁹⁵ Cockrell *op cit* note 4 306-312; Naudé (2013) *op cit* note 4 277-281.

frequently invoked in judgments, *mora creditoris* has developed along analogous lines, with it now being recognised that the same requirements for cancellation apply to both forms of negative malperformance.³⁹⁶ This discussion therefore deals with both forms of *mora* as a general concept.

The majority judgment in *Nel v Cloete*³⁹⁷ confirmed the application of Roman-Dutch principles in relation to the giving of a notice to put the non-performing debtor into *mora*, an *interpellatio*, and of the English remedy of cancellation by means of giving a notice in order to make time of the essence.³⁹⁸ Although appearing to accept the use of the term 'time of the essence' this did not amount to a wholesale acceptance of the English rules on cancellation for delay. Wessels JA for the majority, rather found that the notice must operate according to the principles of the Roman-Dutch law, explicitly divorcing the operation of the notice making 'time of the essence' from its English roots.³⁹⁹ This left open what formed the basis for the right to cancel.

The 'time of the essence' doctrine being separated from its English roots then resulted in contention as to the basis for a finding that time was impliedly of the essence, with some supporting the notion that this was based on a tacit *lex commissoria*⁴⁰⁰ while others criticized this construction.⁴⁰¹ Without excluding the possibility of a party demonstrating the existence of a tacit *lex commissoria*, it would seem preferable to base the right to cancel where 'time is of the essence' on the objective detriment likely to be suffered by a party as a result of the delay rather than on the possibility of an unexpressed intention to allow for cancellation (a tacit *lex commissoria*).⁴⁰²

The explanation for the operation of a notice making 'time of the essence' found in Anglo-American law, that the failure to perform within the time allowed by a notice making time of the essence amounts to a repudiation, would also seem preferable.⁴⁰³ The delaying party's failure to perform within the period allowed indicates that the delaying party's performance will be either significantly delayed or not occur at all.⁴⁰⁴ The operation of a notice making 'time of the essence' is then justified on the basis that it provides a mechanism for relieving the uncertainty of whether the delaying party's performance will be forthcoming within a reasonable period that occurs when a party is faced with delay.

Unfortunately what is reflected in *Nel v Cloete* and *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd*,⁴⁰⁵ is confirmation of Van Zijl Steyn's position that the application of English principles was unfounded and unfortunate.⁴⁰⁶ This was typical of the 'purist' movement of the time which was extremely critical of the reception of English principles into the

³⁹⁶ Van der Merwe *et al op cit* note 2 219-322; Cockrell *op cit* note 4 311.

³⁹⁷ *Nel v Cloete* 1972 (2) 150 (A).

³⁹⁸ *Nel v Cloete supra* note 397 162-4; Cockrell *op cit* note 4 309-10.

³⁹⁹ *Ibid.*

⁴⁰⁰ Van Zijl Steyn *op cit* note 387; Van Rensburg *et al op cit* note 2 393; Hutchison *op cit* note 2 286-8; *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A).

⁴⁰¹ Naudé (2013) *op cit* note 4 291-2; Naudé & Lubbe *op cit* note 4 394; Van der Merwe *et al op cit* note 2 249; Cockrell *op cit* note 4 303.

⁴⁰² Naudé and Lubbe *op cit* note 4 394.

⁴⁰³ *Louinder v Leis* (1982) 149 CLR 509; *Treitel op cit* note 15 914; Naudé *op cit* note 4 291.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A).

⁴⁰⁶ Van Zijl Steyn *op cit* note 387 2.

Roman-Dutch law.⁴⁰⁷ The result of Van Zijl Steyn's position, as confirmed in *Nel v Cloete and Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd*,⁴⁰⁸ was to limit the influence of English principles and stifle further development of any general right to cancel on the basis of delay.

This is well illustrated by the question as to whether a party will automatically fall into *mora* following the elapse of a reasonable period, even where no time for performance has been set. A line of cases commencing with *Federal Tobacco Works v Baron and Co*⁴⁰⁹ and culminating in *Broderick Properties v Rood*⁴¹⁰ suggested that a party should be entitled to cancel a contract where time was of the essence even where no date had been set for performance, either expressly in the contract or by means of an *interpellatio*.⁴¹¹

A number of justifications for these decisions have been offered all of which would seem to have been considered unsatisfactory.⁴¹² It would now seem to be universally accepted that this view confuses the requirements for putting a delaying party in *mora* and the requirements for cancelling on the basis of *mora*.⁴¹³ It should be noted however that in English law it was, and still is, possible to cancel on the basis of an unreasonable delay on a contract where 'time is of the essence' without setting a date for performance.⁴¹⁴ A ready explanation for Innes JA's decision is that that it was merely reflective of the general trend at the time of applying English principles, often without any justification or even acknowledgement, as part of the South African contract law.⁴¹⁵

Although the decisions have not been explicitly overruled, the generally accepted position would nonetheless appear to be that it is necessary to set a date for performance, either as a term of the contract or by means of an *interpellatio*, before a party will fall into *mora*.⁴¹⁶ Further a party will only be entitled to cancel the contract on the basis of such *mora* where the contract contains a *lex commissoria* or time is of the essence of the contract or made to be through a notice of rescission.⁴¹⁷ This is regardless of the duration of the delay in performance. The absence of either of these conditions will mean that party will not be entitled to cancel even where there has been a significant and prejudicial delay.⁴¹⁸ Unlike in the context of positive malperformance, the English rules allowing for a more generally applicable right to cancel were not received into the South African law relating to cancellation for delay.

⁴⁰⁷ Francois Du Bois 'Introduction: History, System and Sources' 12 in C G van der Merwe and Jacques E Du Plessis (eds) *Introduction to South African Law* (2004).

⁴⁰⁸ *Greenfield Manufacturers supra* note 405.

⁴⁰⁹ *Federal Tobacco Works v Baron and Co* 1904 TS 483.

⁴¹⁰ *Broderick Properties v Rood* 1962 (2) SA 434 (T).

⁴¹¹ Van der Merwe *et al op cit* note 2 297-300; Cockrell *op cit* note 4 310.

⁴¹² *Ibid.*

⁴¹³ *Ibid.*

⁴¹⁴ *Chitty op cit* note 12 21-011, 24-049.

⁴¹⁵ Cockrell *op cit* note 4 308.

⁴¹⁶ Van der Merwe *et al op cit* note 2 297-300; Hutchison *op cit* note 2 281; Van Rensburg *et al op cit* note 2 393.

⁴¹⁷ *Ibid.*

⁴¹⁸ Some support for the position that time will be considered to be of the essence of a contract, entitling a party to cancel on the basis of a delay, where the offending party is in *mora* and the aggrieved party suffers significant prejudice as a result of the delay is found in *Cowley v Estate Loumeau* 1925 AD 392 however this is not the accepted position, see Naudé and Lubbe *op cit* note 4 386.

The requirement that a party will not be in breach for a delay unless a date for performance has been set can be justified on the grounds that it enhances certainty and protects the delaying party who may have overestimated what would constitute a reasonable period in which to perform. This must be balanced against the potential prejudice to the aggrieved party. This prejudice would arise in cases where the other party has delayed significantly and because no date has been set for performance that party will not be in breach and the aggrieved party will not have an immediate remedy. The absence of an *ex lege* right to cancel a contract on the basis of a delay where the offending party is in *mora* and the aggrieved party has suffered significant detriment without a *lex commissoria* or time being of the essence does not appear to have any good justification. Cockrell noted that:

[it] is anomalous that a debtor in this situation who fails to perform a vital term is better placed than one whose timeous performance is materially defective; yet in the former case the debtor must receive a “notice of rescission” before a right to cancel accrues, while in the latter case the creditor can cancel immediately.’⁴¹⁹

Harker justifies the position in South Africa law on the basis that as Roman-Dutch law does not regard delay as ever constituting a fundamental breach, a delay must always be elevated to a fundamental breach by means of an express or tacit *lex commissoria* or in terms of the ‘time of the essence’ doctrine.⁴²⁰ The requirements for cancelling on the basis of delay are then not true exceptions to the general position that a party may cancel for material breach. This is because the delaying party does not commit a breach unless a date has been set for performance and this breach will not be of a material nature unless elevated to such by a *lex commissoria* or the ‘time of the essence’ doctrine.⁴²¹

This position is however very difficult to reconcile with the underlying justification for affording an aggrieved party the right to cancel a contract, of treating both parties fairly, discussed in *Singh v McCarthy Retail Ltd t/a McIntosh Motors*.⁴²² The current structure can clearly treat an aggrieved party who has suffered significant prejudice unfairly. The rule that a delay cannot amount to a material breach unless elevated by a *lex commissoria* has no underlying justification and flies in the face of the actual prejudice which an aggrieved party could suffer.

The development of cancellation as a general remedy as a response to a breach constituted by a delay in performance did not arise as easily as in the context of positive malperformance and there continue to be a number of exceptions to the position that a party may cancel on the basis of a material breach. This can likely be attributed to the highly influential work of Van Zijl Steyn, which has formed the basis for much of the law on *mora*, where he criticised the use of English rules and resisted further development along English lines.⁴²³ The result of this is that applying the existing rules on cancellation for *mora* to an anticipated delay would result in confusion and uncertainty as it is unclear how the potentially necessary *interpellatio* and notice making time of the essence could operate where the delay has not yet occurred but is anticipated. The reconciliation of these

⁴¹⁹ Cockrell *op cit* note 4 319.

⁴²⁰ Harker (1980) *op cit* note 334 72.

⁴²¹ *Ibid.*

⁴²² *Singh v McCarthy Retail Ltd supra* note 381.

⁴²³ Van Zijl Steyn *op cit* note 387 2.

principles with the structure for cancellation of anticipatory breach set out in *Datacolor* is discussed below.⁴²⁴

3.3 Cancellation for breach of contract in English law

Before considering what structure should be used to determine whether a right to cancel arises from an anticipatory breach of contract in South African law it is worthwhile engaging in a brief overview of other sets of rules which are employed in this context. The English principles on cancellation for breach of contract, and those relating specifically to anticipatory breach of contract, are of particular relevance given the role that they have played in the development of the South African law. Certain transnational instruments which, like the South African rules on breach, are also based on the English rules are considered in the following section.

In respect of English law, McKendrick in *Chitty on Contracts* discusses ‘Renunciation’, ‘Impossibility created by one party’ and ‘Failure of performance’ as forms of breach of contract, with renunciation and impossibility constituting anticipatory breaches where they occur before the time for performance.⁴²⁵ Peel in *Treitel on the Law of Contract* on the other hand discusses renunciation and disablement under the heading of anticipatory breach, again defined as a breach of contract occurring before the time for performance has arrived, and rather includes a refusal to perform occurring at or after the time for performance under the discussion of breach by ‘Failure or Refusal to Perform’.⁴²⁶ These terminological differences do not appear to be significant as the discussion of cancellation for breach of contract by these authors and those in *Anson’s Law of Contract* and the authors of Furmston’s *The Law of Contract* would appear to be broadly consistent.⁴²⁷

Peel, McKendrick and the authors of *Anson’s Law of Contract* and Furmston’s *The Law of Contract* have not accepted Liu’s construction of anticipatory breach of contract as being an ‘inferred fundamental breach’ noted above and continue to distinguish anticipatory breach of contract from actual breach of contract on the basis that anticipatory breaches occur before the time for performance.⁴²⁸ However, all the authors note that for both actual and anticipatory breaches the same principles are applied when determining whether a breach of contract gives rise to a right to cancel the agreement.⁴²⁹ The authors’ discussions, separated as they are into various categories of breach (each with its own requirements), demonstrate that English law applies different rules to the various forms of breach of contract which it recognises.⁴³⁰ The English law nonetheless displays a

⁴²⁴ See section 3.5 *Cancellation for anticipatory breach in South African law* below.

⁴²⁵ *Chitty op cit* note 12 24-001 ff.

⁴²⁶ *Treitel op cit* note 15 828 ff.

⁴²⁷ *Anson’s op cite* note 12 507 ff; Michael Furmston *The Law of Contract op cit* note 92 1589 ff.

⁴²⁸ See section 2.3 *The predicted breach* above; *Chitty op cit* note 12 24-027-31; *Treitel op cit* note 15 844; *Anson’s op cite* note 12 514-7; Michael Furmston *The Law of Contract op cit* note 92 1608; See section 2.3 *The predicted breach* above. Liu’s construction, like Nienaber’s, labels a breach anticipatory on the basis that it is founded in conduct which supports an inference that a party will commit an actual breach of the contract, regardless of whether such conduct occurs before, at or after the time set for performance. It is this anticipated breach, rather than the time at which such conduct occurs which gives this form of breach its name and character.

⁴²⁹ *Ibid.*

⁴³⁰ Naudé (2013) *op cit* note 4 288-90.

more unitary conception of breach than does the South African law and includes a generalised remedy of cancellation for a breach of sufficient seriousness.⁴³¹

This unitary conception of breach finds expression in the rule that a breach will justify cancellation where it goes to the 'the root of the whole and substantial consideration' or in a more modern expression by Diplock LJ:

'does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?'⁴³²

Peel summarises this proposition, that 'any defect in performance must attain a minimum degree of seriousness to entitle the injured party to terminate' as the requirement of "substantial failure" in performance'.⁴³³ Although Liu prefers the term 'fundamental breach', as it is defined by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd*,⁴³⁴ McKendrick's discussion in Chitty makes it clear that the concept referred to with these labels is the same.⁴³⁵ Peel notes that whether a breach will amount to a substantial failure in performance is determined by a court considering whether 'termination (as opposed to damages) is necessary to protect the injured party and, on the other hand, take into account the prejudice which termination will cause to the other party.'⁴³⁶ The similarity with the approach adopted by Olivier JA in *Singh v Mccarthy Retailers* noted above is evident.

The conceptual structure underlying breach of contract in English law endorsed by McKendrick, Peel and the authors of in *Anson's Law of Contract* is that set out by Lord Diplock in *Hong Kong Fir Shipping* and *Photo Production*.⁴³⁷ Lord Diplock draws a distinction between primary obligations under the contract, being the obligations to render the performance promised, and secondary obligations, to pay damages, which arise in the event of a breach of contract or cancellation of the contract.⁴³⁸

In *Photo Production* Lord Diplock describes a general rule that a breach of the primary obligations in a contract gives rise to a secondary obligation on the breaching party to pay damages while leaving the primary obligations of the breaching party intact.⁴³⁹ This rule is subject to two exceptions, the first is where the resulting failure by one party to perform a primary obligation has the effect of depriving the aggrieved party of substantially the whole benefit that was intended (corresponding with the *ex lege* right to cancel discussed above).⁴⁴⁰ The second arises where the contracting parties have agreed that any failure by one party to perform an obligation will entitle the aggrieved party to

⁴³¹ *Ibid.*

⁴³² *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 CA 66.

⁴³³ *Treitel op cit* note 15 866.

⁴³⁴ *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.

⁴³⁵ Liu (2011) *op cit* note 12 73; *Chitty op cit* note 12 24-042.

⁴³⁶ *Treitel op cit* note 15 866.

⁴³⁷ *Chitty op cit* note 12 24-001; *Treitel op cit* note 15 859; *Anson's op cite* note 12 507; Michael Furmston *The Law of Contract op cit* note 92 1646; *Photo Production supra* note 434.

⁴³⁸ *Ibid.*

⁴³⁹ *Photo Production supra* note 434 848-9.

⁴⁴⁰ *Ibid*; *Afovos Shipping Co SA v Romano Phnan and Pietro Pagnan ('The Afovos')* [1983] 1 WLR 195 (HL) 195.

cancel.⁴⁴¹ In the case of these two exceptions, a breach will entitle the aggrieved party, as an alternative to claiming damages, to elect to put an end to the primary obligations of both parties remaining unperformed, that is, to cancel the contract. Where such an election is made an alternative secondary obligation, what Lord Diplock labels an anticipatory secondary obligation, to pay monetary compensation to the aggrieved party for the loss sustained in consequence of the breaching party's non-performance arises.⁴⁴²

Lord Diplock noted in *The Afovos* that '[t]he doctrine of anticipatory breach is but a species of the genus repudiation and applies only to fundamental breach.'⁴⁴³ Whether conduct or circumstances amount to an anticipatory breach:

'depends upon whether the threatened non-performance would have the effect of depriving that other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the primary obligations of the parties under the contract then remaining unperformed.'⁴⁴⁴

Following this reasoning, for both actual and anticipatory breach it is the prospect of an aggrieved party being substantially deprived of the benefit of the contract which justifies affording the aggrieved party an *ex lege* right to cancel the contract. This equality of treatment can be easily justified. Conduct or circumstances which indicate, with sufficient certainty, that a party will fail to perform their primary obligations correctly can support the conclusion that a party will be substantially deprived of the benefit of the contract just as easily as an actual failure to perform such primary obligations. In cases of both actual and anticipatory breach it is the prospective substantial deprivation which the aggrieved party will suffer which justifies affording the aggrieved party a right to cancel the contract.

Applying this analysis to anticipatory breach of contract, a right to cancel arises where a party's conduct or the surrounding circumstances indicate, with sufficient certainty, that they are going to fail to correctly perform their primary obligations and that this failure will substantially deprive the other party of the benefit of the contract. It is this substantial deprivation which justifies affording the aggrieved party a right to cancel the primary obligations under the contract and it is the relative certainty that the offending party will commit a breach causing substantial deprivation which justifies affording such right to the aggrieved party immediately, rather than awaiting the actual breach. If the aggrieved party elects to cancel the contract, the cancellation of the primary obligations then triggers an anticipatory secondary obligation on the offending party to pay monetary compensation for the loss sustained by the aggrieved party as a consequence of the cancellation of the primary obligations.

⁴⁴¹ In English law this would form the basis for cancellation as a result of a failure to correctly perform a term which is classified as a 'condition'. This classification can be made either by statute, judicial decision, or by the parties expressly or impliedly agreeing that the term is a condition. See *Chitty op cit* note 12 24-039; *Treitel op cit* note 15 845; *Anson's op cite* note 12 520. In South African law, which has not imported the English rules relating to conditions, it would provide the basis for cancellation in terms of an express or tacit *lex commissoria*, that is an *ex contractu* right to cancel. See Van der Merwe *et al op cit* note 2 343; Christie & Bradfield *op cit* note 2 534.

⁴⁴² *Photo Production supra* note 434 848-9.

⁴⁴³ *The Afovos supra* note 440 203.

⁴⁴⁴ *Ibid.*

Lord Diplock's model distinguishes between, and provides different justifications, for the right to claim damages arising from breach of contract generally and the right to cancel the contract and claim damages for fundamental breach. The general secondary obligation to pay damages arises where a party fails to perform their primary contractual obligations correctly. This secondary obligation to pay damages for breach generally is justified by the losses sustained by the aggrieved party attributable to the offending party's failure to correctly perform their primary obligations.⁴⁴⁵ Performance of the secondary obligation then has the effect of mitigating the effects of the imperfect performance of the primary obligation.⁴⁴⁶

As noted above, the justification for the *ex lege* right to cancel a contract arises where a party commits a fundamental breach. This right to cancel rather than arising directly from the failure to perform is instead founded in the prospective substantial deprivation that the aggrieved party will suffer as a result of the breaching party's conduct. This recognises that where a party will be substantially deprived of the benefit of the contract a right to claim damages would insufficiently mitigate the effects of the imperfect performance. As an alternative the aggrieved party may elect to cancel the primary obligations and trigger an 'anticipatory secondary obligation', justified by the cancellation rather than the breach itself, to pay damages arising from the cancellation.

Lord Diplock's model therefore provides different bases and justifications for the general right to claim damages that arises on a breach of contract (the secondary obligation to pay damages) and the right to claim damages following cancellation (the anticipatory secondary obligation to pay damages). The general secondary obligation to pay damages has the breach as its basis and is justified by the losses sustained by the aggrieved party as a result of that breach. The anticipatory secondary obligation to pay damages has the cancellation of the contract following a fundamental breach as its basis and is justified by the losses sustained by the aggrieved party arising from the cancellation. This then provides a doctrinal basis for the position that a party must, in general, cancel the contract before claiming damages for an anticipatory breach of contract and the exception to that rule which allows for a claim for damages where the anticipatory breach causes an immediate loss through breach of a primary obligation.⁴⁴⁷

Unlike an actual breach of contract an anticipatory breach of contract does not necessarily imply that a party has failed to correctly perform her or his primary contractual obligations. Where a party has not failed to perform their primary obligations under the contract there is no actual breach of contract and the secondary obligation to pay damages does not arise. There is no reason that it should. The party committing the anticipatory breach has not breached her or his primary obligations and so the aggrieved party could not have suffered any losses arising from such breach. In general therefore a secondary obligation to pay damages to the aggrieved party does not arise. It is only on cancellation that the anticipatory secondary obligation to pay damages arises. The exception occurs where the conduct amounting to an anticipatory breach also consists of a breach of the primary obligation and as such causes immediate losses to the aggrieved party potentially triggering the secondary obligation to pay damages.

⁴⁴⁵ John Gardner 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) *Law and Philosophy* 30 1.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ See section 2.4 *Repudiation is a material breach* above.

Lord Diplock frames circumstances giving rise to a right to cancel the agreement as exceptions to the general rule that '[e]very failure to perform a primary obligation is a breach of contract' which gives rise to a secondary obligation on the contract breaker to pay damages but leaves 'the primary obligations of both parties so far as they have not yet been fully performed unchanged.' Despite this, in light of the separate justifications for this secondary obligation to pay damages and the provision of a right to cancel the contract to the aggrieved party, it is possible to construe actions by a contracting party or circumstances which do not consist of a failure to perform the primary obligations, and as such do not justify a secondary obligation to pay damages, but still justify affording the aggrieved party a right to cancel.

These circumstances arise in the context of an anticipatory breach of contract occurring before the date set for performance. As noted above, the conclusion that a party will suffer substantial detriment can also be based on conduct or circumstances which indicate that the offending party will fail to correctly perform their primary obligations. Because the right to cancel arises from the substantial detriment rather than directly from a failure to perform the primary obligations the right to cancel could be justified with reference to conduct or circumstances indicating that the offending party will fail to perform their primary obligations rather than only by an actual failure, as in the case of actual breach. Where an offending party has not failed to correctly perform a primary obligation the aggrieved party will not have suffered any loss as yet. Absent any loss there is no justification for affording a party a right to claim damages merely on the basis of the anticipatory breach.

Although Lord Diplock notes that every failure to perform a primary obligation is a breach of contract, this does not imply that every breach of contract consists of a failure to perform a primary obligation. Anticipatory breach of contract, although a breach of contract, does not necessarily consist of a failure to perform a primary obligation, it rather consists of conduct or circumstances which indicate that a party will commit a fundamental breach.⁴⁴⁸ This may consist of an actual failure to perform a primary obligation, as can occur in the context of instalment contracts, or may be merely indicative that such a failure will occur, as in the case of a refusal to perform in the future. What these circumstances have in common, and what makes them anticipatory breaches, is that they support the conclusion that a party will commit a fundamental breach.

Lord Diplock's model also provides a justification for his statement that 'it is to fundamental breaches alone that the doctrine of anticipatory breach is applicable.'⁴⁴⁹ In terms of the model, a right to cancel a contract is afforded to an aggrieved party where that party will be substantially deprived of the benefit of the contract. The right to claim damages, in terms of a secondary obligation, arises where a party fails to correctly perform their primary obligations under the contract. As was demonstrated above, the conclusion that a party will be substantially deprived of the benefit of the contract can be based on conduct or circumstances occurring before the time for performance which indicate, with sufficient certainty, that a party will commit a breach of their primary contractual obligations. On the other hand, conduct occurring before the time for performance which indicates that a party will fail to correctly perform their primary obligations is not a failure to correctly perform such primary obligations. Because this conduct is not a failure to

⁴⁴⁸ *Photo Production supra* note 434 849.

⁴⁴⁹ *The Afvos supra* note 440 203.

perform the primary obligations it does not trigger a secondary obligation to pay damages, and, if it does not amount to a material breach, is not a breach of contract at all.

Lord Diplock's model then offers a unitary explanation for providing an *ex lege* right to cancel a contract on the basis of an actual or anticipated fundamental breach. This unified basis for cancellation provides a doctrinal explanation for why anticipatory breach of contract occurs only where a material or fundamental breach is predicted and for the requirement that an aggrieved party must, in general, cancel the contract in order to claim damages, reinforcing the practical considerations discussed above.⁴⁵⁰

Although Mckendrick, Peel and the authors of *Anson's Law of Contract* and Furmston's *The Law of Contract* have accepted Lord Diplock's model they have failed to recognise that the unitary explanation for the *ex lege* right to cancel provided by Lord Diplock in *Photo Production* would suggest a formulation of anticipatory breach of contract that is based on the predicted consequences of a party's conduct. Liu further notes that the English case law predominantly supports an approach that considers the consequences of the breaching party's conduct as a basis for establishing whether or not the aggrieved party should be afforded a right to cancel.⁴⁵¹ A clear example of this outside of Lord Diplock's judgments can be seen in *Federal Commerce & Navigation Ltd v Molena Alpha Inc.*⁴⁵² Here the charterers would have faced the severe consequences of being blacklisted if the owners' instructions had been carried out and this would have substantially deprived the charterers of the benefit of the contract.⁴⁵³ It was this which justified granting them a right to cancel the contract.⁴⁵⁴

Following Lord Diplock's model, an *ex lege* right to cancel, in both actual and anticipatory breach, is then based on the prospective substantial deprivation which the aggrieved party will suffer. An actual breach of contract which justifies cancellation consists of a failure to perform a primary obligation, which failure will result in the aggrieved party being substantially deprived of the benefit of the contract. An anticipatory breach rather consists of conduct or circumstances which support a conclusion that a party will commit an actual breach which will result in the aggrieved party being substantially deprived of the benefit of the contract.

That an anticipatory breach does not necessarily consist of a present failure to perform the primary obligations which will result in the aggrieved party being substantially deprived of the benefit of the contract but rather of conduct or circumstances predicting such a failure must then be the basis on which actual and anticipatory breach of contract are distinguished rather than on the basis of whether or not it occurs before the time set for performance. This is consistent with the 'inferred fundamental breach' model suggested by Liu. The approach adopted by current English authors including McKendrick, Peel and the authors of *Anson's Law of Contract* of differentiating between actual and anticipatory breach of contract on the basis that a breach is an anticipatory breach where

⁴⁵⁰ See the discussion in section 2.4 *Repudiation is a material breach* above.

⁴⁵¹ Liu (2011) *op cit* note 12 52 ff; Liu traces this focus on the consequences back to Lord Blackburn's decision in *Mersey Steel supra* note 44 443-4 where he found that the breach must go 'to the root of the contract to the foundation of the whole'.

⁴⁵² *Federal Commerce supra* note 235 783-4 for a full explanation of the facts see section 2.3 *The predicted breach* above.

⁴⁵³ *Ibid* 779.

⁴⁵⁴ *Ibid*.

it occurs before the time set for performance and an actual breach where it occurs at or after the time set for performance is then inconsistent with Lord Diplock's model.

The unitary conception of 'fundamental breach' is also consistent with, and supports, the conclusion that there is no doctrinal basis for the historical differentiation between repudiation and impossibility which many English and South African authors continue to make. Both species of anticipatory breach must consist of conduct or circumstances which support a conclusion that a party will commit an actual breach of the primary obligations under the contract which will result in the aggrieved party being substantially deprived of the benefit of the contract. Although possibly helpful in ascertaining which facts may be relevant for determining the likelihood of the predicted breach it is clear that it does not matter whether the breach will be caused by the breaching party's unwillingness or inability to perform the primary obligations or even a combination of unwillingness and inability. As Devlin J noted in *Universal Cargo Carriers v Citati*:

'unwillingness and inability are often difficult to disentangle, and it is rarely necessary to make the attempt. Inability often lies at the root of unwillingness to perform.'⁴⁵⁵

The terminology of primary and secondary obligations has been applied in a similar sense to that used by Lord Diplock in a small number of South African decisions, without any reference to Lord Diplock's judgments, and enjoys some academic support.⁴⁵⁶ Cockrell notes that this distinction did not exist in the Roman-Dutch law and suggests that the distinction originates in Lord Diplock's judgments.⁴⁵⁷ However, the use of the terminology of primary and secondary rights and obligations in South African law may rather originate from De Vos's writing where he describes sleeping secondary rights under a contract which become active upon breach of the contract.⁴⁵⁸ This is consistent with the usage by Smalberger JA in *Atteridgeville Town Council* where he notes that although primary obligations are extinguished on cancellation 'secondary obligations, for example, the duty to compensate for damages arising from wrongful repudiation, however, remain.'⁴⁵⁹

Van der Merwe *et al*, discuss De Vos's construction of breach of contract based on primary and secondary obligations in terms of which primary obligations arise from the terms agreed to by the parties and secondary obligations arise from terms implied by law which become activated by a breach of contract. Importantly, although also using the same terminology of primary and secondary obligations this description of breach of contract is not the same as that given by Lord Diplock.⁴⁶⁰ The secondary obligations to which Lord Diplock refers arise 'by implication of the common law' rather than from an *ex lege* term as De Vos suggests.

The authors of Van der Merwe *et al* suggest an alternative construction, which they attribute to Nienaber, in terms of which breach of contract is seen as 'a new category of obligatory fact' which gives rise to a new obligation to pay damages.⁴⁶¹ Van der Merwe *et al* prefer Nienaber's construction primarily because, they suggest, it provides a satisfactory basis for accepting

⁴⁵⁵ *Universal Cargo Carriers supra* note 63 437.

⁴⁵⁶ *Atteridgeville Town Council v Livanos t/a Livanos Bros Electrical* 1992 (1) SA 296 (A) 304; *CIR v Collins* 1992 (3) SA 698 (A); Cockrell *op cit* note 4 324-5; Harker (1980) *op cit* note 334.

⁴⁵⁷ Cockrell *op cit* note 4 324-5.

⁴⁵⁸ De Vos *Verrykingsaanspreklikheid in die Suid-Afrikaanse Reg* (1987) 356.

⁴⁵⁹ *Atteridgeville Town Council supra* note 456 304.

⁴⁶⁰ *Photo Production supra* note 434 848-9; see the discussion at note 439 above.

⁴⁶¹ Van der Merwe *et al op cit* note 2 343-4.

wrongfulness as a requirement for breach of contract in contrast to De Vos's model which does not. The authors do not elaborate much further on this reasoning and it is difficult to determine if this provides sufficient basis for preferring Nienaber's model over De Vos's.

Although a full consideration of this issue is beyond the scope of this thesis, it would seem that Van der Merwe *et al* are correct in preferring a model which does not rely on *ex lege* terms as the source of the secondary obligations. Although it may be possible to construe *ex lege* terms which would give rise to the obligations which arise from the breach of a contract this would seem to be an overly elaborate mechanism to achieve this result. Directly imposing these obligations by operation of law, without construing them as being derived from *ex lege* terms, would provide a simpler explanation and have the same effect.

There also appears to be a coherent basis for distinguishing between the primary and secondary obligations under a contract.⁴⁶² The primary obligations provide a reason, justified by the party's promise, to do what they have promised to do.⁴⁶³ The secondary obligations serve to mitigate the wrong created by the non-performance or imperfect performance of the primary obligations, to correct the earlier failure.⁴⁶⁴ Applying a model using *ex lege* terms this distinction is lost, the aggrieved party is merely enforcing an alternative obligation under the contract, making it unclear why these are then referred to as secondary obligations at all.

Questions can also be raised as to whether Nienaber's construction, which describes breach of contract as a source of obligations, is entirely satisfactory. The justification for the imposition of these secondary obligations must ultimately be rooted in the contract between the parties. Although it is the breach of contract which may be the proximate source of these obligations it is the existence of the contract which ultimately justifies the imposition of the obligations which arise from its breach. Nienaber's construction perhaps fails to acknowledge the continuity that exists between the primary and secondary obligations and therefore runs the risk of viewing breach of contract and the imposition of obligations arising from such breach as separate from the underlying contract.⁴⁶⁵ However, this criticism may not be one of substance. Nienaber's and Lord Diplock's models would appear to be largely consistent and may only differ to the extent that different labels are used to describe the secondary obligations.

The conception of anticipatory breach of contract drawn from Nienaber JA's findings in *Datacolor* and set out in Chapter 2 above establishes an anticipatory breach on the basis of conduct or circumstances which support the conclusion that a party will commit a breach which will justify cancellation of the contract by the aggrieved party. Like Liu's construction of anticipatory breach in English law, this conception requires a mechanism for determining whether a predicted breach will justify cancellation. The unitary conception of 'fundamental breach' that arises from Lord Diplock's model provides a coherent explanation for the operation of breach of contract and is consistent with the construction of breach of contract favoured by Van der Merwe *et al*, in terms of which breach is a source of legal obligations.

⁴⁶² For a further explanation of this concept of primary and secondary duties see Gardner *op cit* note 445 29-35, 48-50.

⁴⁶³ *Ibid.*

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

Application of Lord Diplock's model of primary and secondary obligations as a basis for breach of contract would also seem to avoid the major criticism levelled by Liu at the current English conception of anticipatory breach of contract. As is discussed above, Liu criticises the current academic explanation of anticipatory breach of contract in English law, which he labels as the renunciation approach, on the basis that the model's focus on the intentions and attitude of the potentially breaching party results in it being superficial and uncertain.⁴⁶⁶ Lord Diplock's model, providing a unified basis for anticipatory breach of contract which is rooted in the predicted substantial deprivation which an aggrieved party is likely to suffer, supports Liu's conception of anticipatory breach of contract as an 'inferred fundamental breach'.

Nienaber JA's finding in *Datacolor* that 'whether a party will be entitled to resile will ultimately depend on the nature and the degree of the impending non- or malperformance', does not provide any mechanism for determining whether a breach will justify cancellation and leaves open what justifies affording a party a right to cancel. The understanding offered by Lord Diplock's model of primary and secondary obligations and the application of this to anticipatory breach by Liu provides a potential answer to the questions left open by Nienaber JA. Further insight into possible mechanisms for determining whether a breach will justify cancellation can be gained by examining transnational instruments employing concepts of 'fundamental' or 'material' breach of contract and recognising anticipatory breaches of contract. These are discussed next.

3.4 *Anticipatory breach in transnational instruments*

Article 72 of the CISG, Article 9:304 of the PECL and Article 7.3.3 of the PICC all deal with cancellation for what is labelled 'anticipatory non-performance'.⁴⁶⁷ The provisions of these different instruments are very similar to one another and it is therefore sensible to consider them jointly. Article 71(1) of the CISG provides that:

'If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.'⁴⁶⁸

This article, along with the equivalent articles in the PECL and PICC, incorporates the English doctrine of anticipatory breach of contract by entitling a contracting party to cancel the contract on the basis that the other party will commit a fundamental breach.

In addition to incorporating the doctrine of anticipatory breach, the CISG, PECL and PICC all rely on a unified concept of breach justifying cancellation. This is labelled as a 'fundamental breach' in the CISG and 'fundamental non-performance' in the PECL and PICC,⁴⁶⁹ with Article 25 of the CISG providing

'[a] breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect

⁴⁶⁶ Liu (2011) *op cit* note 12 65-9.

⁴⁶⁷ The CISG *op cit* note 266; the PICC *op cit* note 266, PECL *op cit* note 266.

⁴⁶⁸ Art 72 of the CISG.

⁴⁶⁹ The term breach is used in Art 25 of the CISG *op cit* note 266. Art 8:103 of PECL *op cit* note 266 and Art 7.3.1 of the PICC *op cit* note 266 instead use 'non-performance' which encompasses both breach and excusable non-performance arising from superior force, see Naudé *op cit* note 4 275, Peter Huber 'Chapter 7: Non-performance' in S Vogenauer *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* 2 ed (2015) 922. For the purposes of this discussion nothing turns on this distinction.

under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.’

The concept of ‘substantial deprivation’ which provides the basis for the test is drawn from the English case of *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* discussed above,⁴⁷⁰ and is also used to define ‘fundamental non-performance’ in the PECL and PICC. In the absence of the English distinction between ‘conditions’, ‘warranties’ and other terms these instruments have entirely generalised the notion of a breach giving rise to cancellation.

As noted above the unified concept of fundamental breach (or non-performance) applied in these instruments also provides for consistency in treatment between actual breach and anticipatory breach. In both cases it is the ultimate consequences of the breaching (or non-performing) party’s conduct which will determine whether the aggrieved party will be entitled to cancel. Naudé notes that this unified approach has the advantage of norm reduction and promotes consistency of treatment across different manifestations of breach.⁴⁷¹

The PICC, which lists a set of potentially relevant factors provides further clarity which addresses the degree of vagueness that is present in the CISG and PECL formulation and that is expected of an entirely generalised test.⁴⁷² These factors include whether the aggrieved party would suffer foreseeable substantial detriment, whether the non-performance is intentional, reckless or gives the aggrieved party reason to believe that they cannot rely on future performance and whether the non-performing party would suffer a disproportionate loss as a result of the cancellation.⁴⁷³

Naudé and Lubbe in reviewing the South African case law find that these same factors have been considered by judges when deciding on whether a right to cancel arises.⁴⁷⁴ Although the South African courts ‘often do not fully articulate’ the factors considered, Naudé and Lubbe note that there are ‘parallels between South African judicial practice on cancellation for material breach and articles 25 of the CISG and 7.1.3 of the [PICC].’⁴⁷⁵ The fractured approach to breach would seem to provide an obstacle to recognition of generally relevant factors and Naudé and Lubbe note further that the vague formulation of the tests for material breach leads to legal uncertainty and that courts should rather follow the direction of the decisions noted by Naudé and Lubbe which have considered these factors when deciding whether a right to cancel arises.⁴⁷⁶

As was noted above, the standard of certainty required in order to establish an anticipatory breach in these instruments is that it must be clear. The language used establishes that this is an enquiry into the likelihood of the breach occurring rather than the historical standard in the form of an assessment of how clearly a party has indicated their intent. Although there has been some debate as to the exact meaning of this standard, drawing on the official comment to the PICC, it would seem that a very high degree of probability is required, with a mere suspicion not being enough.⁴⁷⁷ The right to cancel the contract afforded to the aggrieved party is clearly founded in the prejudice likely

⁴⁷⁰ Huber *op cit* note 469 924.

⁴⁷¹ Naudé *op cit* note 4 293-6.

⁴⁷² *Ibid*; Naudé and Lubbe *op cit* note 4 393.

⁴⁷³ Art 7.1.3 of the PICC.

⁴⁷⁴ Naudé and Lubbe *op cit* note 4 390-1.

⁴⁷⁵ *Ibid*.

⁴⁷⁶ *Ibid*.

⁴⁷⁷ Huber *op cit* note 469 947.

to be suffered by the aggrieved party arising from the fundamental breach and it is afforded to the aggrieved party immediately on the basis of the high degree of probability that such a breach will occur.

These instruments differ from the model of anticipatory breach proposed in Chapter 2 above, and Nienaber's and Liu's constructions, in that the transnational instruments continue to distinguish anticipatory breach from actual breach on the basis that anticipatory breach occurs before the date for performance. It is therefore necessary to deal with conduct or circumstances occurring after the date for performance which would suggest that a fundamental breach will arise as an actual non-performance, as it must necessarily be, because at a minimum the party has delayed in fully performing its obligations. This is explicitly captured in Article 7.3.1(2)(a) of the PICC which lists as a relevant factor to be considered when determining whether a breach is fundamental as whether:

'the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance'.

A breach of contract which would otherwise not amount to a fundamental breach could amount to a fundamental breach on the basis that it provides a reason to believe that the breaching party will fail to correctly perform their future obligations. Following the model proposed in Chapter 2 above and by Liu this conduct would rather be characterised as an actual breach which, because it indicates that a party will fail to correctly perform its future obligations correctly in a manner justifying cancellation, also amounts to an anticipatory breach.

It is not entirely clear which approach is preferable but the approach in the transnational instruments does seem to miss the essential consistency between conduct or circumstances occurring after the time for performance which supports the conclusion that the aggrieved party will be substantially deprived 'of what it was entitled to expect under the contract'⁴⁷⁸ and conduct or circumstances occurring before the time for performance which does not consist of an actual breach but nonetheless supports the same conclusion. In both cases it is the likelihood that the aggrieved party will be substantially deprived of the benefit of the contract which would seem to provide the justification for providing the aggrieved party a right to cancel. On the other hand the transnational instruments make it explicit that the effect of the actual breach and its likely future effects should be considered jointly, which is the preferable approach. A full consideration of the merits of the different approaches is beyond the scope of this thesis.

The CISG, PECL and PICC also differ from the English and South African law by allowing an aggrieved party to make a request for an 'adequate assurance of performance', with this being generally required by the CISG before cancellation may be effected in the case of an anticipatory breach.⁴⁷⁹ The mechanism in the PECL and the PICC allow a party to make a request for an adequate assurance of performance' on the basis of a 'reasonable suspicion' (in the PECL) and 'reasonable belief' (in the PICC), that the other party will commit a fundamental non-performance.⁴⁸⁰ This mechanism is strongly analogous to a notice making time of the essence as it exists in the English and South African law, and as is available in the CISG, PECL and PICC, but instead of functioning with respect to

⁴⁷⁸ Art 7.3.1(a) of the PICC.

⁴⁷⁹ Art 71(3) of the CISG. Art 9:304 of PECL and 7.3.4 of the PICC

⁴⁸⁰ This is recognised as a lower standard of probability than is required in order to meet the 'clear' requirement used in Article 8:304 of the PECL and 7.3.3. of the PICC.

the seriousness of the delay rather functions with respect to the likelihood of the breach. This is discussed in more detail in Chapter 4 below.

The unified basis for cancellation founded in the prejudice likely to be suffered by the aggrieved party and the adoption of a mechanism for anticipatory breach that considers whether a sufficiently serious breach is sufficiently likely to occur adopted by these supra-national instruments are consistent with the model for anticipatory breach considered above. The model rules therefore provide a useful basis for comparison with both existing and proposed South African rules on cancellation for anticipatory breach of contract and also a strong indication of the feasibility and practical effectiveness of the set of rules considered earlier in this chapter.

3.5 Cancellation for anticipatory breach of contract in South African law

If an anticipatory breach is defined as conduct by a contracting party or circumstances which support a reasonable inference that a party will commit a material breach and a material breach is defined as a breach justifying cancellation, a party will in principle always be entitled to cancel a contract on the basis of an anticipatory breach. Whether or not an aggrieved party will be entitled to cancel the contract is then determined by whether or not the offending party's conduct or the surrounding circumstances amount to an anticipatory breach of contract. That is, whether a party's conduct or the surrounding circumstances support a conclusion that they will fail to correctly perform their obligations under the contract and that this failure will justify the other party cancelling the contract.

For conduct or circumstances to amount to an anticipatory breach it must then be established that a party will likely commit a breach of contract and that that breach will justify cancellation. The first aspect of this involves drawing a conclusion as to the likely consequences of a party's conduct or the surrounding circumstances. It is clear that this is from an objective perspective, the perspective of a reasonable person in the position of the aggrieved party, and that although a party's intentions are likely to be relevant it is the predicted outcome of their conduct, taking into account the surrounding circumstances, that is the determining criterion. Consistent with the position that cancelling the contract is a drastic remedy and it must be assumed that contracting parties are generally predisposed to respecting their contractual obligations, a high standard of probability is required.

Importantly the standard is one of probability rather than of the clarity and certainty of a party's expression of their intentions. The existing judicial statements of this standard, such as that a repudiation must be 'clear and unequivocal', relate to a party's expression of their intent and, although confirming that a high standard is required, are only helpful where a party will be able to give effect to their intentions. These expressions do not provide the general standard of probability that is required in order to establish an anticipatory breach. The standard applied in the CISG, PECL and PICC, that is must be 'clear' that a party will commit a breach of contract is a useful guideline. As noted above, this would seem to indicate something that is more than just the most likely outcome but is rather reasonably certain to occur without it being necessary for it to be absolutely certain.

It would however seem preferable to express the required level of certainty as an explicit measure of probability in order to avoid the focus on the breaching party's intention which the enquiry into repudiation has followed in the past. The use of 'clear', although succinct could lead to confusion as to whether it is the potentially breaching party's expression of their intention which must be clear or whether, as is the correct interpretation, that it must be clear that the predicted outcome will arise.

Requiring a reasonable certainty, something more than a possibility but less than an absolute certainty clearly labels the test as being one of probability and is also consistent with the necessity that it be a high but not insurmountable standard of likelihood.

The second aspect of the test relates to the nature of the anticipated breach. Although the South African courts have shown some consideration of more general factors when deciding whether a right to cancel arises as a result of a breach of contract, there is as yet no recognition of a generalised notion of material breach of contract based on the substantial detriment to the aggrieved party.⁴⁸¹ This provides an obstacle to the application of a test for anticipatory breach of contract that relies on such a notion.

However, 'the effect of the breach on the aggrieved party has in many decisions been considered in order to establish the materiality of a breach' and it has been suggested that it is whether the breach caused substantial detriment which was the 'common denominator' which was used to determine whether the breach justified cancellation.⁴⁸² This is not unexpected, because, as was discussed above, cancellation as a remedy for breach of contract in South African law would appear to originate in English law and the English law has continued to play a significant role in its development.

In the early cases on anticipatory breach of contract the courts appear to focus solely on whether there was a 'clear refusal to perform the contract'.⁴⁸³ These cases mostly involved circumstances where a party was refusing to perform the contract at all or where a party has made it impossible for herself or himself to perform the contract in its entirety. An anticipatory breach indicating that no performance at all will be forthcoming must necessarily amount to a material breach and the courts failure to apply any materiality criterion is not unexpected. More recent cases have had to deal with circumstances where it was not immediately clear whether the breach is sufficiently serious to justify cancellation.

In *Stewart Wrightson v Thorpe*, where the aggrieved party had been denied work and access to his office, Jansen JA used repudiation to mean a 'fundamental breach' although no further content was given to this description.⁴⁸⁴ In *Culverwell v Brown* Nicholas AJA, writing for the majority on this point, based the conclusion that the seller had not repudiated the contract by leasing a portion of the premises sold to the buyer on the basis that this was not 'a material breach' and that the breach 'was not one which went to the root of the contract'.⁴⁸⁵ In both of these cases the predicted breach took the form of positive malperformance and the court in *Culverwell v Brown* in particular appears to have been influenced by the language used by South African cases on positive malperformance.

As was noted above, the various phrases which have been used to express the materiality criteria in South Africa in the context of positive malperformance can themselves be traced back to English law and, in general, to decisions on anticipatory breach of contract.⁴⁸⁶ The notion of materiality which

⁴⁸¹ Naudé and Lubbe *op cit* note 4 388-9.

⁴⁸² *Ibid.*

⁴⁸³ Wessels *op cit* note 15 864;

⁴⁸⁴ *Stewart Wrightson v Thorpe supra* note 60 951-2.

⁴⁸⁵ *Culverwell v Brown supra* note 60 13-14, 24.

⁴⁸⁶ See 3.1 *Origin and development of cancellation for positive malperformance* above and Cockrell *op cit* note 4 312-4.

has been applied in South African law in relation to anticipatory breach and in the context of positive malperformance is already largely consistent, both ultimately drawn from English sources. Applying this as a general materiality criterion in order to determine whether a predicted positive malperformance would justify cancellation does not therefore require any major conceptual shift.⁴⁸⁷

This is also exactly what is to be expected based on Lord Diplock's model for breach of contract. It is the prospective substantial detriment of the aggrieved party, balanced against the interests of the breaching party, which justifies the provision of a right to cancel. This is consistent across both actual and anticipatory breach and as such the concept of a material breach should also remain consistent.

Cancellation for negative malperformance in South African law has however been more strongly influenced by Roman-Dutch law and does not employ the same materiality criterion. Although the notion of cancellation of the contract for an unreasonable delay by a party in performing their obligations likely originates in English law, the procedural mechanisms required to put a party into *mora* have largely been drawn from Roman-Dutch law. This means that an aggrieved party cannot, in general, cancel the contract only on the basis of a delay by the other party in performing her or his obligations which causes substantial detriment. The delaying party must in addition be in *mora*. Requiring an aggrieved party to put a party in *mora* for an anticipated delay is however problematic. Where a contract does not stipulate a time for performance a party would be required to set a date for performance, allowing the other party a reasonable time to perform, before they could acquire a right to cancel the contract. This becomes an entirely impractical and pointless exercise in circumstances where performance is not yet due but it is nonetheless clear that a party will substantially delay in performing.

Similarly, using a notice to make time of the essence in order to acquire a right to cancel before the time for performance has even arrived seems incongruous. The justification for allowing a party to escalate a delay in terms of a notice making time of the essence, being that it allows a party to relieve the uncertainty of whether performance will be forthcoming at all that occurs when performance is delayed, is not present in the context of an anticipated delay. To illustrate, where a party indicates that there will be a minor delay in performance which will not cause substantial detriment the clear indication of a time for performance would not cause uncertainty as to whether performance will be forthcoming and there is no basis for allowing the aggrieved party to escalate the breach. Using a notice to make time of the essence should therefore be restricted to actual delay.

Requiring a party to set a date for performance before cancelling on the basis of an anticipated delay also does not have any justification. Any benefit of increased certainty which such a rule offers is completely absent where the delay is anticipated rather than actual. Where it can be established that it is reasonably certain that a party is going to materially delay in performing this will be clear whether or not a specific date for performance has been set. Additionally because the aggrieved party is not entitled to escalate a non-material delay by means of a 'notice making time of the essence' there is no need to protect the delaying party.

⁴⁸⁷ Liu (2011) op cit note 12 84.

There is already some indication that South African law is prepared to recognise a right to cancel a contract merely on the basis of a material delay.⁴⁸⁸ In the context of anticipatory breach of contract there is no justification for applying the procedural requirements for putting a delaying party in *mora* and the possibility of a notice of rescission, which distinguish cancellation for breach in the form of delay from breach in the form of a positive malperformance. There is also no basis for restricting cancellation for anticipated delay to circumstances where there is a *lex commissoria* or 'time is of the essence', as has also been suggested by Nienaber and Van der Merwe *et al.*⁴⁸⁹ A substantial delay in performance is just as capable of causing sufficient detriment to the aggrieved party to justify cancellation as the malperformance of an obligation and where such a delay is reasonably certain to occur the aggrieved party should be entitled to cancel. Restricting the right to cancel for an anticipated delay to circumstances where there is a *lex commissoria* or 'time is of the essence' therefore has no justification.

This raises the question of whether a party should be entitled to cancel a contract on the basis of an anticipatory breach where the other party's conduct or the surrounding circumstances indicate that they will commit a non-material breach which, if it arose, would fall within the ambit of a cancellation clause in the contract and entitle the aggrieved party to cancel the contract. The obvious example is the one considered above, that being where a contract does contain a *lex commissoria* entitling a party to cancel for any delay, regardless of its duration. Van der Merwe *et al.*'s position, given above, that cancellation would be allowed, fails to take into account that it is the material nature of the prospective breach which creates the dilemma faced by the aggrieved party and provides the justification for affording the aggrieved party a right to cancel the contract before the time for performance has arrived.⁴⁹⁰

This is consistent with the position in English law and provides the motivation for Lord Diplock's finding in *The Afvos* that 'it is to fundamental breaches alone that the doctrine of anticipatory breach is applicable.'⁴⁹¹ Conduct or circumstances which indicate that a party will commit a non-material breach which would entitle the other party to cancel the contract in terms of a *lex commissoria*, or cancellation clause, do not amount to anticipatory breach of contract as the predicted breach would not cause the aggrieved party to be substantially deprived of the benefit of the contract and therefore do not justify affording the aggrieved party an immediate right to cancel.

Lord Diplock's discussion in *Photo Production* provides two different exceptions to the general rule that a failure to correctly perform the primary obligations under the contract, although giving rise to a secondary obligation to pay damages, leaves the not yet fully performed primary obligations of the parties unchanged.⁴⁹² These exceptions entitle the aggrieved party to instead cancel the contract, putting an end to the unperformed primary obligations under the contract and giving rise to an anticipatory secondary obligation on the breaching party to pay damages.⁴⁹³ The first is where the resulting failure by one party to perform a primary obligation has the effect of depriving the

⁴⁸⁸ Naudé and Lubbe *op cit* note 4 388-9; *Cowley v Estate Loumeau supra* note 418.

⁴⁸⁹ Nienaber (1989) *op cit* note 3 2-3; Van der Merwe *et al op cit* note 2 314.

⁴⁹⁰ Liu (2011) *op cit* note 12 79-85; see also *Treitel op cit* note 15 844, 892 and 900.

⁴⁹¹ *The Afvos supra* note 440 203.

⁴⁹² *Photo Production supra* note 434 849

⁴⁹³ *Ibid.*

aggrieved party of substantially the whole benefit that was intended, an *ex lege* right to cancel.⁴⁹⁴ The second is where the contracting parties have agreed that that any failure by one party to perform an obligation will entitle the aggrieved party to cancel, an *ex contractu* right to cancel.⁴⁹⁵

Although both exceptions entitle a party to terminate the primary obligations, because the underlying justifications for affording a party this right are distinct, the doctrine of anticipatory breach is only applicable to the first exception.⁴⁹⁶ The basis for affording the aggrieved party a right to cancel for the first exception is that the aggrieved party will be substantially deprived of the benefit of the contract. For the second example, the basis rather rests in the party's agreement that any failure will justify cancellation.

Unlike circumstances where the right to cancel is based on the aggrieved party's prospective substantial deprivation, where the right to cancel is based on the contracting parties' agreement that any failure will justify cancellation the failure must actually occur before a right to cancel the contract will be justified. Conduct or circumstances indicating that a party will fail to perform her or his obligations correctly would not support the conclusion that that party has failed to perform her or his obligations correctly and so justify affording the aggrieved party a right to cancel the contract. Contrary to Van der Merwe *et al*'s position that a right to cancel for anticipated delay should be restricted to where 'time is of the essence' or the contract contains a *lex commissoria* it should rather be restricted to where the aggrieved will be substantially deprived of the benefit of the contract. The presence of a *lex commissoria* would not justify affording the aggrieved party a right to cancel before an actual delay had occurred.

An anticipatory breach of contract therefore arises when conduct or circumstances indicate with reasonable certainty that they will commit a material breach of contract, either in the form of a material malperformance, material delay in performing their obligations or that they will not perform their obligations at all. The basis for affording the party the right to cancel the contract is founded in the high likelihood that the offending party will commit the breach and the substantial detriment that the aggrieved party would suffer as a result of the breach balanced against the effects of the cancellation on the breaching party. Because both actual and anticipatory breach give rise to a right to cancel the contract on the basis of a prospective substantial detriment of the aggrieved party, the considerations which are relevant when assessing whether an anticipated breach is material are the same as those which are relevant for actual breach.

It should be noted that a complete refusal to perform, the classic example of a repudiation drawn from *Hochster v De La Tour*, or complete inability, is not, as is sometimes noted, any form of exception to this general rule.⁴⁹⁷ Application of the test set out above to these circumstances would yield the conclusion that it is reasonably certain that the offending party will not perform their obligations at all. This is not anticipation of delay but rather anticipation of complete non-performance, which would necessarily amount to a material breach. A complete refusal or complete inability will almost always amount to an anticipatory breach and justify cancellation, not through any application of a positive rule to that effect, but because the consequences predicted by such a

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *Ibid.*

⁴⁹⁶ See 3.3 *Cancellation for Breach of Contract in English law* above.

⁴⁹⁷ Van der Merwe *et al* *op cit* note 2 314; Naudé *op cit* and Lubbe note 4 384.

refusal or inability will always almost amount to a breach which will deprive the aggrieved party of substantially all of the benefit of performance of the obligation.

The earlier sections in this chapter established that, with the notion of cancellation for breach of contract having been drawn from English law, a general concept of a material breach, that is a breach justifying cancellation, is well enough established in South African law that it would be relatively easy to apply in the context of anticipatory breach of contract. It is clear that there can be benefits to categorizing different forms of breach.⁴⁹⁸ Naudé notes that this can be of assistance in determining which factors are likely to be relevant when assessing the nature of the harm the aggrieved party is likely to suffer and can bring greater legal certainty as ‘certain types of breach merit additional rules on when termination will be justified’.⁴⁹⁹

However, Naudé notes further that this categorization can be applied in conjunction with a unified *ex lege* right to cancel for fundamental or material breach.⁵⁰⁰ This is well illustrated by the transnational instruments discussed above, which allow specifically for a non-fundamental breach in the form of a delay in performance to be elevated to a fundamental breach by a notice calling on the breaching party to perform correctly but do not allow for this possibility in the case of defective performance.⁵⁰¹

Unfortunately many of the decisions following *Datacolor* define repudiation in terms of an expression of an intention no longer to be bound and to exclusively consider the intention of the potentially repudiating party.⁵⁰² In *South African Forestry Co Ltd v York Timbers Ltd*⁵⁰³ Brand JA’s judgment, although referencing the objective test set out in *Datacolor*, uses the ‘deliberate and unequivocal intention’ definition from *Nash v Golden Dumps*⁵⁰⁴ which Nienaber JA’s judgment qualifies.⁵⁰⁵ The decisions in *Food & Allied Workers Union v Ngcobo NO and Another*⁵⁰⁶ and *Sandown Travel (Pty) Ltd v Cricket South Africa*⁵⁰⁷ also make use of this phrasing and Binns-Wards J’s judgment in *Latib v Pro Sana Medical Scheme*,⁵⁰⁸ although noting that the assessment is objective, considers only the intentions of the repudiating party.⁵⁰⁹

As was noted above, the use of the potentially repudiating party’s actual intention does not necessarily lead to the incorrect result. In general a party is likely to be able to give effect to their intentions. The likely consequences of a party exhibiting a ‘deliberate and unequivocal intention no

⁴⁹⁸ Naudé *op cit* note 4 297-300.

⁴⁹⁹ Naudé *op cit* note 4 argues strongly in favour of the use of a more unified notion of material breach of contract in the context of actual breach. This argument would seem to be well supported by the arguments presented in this thesis in favour of the use of a unified notion of breach of contract in the context of anticipatory breach. However, a full discussion of this is beyond the scope of this thesis.

⁵⁰⁰ *Ibid* 298-9.

⁵⁰¹ Art 7.15 of the PICC; Art 49 and 64 of CISG and PECL 8:106(3).

⁵⁰² *South African Forestry Co Ltd v York Timbers Ltd supra* note 309.

⁵⁰³ *Ibid* at [38].

⁵⁰⁴ *Nash supra* note 106.

⁵⁰⁵ *Datacolor supra* note 1 at [16].

⁵⁰⁶ *Food & Allied Workers Union v Ngcobo NO and Another supra* note 309

⁵⁰⁷ *Sandown Travel (Pty) Ltd v Cricket South Africa supra* note 309

⁵⁰⁸ *Latib v Pro Sana Medical Scheme supra* note 309.

⁵⁰⁹ *Food & Allied Workers Union v Ngcobo NO and Another supra* note 309 at [52]; *Sandown Travel (Pty) Ltd v Cricket South Africa supra* note 309 at [18] – [19]; *Latib v Pro Sana Medical Scheme supra* note 309 at [17] – [18].

longer to be bound' are that they will commit a material breach of the contract and there is nothing in the cases discussed above indicating otherwise. However, these decisions clearly illustrate that the courts have, in general, not recognised the changes in approach which are necessitated by the developments that occurred in *Datacolor* as none of these decisions have determined whether conduct or circumstances amount to an anticipatory breach by considering whether such conduct or circumstances supports a conclusion that the offending party will commit a material breach.⁵¹⁰

A very recent decision by the Supreme Court of Appeal marks a welcome departure from this trend.⁵¹¹ In *B Braun Medical (Pty) Ltd v Ambasaam CC* Swain JA specifically criticises the approach in the high court decision which was the subject of the appeal for its reliance on the subjective intentions of the repudiating party and the subjective perceptions of the aggrieved party.⁵¹² Although still making reference to 'a deliberate and unequivocal intention ... not to be bound by the agreement', it is clear from Swain JA's judgment that the basis for overturning the High Court's finding that Braun had repudiated the contract was that '[t]he 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.'⁵¹³

Swain JA justifies this conclusion on the basis that '[e]ven 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.'⁵¹⁴ Importantly, although the finding that a reasonable person in the position of Ambasaam would not conclude that proper performance would not be forthcoming is based on the objective appearance of Braun's intentions, it is clear that it is the consequences expected by a reasonable person in the position of Ambasaam, that proper performance would be forthcoming, which is the determining factor and not Braun's intentions. This focus on the likely consequences of a potentially repudiating party's conduct rather than their attitude to the contract is what is required by the test set out in *Datacolor* and, as argued above, focuses on the actual harm which the aggrieved party may suffer.⁵¹⁵

3.6 Conclusion

An anticipatory breach of contract consists of conduct or circumstances which indicate that a party will not perform their primary obligations under the contract correctly and that this failure will cause the aggrieved party to be substantially deprived of the benefit of the contract, justifying affording the aggrieved party a right to cancel the contract. Where it can be established that this failure is reasonably certain to occur, the aggrieved party may elect to immediately cancel the contract,

⁵¹⁰ *Bierman v Mutual & Federal Versekeringsmaatskappy Bpk* supra note 309; *South African Forestry Co Ltd v York Timbers Ltd* supra note 309; *De Villiers and others v Van Zyl and another* supra note 309; *Ndlovu v Santam Ltd* supra note 309; *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd* supra note 309; *MSC Depots (Pty) Ltd v WK Construction (Pty) Ltd and Others* supra note 309; *Latib v Pro Sana Medical Scheme* supra note 309; *Ashcor Secunda* supra note 309; *Sandown Travel (Pty) Ltd v Cricket South Africa* supra note 309; *Food & Allied Workers Union v Ngcobo NO and Another* supra note 309.

⁵¹¹ *B Braun Medical (Pty) Ltd v Ambasaam* supra note 222.

⁵¹² *Ibid* at [9]-[10] commenting on the judgment of Van der Byl AJ in *Ambasaam CC v B Braun Medical (Pty) Ltd* (71774/2011) [2013] ZAGPPHC 182 (3 July 2013).

⁵¹³ *B Braun Medical (Pty) Ltd v Ambasaam* supra note 222 at [11].

⁵¹⁴ *Ibid*.

⁵¹⁵ *Ibid*; see section 2.3 *The Predicted Breach* above.

extinguishing the primary obligations and giving rise to a secondary obligation on the breaching party to compensate the aggrieved party for any losses arising from the cancellation.

Unlike in circumstances of actual breach of contract, an anticipatory breach does not need to, although may, include a breach of the primary obligations under a contract. Anticipatory breach may therefore occur before the time for performance. However, because the anticipatory nature of the breach is derived from the fact that it anticipates a material breach of a primary obligation rather than anticipates the time for performance of such obligation, it can occur after the time set for performance of the obligation and as noted may be based on a non-material actual breach of the primary obligations which indicates that a further material actual breach will occur.

Anticipatory breaches of contract must by definition justify the aggrieved party cancelling the contract. The appropriate question is not whether an anticipatory breach justifies cancellation but rather whether such conduct or circumstances amount to an anticipatory breach. Whether conduct or the surrounding circumstances will amount to anticipatory breach depends on whether it predicts a breach justifying cancellation and whether such breach is predicted with reasonable certainty. It is then necessary to consider what forms of predicted breach would justify cancellation and this chapter established that a general concept of material breach should be used. Such a material breach may arise in the form of an anticipated material delay, material malperformance or the anticipation that a party will never perform (complete non-performance). In all of these circumstances a general conception of a material breach, determined with reference to the likely detriment which the aggrieved party will suffer balanced against the interests of the breaching party, should be applied.

The approach of considering whether a party's conduct predicts a material breach of contract, rather than focusing on a party's expression of an intention to not perform or incorrectly perform their obligations, has not yet been generally applied in the South African cases following *Datacolor*. The decisions which have continued to focus on the potentially repudiating party's intentions have, as a result, largely missed the significant changes to the doctrine of anticipatory breach of contract which *Datacolor* established. The decision in *B Braun Medical*⁵¹⁶ hopefully marks a shift to a consideration of the consequences predicted by a party's conduct or the surrounding circumstances as the basis for deciding whether or not an anticipatory breach has occurred.

⁵¹⁶ *B Braun Medical (Pty) Ltd v Ambasaam supra* note 222.

4 ALTERNATIVE REMEDIES FOR ANTICIPATORY BREACH OF CONTRACT

In Chapter 2 it was shown that an anticipatory breach of contract consists of conduct or circumstances which indicate with reasonable certainty that a contracting party will commit a breach of contract and that this breach would justify the aggrieved party cancelling the contract. Chapter 3 then argued that, despite the accepted approach in South African law of dividing breach of contract into various categories, each with its own rules on when a breach justifies cancellation, support for a general concept of material breach of contract can be found in the South African case law. It was then argued that this general concept of material breach was best explained using a model of contractual obligations drawn from English law, specifically from decisions by Lord Diplock.⁵¹⁷ This model distinguishes between primary obligations under the contract, the primary performance obligations owed by the parties, and secondary obligations to compensate the aggrieved party which arise on breach of the contract.

In terms of this model a material breach of contract consists of a failure by a contracting party to perform her or his primary obligations correctly, or conduct which indicates with reasonable certainty that she or he will fail to perform their primary obligations correctly, which will substantially deprive the aggrieved party of the benefit of the contract. If, balancing the interests of the parties, it would be fair to afford the aggrieved party a right to cancel the contract this conduct will amount to a material breach of contract.

In Chapter 3 it was further argued that in terms of this model, anticipatory breach of contract could only consist of conduct or circumstances which would justify the aggrieved party in cancelling the contract, that is a material breach. This was because, in terms of the model, although a material breach could consist of either the actual failure to perform a primary obligation correctly or conduct or circumstances indicating with reasonable certainty that such a failure would occur, a non-material breach is restricted to circumstances where a contracting party actually failed to perform their primary obligations correctly. Consistent with the practical justifications for this position given in Chapter 2, Lord Diplock's model provides a doctrinal basis for restricting anticipatory breach to material breaches.

An anticipatory breach must then, by definition, justify affording the aggrieved party a right to cancel the contract. Importantly though, the aggrieved party is in general not required to cancel the contract and may exercise alternative remedies instead.⁵¹⁸ The focus of this chapter is a discussion of whether the breaching party should be entitled to correct the anticipatory breach (if they are able to do so before the aggrieved party cancels the contract) and thereby deprive the aggrieved party of the right to cancel, what alternative remedies may be available to the aggrieved party in place of cancellation and lastly the impact of the model for anticipatory breach of contract set out in Chapters 2 and 3 on these situations.

This chapter will first discuss what is generally referred to as a retraction of a repudiation. This refers to circumstances in which a party, after indicating that she or he will not correctly perform their obligations correctly, subsequently indicates that they will do so. This chapter will then discuss what

⁵¹⁷ *The Afvos supra* note 440; *Photo Production supra* note 434.

⁵¹⁸ *White & Carter (Councils) Ltd v McGregor* 3 ER 1178 (HL); Nienaber (1962) *op cit* note 97; Van der Merwe *et al op cit* note 2 344.

alternative remedies are available to an aggrieved party following an anticipatory breach, including whether an aggrieved party should be entitled to request an adequate assurance of performance.

4.1 Retraction of a repudiation

Anticipatory breach of contract potentially differs from actual breach of contract in that it is possible for a party who has committed an anticipatory breach to remedy the breach before the time for performance has arrived. A party who has committed an anticipatory breach of contract could correct the consequences of the breach before her or his performance obligations became due and then perform the contract correctly at the time performance is due. This occurs most easily in the context of repudiation where a party who has repudiated the contract can subsequently indicate that they will perform their obligations correctly. It is therefore generally referred to as a 'retraction of a repudiation', although it should be noted that it is also possible in the context of relative prevention of performance, although not where performance has become impossible.⁵¹⁹

As was often the case in the context of anticipatory breach of contract, it would appear that this principle was introduced into South African law on the assumption that the English law of the time was also applicable in South Africa. Wessels gives only the decision of Parke B in *Ripley v M'clure* when stating the principle.⁵²⁰ *Ripley v M'clure* is actually a decision predating the recognition of anticipatory breach in *Hochster* and which had found that a repudiation of a contract before the time for performance was no breach at all and on that basis obviously capable of withdrawal.⁵²¹

This proposition, that a repudiation could be withdrawn before performance became due, was however maintained in the English law after the recognition of a refusal to perform occurring before the time for performance as a breach of contract in *Hochster*.⁵²² English law still recognises that '[t]he injured party will ... lose his rights in respect of the anticipatory breach if he does not accept it and if, before performance from the guilty party has become due, that party withdraws his repudiation'.⁵²³ Clearly this can no longer be based on the reasoning employed by Parke B in *Ripley v M'clure*⁵²⁴ and it would seem that this was rather premised on the position that an anticipatory breach, unlike an actual breach, is only completed upon acceptance by the aggrieved party and so can be withdrawn and undone prior to acceptance.⁵²⁵

The English position that a repudiation can be withdrawn was endorsed by De Wet and Yeats.⁵²⁶ The authors' discussion would suggest that the basis for this position in South African law also rested on

⁵¹⁹ Lubbe *op cit* note 315; Van der Merwe *et al op cit* note 2 356-7.

⁵²⁰ Wessels *op cit* note 63 at 2955; *Ripley v M'clure supra* note 29; *Kameel Tin Co v Brollomar Tin Exploration supra* note 58.

⁵²¹ *Ripley v M'clure supra* note 29.

⁵²² *Norwest Holst Group Administration Ltd v Harrison* [1985] ICR 668 (CA); *Buckland v Bournemouth University Higher Education Corp* [2010] EWCA Civ 121 at [39] – [43]; Treitel *op cit* note 16 849; Liu (2011) *op cit* 12 footnote 35, 160.

⁵²³ Treitel *op cit* note 16 849. See also the authorities cited in footnote 522 above. It should be noted that anticipatory breach is used there to refer to a breach occurring before performance is due rather than referring to a breach which predicts a material non- or malperformance as suggested in this thesis.

⁵²⁴ *Ripley v M'clure supra* note 29.

⁵²⁵ *Buckland v Bournemouth University supra* note 522 at [43].

⁵²⁶ JC De Wet & JP Yeats *Kontraktereg en Handelsreg* (1947) 136; De Wet & Van Wyk *op cit* note 2 216.

the notion that a repudiation was only completed upon 'acceptance' rather than on the basis provided by Parke B in *Ripley* which had been suggested by Wessels.⁵²⁷

A number of South African decisions have repeated this position.⁵²⁸ However, as Lubbe notes, the legal position was nonetheless not entirely clear as in each of these cases the remarks have been *obiter* and are not without contradiction.⁵²⁹ Briefly, in *HMBMP Properties (Pty) Ltd v King*⁵³⁰ the finding by Thirion J that '[t]he party who has repudiated is entitled to withdraw his repudiation before the other party has made his election' is unnecessary to reach the conclusion as to when prescription began to run which formed the basis for the decision, as was the remark in *Cole v Stuart*⁵³¹ from which this principle was drawn. In *Vromolimnos v Weichbold*,⁵³² *Langverwacht Farming Co v Sedgwick & Co Ltd (II)*⁵³³ and *Culverwell v Brown*⁵³⁴ the courts would again endorse this principle without relying on it to reach their ultimate decisions.⁵³⁵ By contrast, in *Kameel Tin Co v Brollomar Tin Exploration Ltd* Greenberg J, in a rather confused judgment and restricting his finding to a refusal persisting past the date when performance was due, found that a withdrawal of the repudiation and tender of performance would not affect the aggrieved party's right to cancel.⁵³⁶

It is generally accepted that, outside of the context of repudiation, a breaching party cannot deprive the aggrieved party of a right to cancel the contract by means of a tender to cure the defective performance.⁵³⁷ A contracting party is rather entitled to a reasonable period in which to elect whether or not to exercise the right to cancel the contract. It is not merely the elapse of the reasonable period which deprives the party of the right to cancel the contract but rather that in appropriate circumstances it is possible to infer that the aggrieved party has elected to affirm the contract.⁵³⁸ It is only this tacit or express affirmation or the reliance on the appearance thereof that would deprive the aggrieved party of the right to cancel.⁵³⁹ Lubbe has suggested that, absent any clearly binding authority supporting the position that a right to cancel can be lost on the retraction of a repudiation, the same position should apply in the context of repudiation.⁵⁴⁰ A number of other

⁵²⁷ Wessels *op cit* note 63 at 2955.

⁵²⁸ *HMBMP Properties (Pty) Ltd v King* 1981 1 SA 906 (N) 911; *Cole v Stuart* 1940 AD 399 414; *Vromolimnos v Weichbold* 1988 2 SA 468 (C) 477; *Langverwacht Farming Co v Sedgwick & Co Ltd (II)* 1942 CPD 155; *Culverwell and Another v Brown* 1988 2 SA 468 (C).

⁵²⁹ Lubbe *op cit* note 315 148-50.

⁵³⁰ *HMBMP Properties supra* note 528 911.

⁵³¹ *Cole v Stuart* 1940 AD 399 414.

⁵³² *Vromolimnos v Weichbold supra* note 528 477.

⁵³³ *Langverwacht Farming Co supra* note 528 155.

⁵³⁴ *Culverwell v Brown* (1988) *supra* note 528; this reasoning was cited with approval by Hefer JA on appeal in *Culverwell v Brown supra* note 60, again it played no role in reaching the final decision.

⁵³⁵ Lubbe *op cit* note 315 148-50.

⁵³⁶ *Kameel Tin Co v Brollomar Tin Exploration Ltd supra* note 58 733; Lubbe *op cit* note 315 152-4.

⁵³⁷ *Mahabeer v Sharma NO and Another* 1985 (3) SA 729 (A); *Culverwell v Brown supra* note 60; Dale Hutchison and Francois Du Bois 'Contracts in General' in Francois Du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 882; Van der Merwe *et al op cit* note 2 356-7.

⁵³⁸ Van der Merwe *et al op cit* note 2 412-4.

⁵³⁹ *Ibid.*

⁵⁴⁰ Lubbe *op cit* note 315 148-50.

academic commentators have also questioned whether a retraction should deprive an aggrieved party to cancel the contract on this basis.⁵⁴¹

It is clear that the possibility that a repudiation could be retracted on the basis that it remains incomplete before being accepted can no longer be endorsed in South African law. The finding in *Tuckers Land and Development Corporation*⁵⁴² and subsequent confirmation in *Datacolor*⁵⁴³ that an anticipatory breach is an immediate breach make that reasoning untenable. Similarly the distinction made in *Kameel Tin*⁵⁴⁴ between a refusal before the time performance is due and one occurring after the time performance is due is difficult to sustain where anticipatory breach includes both forms of refusal. It is then unclear why a repudiation occurring before the time for performance could be withdrawn but not in the case of a repudiation occurring at or after the time performance became due.

However, the construction given to repudiation by Nienaber JA in *Datacolor*,⁵⁴⁵ does potentially provide an alternative basis for allowing a party to withdraw their anticipatory breach and deprive the aggrieved party of the right to cancel the contract. Nienaber has set out this reasoning himself on a number of occasions and confirmed this position in an *obiter* remark in *Datacolor*.⁵⁴⁶ Consistent with the definition Nienaber JA gives to repudiation in *Datacolor*,⁵⁴⁷ Nienaber, in his earlier academic writing, notes that repudiation is 'characterised by a definite relationship existing between the act of repudiation and the actual breach it predicts.'⁵⁴⁸ It is the expectation of this eventual actual breach which provides the basis for affording the aggrieved party an immediate right to cancel the contract.⁵⁴⁹

Nienaber suggests that this explains why a retraction of a repudiation deprives the aggrieved party of the right to cancel the contract.⁵⁵⁰ Where a party retracts their repudiation the expectation of a non- or malperformance is replaced with 'the original expectation of full performance,'⁵⁵¹ 'with the result that, strictly speaking, nothing remains after the repudiation has been withdrawn on which to justify the rescission of the contract.'⁵⁵² On Nienaber's reasoning it is the likelihood that the repudiating party will commit a non- or malperformance that would justify cancellation which forms the basis for the right to cancel and because this expectation is reversed when the repudiation is withdrawn the right to cancel the contract should fall away. Nienaber notes that any immediate loss suffered as a result of the repudiation would remain recoverable.⁵⁵³

⁵⁴¹ Van der Merwe *et al op cit* note 2 356-7; Wille's Principles *op cit* note 537 869, 882; A J Kerr *op cit* note 6 595-7; Christie and Bradfield *op cit* note 2 563.

⁵⁴² *Tuckers supra* note 60 653.

⁵⁴³ *Datacolor supra* note 1 at [16].

⁵⁴⁴ *Kameel Tin Co v Brollomar Tin Exploration Ltd supra* note 58.

⁵⁴⁵ *Ibid* at [17].

⁵⁴⁶ *Ibid* at [29]; see also Nienaber (1962) *op cit* note 97 224; Nienaber (1961) *op cit* note 21 425-32; Nienaber (1963) *op cit* note 21 37; Nienaber (1989) *op cit* note 3 1-4.

⁵⁴⁷ *Datacolor supra* note 1.

⁵⁴⁸ Nienaber (1962) *op cit* note 97 224.

⁵⁴⁹ Nienaber (1961) *op cit* note 21 425-32; Nienaber (1962) *op cit* note 97 224; Nienaber (1963) *op cit* note 21 37; Nienaber (1989) *op cit* note 3 1-4.

⁵⁵⁰ *Ibid*.

⁵⁵¹ Nienaber (1961) *op cit* note 21 425.

⁵⁵² Nienaber (1961) *op cit* note 21 432.

⁵⁵³ Nienaber (1961) *op cit* note 21 425 ; Nienaber (1989) *op cit* note 23 3.

Liu applies essentially the same reasoning in his discussion of English law.⁵⁵⁴ He defines anticipatory breach as an 'inferential breach of a future obligation' and notes that '[a]s a result of its futurity, the loss of performance that the victim might sustain is in a state of flux.'⁵⁵⁵ The aggrieved party must accept the breach in order 'to render the anticipated breach in effect "inevitable"'.⁵⁵⁶ Prior to acceptance it is then open to the repudiating party to retract their repudiation and destroy the inference that they will in future commit a fundamental breach. It is on this basis that Liu describes an unaccepted anticipatory breach as a 'retractable wrong'.⁵⁵⁷

Both Nienaber and Liu suggest that the basis for affording the aggrieved party the right to cancel the contract is the predicted breach, a breach which will result in the aggrieved party being substantially deprived of the benefit of the contract. However what both Nienaber and Liu miss is that although the expectation that the aggrieved party will be substantially deprived of the benefit of the contract provides the justification for affording the aggrieved party a right to cancel it does not form the basis for such right. The anticipated breach is an expectation which will most likely never arise once the aggrieved party takes any action as a result of such expectation. Using the anticipated breach as the basis for affording the aggrieved party a right to cancel would create a paradox in that the remedy of cancelling the contract would destroy the basis for affording the aggrieved party the remedy.

The basis for the right to cancel is rather the material breach of contract which is constituted by the conduct or circumstances giving rise to the expectation that the breaching party will fail to correctly perform their primary obligations.⁵⁵⁸ It is this immediate infringement of the right to performance which constitutes the anticipatory breach, and not the anticipated future infringement of the right to performance, which forms the basis for affording the aggrieved party a right to cancel the contract. Although a party may withdraw their repudiation and by doing so may reverse the expectation that the aggrieved party will be substantially deprived of the benefit of the contract they cannot reverse the fact of having committed a material breach of contract. The repudiating party may be able to restore the expectation that they will perform their obligations correctly but cannot 'undo' the circumstances which constituted the material breach.

Anticipatory breach is then no different from actual breach of contract. Although the expected substantial deprivation provides the justification for affording the aggrieved party the right to cancel it is the present conduct or surrounding circumstances which form the basis for such right. This is true for both actual and anticipatory breach of contract. Actual breach differs from anticipatory breach only to the extent that this basis takes the form of a material non- or malperformance rather than conduct or circumstances which predict that such material non- or malperformance will occur.

⁵⁵⁴ Liu (2011) *op cit* note 12 160.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Ibid.*

⁵⁵⁸ This reasoning is similar to the argument presented by Lubbe *op cit* note 315 160-1. Although Lubbe disputes Nienaber's position that the 'right to cancel can be brought home under the element of prospectivity' he seems to accept Nienaber's reasoning regarding the claim for damages. It was however established in Chapter 3 that the claim for damages must be based on cancellation and not on any predicted breach and so this contention must also be rejected. See also Chitty *op cit* note 12 24-023 in respect of English law and cases cited under note 158.

From a practical perspective, as Lubbe notes, it is not clear that the retraction of a repudiation necessarily reverses the expectation that a party will commit a breach.⁵⁵⁹ Lubbe further notes that retraction is also open to abuse, potentially allowing ‘an unscrupulous contract breaker to play ducks and drakes with the aggrieved party’. It could also incentivise aggrieved parties to act quickly, and perhaps rashly, in cancelling the contract on the basis of a repudiation in order to prevent the repudiating party from withdrawing their repudiation. Lubbe correctly points out that to ‘permit retraction will result in the very uncertainty the avoidance of which forms the basis of the recognition of repudiation’.⁵⁶⁰

What Lubbe does acknowledge is that if, as some commentators suggest, a retraction would need to be accompanied by some tender or assurance of performance in order to be effective, this would to some extent address these concerns.⁵⁶¹ However, if it is accepted that a party who had committed a material breach could take steps which sufficiently mitigated the prejudice to the aggrieved party such that it justified taking away the aggrieved party’s right to cancel it is not clear why this should be restricted to anticipatory breach of contract. What is then described would appear to be consistent with what is sometimes referred to as a ‘tender to cure’ a breach.⁵⁶²

In the context of actual breach of contract this would presumably take the form of a tender of full performance. For anticipatory breach of contract, because performance is not yet due, this would likely be achieved by providing an ‘adequate assurance of performance’.⁵⁶³ At this stage in South African law, a tender to cure a material breach will, in general, not affect the aggrieved party’s right to cancel the contract, although strong arguments have been presented in favour of introducing a mechanism that would allow for such.⁵⁶⁴

Importantly it would seem clear that the right to tender to cure a material breach (whether for an actual or anticipatory breach) and deprive the aggrieved party of the right to cancel the contract must be subject to requirements and restrictions that serve to avoid possible prejudice to the aggrieved party.⁵⁶⁵ Although curing an anticipatory breach may be easier, because the breaching party has not yet necessarily committed any malperformance and may still have time available before she or he is required to perform, as was shown above, from both a practical and doctrinal perspective, there is no reason that the same restrictions as are suggested in the context of actual breach should not also apply in the context of anticipatory breach. The distinction between actual and anticipatory breach which is created by allowing ‘retraction’ of a repudiation but not allowing a breaching party to ‘tender to cure’ a material actual breach is unwarranted. Arguments in favour of allowing a right to correct an anticipatory breach because it may be easy to do so only make arguments in favour of introducing a right to tender to cure both forms of breach all the more pressing.

⁵⁵⁹ Lubbe *op cit* note 315 160-2.

⁵⁶⁰ *Ibid.*

⁵⁶¹ *Ibid.*

⁵⁶² Tjakie Naudé ‘Termination for Breach of Contract’ in Hector MacQueen & Reinhard Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* (2006) 280.

⁵⁶³ See the discussion of ‘adequate assurance of performance’ in Section 4.2 *Alternative remedies* below.

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid.*

There is no doctrinal justification for depriving an aggrieved party of the right to cancel on the basis that a party who has committed an anticipatory breach offers a bare retraction of such anticipatory breach. Further, allowing the party committing an anticipatory breach to deprive the aggrieved party of the right to cancel is also not justified from a practical perspective. It is not clear that a retraction will reverse the effects of the anticipatory breach and restore the aggrieved party's expectation of proper performance and it could be open to abuse by an unscrupulous contracting party. Finally, the suggestion that a breaching party should be entitled to deprive the aggrieved party of their right to cancel by retracting their repudiation and tendering full performance rather than supporting an argument in favour of recognising 'retraction' instead supports an argument in favour of allowing a right to 'tender to cure' a material breach generally.

4.2 *Alternative remedies*

It was established above that an anticipatory breach will always entitle the aggrieved party to cancel the contract and that the breaching party cannot deprive the aggrieved party of their right to cancel the contract by withdrawing their anticipatory breach. There are nonetheless circumstances in which a contracting party can face prejudice in the face of an apparent anticipatory breach of contract which the remedy of cancellation does little to address.

This prejudice can arise, firstly, where the aggrieved party's performance is due at the time, or will be due shortly after, a party commits an anticipatory breach of contract. In these circumstances the aggrieved party must either perform her or his contractual obligations in the face of the uncertainty created by the anticipatory breach or cancel the contract, thus terminating their obligation to perform. The prejudice arises because, although the breaching party cannot deprive the aggrieved party of their election on whether or not to cancel, the obligation to perform could inhibit the opportunity to make such election. If a party wishes time in which to make a decision as to whether to cancel or to push for performance, absent a remedy, she or he would also be required to perform their obligations or breach the contract themselves, despite the indication that the breaching party's performance will not be forthcoming.

Secondly, prejudice can arise where it would appear that a party is likely to commit a material breach of contract but where it may not be possible to be reasonably certain that they will commit the breach. This means that the conduct may or may not amount to an anticipatory breach. These have been labelled 'uncertainty of performance' cases.⁵⁶⁶ In these circumstances where a party may have committed an anticipatory breach the aggrieved party faces a dilemma. If she or he cancels the contract she or he will risk committing an anticipatory breach themselves if it turns out that her or his assessment was incorrect. If she or he chooses not to cancel the contract she or he will be uncertain as to whether the performance owed to her or him will be forthcoming and may be required to perform in the face of this uncertainty.

South African law recognises a remedy for the first case. Where a party has committed a repudiation the aggrieved party is entitled to suspend performance of their outstanding obligations while the repudiation persists or she or he elects to cancel the contract.⁵⁶⁷ In *Moodley v Moodley*, Nienaber J, as he was then, finds the basis of the rule in the notion that a party cannot advantage herself or

⁵⁶⁶ Liu (2011) *op cit* note 12 2-4.

⁵⁶⁷ *Ashcor Secunda supra* note 309 [8]; *Erasmus v Pienaar* 1984 4 SA 9 (T) 29 read with 22; *Moodley v Moodley* 1990 1 SA 427 (D) 431; Andrew Hutchison 'Reciprocity in Contract Law' (2013) 24 *Stellenbosch Law Review* 3.

himself by their own wrongful action.⁵⁶⁸ That is, the repudiating party, being the reason why the aggrieved party is withholding performance, cannot use the failure to tender performance to her or his advantage.

This remedy, which has also been described as being derived from the principle of reciprocity, allows a party who would otherwise be obliged to perform in the face of an anticipatory breach of contract by the other party to suspend their own performance, giving them the opportunity to consider their position or press for performance without being prejudiced by the obligation to perform in the face of the breaching party's refusal or impaired ability to perform.⁵⁶⁹

Allowing a party to suspend their performance in the face of an anticipatory breach by the other party also provides an extra curial remedy which the aggrieved party could use to try and enforce performance by the breaching party. Importantly, this enforcement function, unlike where it provides the aggrieved party time to consider their position, would not only be useful in the context of an anticipated material breach but any anticipated breach. This then raises the question as to whether it would be appropriate to afford parties anticipating a non-material breach a remedy and by extension recognise such conduct as amounting to a breach. Although perhaps attractive, as an anticipated non-material breach does infringe a party's interest in the promised performance, the argument presented above, that a predicted non-material breach is not a sufficiently serious infringement of a contracting party's interest in the performance so as to justify providing a remedy is nonetheless persuasive.⁵⁷⁰

Importantly though, the remedy does not, as has been suggested, provide any assistance in the second set of circumstances described above, the uncertainty of performance cases, for which no adequate remedy is provided.⁵⁷¹ This follows from the conclusion that suspension of performance as a remedy is and should only be available where a party has committed an anticipatory breach of contract, that is where it is reasonably certain that a party will commit a material breach. As with cancellation, the suspension of performance in a case of uncertainty of performance could itself amount to an anticipatory breach. The party facing this uncertainty experiences the same dilemma whether they seek cancellation or suspension of performance as a remedy if it turns out that the uncertainty is insufficient to establish an anticipatory breach. They therefore risk committing an anticipatory breach themselves by cancelling or suspending their own performance.

A contracting party in the uncertainty of performance case, as an alternative to cancellation or suspension of performance, could seek an order of specific performance. While there would appear to be no reported South African decisions in which a court ordered specific performance, this can likely be attributed to fact that the dominant view as to what constituted repudiation for most of the recent case history was that repudiation was only completed as a breach of contract upon acceptance by the aggrieved party.⁵⁷² This position, that an anticipatory breach is only completed on acceptance, would preclude an aggrieved party from obtaining an order of specific performance on

⁵⁶⁸ *Moodley v Moodley supra* note 567 431.

⁵⁶⁹ *Ibid.*

⁵⁷⁰ See sections 1.8 *A breach justifying cancellation*, 2.4 *Repudiation is a material breach*, 3.3 *Cancellation for Breach of Contract in English law* above.

⁵⁷¹ Andrew Hutchison (2013) *op cit* note 567.

⁵⁷² As was noted above an order of specific performance on the basis of an anticipatory breach was granted by the Privy Council in *Khatijabai Jiwa Hasham v Zenab supra* note 94.

the basis of an anticipatory breach as the breach would only be completed after the contract had been cancelled. The rejection of the 'breach conversion' rule, as it is termed by Liu, in *Stewart Wrightson v Thorpe*⁵⁷³ has however ended any objection to such an order being made.

Although seeking an order of specific performance does not carry the risk of such action amounting to an anticipatory breach, as is potentially the case with cancellation or suspension of performance, it is nonetheless not an effective remedy. This is firstly because, again, the remedy only arises where a breach can be established.⁵⁷⁴ If the party seeking the order was unable to establish that an anticipatory breach has occurred, as is potentially the case in uncertainty of performance cases the party would not be able to obtain an order of specific performance and would potentially face an adverse costs order in bringing the matter to court. Further, the availability of an order of specific performance does not effectively address the prejudice that is likely to arise in the circumstances.

Prejudice is most likely to arise where a party is in a precarious position and needs to establish with a degree of urgency whether or not the party whose performance is uncertain is or is not likely to perform. That is, where a party needs to resolve the uncertainty as to whether there is or is not an anticipatory breach of the contract. In these circumstances a likely slow moving curial remedy would be of little assistance even if it could resolve the uncertainty of performance.

An innovative extra curial remedy was introduced by the Uniform Commercial Code in the United States of America and has subsequently been adopted by a number of transnational instruments to address these 'uncertainty of performance' cases.⁵⁷⁵ This remedy entitles a party in an uncertainty of performance case to make a request for an 'adequate assurance of performance' from the party whose performance is uncertain. If the party whose performance is uncertain fails to provide an 'adequate assurance of performance' the aggrieved party is then entitled to cancel the contract. This can be seen in the wording of Article 7.3.4 of the PICC, which also incorporates a similar right to suspend performance as was discussed above.

'A party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and may meanwhile withhold its own performance. Where this assurance is not provided within a reasonable time the party demanding it may terminate the contract.'⁵⁷⁶

One of the key features of Article 7.3.4 and how it functions to address the uncertainty of performance cases is that the standard of probability required for the article to be applicable is that the aggrieved party must 'reasonably believe'. This is a lower standard of probability than is used in Article 7.3.3, which affords the aggrieved party an immediate right to cancel the contract, where it is 'clear' that a party will commit a fundamental breach.⁵⁷⁷ This lower standard of probability makes the remedy in Article 7.3.4 applicable in uncertainty of performance cases in addition to cases where it is clear that a party will commit a fundamental breach.

⁵⁷³ *Stewart Wrightson v Thorpe supra* note 60.

⁵⁷⁴ *Hayne v King William's Town Municipality* 1951 (2) SA 371 (A) 378; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 772; *Botha and Another v Rich NO supra* note 382.

⁵⁷⁵ The UCC *op cit* note 332 § 2-610-11; the CISG *op cit* note 266 Article 71; the PICC *op cit* note 266 Article 7.3.4; PECL *op cit* note 266 Article 8:105.

⁵⁷⁶ The PICC *op cit* note 266 Article 7.3.4.

⁵⁷⁷ The PICC *op cit* note 266 Article 7.3.3; Huber *op cit* note 469 951.

The mechanism in Article 7.3.4 allows a party facing uncertain performance to address this uncertainty with the request for an adequate assurance of performance. The official comment to the PICC states that what constitutes an adequate assurance of performance depends on the circumstances but could be as little as a declaration that performance will be made or as much as providing security or guarantees of performance.⁵⁷⁸ It is clear from the examples given and the label used that an adequate assurance of performance must be sufficient in the circumstances to create a reasonable belief that due performance will be made, thereby addressing the aggrieved party's uncertainty. If an adequate assurance of performance is not provided the aggrieved party will be entitled to cancel the contract, thereby also resolving the uncertainty, effectively escalating the likelihood of the breach and allowing the same remedy as would be the case if it was clear that a fundamental malperformance was going to occur.⁵⁷⁹

It is also worth noting that the operation of Article 7.3.4 is restricted to where there is a reasonable belief that a 'fundamental breach' will occur.⁵⁸⁰ As was discussed above the notion of a fundamental breach used in the PICC is strongly analogous to the concept of a material breach used in South African law.⁵⁸¹ For the same reasons as were discussed above in relation to anticipatory breach generally, the necessity for a remedy in uncertainty of performance cases is restricted to circumstances where there is a reasonable belief that a material breach will occur. Those being that it is only the anticipation of a material breach that will likely lead to wasted expenditure and which will create the dilemma for the aggrieved party over whether or not to cancel. Article 7.3.4 therefore serves to resolve uncertainty over whether or not such fundamental or material breach will occur.

This procedure of allowing a party to cancel after a party whose performance is uncertain fails to provide an adequate assurance of performance within a reasonable time after such request was made has a logical consistency with the remedy of immediate cancellation that is allowed where it is clear that the party will commit a fundamental or material breach. Where a party is either unable or unwilling to provide an adequate assurance of performance it will often provide a strong indication that they are unable or unwilling to perform their obligations correctly and this would in turn, in general, serve to confirm the doubts as to their likely performance and make it clear that they will not perform correctly. The adequate assurance procedure therefore serves to reinforce the logical conclusion that would generally follow the failure to cater to such a request.

In addition to its logical coherency, Naudé has noted that there is existing South African authority which supports a principle which would entitle a party to request an assurance of performance on the basis of a reasonable belief that the party to whom this request is made will commit a material breach.⁵⁸² In *Hayne v Narun Bros*,⁵⁸³ drawing on principles set out by Domat and Pothier, the court allowed a seller of goods on credit to request an assurance of payment in the form of a bank guarantee after the buyer assigned his estate, failing which the seller would be entitled to cancel the contract.⁵⁸⁴ It should be noted that Vivier JA, although specifically avoiding making a finding as to

⁵⁷⁸ Official Comment 2 to Article 7.3.4 226; Huber *op cit* note 469 951-2.

⁵⁷⁹ The PICC *op cit* note 266 Article 7.3.3; Huber *op cit* note 469 953-4.

⁵⁸⁰ *Ibid*.

⁵⁸¹ See sections 1.1 and 3.4.

⁵⁸² Naudé (2013) *op cit* note 4 299-300.

⁵⁸³ *Hayne v Narun Bros* 1926 OPD 207.

⁵⁸⁴ *Ibid* 214.

whether the rule could be extended, noted in an *obiter* statement with regard to the rule expressed in *Hayne* that:

'I doubt whether there is any need for the application of the rule in a sale of land for cash in our law where the obligations of the seller and buyer are reciprocal and concurrent and where the seller is adequately protected by the ordinary guarantee...'⁵⁸⁵

This could militate against the extension of this principle on this basis. However, even if Vivier JA's position is accepted, there is nonetheless an alternative basis on which the request for an adequate assurance of performance could be based and that is by analogy with the notice of rescission applied in the context of delay.⁵⁸⁶ Naudé has cogently argued that the notion of escalating the seriousness of a breach by notice in order to obtain a right to cancel should not be extended to allow for the escalation by notice of a breach consisting of a non-material positive malperformance. Naudé notes that the German law and Dutch law allow for the possibility of a notice of the intention to cancel on the basis of a non-material positive malperformance in terms of a *Nachfrist* notice.⁵⁸⁷ However, because of the restrictions put in place to protect the breaching party from cancellation for a trivial breach the introduction of such a procedure would not serve to introduce any greater certainty on when termination is allowed and on balance does not justify a departure from the South African position.⁵⁸⁸

A procedure allowing a contracting party to demand an adequate assurance of performance, and to cancel if such is not provided, on the basis of a reasonable belief that the other party will commit a material breach would not require any such protections as it would only apply where a material breach was expected. Like the notice of rescission in the context of delay such a demand would serve to resolve the uncertainty created as to whether performance will be made correctly by putting the party whose performance is uncertain to an ultimatum. The party whose performance is uncertain, either based on their delay in performing or as a result of their conduct or circumstances which give rise to a reasonable belief that they will commit a material malperformance, must then resolve this uncertainty either positively, by complying with the requirements of the notice and restoring confidence, or negatively, by failing to do so which would give rise to a right to cancel the contract.

The demand for adequate assurance of performance, unlike the *Nachfrist* notice, would not allow a party to cancel for a non-material breach. Rather, as is suggested is the correct theoretical basis for the notice of rescission, it would afford a contracting party the right to put the other party, whose performance is in doubt, to an ultimatum. Compliance with this ultimatum would remove the doubt and the failure to comply with it would be deemed to be a confirmation of this doubt and so would then justify affording the aggrieved party a right to cancel the contract on the basis of what would amount to an anticipatory breach of contract.⁵⁸⁹

⁵⁸⁵ *Wilson v Spitze* (539/87) [1989] ZASCA 11 (16 March 1989) 32-3.

⁵⁸⁶ Naudé (2013) *op cit* note 4 299-300.

⁵⁸⁷ *Ibid.*

⁵⁸⁸ *Ibid.*

⁵⁸⁹ See section 3.2; *Louinder v Leis supra* note 403; *Treitel op cit* note 15 914; Naudé *op cit* note 4 291.

4.3 Damages for anticipatory breach and mitigation of losses

As was noted above, Nienaber has suggested in his academic writing that conduct which predicts a non-material breach should also be recognised as constituting an anticipatory breach of contract.⁵⁹⁰ Nienaber premised this position on the basis that the rejection of the 'offer-acceptance' model for anticipatory breach of contract meant that an anticipatory breach need not amount to an offer to cancel the contract and that there was therefore no longer any basis for insisting that an anticipatory breach must justify the cancellation of the contract.⁵⁹¹ However, as was discussed above, although Jansen JA writing in *Stewart Wrightson v Thorpe*⁵⁹² correctly rejected the construction of repudiation as consisting of any form of offer this did not also imply a rejection of the 'conditional damages claim' model described by Liu.⁵⁹³

In terms of the conditional damages claim model, although an anticipatory breach is an immediate breach constituted by conduct or circumstances giving rise to an inference that a contracting party will fail to correctly perform their obligations, this breach does not, in general, give rise to an immediate right to claim damages. The damages claim arises only after the aggrieved party has elected to cancel the contract on the basis of the anticipatory breach. As was discussed above, this conditional damages claim model provides a more coherent explanation for the earlier decisions on the operation of anticipatory breach of contract and further, that restricting anticipatory breach of contract to material breach, as entailed by the model, promotes certainty and economic efficiency.⁵⁹⁴ The conditional damages claim model, in terms of which an aggrieved party is, in general, only entitled to claim damages on the basis of an anticipatory breach after cancellation, is also consistent with the model of obligations arising from breach of contract proposed by Lord Diplock.⁵⁹⁵

As was also noted above, Lord Diplock's model describes a secondary obligation to pay damages that arises from a breach of contract consisting of a failure to perform a primary obligation under the contract and an alternative anticipatory secondary obligation to pay damages arising after a contract is cancelled on the basis of a material breach of contract. The secondary obligation to pay damages is directed at mitigating the negative financial effects of the imperfect performance of the primary obligations.⁵⁹⁶ Where a party commits a material breach the aggrieved party may instead of enforcing the secondary obligation to pay damages elect to cancel the contract, that is terminate the outstanding primary obligations.⁵⁹⁷ It is this termination of the primary obligations under the contract, the cancellation, which then gives rise to an anticipatory secondary obligation to pay

⁵⁹⁰ See Sections 1.8 *A breach justifying cancellation* and 2.4 *Repudiation is a material breach* above and Nienaber (1961) *op cit* note 21 277; Nienaber (1989) *op cit* note 3 2-4.

⁵⁹¹ *Ibid.*

⁵⁹² *Stewart Wrightson v Thorpe supra* note 60.

⁵⁹³ *Ibid*; Liu (2005) *op cit* note 92 560.

⁵⁹⁴ Liu (2005) *op cit* note 92 560.

⁵⁹⁵ See sections 3.3 *Cancellation for Breach of Contract in English Law* and 3.6 *Conclusion* above.

⁵⁹⁶ *The Afvos supra* note 440 203. Gardner (2011) *op cit* note 445 30:1-50.

⁵⁹⁷ It should be noted that any actual breach of contract, including material actual breach, may give rise to a secondary obligation to pay damages which would arise at the time of the breach. Where a party elects to cancel the contract on the basis of an actual material breach they will therefore be cancelling both the outstanding primary obligations and the secondary obligation to pay damages which arose at the time of the breach. The secondary obligation to pay damages is then replaced with an anticipatory secondary obligation to pay damages arising from the cancellation of the primary and secondary obligations.

damages, an obligation to mitigate the negative financial effects arising from the cancellation of the contract.⁵⁹⁸

This creates a small but significant distinction between damages arising from breach generally and damages arising following the cancellation of the contract. The secondary obligation to pay damages finds its basis in, and arises at the time of, the breach of contract. By contrast the anticipatory secondary obligation finds its basis in the cancellation of the contract and therefore can only arise once the aggrieved party has made the election to cancel the contract. This would hold true not just for cancellation following anticipatory breach but also where the aggrieved party cancels the contract following a material actual breach. Whether a contract is cancelled on the basis of a material actual breach, or an anticipatory breach, it is the cancellation which gives rise to the obligation to pay damages rather than the breach itself. This makes the time at which the obligation to pay damages after cancellation of the contract arises consistent with the time at which the obligation to effect restitution after cancellation arises, that being the time at which the contract is cancelled.⁵⁹⁹

This distinction between the time at which the secondary obligation to pay damages following breach arises and the time at which the anticipatory secondary obligation to pay damages following cancellation arises affects the time at which the aggrieved party is required to take steps to mitigate their loss and when prescription begins to run. Because the anticipatory secondary obligation only arises on cancellation and not at the time of the breach the earliest time at which an aggrieved party can be required to take steps to mitigate her or his losses and at which prescription can begin to run is after cancellation rather than, as has been suggested, at the time of the breach of contract.⁶⁰⁰

Importantly, the effect of this distinction between the secondary obligation to pay damages arising from breach generally and the anticipatory secondary obligation to pay damages arising from cancellation is limited to creating a distinction between the time at which the damages claim arises in respect of secondary and anticipatory secondary obligation to pay damages. It does not affect the

⁵⁹⁸ *The Afovos supra* note 440 203. Gardner (2011) *op cit* note 445 30:1-50.

⁵⁹⁹ The South African law which deals with the moment at which the damages are to be calculated is not altogether clear and although a distinction is drawn between the standard position where damages are generally calculated at the time of the breach (see *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 187; *Van der Merwe et al op cit* note 2 349-50) and in the context of repudiation (*Culverwell supra* note 60 30) where damages are generally calculated at the time of the acceptance of the repudiation the basis for this distinction is not the one used above. In fact, using the time of the acceptance as the time at which damages are to be calculated is described as 'arbitrary' by Hefer JA in *Culverwell supra* note 60 30 while the discussion above shows that this is not the case at all. These rules are also subjected to a number of exceptions which allow for the calculation of damages at a different time where appropriate, such as at the time the plaintiff enters into a substitute contract. Although a full discussion is beyond the scope of this thesis it is submitted that describing these as exceptions demonstrates some confusion. It is submitted that the appropriate time to calculate damages (that is the moment at which the plaintiff's actual financial position is compared to the hypothetical financial position they would have occupied had the contract been performed correctly) will always be the time of the breach, for an actual breach where the contract is not cancelled, and at the time of cancellation where the contract is cancelled on the basis of a material breach. Although it may be necessary to consider costs and prices at other times in order to make this determination or because such costs or prices may be the best reflection of the cost or price at the time of the breach or cancellation, the relevant time to calculate damages remains the time of the breach or cancellation. This is the time at which the obligation to pay damages will arise and is therefore the moment with reference to which they must be determined.

⁶⁰⁰ *Van der Merwe et al op cit* note 2 357-369.

manner in, nor the moment with reference to, which damages are calculated. This is because the purpose of the two different forms of damages obligation is the same. Despite some uncertainty in the South African case law as to the approach which should be used to determine the amount that an aggrieved party is entitled to recover as damages for breach of contract, the purpose of imposing the obligation to pay damages on the breaching party would seem clear.⁶⁰¹ This purpose, as stated by Innes JA in *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines*,⁶⁰² is to place the aggrieved party in the position she or he would have occupied had the contract been performed properly.⁶⁰³

The distinction between the time at which the secondary and the anticipatory secondary obligation to pay damages arise would have no effect on this purpose of placing the aggrieved party in the position she or he would have occupied had the contract been performed properly. The position in which the aggrieved party finds themselves will obviously differ depending on whether or not the damages arise from a breach or from cancellation following a material breach because of the effects of cancellation on the aggrieved party's financial position. However, the purpose remains consistent across both forms of damages obligation and there is no basis on which to distinguish them other than the time at which the obligation arises. There is therefore no basis for using a different approach to calculate the damages.

The effect of this distinction is therefore limited to the time at which the damages obligation arises and, following from that, the earliest time at which a party can be expected to take steps to mitigate their loss and at which prescription can begin to run. Importantly this distinction is not made between damages arising from actual breach of contract and anticipatory breach of contract but rather between damages arising from a breach generally and those arising following cancellation of the contract.

4.4 Conclusion

Despite Nienaber's support for the proposition that the retraction of a repudiation, if made before the aggrieved party has given notice cancelling the contract, should prevent the aggrieved party from cancelling the contract it would seem clear that the establishment of repudiation as an immediate breach and rejection of the 'offer acceptance' model in *Stewart Wrightson*⁶⁰⁴ and confirmed by Nienaber JA in *Datacolor*⁶⁰⁵ would rather suggest that a party committing an anticipatory breach cannot affect the aggrieved party's right to cancel with a mere retraction. Rather, in the interests of promoting certainty, a breaching party should only be entitled to prevent the aggrieved party from cancelling a contract on the basis of a fundamental breach in terms of a general right to tender to cure a material breach, as suggested by Naudé .

Similarly, in the interests of promoting certainty, in addition to being entitled to suspend performance of outstanding obligations on the basis of an anticipatory breach, a contracting party

⁶⁰¹ *Ibid*; this contrary to the finding by Binns-Ward J in *Latib v Pro Sano Medical Scheme supra* note 309 where it was assumed without any justification that prescription would run from when the plaintiff became aware of the repudiation.

⁶⁰² *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines* 1915 AD 1.

⁶⁰³ *Ibid* 22.

⁶⁰⁴ *Stewart Wrightson v Thorpe supra* note 60.

⁶⁰⁵ *Datacolor supra* note 1.

should be entitled to request an adequate assurance of performance from the other party on the basis of a reasonable belief that the other party will commit a material breach, failing which the requesting party should be entitled to cancel the contract. In 'uncertainty of performance' cases, that is where there are reasonable doubts as to whether a contracting party will be able to perform their obligations correctly but it is not clear that the party whose performance is in doubt will commit a material breach, the aggrieved party runs the risk of committing an anticipatory breach by acting on the uncertainty but otherwise has no remedy to address these doubts. Allowing the aggrieved party to request an adequate assurance of performance as an alternative would enable the aggrieved party to resolve the uncertainty without taking the drastic step of cancelling the contract and would serve to promote performance of the contract ahead of cancellation.

Lastly, the acceptance of the conditional damages claim model creates a small but significant distinction between damages arising from breach generally and damages arising following the cancellation of the contract. The difference is that unlike for breach of contract generally, the basis for claiming damages arising from cancellation rests not on the breach but rather arises as a result of such cancellation. Because this right to claim damages only arises after an aggrieved party has elected to cancel the contract the prescription of such claim and the requirement that a party take steps to mitigate their losses as a limitation on such damages claim also only arises at the time the cancellation is effected.

The model for anticipatory breach set out in Chapters 2 and 3 provides a strong theoretical basis for anticipatory breach of contract which, it is argued in these chapters, would enhance clarity and certainty through its application. The impact of this model on the remedies available for anticipatory breach of contract is relatively limited. It would only serve to confirm the position that a party is not entitled to deprive the aggrieved party of a right to cancel the contract arising from an anticipatory breach by merely retracting their repudiation, that a party faced with an uncertain performance is inadequately protected by the existing primary remedy of cancellation and reveals a distinction between damages arising from breach of contract generally and damages arising from cancellation.

These effects in turn have relatively limited impact, suggesting as they do that the argument for introducing a right to cure a breach be reiterated, that a party be entitled to request an adequate assurance of performance on the basis of a reasonable belief that a material breach will be committed and that the 'duty to mitigate', in general, only arises after cancellation in the context of anticipatory breach of contract.

This limited impact is what would be expected of a model that is, as argued by Liu, consistent with the existing case law on repudiation.⁶⁰⁶ At the same time this impact is potentially highly significant where these issues are disputed and serves to increase the consistency and clarity of the doctrine of anticipatory breach of contract and its outcomes.

⁶⁰⁶ Liu (2011) op cit note 12 43 and 64-5.

5 CONCLUSION

The doctrine of anticipatory breach of contract is directed at addressing the prejudice suffered by a contracting party where such party can be reasonably certain that proper performance of the outstanding obligations owed to them will not be forthcoming. This is achieved by allowing an aggrieved party an immediate action for breach of contract in circumstances where a breach of contract is predicted. This doctrine of anticipatory breach of contract, introduced into the South African law from the English law, has traditionally been divided into two broad categories of breach consisting of repudiation, where a party indicates an unwillingness to perform, and prevention of performance, where a party is inhibited or unable to perform.

Although it has been generally acknowledged that the decision in *Datacolor* established a 'new approach' to repudiation in South African law, commentators and the courts have been slow to recognise the full impact that this 'new approach' has had on repudiation, anticipatory breach of contract and cancellation for breach of contract more generally. This thesis explains the effect of the decision in *Datacolor* on the South African law on repudiation and anticipatory breach of contract and then demonstrates and motivates the further implications of this decision on cancellation for breach of contract more generally and the remedies available to aggrieved parties facing an anticipatory breach of contract.

The decisions of Jansen JA in *Stewart Wrightson*⁶⁰⁷ and *Tucker's Land and Development Corporation*⁶⁰⁸ initiated a departure from the 'traditional approach' to repudiation with their rejection of the notion that the right to terminate a contract following a repudiation was completed upon acceptance and the finding that repudiation was therefore an immediate breach of contract. Although, in *Stewart Wrightson*, Jansen JA found that repudiation consisted of a violation of a duty not to repudiate, derived from the *bona fides* underlying the law of contract, this thesis demonstrates that Nienaber's suggestion that anticipatory breach of contract arises as a result of a breach of an *ex lege* duty that is an incident of the duty to render performance in terms of the contract, provides a more convincing explanation of the operation of the doctrine of anticipatory breach of contract.

Nienaber JA, in *Datacolor*, built on Jansen JA's findings to define repudiation as consisting of an 'intimation ... that all or some of the obligations arising from the agreement will not be performed according to their true tenor'⁶⁰⁹ and that '[w]hether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.'⁶¹⁰ This explicit link that Nienaber JA established between the nature of the predicted breach and the determination of whether or not the aggrieved party would be entitled to cancel the contract combined with his confirmation of the objectivity of the assessment necessitates a substantial shift in the conception of repudiation and anticipatory breach of contract in South African law.

⁶⁰⁷ *Stewart Wrightson v Thorpe supra* note 60.

⁶⁰⁸ *Tuckers supra* note 60 651-2.

⁶⁰⁹ *Datacolor op cit* note 1 at [17].

⁶¹⁰ *Ibid.*

In Chapter 2 it was shown that the test for repudiation set out Nienaber JA's judgment in *Datacolor*, a test which uses the outcomes predicted by a contracting party's conduct or the surrounding circumstances as the basis for determining whether an anticipatory breach of contract has occurred, requires the application of a purely objective test for anticipatory breach of contract. In terms of this purely objective test, although a party's intentions are likely to be relevant, it is the predicted outcomes and not a potentially breaching party's intentions which must be ultimately determinative of whether an anticipatory breach has occurred.

The judgment further established that where a breach of contract was predicted, whether or not the aggrieved party would be entitled to cancel the contract would depend on the nature of the predicted breach. That is whether or not a party would be entitled to cancel the contract would depend on whether or not the predicted breach, if it were to occur, would justify affording the aggrieved party a right to cancel the contract (a material breach of contract). Unlike the 'traditional approach', which by focusing on the outward expression of intent places form over substance, this 'new approach' rather focuses on the underlying basis for affording an aggrieved party a remedy, that being the anticipated breach.

It was then established that the adoption of this approach, which defines repudiation with reference to the predicted consequences, destroys any basis for distinguishing between repudiation and prevention of performance occurring before, at or after the time for performance. Similarly it was shown that, following this approach, it is no longer possible to distinguish repudiation from prevention of performance on the basis that repudiation requires some positive expression of intent by the offending party. This has the effect of collapsing the categories into which anticipatory breach has traditionally been divided into a single doctrine of anticipatory breach of contract.

However, contrary to the academic writing of Nienaber and the suggestion by his further, *obiter*, findings as Nienaber JA in *Datacolor*, the doctrine of anticipatory breach of contract should not be extended to include any anticipated breach. Including anticipated non-material breaches within the ambit of anticipatory breach of contract is, contrary to Nienaber JA's suggestion, not adequately justified as it would not avoid wasted efforts and could undermine instead of enhance certainty. The opportunity for abuse by a contracting party and the possibility of engendering wasteful litigation further suggest that an anticipatory breach should only be recognised where it is clear that it is a material breach which is predicted. This restriction is founded on the nature of anticipatory breach of contract as consisting of conduct or circumstances that predict that a breach will occur rather than being based on an actual breach of contract. It is the uncertainty inherent in any prediction which ultimately justifies limiting the recognition of a breach to circumstances where a material actual breach of contract is anticipated.

It was further shown that the 'acceptance requirement', in the form of the 'conditional damages claim' rule, serves a useful function in enhancing certainty in cases of an anticipatory breach of contract. The 'conditional damages claim' rule, which makes the claim for damages arising from anticipatory breach of contract contingent upon the aggrieved party cancelling the contract, promotes finality and consistency by preventing the aggrieved party from simultaneously claiming damages and attempting to uphold the contract and only allowing an aggrieved party to claim damages once these damages have been made certain by the cancellation of the contract.

Anticipatory breach of contract then consists of conduct or circumstances which indicate with reasonable certainty that a contracting party will commit a breach of contract and that this breach would justify the aggrieved party cancelling the contract. This model for anticipatory breach provides a clear test for determining whether or not an anticipatory breach has occurred, a test which directly addresses the source of the prejudice which the aggrieved party suffers, being the expectation of a material breach of contract. By doing so the proposed model for anticipatory breach of contract enhances certainty and economic efficiency. This is achieved by allowing parties to clearly determine when an anticipatory breach has arisen and by allowing aggrieved parties to cancel the contract immediately and thus avoid wasted expenditure.

Importantly, this model for breach of contract requires consideration of the circumstances in which a predicted breach of contract, if it were to occur, would justify affording an aggrieved party an immediate right to cancel the contract. This has traditionally been answered by dividing breach of contract into various categories, each with their own rules on when a party would be entitled to cancel the contract. This does however raise issues particularly in respect of predicted negative malperformance, or *mora*, where the South African law can require an aggrieved party to engage in procedural steps before they are afforded a right to cancel the contract, even where a material delay has occurred.

Chapter 3 examined the historical development of cancellation for breach of contract in South African law. It was demonstrated that the notion of cancellation for breach in South Africa was primarily drawn from English sources and that, with the exception of *mora*, there was strong support for a general standard of material breach justifying cancellation. Further, even in the context of *mora*, where the Roman-Dutch sources sets out procedural steps required before cancellation can be effected, the notion of a material breach of contract justifying cancellation can be accommodated.

Building on this, it was then argued that despite the accepted approach in South African law of dividing breach of contract into various categories, each with its own rules on when a breach justifies cancellation, that support for a general concept of material breach of contract can be found in the South African case law. This general concept of material breach is best explained using a model of contractual obligations drawn from English law, specifically drawing on a number of decisions given by Lord Diplock relating to breach of contract.⁶¹¹ The proposed model distinguishes between primary obligations under the contract, the performance obligations owed by the parties, and secondary obligations to compensate the aggrieved party which arise on breach of the contract.

In terms of this model a material breach of contract then consists of a failure by a contracting party to perform her or his primary obligations correctly, or conduct which indicates with reasonable certainty that she or he will fail to perform her or his primary obligations correctly, which will substantially deprive the aggrieved party of the benefit of the contract. If, balancing the interests of the parties, it would be fair to afford the aggrieved party a right to cancel the contract this conduct will amount to a material breach of contract.

Anticipatory breach of contract can then only consist of conduct or circumstances which would justify the aggrieved party in cancelling the contract, that is a material breach. This is because

⁶¹¹ See for example *The Afvos supra* note 440 and *Photo Production supra* note 434.

although a material breach could consist of either the actual failure to perform a primary obligation correctly or conduct or circumstances indicating with reasonable certainty that such a failure would occur, a non-material breach is restricted to circumstances where a contracting party actually failed to perform their primary obligations correctly. Consistent with the practical justifications for this position given in Chapter 2, Lord Diplock's model provides a doctrinal basis for restricting anticipatory breach to material breaches.

If anticipatory breach must be a material breach it will always justify affording the aggrieved party a right to cancel the contract, but this does not imply that an aggrieved party must cancel the contract or that an aggrieved party's only remedy is cancellation. When considering what alternative courses of action an aggrieved party facing an anticipatory breach could pursue the first issue that arises is whether a party having committed an anticipatory breach of contract and thus entitling the aggrieved party to cancel could act to remedy the breach and deprive the aggrieved party of the right to cancel arising on the basis of the anticipatory breach. This is generally referred to as a 'retraction'.

It was shown in Chapter 4 that a breaching party should not be entitled to prevent the aggrieved party from cancelling the contract by means of a retraction of her or his repudiation. Despite what is suggested by Nienaber JA in *Datacolor*⁶¹² and is supported in his academic writing⁶¹³ it is not justifiable in principle or practice to depart from the current principle applicable to material breach of contract generally, that a party is not entitled to 'cure' a material breach of contract and thereby deprive the aggrieved party of the right to cancel the contract.

It was shown in Chapter 3 that the right to cancel a contract on the basis of an actual material breach of contract and an anticipatory breach of contract is constituted by the immediate conduct of the breaching party and in both cases is founded on the basis that the aggrieved party will be substantially deprived of the benefit of the contract. There is then no doctrinal basis for distinguishing repudiation from other forms of breach by allowing a party to retract her or his repudiation. From a practical perspective, retraction does not necessarily undo the effects of the original anticipatory breach and, as Lubbe notes, '[would] result in the very uncertainty the avoidance of which forms the basis of the recognition of repudiation'.⁶¹⁴ Rather, what support there is for affording a breaching party the opportunity to remedy an anticipatory breach of contract suggests that a general right to cure a breach should be available to parties who have committed a material breach of contract.

It was then demonstrated that, in addition to being entitled to suspend performance of her or his outstanding obligations on the basis of an anticipatory breach of contract, a contracting party should be entitled to request an 'adequate assurance of performance' where she or he has reasonable doubts as to whether proper performance will be forthcoming. This remedy, which is available under the Uniform Commercial Code⁶¹⁵ and transnational model rules of contract,⁶¹⁶ affords a party who is facing 'uncertainty of performance' an intermediate remedy. This remedy allows the

⁶¹² *Datacolor supra* note 1 at [29].

⁶¹³ Nienaber (1962) *op cit* note 97 224; Nienaber (1961) *op cit* note 21 425-32; Nienaber (1963) *op cit* note 21 37; Nienaber (1989) *op cit* note 3 1-4.

⁶¹⁴ Lubbe *op cit* note 315 160-2.

⁶¹⁵ The UCC *op cit* note 332 § 2-610-11.

⁶¹⁶ the CISG *op cit* note 266 Article 71; the PICC *op cit* note 266 Article 7.3.4; PECL *op cit* note 266 Article 8:105.

aggrieved party the opportunity to obtain certainty as to whether or not proper performance will be forthcoming without risking committing an anticipatory breach her- or himself and serves to address the prejudice suffered by a contracting party that arises in 'uncertainty of performance' cases. By providing an alternative to cancellation this remedy also serves to promote the correct performance of contractual obligations over cancellation of the contract.

Finally Chapter 4 addressed the relatively limited impact that the model for anticipatory breach of contract proposed by this thesis has on the existing remedies. This model distinguishes between the secondary obligation to pay damages arising from breach of contract generally and the anticipatory secondary obligation to pay damages arising from cancellation of the contract. Because the anticipatory secondary obligation to pay damages only arises at the time the contract is cancelled prescription of such damages claim only begin to run from the time the contract is cancelled and the requirement that a party take steps to mitigate such damages also only arises at this point in time.

A series of decisions by the Supreme Court of Appeal following the decision in *Datacolor*⁶¹⁷ demonstrates how slow the court has been in recognising the full implications of the development of the law by Nienaber JA in *Datacolor*. The Supreme Court of Appeal, despite each time citing its own earlier decision in *Datacolor*, continued to frame repudiation in terms of the repudiating party's intention, an approach which was strongly deprecated in *Datacolor*.⁶¹⁸ It has been only be in the very recent decision of *B Braun Medical (Pty) Ltd v Ambasaam*⁶¹⁹ that the court, although still using the language of 'an unequivocal intention', has clearly indicated that the basis of the repudiation is founded in the predicted breach rather than the intentions of the repudiating party.⁶²⁰

This failure to engage with the substantial shift brought about by *Datacolor* has also on occasion resulted in significant confusion. For instance, in *Sandown Travel (Pty) Ltd v Cricket South Africa*⁶²¹ Wepener J draws an unwarranted distinction between anticipatory breach occurring before the time for performance and anticipatory breach occurring after the time for performance. In *Sandown Travel (Pty) Ltd v Cricket South Africa*⁶²² Wepener J applies the 'repentance principle', the notion that an aggrieved party may reconsider an affirmation of the contract and instead cancel once the time for performance arrives, in order to justify the finding that despite at first affirming the contract the plaintiff was nonetheless entitled to cancel the contract on the basis of the defendant's continuing repudiation.⁶²³

The principle that a party, at first electing to affirm the contract, is entitled to cancel the contract where the breaching party persists in their repudiation would appear to be quite well established in South African law.⁶²⁴ This principle, as stated here, is entirely consistent with the definition of repudiation and anticipatory breach set out in this thesis, that is where an anticipatory breach is defined with reference to the predicted breach. Where a party persists in her or his refusal to

⁶¹⁷ *Datacolor supra* note 1.

⁶¹⁸ *South African Forestry Co Ltd v York Timbers supra* note 309; *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd supra* note 309; *Food & Allied Workers Union v Ngcobo NO and Another supra* note 309.

⁶¹⁹ *B Braun Medical (Pty) Ltd v Ambasaam supra* note 222.

⁶²⁰ *Ibid* at [11].

⁶²¹ *Sandown Travel (Pty) Ltd v Cricket South Africa supra* note 309.

⁶²² *Ibid*.

⁶²³ *Ibid* at [39].

⁶²⁴ See for example *Culverwell v Brown supra* note 60 17.

perform the contract such conduct continues to support a conclusion that proper performance will not be forthcoming and there is, in general, no reason to restrict the aggrieved party's right to cancel.

However, what is problematic is Wepener J's finding that the opportunity to cancel arises at the time that performance is due.⁶²⁵ This relies on drawing a distinction between anticipatory breach occurring before the time for performance and anticipatory breach occurring or persisting after the date for performance, a distinction which this thesis has demonstrated as having no basis following the decision in *Datacolor*.⁶²⁶ The application of the 'repentance principle' in the way it was construed by Wepener J demonstrates a failure to engage with the significant shift in the law on anticipatory breach brought about by *Datacolor*, this is again in spite of the reliance on the *Datacolor* judgment by Wepener J.⁶²⁷

This thesis is then an attempt to set out and explain the impact of the decision in *Datacolor* on the doctrine of anticipatory breach of contract in South African law and the broader implications that this has had on the South African law of breach of contract and to address any confusion or uncertainty about its application.

In pursuit of this goal this thesis has demonstrated that material breach of contract is best understood as consisting of a failure by a contracting party to perform her or his primary obligations correctly, or conduct which indicates with reasonable certainty that she or he will fail to perform their primary obligations correctly, which will substantially deprive the aggrieved party of the benefit of the contract. If, balancing the interests of the parties, it would be fair to afford the aggrieved party a right to cancel the contract this conduct will amount to a material breach of contract. Anticipatory breaches of contract are then those material breaches which consists of conduct indicating that a failure will occur rather than consisting of the actual failure to perform a primary obligation.

As was shown above, this understanding of material, and anticipatory, breach of contract follows from the 'new approach' to anticipatory breach of contract established in *Datacolor*.⁶²⁸ In terms of this 'new approach' anticipatory breach of contract is defined with reference to the consequences predicted by a breaching party's conduct. This thesis showed that this ultimately necessitates the application of a purely objective test in terms of which anticipatory breach of contract consists of conduct or circumstances that indicate with reasonable certainty that a material (actual) breach of contract will occur.

By focusing on the actual prejudice suffered by the aggrieved party, that being the prejudice caused by the anticipation of a material failure to perform the primary contractual obligations, the definition of anticipatory breach of contract proposed by this thesis clarifies what forms of conduct constitute anticipatory breach of contract and what remedies might be available to an aggrieved party. When defined in this way anticipatory breach of contract effectively addresses the prejudice suffered by contracting parties faced with the likelihood that proper performance of the obligations

⁶²⁵ *Sandown Travel (Pty) Ltd v Cricket South Africa supra* note 309 at [39], [52].

⁶²⁶ *Datacolor supra* note 1.

⁶²⁷ *Sandown Travel (Pty) Ltd v Cricket South Africa supra* note 309 at [21].

⁶²⁸ *Datacolor supra* note 1.

owed to them will not be forthcoming while protecting the interests of the party who is required to perform such obligations.

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