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Supervening impossibility of performance in the South African law of contract

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> "It is clear from the authorities that if a leased building is so damaged by fire caused by lightning that it cannot be used for the purposes for which it was leased, the lessee may vacate the leased premises without liability thereafter to pay rent. Even though only a portion of the building is destroyed, if the destruction is such as to prevent the use at all of the building for the purpose for which it was leased, I think the same would apply. If what has been destroyed is essential to the beneficial use of the building, for the purpose for which it was let, then it may be that, if the cost of restoration is so trifling as to fall under the *de minimis* rule, the lessee would not be entitled to rid himself of liability, but I express no opinion at this stage on the question as to whether it would be the duty of the lessor or the lessee to incur the expense; but where the cost of restoration exceeds such trifling amount, I am not aware of any rule of law that makes the tenant liable to pay rent when by *vis major* the premises have been reduced to such a condition as not at all to afford him the occupation contemplated by the lease."

It must, however, be remembered that here the lease imposed upon the lessee the obligation to keep the licence alive, so the court was concerned to see whether this implied a duty on him to make the necessary structural alterations to the leased premises; this could account for some, at least, of the observations regarding the magnitude and cost of those alterations, and the remarks cannot be made into a peg upon which to hang a doctrine of commercial impossibility.

Bayley's case should be contrasted with the case of *Weinberg v Weinberg Bros (Pty) Ltd*,[52] where Van Winsen J said:[53]

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52. 1951 (3) SA 266 (C) at 266-7.

53. At 276-7.

"If as plaintiff contends he has let a registered factory it seems to me that he has accepted an obligation to keep these premises in a state in which continued registration is legally possible even if in order to do so he might have to make substantial structural alterations to the leased premises. Plaintiff does not really complain in this case that it is legally or physically impossible to put the premises in a state in which they could be registered as a factory. His complaint is that to do so would involve him in reconstruction of the building so as to amount to substantially a new building. It might well be argued that if a landlord lets as a registered factory a building which he knows does not comply with the provisions of the regulations under the Factories Act prevailing at the time he let the building, he must be held to have impliedly undertaken to the tenant to make all such alterations to the building as the authorities concerned could legally demand under such regulations as a condition of continued registration of such building as a factory. This point, however, was not argued and I prefer not to express any final opinion thereon."

In this case the premises let had been substantially damaged by fire,[54] and it was contended, though not established, that they could not be restored because of a number of statutory restrictions, and that until they had been restored they could not be used as a factory as contemplated. The case does not appear to have been referred to in *Bayley v Harwood*, but is distinguishable from it on the ground that additional structural alterations were not called for. All that was required was that the premises be restored to the condition

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54. Which, it seems, was assumed to have been accidentally caused.

they were in at the commencement of the lease,[55] which it seems to have been decided in *Weinberg's* case was a duty that lay upon the plaintiff at common law.[56]

The conclusion seems warranted, that in considering whether a contract has in fact become impossible of performance, particularly in the light of specific terms contained in it are relevant to show whether either party has expressly or tacitly assumed responsibility to rectify the situation which threatens to make performance impossible, such as a duty to effect repairs, to obtain or "re-transfer" licences, to re-deliver a certain number of head of stock, or to guarantee "outlets" or markets, it is not inappropriate to take into account the extent and the expense of the steps required to make performance possible.

E. Doctrine of "Changed Circumstances" and "Commercial Frustration"

In considering whether performance has in fact become impossible it is essential to determine carefully exactly what has been promised.

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55. The very point considered by Greenberg JA in *Bayley v Harwood (supra)* at 502.

56. A doubtful proposition in cases of *vis major* or *casus fortuitus*; see *Rubridge v Hadley* (1848) 2 Menzies 174; *Rahman v Suliman* (1900) 21 NLR 133; *Enochson v Evans* (1900) 9 HCG 54; *Fleming v Johnson & Richardson* 1903 TS 319; *Hansen Schrader & Co v Kopelowitz* 1903 TS 707; *Goldberg v Nante* 1903 TH 150; *Rolfes, Nebel & Co v Zweigenhaft* 1903 TH 242; *Sheffield & Sheffield v Hart* 1903 TH 469; *The Salisbury Building and Investment Society v The British South Africa Co* (1904) 21 SC 238; *Holtshausen v Minnaar* (1905) 9 HCG 50; *Bayley v Harwood* 1954 (3) SA 498 (A) at 509.

Cooper[57] contends that a distinction should be drawn between cases where the leased premises are totally destroyed and cases where the lessee, as a result of the *vis major* or *casus fortuitus*, is merely deprived of the use and enjoyment of the property. He states:

> "In the latter situation the lessor is not being prevented from performing. He has given occupation of the property and occupation remains with the lessee. The reason why . . . the lessee is entitled to remission of rent, it is submitted, is that the continuous full beneficial use and enjoyment of the property was a supposition upon which the parties contracted and, therefore, on failure of their supposition, the lessee is entitled to claim remission of rent."[58]

I respectfully agree with this conclusion, but consider the phraseology used somewhat unfortunate, because it is redolent of the so-called underlying-basis-of-the-contract or common-assumption-of-the parties approach, which constitutes the legal fiction of the "implied-term" theory of the English doctrine of frustration and could lead us into a "changed circumstances" situation similar to that which obtained in English law.[59] If, however, all that is meant by Cooper is that one can infer what has been promised from the relevant

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57. W E Cooper *The South African Law of Landlord and Tenant* (1973) at 180.

58. He gives as his authority for this proposition Wouter de Vos *Verrykingsaanspreeklikheid in die Suid Afrikaanse Reg* 2nd ed 1971) 10, 11, 62, 141, and adds: "This provides a *rationale* for the proposition that when a neighbour, by building, completely obscures the light of leased apartments the lessee is entitled to a remission of rent - *D* 19.2.25.2; Voet 19.2.23. See too *Rex v Stamp* (1879) Kotzé 63; *Baum v Rode* 1905 TS 66 at 67."

59. See above at pp 74f.

terms of the contract and the surrounding circumstances, even if it has not been completely expressed in the contract, his statement of the law is unexceptionable. The correct test revolves around an examination of what indeed was promised contractually by one party to the other.

In *Mountstephens & Collins v Ohlsson's Cape Breweries*[60] Solomon J said:

> "The first question, then, which I have to decide is, what was the subject of the lease? Now on that point there can be no doubt that what was let to the defendants was the building consisting of four rooms. The premises are, it is true, described as a beer hall, but they were not let as licensed premises, although the defendants had the right to use them as such only. The premises had been leased for some years previously, and during that time had been used as a beer hall; but the plaintiffs had never supplied the licence, and in the present action it is common cause that the licence was to be obtained by the defendants. It was the defendants, indeed, who approached the plaintiffs in the first instance and asked them to lease the premises for use as a beer-hall; and I can only assume that they were confident at the time that there would be no difficulty in obtaining the necessary licences. . . . This is not a case, therefore, which involves the destruction of the *res* or the deterioration of the property leased; . . . I am satisfied that it is just as suitable today for the purposes for which it was leased as it was when the lease was entered into. . . . "

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60. 1907 TH 56 at 57.

This principle has also been acted upon in other cases,[61] and must be the true basis of the test in deciding whether *casus fortuitus* or *vis major* creates an impossibility of performance. At an earlier place[62] attention was drawn to the English rule in the so-called Coronation cases.

The principles of English law in this regard seem to have been considered to exist also in our law as early as 1904, in the case of *The British South Africa Co v The Salisbury Investment Society,*[63] where Watermeyer J, after referring to some of the English cases and in particular quoting from the judgment of Vaughan-Williams LJ in *Krell v Henry,*[64] continued:

> "These cases profess to be decided on the principles of Roman law, and are therefore binding on us, and in my opinion they are conclusive, that when the subject of the contract is destroyed, both parties remain where they are, and neither can call on the other for further fulfilment."[65]

However, as can be inferred from the quotations, the case dealt with the physical destruction (by fire) of the subject-matter of the contract and, despite the reference to the English cases, did not deal with impossibility of performance "by reason of the non-existence of a state of things, assumed

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61. *Dutch Reformed Church Council v Crocker* 1953 (4) SA 53 (C) at 59; *Naran v Pillai NO* 1974 (1) SA 283 (D) at 285 (a case where impossibility was not raised, however); *Ornelas v Andrew's Café* 1980 (1) SA 378 (W) at 384D, 389A and 390C, though at 389A Nestadt J speaks of an "implied" term (as also does Steyn J at p 60 of *Crocker's* case.)

62. See above pp 74f.

63. (1904) 21 SC 238 at 240 (High Court of Southern Rhodesia), upheld on appeal by the Cape Supreme Court, which in terms of the law of Southern Rhodesia sat as a court of appeal (H R Hahlo and Ellison Kahn *The Union of South Africa: The Development of Its Laws and Constitution* (1960) 211).

64. *Supra.*

65. At 240.

by both contracting parties as the foundation of the contract.. . . "[66]

A further such case is *Witwatersrand Township Estate & Finance Corporation Ltd v Rand Water Board*,[67] where legal impossibility supervened. The statement by Bristowe J[68] was also *obiter*.

The position in Roman law was also considered in another early case, this time without reference to the English law. The case is *Kopelowitz v Hansen, Schrader & Co*,[69] where Mason J said:[70]

> "In a later section (234) Troplong[71] refers to another aspect of the same matter, namely, where the act of *vis major* , while leaving untouched the property hired, destroys or very materially affects the objects or purpose for which the premises are used. If these objects or purposes, he says, were selected by the lessee, then no remission of rent is claimable; but if the purposes for which the premises were destined are contemplated between the parties, and formed the determining element in the contract of lease, then the tenant is entitled to relief. The same principles are applied to incorporeal rights which are the subject of the

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66. The words quoted by Watermeyer J are from the judgment in *Krell v Henry (supra)*. At 747-8 Vaughan-Williams LJ said: "The real question in this case is the extent of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions."

67. 1907 TS 231.

68. At 241.

69. 1903 TH 134.

70. At 143-4.

71. *Le droit civil, Louage*.

lease. The law which is referred to by these authorities appears in the writings of many commentators, and has been accepted in many cases decided under our system of jurisprudence (Matt *de Auct* 2, 5 (2-14); Wesel *Tract de remissione mercedis;* Gail, bk 2 obs 23; Voet, 19, 2, 23-25; Juta's *Colonial Law* p 227; Van Leeuwen *Cens For* 1, 4, 22 (17); Christ *Decis Belg* 3.110.13 *et seq;* Brunn *Pand* 19.2.5 *et seq; Albouy v Retemeyer* 3 Moore PC Cases 452; *Rubridge v Hadley* (1848) 2 Menzies 174; *Treasurer-General v Lowton* (1881) SC 304; *Commercial and Agricultural Bank v De Pass, Spence & Co* N.L.R.1870 p 10.)

"It may therefore be laid down that the granting of a remission of rent, in cases where acts of *vis major* have obstructed the tenant in his enjoyment of the property, is not an exception to the law governing letting and hiring, which has to be strictly construed, but is a general principle, applicable not only to the specific cases which are mentioned by the various authorities, but also to circumstances which may not have been specially considered by them, but which fall within the general principle."

In this case certain premises had been let for the purposes of being sub-let as bars, cafés, beerhalls, shops, bedrooms and offices in terms of clause 5 of the lease, and there were existing tenancies which were transferred to the lessee on the execution of the lease.

With the exception of the closing of the bar, there was no direct act of any superior power which prevented the lessee from occupying the leased premises. However, when war was believed to be imminent, or immediately on its outbreak, all the tenants, except one or two, left, and it seems that fresh tenants were not to be found. The inability to find new

tenants the court found to be understandable in the circumstances,[72] as it was due to the fear of hostilities and their consequences. In other words, the departure of the tenants was a direct and natural consequence of the outbreak of war.[73] The learned judge was of opinion that

> "[w]here the intention of the parties, whether expressed in an agreement or deduced from the nature of the premises, was that they should be sub-let and that the lessee should make his profit out of the sub-tenants, then it appears to me that the sub-tenants occupy, with reference to such a lease, a position analogous to that occupied by crops with reference to leased rural property".

In the circumstances a remission of rent was allowed.

This case, however, surely cannot be used to support a doctrine that in such circumstances, where there is a common understanding between the parties as to the purpose of the contract that could be said to have formed the underlying basis of their agreement, a condition should be implied that the contract was to operate only so long as the material circumstances underpinning such understanding remain unchanged, as with the legal fiction evidenced in the English "Coronation" cases.[74]

Pothier[75] states that a landlord is obliged to warrant

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72. The "reasonable apprehension of serious harm" contemplated by the old authorities, see above at 94.
73. But see the different view adopted by Wessels J (concurred in by Innes CJ and Solomon J) on appeal in *Hansen, Sohrader & Co v Kopelowitz* 1903 TS 707 at 715-16, which, it is submitted, is correct. Hence, the impossibility was not absolute in relation to the vacated accommodation that had been sub-let.
74. See above at pp 76f.
75. *Contrat de Louage* § 112.

against "defects"[76] that prevent the use of the thing hired, not only those that exist at the date the lease is entered into, but also those that have arisen since;[77] hence if such "defects" intervene the lease may be cancelled.[78] It has often been stated, as it was stated by Mason J in *Kopelowitz v Hansen, Schrader & Co*,[79] that decisions on leases are only illustrations of the general principles of contract applicable in instances of supervening impossibility of performance and do not turn on the application of special rules applicable to lease.[80] In *Peters, Flamman & Co v Kokstad Municipality*[81] many passages of the old authorities relating to lease were relied on, which prompted the following question from Solomon ACJ:[82]

> "Why is it that all the passages refer to leases only?"

To which counsel replied:

> "A lease was a well-recognised and popular form of contract in Roman law."

Nevertheless, a lease, because it regulates a continuing

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76. Mulligan's translation at p 48.

77. This applies even if he would not have so warranted had he known of the existence of those defects at the time the contract was entered into (Pothier *op cit* § 116; Voet 19.2.23; *Morris v Mappin & Webb Ltd* 1903 TS 244 at 250; *Baum v Rode*, 1905 TS 66 at 67).

78. Pothier *op cit* § 116. These arguments were advanced by counsel for the appellant in *Bayley v Harwood* 1954 (3) SA 498 (A) at 499, but were not accepted by the court as being applicable to the facts of that case.

79. 1903 TH 124; see quotation from the judgment above at pp 130f.

80. See, for example, *Bayley v Harwood* 1954 (3) SA 498 (A) per Schreiner JA at 505.

81. 1919 AD 427.

82. At 430.

relationship between the parties (in the letting and hiring of personal services as well as of property), does in fact often result in consequences different from those that would result with contracts of shorter duration.

One must scrutinise the contract entered into between the parties to ascertain exactly what was promised, and if it has become impossible then the rules of supervening impossibility apply. Hence, in the so-called Coronation cases in England what was promised was not a room, but in fact a vantage-point from which the coronation procession could be viewed. When that became impossible of fulfilment, the contract was at an end.

So, too, it was decided that if premises are let as licensed premises for the sale of liquor and afterwards cannot be used for that purpose owing to the cancellation of the licence by the military authorities, the lessor's promise has become impossible of performance;[83] or if the premises are let as a restaurant or eating house for blacks, and cannot be so used because of the refusal of a permit under the Group Areas Act 36 of 1966,[84] the same result obtains. And there are many other cases resting on a similar principle.[85]

The correct approach has been adopted by our courts on a number of occasions. For example, in *Baum v Rode*[86] the court stated

> "If the parties have contracted that the lessor lets and the lessee hires the property for a certain

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83. *Kopelowitz v Hansen,Schrader & Co* 1903 TH 134.

84. *Ornelas v Andrews Café* 1980 (1) SA 378 (W).

85. *D* 45.1.140.2; Donellus *Ad hanc legem tit De Verb Oblig* 11.1652; Pothier *Pand ad D* 46.3.104 (cf *D* 50.17.85.1 and Wessels *Law of Contract* § 2631). See also *Stansfield v Kuhn* 1940 NPD 238 at 246, a case of initial impossibility, but applicable on this point.

86. 1905 TS 66, per Wessels J at 67, delivering the judgment of the court (Innes CJ and Mason J.)

> definite purpose, the lease only endures so long as the lessee can have the *commodus usus* of the property for the purposes let."

In *Schlengemann v Meyer, Bridgens & Co Ltd*[87] the court, after considering a number of English cases dealing with contracts of service affected by the outbreak of war, said:

> "Applying these principles it seems to me that we have to look and find out upon what footing was the agreement entered into between Schlengemann and the Company. It seems quite clear in my mind that it was made on the footing that there should be a continuous giving of personal services. . . . The agreement in paragraph (4) says: 'Each of the partners of the firm shall devote his whole time and attention to the business and conduct of the affairs of the company. . . .'"

The court held that when Schlengemann was interned shortly after the outbreak of war "the possibility of continuous service on his part had gone. . . . [Furthermore] it was evident that the period of internment was indefinite and might be for a very long time. Therefore . . . the possibility of any services within a reasonable time had [also] disappeared."

It might not be necessary to imply a term in any contract in order to find that it has been terminated by supervening impossibility of performance if one were only to look at precisely what was promised by each party to the other. By this I do not mean that a term may not be implied in an appropriate case, provided that the implication of such a

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87. 1920 CPD 494 at 502.

term follows the ordinary rules of interpretation of contract[88] and does not become instead a legal fiction, as it would if the approach of the "Coronation" cases or the approach of Windscheid is adopted in our law.[89]

Impossibility arising from changed circumstances does not *per*

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88. *McCabe v Burisch* 1930 TPD 261; *Williams v Evans* 1978 (1) SA 1170 (C) at 1174; *B N Aitken (Pty) Ltd v Tamarillo (Pty) Ltd* 1979 (1) SA 1090 (D), 1979 (4) SA 1064 (N). The rules of interpretation are considered in *D* 45.1.23.33; 45.1.91.2, 3; 46.3.107; *Lucerne Asbestos Co Ltd v Becker* 1928 WLD 311 at 336; *Van Wyk v Millington* 1948 (1) SA 1205 (C); *Dutch Reformed Church Council v Crocker* 1953 (4) SA 53 (C) at 64; *Ornelas v Andrew's Café* 1980 (1) SA 378 (W). See, for example, *McCabe v Burisch* (*supra*) at 269-70, where it was held to be implied in the contract that the seller would not put it out of his power to pass transfer of the property sold to the buyer.

89. Windscheid's views, as we have seen (p 84), were based on those of the Canonists, particularly Thomas Aquinas, who were concerned with the question when one justifiably may break a promise or an oath. These views were not taken up by the Roman-Dutch jurists with the exception of Grotius, who referred to them with approval in *De Jure Belli ac Pacis* so far as public law is concerned. Windscheid's views found a limited recognition in the provisions of the Prussian Civil Code, but were expressly rejected by the framers of the BGB, though the courts subsequently gave an attenuated recognition for a while to a modified form of Windscheid's views, as propounded more especially by Kruckmann and Oertmann (see W A Ramsden "Supervening Impossibility of Performance and Changed Circumstances in German Law" (1976) 39 *THR-HR* 367, especially at 375). In France the view that there is an implied condition that the contract shall be extant only so long as circumstances remain the same is applied in administrative law (*droit administratif*) but not in private law, by virtue of a decision of the *Cour de Cassation*; which accords roughly with the view of Grotius as to its applicability (see Ramsden *op cit* 367 and "Some Historical Aspects of Supervening Impossibility of Performance of Contract" (1975) 38 *THR-HR* 153 at 174).

se excuse under South African law.[90] The limits of the Roman law in this regard have not been extended.[91] Although the "changed-circumstances" doctrine was considered in *African Realty Trust Ltd v Holmes*,[92] the remarks made there are purely *obiter*, since De Villiers JA[93] said:

> "But it is unnecessary to pursue this further, for in the present case the contract specifically deals with the matter and it therefore becomes one of interpretation. The agreement of purchase and sale was expressly made 'subject to the irrigation board . . . completing the aforesaid irrigation works now contemplated . . . '."

Finally, before leaving this subject, it must be mentioned that C I Belcher[94] states that there seems to be no basic impediment to the adoption into our law of the English "doctrine of commercial frustration".

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90. *Algoa Milling Co Ltd v Arkell & Douglas* 1918 AD 145 per Maasdorp JA, at 171, referring to *Instits* 3.19.11; Grotius 3.3.37; Voet 28.7.9, 16; Van Leeuwen *R-HR* 4.3.5 and Decker's note to Van Leeuwen *R-HR* 4.1.3, as well as the English cases of *Taylor v Caldwell* (1863) 3 B & S 826, 122 ER 309 (KB); *Bailey v de Crespigny* (1869) LR 4 QB 180 and *Hadley v Clarke* (1799) 8 TR 259, 101 ER 1337, and early Cape cases, namely, *Norden v Shaw* (1847) 2 Menzies 150; *Hay v The Divisional Council of King William's Town* (1880) 1 EDC 97 ;and *Searle & Son v Arkell & Douglas* (1899) 16 SC 522.

91. Contrary to the submission of counsel in *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 at 431.

92. 1922 AD 389, per De Villiers JA at 400-2, mentioning *inter alia*, Windscheid's doctrine of *Voraussetzung*.

93. At 403.

94. *Norman's Purchase and Sale in South Africa* 4th ed (1972) at 471.

"Commercial frustration" or, more correctly, commercial impossibility, is sometimes used to describe cases

(a) of undue hardship in performance; or

(b) where the motive for contracting is not achieved.

I have already considered (a) above[95] and put forward the view that our law does not allow undue hardship to be used as excuse for non-performance of a contractual obligation which it is not absolutely impossible to perform; though, in considering whether performance is absolutely impossible, regard may be had to the contract read in the light of the surrounding circumstances to determine whether what is required could properly be said to fall within the ambit of the contract.

However, it would appear that it is (b) which Belcher has in mind when he speaks of "commercial frustration". He looks for support in one of two directions. The first is the doctrine of the implied condition as established in England in the "Coronation" cases, which as I have already submitted[96], is not in accordance with the principles of our own law. The second is " a broad equitable jurisdiction". He concludes that "our courts have not yet been prepared to assume" it, but, he states, "there seems no reason to believe that they will not accept this challenge and in this particular instance do justice between man and man (see *Jajbhay v Cassim*, 1939 AD 537)".[97]

Why should our courts assume a "broad equitable jurisdiction" in these matters? In the first place, by so doing, they would run the grave risk of making a new contract for the parties, which would undermine two of the fundamental principles of

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95. At pp 113f.

96. At pp119f.

97. At 471.

our law, that of contractual freedom and certainty of contracts. Secondly, the existing principles appear to be well suited to ensure that the contractual intentions of the parties are carried out equitably. Thirdly, there would appear to be no pressing social need for the courts to undertake this formative jurisdiction. It must be borne in mind that when the courts of Germany exercised a similar broad discretion in the 1920s, the German economy was in a parlous condition and that subsequently the German courts returned to a far greater allegiance to the principle *pacta sunt servanda*.[98]

It is clear, then, that once it is established that after the conclusion of a contract an event has occurred which can be categorised as *vis major* or *casus fortuitus*, and the contract having been carefully examined to determine exactly what performance was promised, the next step is the establishment of a causal connection between the event and a failure of performance.

This means that the event may not necessarily have the result of preventing performance. This is clear from the case of *Hansen, Schrader & Co v Kopelowitz*[99] where Wessels J, delivering the judgment of the court, said:

> "An examination of the principal Roman-Dutch law authorities will clearly show that in all the examples discussed by them the connection between the extraordinary cause and the resulting loss is direct and immediate . . . .
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> "The immediate connection between the *vis major* and the loss will also be found to be present in

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98. See above at p 84.

99. 1903 TS 707 at 719.

> the examples cited by the learned judge *a quo*[100] from the French jurists Pothier and Troplong, and from the German jurist Gail, upon which he specially relies for his judgment in this case."[101]

F. Where Performance Conditionally Possible, as with Licence or Permission

It is necessary for the performance to be in fact impossible. It could happen, for instance, that apparent impossibility caused by the act of a third person on examination is revealed not to be actual impossibility as his act is a nullity in law.[102] The onus of establishing the impossibility is on the party pleading it.[103] If the facts do not support the conclusion that there is actual impossibility, the contract will not be terminated, and the promisor will be held liable to perform or to pay damages for a breach of his undertaking

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100. See *Kopelowitz v Hansen, Schrader & Co* 1903 TH 134.

101. Approved of in *Mountstephens & Collins v Ohlsson's Cape Breweries* 1907 TH 56 at 589 (quoting from *Hansen, Schrader & Co v Kopelowitz* 1903 TS 707 at 718.) See also *North Western Hotel Ltd v Rolfes, Nebel & Co* 1902 TS 324 at 341, where Mason J referred to the "general doctrine that any damage to the leased property *caused* by *vis major* . . . falls upon the landlord and not upon the lessee" (ie risk, not *casus* or supervening impossibility of performance), distinguished by Mason J in *Morris v Mappin & Webb Ltd* 1903 TS 244 at 250-1.

102. For example, one cannot plead that state interference creates the impossibility if such interference is illegal and redressable (*William Maine & Son (Pty) Ltd v Rhodesia Railways* 1976 (4) SA 914 (SR), where the directions of the Minister went beyond the powers conferred by an Act of Parliament)

103. See below at p190f.

to perform.[104]

It is, of course, not enough that a statute prohibits performance, if the statute provides a way in which performance may nevertheless be effected. For example, the Group Areas Act[105] prohibits the acquisition of land or residence in an area set aside for a particular racial group by members of another racial group. However, such acquisition or residence can be permitted under a permit granted by the Minister. Hence, if it is not specifically alleged in the pleadings that a permit had been applied for and refused, it must at least be possible to infer from them that this was the case, or that such an application would inevitably have been refused had it been made.[106] The same applies where sub-division is prohibited unless specifically approved or authorised,[107] or where approval can overcome a statutory or another type of prohibition.[108]
It must be shown that all possible avenues of effecting performance have been explored and have been found to be

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104. *Searle & Son v Arkell & Douglas* (1899) 16 SC 522, where the court held that it could not have been impossible to send the shipment in question by regular steamer since the promisor had been able to send other shipments by such vessels to fulfil orders received by him after the promisee's order had been placed (time being of the essence of the contract here).

105. Act 36 of 1966(formerly Act 77 of 1957).

106. *Naidoo v Ramnarain* 1962 (3) SA 90 (D) at 909-10; *Ornelas v Andrews Cafe* 1980 (1) SA 378 (W) at 394f.

107. *Wilson v Smith* 1956 (1) SA 393 (W) at 376; *Bekker NO v Duvenhage* 1977 (3) SA 884 (E) at 889-90.

108. For example, under the Factories Act 22 of 1941 (*Weinberg v Weinberg Bros (Pty) Ltd* 1951 (3) SA 266 (C) at 276-7) or a military pass is possible (*Van der Merwe v Colonial Government* (1904) 21 SC 520 at 523). See also *Moser v Milton* 1945 AD 517; *Corondimas v Badat* 1946 AD 548; *Cross v Wiehahn* 1954 (1) SA 216.

closed.[109] The onus thus rests on the promisor to show that performance is not possible.

Conversely, where the promisor has *prima facie* put it out of his power to perform, the duty rests on him to establish that he will be in a position to perform on due date.[110] Performance may therefore still be possible, despite the intervention of *vis major* or *casus fortuitus*. This possibility appears to underlie the operation of the maxim *genus non perit*, unless, as already indicated,[111] the whole genus or species perishes, as in the case of a sale of a certain number out of a given quantity of goods belonging to the vendor all of which perish.[112] This point was argued by counsel (H de Villiers, later De Villiers J) in the case of *Hersman v Shapiro & Co*,[113] where he submitted:

> "Impossibility of performance is an excuse even where the *genus* of the goods sold has perished through *casus fortuitus*. . . . The rule that impossibility does not excuse where there has been destruction of the *genus* including the class of goods sold, on the ground that *genus nunquam perit* (Van Leeuwen, *Censura Forensis*, 1.4.39.2), does not apply, because Van Leeuwen only speaks of the destruction of the debtor's goods, and not of the temporary destruction of the *genus*. This view is confirmed by Windscheid, *Roman Law*, vol.2, pp36-37, also para 364."

It is submitted that this statement is correct. It also

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109. *Yodaiken v Angehrn & Piel* 1914 TPD 254 at 260-2; *Hersman v Shapiro* 1926 TPD 367 at 375.

110. *McCabe v Burisch* 1930 TPD 261 and *Van der Heever v Baster* 1961 (3) SA 625 (O) at 627.

111. Above at pp 100f and 116f.

112. *D* 18.1.35.5, 7.

113. 1926 TPD 367 at 368.

underlies the need to show that alternative methods of performance are both impossible of fulfilment,[114] unless a selection has already been made between such alternatives and underlies the rules applicable to contracts *ad faciendum*.

G. Contracts *Ad Faciendum*

A contract *ad faciendum* that need not necessarily be performed in person is not dissolved by the death or illness of the promisor.[115] If an agent becomes ill or otherwise unable to carry out his mandate, he is obliged to notify his principal as soon as possible to enable the latter to find a suitable substitute.[116]

In the English case of *Robinson v Davidson*[117] the question was raised whether this rule ought to apply also to a contract of service, such as an engagement to perform at a concert. In that case the performer, a pianist, had timeously notified her employer of her illness, so the point did not come up for decision, but Kerr[118] submits that the rule is equally applicable to cases such as *Robinson v Davidson*.[119] Mandate is a contract *uberrimae fidei*;[120] hence it could be argued that the same considerations do not apply to contracts of service.

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114. Above at pp 116f.

115. *D* 19.2.48; 45.1.38.21; 46.3.31; Pothier *Louage* § 432; Molitor *Oblig* 2.704 n 612.

116. *D* 45.1.23.33; 45.1.91.2.3; 46.3.107; Pothier *Mandate* § 43; *MacDuff & Co (in Liquidation) v Johannesburg Consolidated Investment Co* 1924 AD 573 at 601.

117. (1871) LR 6 Ex 269.

118. *Contract* 272 in the 3rd ed p32 n 192 ; *Agency* 171.

119. *Supra*.

120. *D* 17.2, *Lex* 63; *C* 4.37.3; *Parr v Crosbie* (1886) 5 EDC 211; *Ford v Aberarombie* 1904 TS 884; *Wegner v Surgeson* 1910 TPD 571 at 579.

Furthermore, if the rule does extend to contracts of service, why not also to other contracts? If, for example, A lets a theatre to B for a stated period for a performance or a series of performances, and the theatre is accidentally burnt down before the period arrives, is it necessary for A to advise B immediately of this fact to enable him to take whatever steps he can to hire another theatre? If B, in ignorance of the fact that the theatre has been burnt down, spends money in advertising the performance or sells tickets to concert-goers, could it be said that A would be estopped from setting up the supervening impossibility of performance as a defence to an action for breach of contract? Even if B had done nothing to alter his position in reliance on the contract, could estoppel still apply? For example, if A were to charter his ship to B for the conveyance of goods B has already contracted to supply to overseas customers, and the ship is accidentally lost through fire, shipwreck, the action of a hostile navy or other unforeseen calamity before it is made available to B, could A, if he has failed to notify B of this happening, be estopped from pleading impossibility if sued on the charter?

H. Estoppel Operating to Preclude Reliance on Impossibility

Estoppel by representation[121] is not uniformly applicable to all situations, because the requirements of justice and fairness of each situation cannot be equated, and estoppel

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121. Generally regarded as the legitimate successor of the *exceptio doli mali* Hoffmann and D Zeffertt (LH) *The South African Law of Evidence* 3rd ed (1981) 270; *Waterval Gold Mining Co v New Bullion Gold Mining Co* 1905 TS 722; *Baumann v Thomas* 1920 AD 428; *Sodomer v American Insurance Co* 1960 (4) SA 428 (T); *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C); *Connock's (S A) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk* 1964 (2) SA 47 (T); *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A) at 510; *Credit Corporation of South Africa Ltd v Botha* 1968 (4) SA 837 (N).

is essentially a principle of law designed to produce an equitable result. There are, however, certain general principles that could serve as indicators whether estoppel would be applicable or not.

First, estoppel must relate to an existing state of facts. This would appear to be satisfied, the facts being the existence of a contractual relationship between the parties under which certain expectations have arisen as a result of implied representations of present fact which appear in it.[122]

Secondly, it is generally accepted that estoppel may be used only as a defence to an action or a counter to a defence, and not as a cause of action in itself.[123] This, too, is satisfied in the cases posed, since the action will be brought upon the contract to enforce its terms; the defence to this will be a plea of supervening impossibility of performance, and the counter to that will be that the defendant is estopped from setting up the defence because he has allowed the plaintiff to continue under the belief that performance was still possible.

This then raises a third requirement, namely that of representation. Silence will constitute a representation only if there is a duty to speak.[124] It therefore depends upon whether it can be said that there was a duty to speak in

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122. See below.

123. *Michau v Rousseau* 1913 CPD 146; *Union Government v National Bank of S A Ltd* 1921 AD 121; *Sampson v Union & Rhodesia Wholesale Ltd (in liquidation)* 1929 AD 468; *Pandor's Trustee v Beatley & Co* 1935 TPD 358; *Biloden Properties v Wilson* 1946 NPD 750; *Man v Sidney Hunt Motors (Pty) Ltd* 1958 (2) SA 102 (GW).

124. *Reed v Reed* 1909 EDC 244; *Stuttaford & Co v Parker* 1921 CPD 381; *Union Government v National Bank of South Africa Ltd* 1921 AD 121; *Collen v Rietfontein Engineering Works* 1948 (1) SA 422 (A); *Martin v De Kock* 1948 (2) SA 735 (A); *Parsons v Langemann* 1948 (4) SA 263 (C); *Peri-Urban Areas Health Board v Breet NO* 1958 (3) SA 783 (T).

any of the cases envisaged, which, unlike the contract of agency, are not contracts *uberrimae fidei*. This is sometimes called estoppel by negligence.[125] For a duty to speak to exist there must be a duty to do so owed to the other contractual party in the circumstances so that he will not act to his detriment[126] and it ought to have been foreseen (or ought reasonably to have been foreseen) that the conduct that creates the duty to speak would cause the other party to be misled unless any such mistaken impression he might harbour were corrected.[127]

This conduct in the cases envisaged here would be the implied statement in the contract that the promisor is in a position to perform his side of the bargain or knows of no circumstances which will make performance impossible, or both.[128] It is submitted that it would be contrary to the *bona fides* that underlies contracts for one party, knowing that he will be unable to perform on due date, to allow the other to continue under the impression that performance is possible until it is too late for him to make suitable alternative

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125. Hoffmann & Zeffertt *The South African Law of Evidence* 3rd ed (1981) 277.

126. *Union Government v National Bank of South Africa Ltd* 19[illegible] and the cases referred to in note 121. See also *The Law of South Africa* (edited by W A Joubert) vol 9 s v 'Estoppel' by P J Rabie (now the Chief Justice) para 371.

127. *Trust Bank of South Africa Ltd v Maharaj* 1961 (2) SA [illegible]; *Trust Bank of Africa Ltd v Van der Walt* 1962 (1) SA 175 (T); *Credit Corp of South Africa Ltd v Botha* 1968 [illegible] 837 (N); *Szambou-Nasionale Bouvereeniging v Friedman* 1979 (3) SA 978 (A).

128. The statement must be of an existing fact and not one of future intention (*Murman v Minchin* (1910) 10 HCG 313; *Wege v Kemp* 1912 TPD 135; *Rex v Oakley* 1935 OPD 38.) Hence it could not be argued that the contract implies that on due date the promisor will perform or even that he will be in a position to perform, since that would not be enough.

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arrangements.[129]

It may be worth while to take another look at the examples posed. If the performer becomes ill and fails to notify his employer of his illness in sufficient time before the scheduled date of the concert to enable the employer to find another performer to take his place, he must foresee that his employer may be misled into thinking he can perform, and that the employer will alter his position in reliance thereon to his prejudice, by advertising the concert and by printing and selling tickets. True, it is difficult to imagine that if a theatre burnt down the lessee would not know of it; but one can imagine other circumstances where the lessee might not be able to find out about the loss or destruction of the property let unless the lessor told him of it; for example the destruction of a very special computer or other piece of electronic equipment, perhaps as a result of a bolt of lightning. If the lessee were told of its destruction he might be able to arrange to import or hire other equipment in time to fulfil his contractual needs.

This explanation draws attention to other requirements of estoppel which must be met, namely, that the representation caused the other party to alter his position in reliance on

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129. Similar sort of reasoning can be found in *McCabe v Burisch* 1930 TPD 261. Here it was held that the contract was entered into on the footing that the property sold was registered in the defendant's name and that a sale and transfer of it to a third party before due date was inconsistent with that footing; it had the effect of disabling the defendant from performing when paid in full by the plaintiff, notwithstanding the fact that he might then once more be in a position to give transfer of the property to the plaintiff.

it[130] (and also that the representation was intended to be acted on,[131] which is clearly met in the cases posed), that in fact he did act on it as anticipated,[132] and that such action was to his prejudice[133] as a direct result of the representation.[134] This would certainly correspond to one's notions of fairness and does not seem to be stretching the somewhat elastic principles of estoppel too far.

In fact A would be suing B on a contract that is no longer in existence because it has been terminated by reason of the supervening impossibility of performance, but B is estopped from relying on this fact because his conduct in "concealing" the existence of the supervening event has led A to believe that the contract still subsists.

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130. *In re the Contributories of the Rosemount General Mining Syndicate in liquidation* 1905 TH 169; *Hartogh v National Bank* 1907 TH 207 & 1092; *Thomas v Bauman & Gilfillan* 1914 TPD 197; *Rabkin v National Bank* 1915 CPD 545; *Hayman & Napier v Rounthwaite* 1917 AD 456; *Boshoff v Havemann* (1919) 40 NLR 414.

131. *Electrolux (Pty) Ltd v Khota* 1961 (4) SA 244 (W); *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C); *Van Rooyen v Minister van Openbare Werke en Gemeenskapbou* 1978 (2) SA 835 (A).

132. *Angehrn and Piel v Federal Cold Storage Co Ltd* 1908 TS 761; *Erasmus v Du Toit* 1910 TPD 1037; *Bester v Taylor* 1912 OPD 60; *Winder v Taylor* 1921 TPD 518; *Sampson v Union & Rhodesia Wholesale Ltd* (In Liquidation) 1929 AD 468; *Snyman v Mugglestone* 1935 CPD 565; *Strydom v Scheepers* 1942 GWL 73.

133. *Thomas v Bauman & Gilfillan* 1914 TPD 197; *Rabkin v National Bank* 1915 CPD 545; *Hayman & Napier v Rounthwaite* 1917 AD 456; *Lombard v Pongola Sugar Milling Co Ltd* 1963 (4) SA 119 (D).

134. *Union Govt v National Bank of South Africa* 1921 AD 121; *Grosvenor Motors (Potchefstroom) Ltd v Stama (Pty) Ltd* 1975 (1) SA 730 (A) corrected by Appendix 1 of 1975 (4) SA 965; *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A).

It would appear that this situation would apply only where the fact of the occurrence of a supervening event lies peculiarly within B's area of knowledge and is not readily accessible to A, who is ignorant of it.

CHAPTER 6

PARTIAL IMPOSSIBILITY

A contractual obligation may be absolutely impossible of performance in part only. For example, I may promise you a matched pair of duelling pistols from my fire-arms collection, but prior to delivery one is stolen or destroyed by *vis major*. It is then impossible for me to deliver the pair to you as promised. Nevertheless, you may still wish to have the remaining pistol.

A number of circumstances present themselves:

(a) Substantial performance is still possible.

(b) The performance which is possible is severable from that which is not.

(c) The performance which is possible is not severable from that which is not.

(d) Performance has been rendered wholly impossible by partial impossibility.

A. Substantial Performance Possible

Whilst it may not be possible for the promisor to perform in full, nevertheless substantial performance of the obligation may still be possible. The question was discussed above,[1] where the conclusion was reached that substantial performance of an obligation is equivalent, to all intents and purposes, to the performance promised.

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impossibility of performance are in reality founded on this very principle.

In *Stansfield v Kuhn*[2] the court held that

> "[t]he whole of this subject-matter was not destroyed. Substantial performance of the obligation is still possible. The contract must therefore be regarded as valid."

The court relied on Wessels[3] and Voet.[4] These authorities, however, do not concern the right of election of the promisee to take what remains possible after the supervening event, but state that the contract itself is valid, or remains in force, where the real object of the obligation remains possible, or the destruction affects only a small part of it.

The decision in *Wireohms SA (Pty) Ltd v Greenbutt*[5] appears to be similar in effect to that of *Stansfield v Kuhn*, holding that if substantial performance is possible, the promisee is entitled to demand it. Neither case casts much light on what constitutes "substantial performance". Wessels[6] says that the test is whether the real object of the obligation remains possible and Voet[7] says that it is to be judged on whether "it affects the smaller party".

In *Stansfield's* case[8] the land was only 0,029 acre less than

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2. 1940 NPD 238 at 246.
3. *The Law of Contract in South Africa* § 392.
4. 18.1.21.
5. 1959 (3) SA 909 (C), especially at 912.
6. *loc cit.*
7. *op cit.*
8. *Supra.*

that contracted for (0,5 acre), hence not even 6 per cent less than the area promised. And in Wireohms' case[9] the court said:

> "It seems clear that the aforesaid strip of land is relatively small, and if a wall is built along the present boundary it would be in substantially the same position as the wall that has been demolished."[10]

There is a corresponding reduction in the counter-prestation to account for the shortfall.[11] Hence, if substantial performance is possible, that is really equivalent to full performance, and thus if only a minor portion of the contract cannot be performed, it is submitted that the promisee is not entitled to regard the contract as at an end but must be prepared to accept the substantial, though incomplete, performance, which is possible, and be content with a suitable reduction in the counter-performance as compensation for the shortfall.

B. Performance Severable

A substantial part of the performance is not possible, but what is possible is severable from that which is not possible.

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9. *Supra.*

10. It is true that the court also went on to indicate that the promisee could elect to demand performance, but it did not say that he could elect to treat the contract as at an end by virtue of supervening impossibility of performance. Indeed, such a statement would have been surprising, since the strip of land and the exact position of the wall were non-material parts of the contract.

11. *Stansfield v Kuhn (supra).*

In *Stansfield v Kuhn*[12] Broome J set forth the rule expounded by Pothier[13] in the following words:

> " . . . while extinction of the thing due extinguishes the debt when the thing is wholly destroyed, if any part remains the debt continues to subsist so far as regards such part";[14]

subject once more to a suitable reduction in the counter-prestation.[15]

In fact the earlier cases seem to suggest that if any part of the promised performance is possible, then supervening impossibility of performance cannot be pleaded to discharge the contract, since the contract can still be of some benefit to the promisee.[16] Although none of these cases refer to the English law, it would seem that this view accords with the view adopted by that legal system.[17]

However, the majority of these cases turned on other points, such as enrichment, or rather the need to pay for use received

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12. *Supra* at 92.

13. *Supra* § 624.

14. See also *D* 6.1.49; Voet 18.1.21; 46.3.11.

15. Voet 18.1.21; *Stansfield v Kuhn (supra)* at 246; *Bedford v Uys* 1971 (1) SA 549 (C) at 553.

16. See *Rubridge v Hadley* (1848) 2 Menzies 174; *Davy v Walker & Sons* 1902 TH 114 at 127 ("there must be no beneficial occupation whatever"); *Daly v Chisholm & Co Ltd* 1916 CPD 562 at 570 ("It is impossible . . . to say that the defendant cannot have some use and occupation agreed to be given him by the contract"); *Hayes v Field* (1923) 44 NLR 311 at 314-15; *Benjamin v Myers* 1946 CPD 655 at 663.

17. *Herne Bay Steamboat Co v Hutton* [1903] 2 KB 683.

from the property,[18] or on the fact that the destruction was caused by the lessee's own fault,[19] or on the ground that the promisee wished to avail herself of so much of the performance as remained possible.[20] It seems clear, therefore, that in these cases the courts really had in mind the principle that the promisor is not entitled to a declaration that the contract is at an end unless the whole of the promised performance is impossible; most courts did not in fact consider whether the promisee could accept less than full performance if he chose, though that he could is in fact implicit in those decisions.

In *Bedford v Uys*[21] Tebbutt AJ said:

> " . . . where performance becomes partially impossible through no fault of the debtor he is, where performance is divisible, *pro tanto* discharged from his obligation to perform and the reciprocal performance or prestation on the part of the other party to the contract is proportionately reduced. It is only where performance is indivisible that the contract is extinguished as in the case of complete impossibility, unless the creditor is prepared to accept part performance in which case, again, contraprestation is

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18. *Rubridge v Hadley (supra); Davy v Walker & Sons (supra).*

19. *Daly v Chisholm & Co Ltd (supra); Benjamin v Myers (supra).*

20. *Hayes v Field (supra).* See also *Stansfield v Kuhn* 1940 NPD 84 at 92.

21. 1971 (1) SA 549 (C) at 553. See also *Mnyandu v Mnyandu NO* 1964 (1) SA 418 (N) at 424 and *Joubert v Bester* 1977 (4) SA 560 (T) at 567-8.

proportionately reduced."[22]

It would seem to follow from what is stated in the case that

(i) where the obligation is divisible or severable, the obligation to perform what remains possible is not extinguished;[23]

(ii) this does not appear to have anything to do with the wishes of the parties (unless of course, both decide to abandon or novate the agreement);

(iii) if, however, the obligation is not divisible, the supervening impossibility to perform a portion of it results in the contract being extinguished unless the creditor is prepared to accept part performance.[24]

In *Bedford v Uys*[25] the defendant sold some 27 erven which were to form part of a projected township, but before effect could be given to the contract three of the 27 erven were reserved as an endowment in favour of the local authority under legislative powers. The court held that the obligation to transfer the erven was divisible and continued to remain binding in respect of the remaining 24 erven, subject to a reduction in the total price payable under the contract.

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22. Relying on De Wet and Yeats *Kontraktereg en Handelsreg* 122 (p 159 of the 4th ed) and also quoted with approval in *Joubert v Bester* 1977 (4) SA 560 (T) at 568. Only three authorities are quoted by the learned authors in support of their statement of the law, *viz Stansfield v Kuhn* 1940 NPD 84; *Hayes v Field (supra)* (both of which support the learned authors' contention, though without drawing the distinction between severable and non-severable obligations) and *Daly v Chisholm & Co (supra)* (where it was decided that the impossibility was self-created anyway.)

23. Unless what remains has been used for manufacturing something entirely new with the consent or fault of the debtor, when the entire debt is extinguished (*D* 46.3.98.8).

24. See also *Stansfield v Kuhn* 1940 NPD 84 at 92; *Mnyandu v Mnyandu NO* 1964 (1) SA 418 (N) at 424-5; *Gengan v Pather* 1977 (1) SA 826 (D) at 830; and *Joubert v Bester* 1977 (4) SA 560 (T); and see n 22 above.

25. *Supra*.

Much will depend upon what is meant by divisible or severable. It would appear that mere physical severability is not enough. Take the example given of the matched pair of duelling pistols: the promisee should not be compelled to accept delivery of one of the pair of pistols merely because it is physically divisible,[26] any more than one could be required to accept and pay for the belt of a raincoat which was promised but (except for the belt) has been accidentally destroyed.[27] Furthermore, it often happens that a bulk order is far cheaper than a smaller one; hence it might be worth my while to refuse to accept what remains over of the articles promised and to conclude an agreement with another person for the bulk supply of the entire order, rather than pay a higher average sum for the balance. On the other hand, if I engage a firm to manufacture and supply me with two thousand units of a certain article, and after it has manufactured one thousand units its factory is expropriated for essential war production,[28] it may be unfair to the manufacturer to allow me to refuse to accept the one thousand units.[29]

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26. Since a matched pair of duelling pistols is far more valuable than a single pistol, it is clear that the counter-prestation will have to be reduced by far more than half the contract price if the creditor elects to claim the surviving pistol. This in itself is an indication of the indivisibility of the contract.

27. Reminiscent of the debate in ancient times, exemplified by *D* 31.49.pr.

28. Here, again a fair abatement of the price will be difficult to assess should I decide to accept delivery of the one thousand units produced, since the costs of producing each unit diminishes as more are produced from the same tools and dies.

29. The solution suggested by *Bedford v Uys (supra)* may be the most equitable here, since it would apportion the loss between the parties. The manufacturer would recover far less of his costs than expected, and the customer would have to pay for the remaining one thousand units at a higher price than contracted for. This assumes that all other factors are constant, for example, that the additional one thousand units are obtainable or can be dispensed with, that the delay if any in obtaining (continued)

Hence it is submitted that the courts should be anxious to ascertain the true nature and effect of the contract between the parties to see just how material complete performance is to the contract. The normal test of materiality should be applicable, namely, would the party to whom the performance is owed have contracted at all had he known from the beginning that the only performance he would receive under the contract is that which ultimately turned out to be possible, or would he nevertheless have contracted, but for a reduced price?[30]

To decide otherwise would in effect force upon the parties a contract entirely different from the one they originally entered into. It is not the function of the courts, when attempting to give effect as far as possible to the true intention of the parties, to make or destroy the bargain reached by them.[31] In other words, the rules in regard to partial impossibility of performance apply unless the contract excludes them,[32] for the courts may not enforce a contract entirely different from the one originally intended.[33]

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29. (continued) the additional one thousand units is not unduly financially burdensome to the customer.

30. The concept is well known in the field of error in the formation of contract. Von Savigny distinguishes between a mistake which excludes the will and one which generates the will (ie an error in regard to motive) (B R Bamford "Mistake and Contract" (1955) 72 *SALJ* 166). If the mistake is operative and essential, the injured party can claim rescission of the contract, but if it is non-essential the most that can be hoped for is a reduction in purchase price or damages.

31. *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A), per Centlivres JA at 428-9 , quoting with approval Lord Tomlin's words in *Hillas & Co Ltd v Arcos Ltd* [1932] All ER Rep 494 at 499; 147 LT 503 at 572; 38 Com Cas 23 at 29.

32. *D* 31.49.pr; Wessels *The Law of Contract in South Africa* § 2695.

33. Note 27 above; *D* 43.3.98.8; *Benjamin v Myers* 1946 CPD 655 at 663; *Bischofberger v Van Eyk* 1981 (2) SA 607 (W) at 610; *Ambrose & Aitken v Johnson & Fletcher* 1917 AD 327 at 355; Wessels *The Law of Contract in South Africa* § 392 read with § 2721.

The correct approach is that in cases of doubt the court should find the obligation to be non-divisible and accord to the creditor an election whether to treat the contract as at an end or to accept such performance as may be possible.[34]

Hence, if the counter-prestation in each of the three cases referred to[35] is not severable without doing damage to the agreement which the parties have concluded, the rules of partial impossibility of performance should not apply, since a reduction in the counter-prestation will not be possible, and to compel one party to give what he promised in return for less than was due to him, or to give something different from what was promised in return for part performance of the other party's obligation would be inequitable in the circumstances and would amount to rewriting the contract for the parties.[36] A number of examples can be envisaged. To take one: if I promise to exchange an oil painting for your suite of furniture, and the settee is destroyed by *casus fortuitus*, I cannot demand the remaining pieces of the suite without offering to deliver the whole painting.[37] The legal rule should be that I could not have the picture valued and tender the *pro rata* value of what remains of the suite, for that would be asking the court to substitute another contract for the one we had made. If, however, in return for the suite I had offered to deliver a ton of wheat to you (and not a painting), then I could offer a *pro rata* amount of wheat in return for the remaining items of furniture. Similarly, if we agreed to exchange farms, and about a quarter of your farm was expropriated

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34. See above at p 157.

35. (a), (b) or (c); see above p 150.

36. For example, where the court orders a money payment in place of delivery or transfer to compensate for the reduced performance of the other party.

37. *Mnyandu v Mnyandu NO* 1964 (1) SA 418 (N) at 425.

for a group area, I could not demand what was left in return for three-quarters of my farm, nor offer you instead a sum of money calculated on the reduced value of your farm. Such problems are fortunately hardly likely to arise in practice nowadays, for in modern times most payments are expressed in money.

C. Partial Destruction Resulting in Total Impossibility

If partial destruction of the subject-matter of the contract has rendered performance wholly impossible, clearly the contract is at an end,[38] for example the lease of a soccer field by a sports club for a soccer match will be terminated at once if half the field is expropriated and taken for public purposes.

To sum up, then, it is a question of interpretation of the contract in each case, depending not only upon the construction of its terms but also probably upon usage and the other surrounding circumstances of the contract, whether the supervening event has the effect of terminating the contract or only part of the obligations owing thereunder, either *per se* or at the instance of the creditor, and whether performance of that part which is possible entitles the debtor to claim any or some, and if some, how much, counter-performance from the creditor. It is clear that one cannot invoke the rules in order to escape performance of part only of the contract and attempt to hold the other party to the remainder, if in effect this would make it a contract entirely different from that originally entered into.

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38. Pothier *Oblig* § 624; Voet 46.3.11; *Bayley v Harwood* 1954 (3) SA 498 (A) at 502-3.

D. Compensation for Reduced Performance

It remains only to consider the question of compensation for reduced performance.

In *Joubert v Bester*[39] Van Reenen J said that there is a " . . . vast difference between a claim for damages and surrogate performance." This is not entirely clear to me. It appears that the learned judge was disapproving of a statement by Van Winsen J in *Stellenbosch Divisional Council v Shapiro*[40] which referred to "damages" claimable by a lessee from his landlord when portion of the leased premises had been expropriated. The point which the learned judge was trying to make in *Joubert v Bester*[41] appears to be that supervening impossibility does not constitute a breach of contract, and hence the use of the word damages to describe the amount payable is inappropriate.

This is doubted because in case of breach of contract one can sue for specific performance alternatively damages and it is clear in such cases that the damages are a surrogate for performance.

In *Wylock v Milford Investments (Pty) Ltd*[42] the court applied the principle of enrichment to re-imburse the plaintiff for amounts spent on maintaining a vessel and on necessary equipment which was of direct benefit to the defendant and refused to take account of the use the plaintiff had of the boat since it did not appear that such use had been of any financial advantage to the plaintiff. It also ordered the

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39. 1977 (4) SA 560 (T) at 570.

40. 1953 (3) SA 418 (C) at 424.

41. *op cit.*

42. 1962 (4) SA 298 (C) at 319.

defendant to repay to the plaintiff the purchase price of the vessel together with interest thereon at the legal rate. Although there is no general action for enrichment in our law,[43] it seems fairly clear that the existing *condictiones*[44] will give ample relief.

In a number of cases already considered[45] an abatement of rental was allowed; in some cases a *quantum meruit* is payable, or, rather, a reimbursement for work already performed,[46] since the letting and hiring of services is governed by the same principles as the letting and hiring of property.[47] Although the rules for *quantum meruit* are not necessarily dependent upon the principle of enrichment,[48] it has been said on a number of occasions that since the employer has been enriched, compensation is payable.[49]

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43. *Nortje v Pool NO* 1966 (3) SA 96 (A).

44. For example, *the condictio causa data causa non secuta.*

45. Some at p 153. See also *The Salisbury Building & Investment Society v The British South Africa Co* (1904) 21 SC 238.

46. For example, *Rubridge v Hadley* (1848) 2 Menzies 174; *Davy v Walker & Sons* 1902 TH 114; *Daly v Chisholm & Co Ltd* 1916 CPD 562; *Hayes v Field* (1923) 44 NLR 311; *Benjamin v Myers* 1946 CPD 655.

47. *Myers v Sieradzki* 1910 TPD 869; *Spencer v Gostelow* 1920 AD 617 at 626; *Beretta v Rhodesia Railways Ltd* 1947 (2) SA 1075 (SR).

48. *Inkin v Borehole Drillers* 1949 (2) SA 366(A) at 372; *Middleton v Carr* 1949 (2) SA 374 (A) at 386.

49. Voet 19.2.27; *Boyd v Stuttaford & Co* 1910 AD 101; *Hitchens v Breslin* 1913 TPD 677 at 685; *Hauman v Nortje* 1914 AD 293 at 296; *Johannesburg Municipality v O'Sullivan* 1923 AD 201 at 206; *Middleton v Carr (supra)*; though the rule works differently, depending upon whether the employer's or employee's death (or, presumably, ill-health, etc) terminates the contract.

In *Joubert v Bester*[50] the court was merely concerned with a *pro tanto* reduction in the purchase price payable, which, as we have seen,[51] is the normal rule where part-performance occurs in sale.

The question of abatement, enrichment, compensation, *quantum meruit, pro tanto* reduction etc will be considered in more detail later.[52]

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50. *Supra*.

51. Above at pp 152f.

52. Below at pp 182f.

CHAPTER 7

TEMPORARY IMPOSSIBILITY

It sometimes happens that the supervening impossibility is absolute (whether entire or partial) but not enduring. For example, I may have contracted to ship certain of your goods to a particular destination, only to be prevented for a time from doing so by a strike, a storm, a civil disturbance or some other passing hindrance. Once more the legal effect of this depends upon the interpretation of the contract in the light of the circumstances prevailing.

A. Distinction Between Partial and Temporary Impossibility

First, it is important to distinguish between temporary impossibility and partial impossibility. The above example is clearly a case which concerns temporary impossibility, because, when the operation of the supervening event ceases, it may be possible to perform the obligation in full.

However, there are cases, for example, contracts of master and servant, where the distinction is not so clear cut. If I hire an artiste to take part in a performance scheduled to take place over the last two weeks of December and the first two weeks in January, and the artiste is able to perform in December, but falls ill in January, through no fault of his own or mine, and is only able to perform in the second week of January, this is not a case of temporary impossibility at all, but one of partial impossibility since, after the cessation of his illness, the artiste is only able to perform part of what he has promised to perform. If he was unable to resume performance at all within the contract period this would be a case of total impossibility of performance, since after the cessation of his illness he is unable even to perform a part of what is still due by him under the contract.

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