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Supervening impossibility of performance in the South African law of contract

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Before a court considers these matters it has to examine closely both the general rule (including its area of application) and the exceptions to the general rule.

A court seised of a matter in which it is contended that supervening impossibility of performance operates would have to decide that

(1) a valid subsisting contract existed between the parties immediately prior to the alleged supervening event;

(2) this contract created an obligation on one or more of the parties to it;

(3) this obligation was wholly or (in my view) at least substantially impossible of being performed

(4) because of the existence of a supervening event,

(5) which, in terms of the law, is recognised as one that excuses performance in such circumstances,

(6) and there are no circumstances to exclude its operation in the case under consideration, such as

(i) the application of a particular rule of law applicable to the contract in question (for example, the rules relating to the passing of risk in goods sold);

(ii) the terms of the contract itself (for example, the voluntary assumption of risk by one of the parties);

(iii) fault, such as negligence or *mora*, on the part of one of the parties,[37]

before it could make a finding in favour of that contention.

In addition, other factors arise for consideration, such as

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37. As will be seen (see below at pp 95f), both (6) (ii) and (iii) can be subsumed under (4).

the question of onus of proof, and in certain instances problems of partial or temporary impossibility may be encountered.

At this stage it will be appropriate to examine the nature and extent of the basic rule more closely and to consider its application in differing circumstances.

B. Definitions

The rule which provides that an obligation which is or has become impossible of performance is not binding on the promisor requires that some state of affairs must exist or have come into existence which makes an obligation under the contract wholly (or at least substantially) impossible of performance. In the case of supervening impossibility of performance this means that something must have occurred after the contract was entered into to make performance wholly or substantially impossible. It is not enough, however, for it to be simply impossible of performance by the promisor. The test is not subjective. There is an objective requirement. The supervening event must be beyond the control of the parties, something generally referred to in our law as *vis major* or *casus fortuitus*.[38]

Vis major includes 'acts of God' in the Greek or non-Christian sense of the expression.[39] In this narrower sense of act of God or *vis divina*, *vis major* really refers to an overwhelming occurrence of nature of a kind that could not reasonably have been anticipated and therefore guarded against.

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38. Referred to as *vis major ac vis divina* by Voet in 19.2.24; sometimes also referred to as *damnum fatale* (inevitable loss or loss arising from inevitable accident), for instance in the Scottish law (see Earl Jowitt *The Dictionary of English Law* s v *damnun fatale*; see also *Davis v Lockstone* 1921 AD 153.)

39. See Wessels *Law of Contract* § 26567-7; *D* 19.2.25.6; 45.1.140.2.

The occurrence, however, need not be unique or a first occurrence of its kind, so long as it is out of the ordinary and could not reasonably have been foreseen. In the words of Claassen:[40]

> "The mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence (when in other words it does not imply any law[41] from which its recurrence can be inferred), does not prevent the phenomenon from being an act of God."

It must, however, be "something overwhelming and not merely an ordinary accidental circumstance, and it must not arise from the act of man".[42]

Casus fortuitus is very similar to act of God, and is also not as wide in its scope as is *vis major*, although it is in one sense wider since it embraces acts of man over whom the parties have no control as I shall indicate presently. In *New Heriot GMG Ltd v Union Govt*[43] Innes CJ stated that

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40. *Dictionary of Legal Words and Phrases* sv "Act of God", quoting from *Butterworths Words and Phrases* 2nd ed.

41. Here the author was clearly referring to a natural or scientific law.

42. Wessels *op cit* states (at § 2662) that "act of God" is not used in our law in the English sense of the term, but that would appear to be wrong (see Solomon JA in *New Heriot Gold Mining Co Ltd v Union Govt* 1916 AD 415 discussing *vis major*; counsel's argument in *Hersman v Shapiro (supra)* at 368; and Jowitt *op cit* s v "Act of God"). See also *Jameson's Minors v Central South African Railways* 1908 TS 575 at 596, adopting the test laid down by the Privy Council in *Great Western Railway Co of Canada v Braid* (1863) 1 MOO NS 101, (PC) as being consistent with South African law.

43. *supra* at 433. See also *Bayley v Harwood* 1953 (3) 498 (A) at 509.

> *'casus fortuitus*,[44] which is a species of *vis major*, is a term well understood and needing no formal definition. It includes all direct acts of nature, the violence of which could not reasonably have been foreseen or guarded against. The doctrine that the operation of such visitations excludes civil liability overlies the fields both of contract and tort".

There is no doubt that together *vis major* and *casus fortuitus* between them embrace natural calamities as well as the acts which man is powerless to control.[45] They include earthquake,[46] fire,[47] lightning, shipwreck, storms and flooding[48] which are contrary to established weather patterns,[49] pestilence,[50]

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44. On the meaning of *casus fortuitus*, see Averanius *Interpretatio Juris Civilis* 2.26; Baldus *Quaestiones Selectae* 12.4; Vinnius *Quaestiones Selectae* 2.1.1; *Jurisprudentia Contracta* 2.66; Wessels *Law of Contract* § 2658; Halsbury *Laws of England* Vol 7 p 428.

45. Vinnius *Jurisprudentia Contracta* 2.66.

46. *D* 19.2.25.2; Voet 19.2.23; Abraham a Wesel *De Remissione Mercedis* 1.1.

47. *D* 2.15.3; 13.6.5.4; 19.2.19.6; Grotius *Inleiding* 3.19.12; Van Leeuwen *Het Roomsch Hollandsche Recht* 4.40.7; *The Salisbury Building and Investment Society v The British South African Company* (1904) 21 SC 238; *Holtzhausen v Minnaar* (1905) 9 HCC 50; *Daly v Chisholm & Co Ltd* 1916 CPD 562.

48. *D* 19.2.15.2; V t 19.2.24; *Hansen, Schrader & Co v Kopelowitz* 1903 TS 707; *Johannesburg Consolidated Investment Company v Mendelssohn & Bruce Ltd* 1903 TH 286; *Kaiser v Shanker & Co* (1904) 21 SC 320.

49. *D* 19.2.15.2; Voet 19.2.24; Van Leeuwen *Censura Forensis* 1.4. 22.17; *Het Roomsch Hollandsche Recht* 4.40.7; Van der Linden *Koopmans Handboek* 1.15.12; Huber 3.8.28; Pothier § 152; Sande *De Regulis Juris* 23; *opera omnia* 38; *Commercial & Agricultural Bank v De Pass, Spence & Co* (1870) NLR (Old Series) 10; *Hansen, Schrader & Co v Kopelowitz (supra); Tilbrook v Port Elizabeth Town Council* (1910) 3 BAC 39; *New Heriot Gold Mining Co Ltd v Union Government (Minister of South African Railways and Harbours)* 1916 AD 415; *Moffat v Rawstone* 1927 TPD 435.

50. See n 42 above and Voet 19.2.23; *Jameson's Minors v Central South African Railway* 1908 TS 575 at 596.

the rapacity of birds, such as jackdaws and starlings,[51] and of locusts,[52] mice[53] and worms,[54] plant diseases, such as blight,[55] an exceptional heat wave,[56] drought[57] and very heavy snowfalls against the usual experience of such occurrences,[58] death[59] or severe illness[60] of, or injury to, man or animal,[61] and insanity,[62] as well as the acts of man,

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51. Voet 19.2.23, 24; Schorer n 394; *Stockham & De Jong v Kaplansky & Co* (1901) 18 SC 156 *(obiter); Joe v Mahomet* (1901) 11 CTR 816 *(obiter)*.

52. *D* 19.2.15.2; Voet 19.2.24; *Hansen, Schrader & Co v Kopelowitz (supra); Johannesburg Consolidated Investment Co v Mendelssohn & Bruce Ltd (supra)*.

53. Voet 19.2.24; Pothier § 153 and the cases cited in n 52.

54. Huber 3.8.28.

55. *D* 19.2.15.2; Voet 19.2.24; *Hansen, Schrader & Co v Kopelowitz,(supra); Johannesburg Consolidated Investment Company v Mendelssohn & Bruce Ltd, (supra)*.

56. Huber 3.8.28.

57. Voet 19.2.24; *Hansen, Schrader & Co v Kopelowitz (supra)*.

58. Voet 17.1.15, 16; 17.2.23; 19.2.23. Grotius 3.12.11; *Heartley v Poupart* (1829) 1 Menz 400.

59. *D* 13.6.5.4; 27.1.10.8; Pothier *Louage* §§ 168, 456; *Parsons v MacDonald* 1908 T S 809; *Fairclough v Buckland*, 1913 SR 186; *Boyd v Stuttaford & Co* 1910 AD 101.

60. *D* 27.1.10.8; 50.17.23; *Sander & Co v Douglas* (1900) 21 NLR 246; *Myers v Sieradski* 1910 TPD 869 at 872; *Fairclough v Buckland (supra); Pelunsky v Pestoli* 1920 WLD 32.

61. *Steyn v Steyn* 1938 WLD 234.

62. Or *cursus latrorum: D* 19.2.13.7; 19.2.15.2; 49.2.13.7 and *Leges* 33 and 34. Grotius 3.19.12; Voet 2.23; 19.2.23, 24; Van Leeuwen *Censura Forensis* 1.4.22.17; *R-HR* 4.40.7; Huber 3.8.28; Pothier § 153; *Rubridge v Hadley* (1848) 2 Menzies 174; *United Mines of Bultfontein v De Beers Consolidated Mines* (1900) 17 SC 419 at 422; *Rahman v Suliman* (1900) 21 NLR 132 at 135; *Enoheon v Evans* (1900) 9 HCG 54; *North Western Hotel Ltd v Rolfes, Nebel & Co* 1902 TS 324 at 331; *Neebe v Registrar of Mining Rights* 1902 TS 65 at 80; *Davy v Walker & Sons* 1902 TS 114 at 127; *Morris*

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such as war,[63] unavoidable theft,[64] riot,[65], strikes,[66] incendiarism[67] and other acts of third parties over whom one has no control, for example of an insurance company[68] or a shipper,[69] acts of State (that is, by way of legislation[70] or lawfully exercised[71] executive action - expropriation,

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(continued) *v Mappin & Webb Ltd* 1902 TS 244;*Flemming v Johnson & Richardson* 1903 TS 319; *Goldberg v Nante* 1903 TH 150 at 155; *Hansen, Schrader & Co v Kopelowitz (supra); Johannesburg Consolidated Investment Company v Mendelssohn & Bruce Ltd (supra); Sheffield & Sheffield v Hart* 1903 T H 469; *Van der Merwe v Colonial Government* (1904) 21 SC 520 at 522; *Partridge v Adams* 1904 TS 472; *Petersen v Tobiansky & Tobiansky* 1904 TH 73; *Moosa v Schiele* 1905 TS 616; *Hughes v Levy* 1907 TS 276; *Algoa Milling Co Ltd v Arkell & Douglas* 1918 AD 145; *Hoffend v Elgeti* 1949 (3) SA 91 (A).

63. *D* 13.6.5.4, 18; 17.2.52.3; 18.6.14.1; 19.1.31 pr; Averanius *op cit* 2.26.14.

64. Voet 19.2.23; *Benoni Produce Co v Minister of Railways & Harbours* 1914 WLD 31.

65. *Johannesburg Municipality v O'Sullivan* 1923 AD 201.

66. *D* 50.17.23 *in fin*; and see n 64 above.

67. *Grobbelaar N O v Bosch* 1964(3) SA 687 (E) at 691; *Bischofberger v Van Eyk* 1981 (2) SA 607 (W) at 610-12.

68. *Algoa Milling Co Ltd v Arkell & Douglas* 1918 AD 145; *Bischofberger v Van Eyk* 1981 (2) SA 607 (W) at 610-12.

69. *Goldberg v Lante* 1903 TH 150 at 155; *Zweigenhaft v Rolfes, Nebel & Co* 1903 TH 242; *Witwatersrand Township Estate & Finance Corporation Ltd v Rand Water Board* 1907 TS 231 at 240-1; *Bayley v Harwood* 1954 (3) SA 498 (A) at 505; *Bekker v Duvenhage* 1977 (3)SA 884(E).

70. *Landmark v Van der Walt* (1884) 3 SC 300; *Stockham & De Jong v Kaplansky & Co (supra); Joe v Mahomet (supra); North Western Hotel Ltd v Rolfes Nebel & Co* 1902 TS 324 at 331; *Peters Flamman & Co v Kokstad Municipality* 1919 AD 427 at 435; *Schlangemann v Meyer, Bridgens & Co Ltd* 1920 CPD 494; *Beretta v Rhodesia Railways* 1947 (2) SA 1075 (SR).

71. *William Maine & Son (Pvt) Ltd v Rhodesia Railways* 1976 (4) SA 914 (SR).

internment, declaration of war, and the like,[72] including the acts of foreign states and foreign laws.[73]

Even the reasonable apprehension[74] of serious harm has been said to be enough, notwithstanding the fact that it subsequently transpired that there was in fact no danger.[75]

C. Where the Basic Rule Does Not Apply

The cases referred to above, however, are only illustrations of the general principle that *vis major* or *casus fortuitus* will excuse performance of an obligation[76] and do not by any

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72. For example, certain measures taken under the Group Areas Act (*Naidoo v Ramnarain* 1962 (3) SA 903 (D); *Soorju v Pillay* 1962 (3) SA 906 (N); *Ornelas v Andrews Café* 1980 (1) SA 378 (W) at 394f); impossibility to obtain registration of a boat (*Wylock v Milford Investments (Pty) Ltd* 1962 (4) SA 298 (C), a case of *initial* impossibility) or the subdivision of a piece of land *Bekker NO v Duvenhage* 1977 (3) SA 884 (E)).

73. Despite the decision in *Wessels & Co v Abraham, Crosbie v Abraham* (1908) 10 HCG 225, which followed English legal authority. The statements in the Roman texts are general; see *D* 45.1.37; 45.1.83.5 *in fin*; 45.1.91.1; 50.17.23. (See Wessels *The Law of Contract in South Africa* § 2675-8, especially at § 2678, where he states: "A prohibition from the point of view of our law, but it is a prohibition *vi majore* and the performance of the contract must be deemed to have become impossible in fact.")

74. *D* 4.2.9; 19.2.27; 50.17.184; Voet 19.2.23; *Enochson v Evans* (1900) 9 HCG 54 at 56-7; *Rex v Zillah* 1911 CPD 643 at 647.

75. *D* 19.2.23; *Stander & Co v Douglas* (1900) 21 NLR 246 at 251-5; *Hansen, Schrader & Co v Kopelowitz* 1903 TS 707 at 718-19; *Steenkamp v Nederlandsch Zuid Afrikaansche Hypotheek Bank* 1916 TPD 396. (In Roman law the notion of *vis major* was applied to the escape of a slave not normally confined - *D* 13.6.5.13 and Voet 18.6 *s v* "risk".)

76. *Kopelowitz v Hansen, Schrader & Co* 1903 TH 134 at 143; *Hansen, Schrader & Co v Kopelowitz (supra)* at 718; *Bayley v Harwood* 1954 (3) SA 498 (A) at 505; *Phillipson v Bahadur* 1956 (1) SA 83 (SR) at 93 (explaining *Bayley v Harwood*).

means constitute an exhaustive list. Moreover, it should be noted that an examination of the texts and cases referred to clearly establishes that neither *vis major* nor *casus fortuitus* can exist where the consequences of the event

(a) were within the contemplation of the parties at the time of contracting; for example, where the promisor had either expressly or impliedly guaranteed that performance was possible or had agreed to be liable in any event;[77]

(b) or even where they should have been foreseen by the exercise of reasonable foresight,and could have been avoided if reasonable care or diligence (which includes the taking of ordinary precautions) had been exercised;[78]

(c) were brought about by the fault of one or both of the

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77. He takes upon himself the *periculum solutionis*, that is, the risk of *casus opinatus et inopinatus* (*D* 18.1.70; 18.6.1 pr 2; 18.16.1; 19.2.13.5; 50.17.185; *C* 4.23.1; 4.24.5; Voet 18.6.2; 18.6.2; 19.2.23; Vinnius *Quaestiones Selectae* 2.1; *Torbat v Attwell's Exors* 1879 Buch 200; *Raphael v Clutterbuak* (1900) 10 CTR 320; *Godfrey & Aronstein v Bamberg & Co* 1903 TH 372; *Morris v Mappin & Webb Ltd* 1903 TS 244; *Ersman v Shapiro & Co* 1926 TPD 367 at 373; *Hoffend v Elgeti* 1949 (3) SA 91 (A) at 102; *Weinberg v Weinberg Bros (Pty) Ltd* 1951 (3) SA 266 (C) at 276-7; *Oerlikon S A (Pty) Ltd v Johannesburg City Council* 1970 (3) SA 579 (A) at 585; *Bisohofberger v Van Eyk* 1981 (2) SA 607 (W) at 610-12);and can be implied by the substantive law in the absence of agreement to the contrary (Pothier *Contrat de Louage* paras 112- 13, 116; *Morris v Mappin & Webb Ltd* 1903 TS 244 at 250; *Baum v Rode* 1905 TS 66 at 67; and argument of counsel in *Bayley v Harwood* 1954 (3) SA 498 (A) at 499D-G).

78. *D* 13.6.5.4, 18; 17.2.52.3; 18.1.35.4; 18.6.14.1; 19.1.31 pr; 19.2.25.6; 45.1.51; 45.1.83.5 *in init*; 45.1.91.1, 3; 50.17.23; Averanius *Interpretatio Juris Cristis* 2.26.14; Baldus *Quaestiones Selectae* 12.4; Vinnius *op cit* 2.1.1: *Jurisprudentia Contracta* 2.66; J Brunnemann *Commentarius in quinquaginta Libros Pandectarum* 18.1.78.3; Abraham & Wesel *Tractatus De Remissione Mercedes* 1.1; *Zwaigenhaft v Rolfes, Nebel & Co* 1903 TH 242; *Mountstephens & Collins v Ohlsson's Cape Breweries* 1907 TH 56 at 59 (as explained in *Bayley v Harwood* 1953 (3) SA 239 (T) at 243); *Jamesson's Minors v Central South African Railways* 1908 TS 575 at 596; *Benoni Produce Co v Minister of Railways and Harbours* 1914 WLD 31; *New Heriot Gold Mining Co Ltd v Union Government (Minister of South African Railways and Harbours)* 1916 AD 415 at 433; (cont.)

parties, which includes

(i) a deliberate or negligent act; or[79]

(ii) undue delay in tendering the performance in question.[80]

It will readily be seen that there is some overlapping of area between (a) and (b) and between (b) and (c). It can be argued that if the occurrence could have been foreseen by the exercise of reasonable foresight, in fact it must have been foreseen, and that in entering into the contract in such circumstances the promisor must be held to have implicitly guaranteed performance or have taken upon himself the *periculum solutionis*. Furthermore, it could also be argued that if the occurrence ought to have been foreseen, and the necessary precautions were not taken (for example, there was insufficient guarding of the subject-matter of the contract against theft), then the subsequent loss of the subject-matter was directly attributable to the negligence of the promisor.

Whether (a) or (b) applies is a matter of construction of

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78. (continued) *Spolander v Ward* 1940 CPD 24 at 30-2; *Bayley v Harwood* 1954 (3) SA 498 (A) at 503, 505-7 and 509-10; *Wilson v Smith* 1956 (1) SA 393 (W) at 396; *Talu Ranching (Pty) Ltd v Circle "A" Ranching Co (Pty) Ltd* 1975 (3) SA 612 (W) at 613. In *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 at 430 counsel submitted that the test was whether the party could have prevented a breach of contract, quoting the English cases of *Brewster v Kitchell* (1698) 1 Salk 198, 91 ER 177, 1 Ld Raym 317, 91 ER 1108, and *Baily v De Crespigny* (1869) LR 4 QB 180. This relates to the second half of the proposition, i e whether reasonable care and diligence could have prevented the occurrence or its prevention of performance.

79. See n 78 and below at pp 102f.

80. See below at pp 105f.

the particular contract in the light of all the circumstances prevailing at the time it was entered into.[81] However, it is of little practical consequence whether (a) or (b) applies, since in either case no *vis major* or *casus fortuitus* can be shown to exist. It is similarly irrelevant whether the situation envisaged in paragraph (b) or (c) applies.[82]

The test of negligence laid down in *Jameson's Minors v Central South African Railway* indicates the link between foreseeability and negligence. It was applied to the question of *vis major* in *New Heriot Gold Mining Co Ltd v Union Government (Minister of South African Railways and Harbours)*[84] (admittedly a case on delict) as being "consistent with the principles of our own law".[85]

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81. *D* 17.2.58 pr; 18.1.34-2; *C* 4.4.245; *Searle & Son v Arkell & Douglas* (1899) 16 SC 522 at 526.

82. *Spolander v Ward*, 1940 CPD 24 at 29-32. But see *Dayley v Harwood* 1954 (3) SA 498 (A) and the discussion of this case below at pp 118f.

83. 1908 TS 575 at 596-7, following the Privy Council decision in *Great Western Railway Co of Canada v Braid* (1863) 1 Moo NS 101, 15 ER 640 (PC).

84. 1916 AD 415 at 461. See also *Crook v Erasmus* 1927 EDL 142 at 146.

85. The onus of establishing a defence of *vis major* lies on the party raising the defence (*New Heriot Gold Mining Co Ltd v Union Government (Minister of Railways and Harbours)* 1916 AD 415 at 438, 462, 467; also *Moffat v Rawstorne* 1927 TPD 435 at 437), including the fact that the impossibility supervened without fault on the part of the debtor; certainly where the circumstances are such that the impossibility could have been brought about by the debtor's fault (Pothier *Oblig* § 620; *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957 at 964, 965-6; *Hoffend v Elgeti* 1949 (3) SA 91 (A) at 104; *Grobbelaar NO v Bosch*, 1964 (3) SA 687 (E) at 691). If the party fails in that defence, the onus of establishing the amount of damages to be awarded for the breach of contract would rest on the party alleging that he has suffered damage as a result of the other party's negligence (the *New Heriot* case at 442; see also *Mposelo v Banks* (1902) 19 SC 370), except in the case of revocation of a licence, for the actions of the licensing board are not unrelated to the conduct of the licensee,

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The general principles stated above, however, need a little further elaboration in the light of the old authorities and the case law on the subject.

(a) Assumption of *periculum solutionis*

The assumption of the *periculum solutionis* may be inferred from the circumstances in which the contract was entered into.[86] In such a case, it has been shown that foresight of the possibility of the *vis major* or *casus fortuitus* is important.[87]

It does not follow that *vis major* and *casus fortuitus* are excluded merely because the contract is of a speculative nature, for almost all commercial contracts are to some

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85. (continued) so that the onus rests on the licensee to show that it was not revoked as a result of his fault (*Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957 at 955-6). If it is alleged that precautions could and should have been taken against the operation of the *vis major* upon performance, the onus of establishing that rests on the person so alleging (*Moffat v Rawstorne op cit* at 38). All this is in accordance with the normal rule that generally he who avers must prove (*Pillay v Krishna* 1946 AD 946 at 951-2). See also below at pp 190f.

86. *D* 18.1.34.2; Huber *Hedendaagse Rechtsgeleerdheyt* 3.42.7; *Hoffend v Elgati* 1949 (3) SA 9 (A) at 102-5; see also *Gengan v Pather* 1977 (1) SA 826 (D) at 829.

87. Huber *op cit* 3.42.7; *Bischofberger v Van Eyk* 1981 (2) SA 607 (W) at 610-12, especially at 611 B-F. At page 324 of the third edition (1980) of his *The Principles of the Law of Contract* A J Kerr states that the basic rule does not apply if the debtor expressly takes the risk in question upon himself, and he continues: "This happens for example where an insurance contract covers accidental destruction of the thing insured." This is not clear, however: if the only contract is the contract of insurance, the issue of supervening impossibility of performance does not arise, on the facts stated alone. If it is suggested that where a party to a contract

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extent speculative.[88] It seems clear that the ordinary risks incidental to the type of contract in question must e taken to have been within the contemplation of the parties when the contract was entered into, and therefore fell out ... the scope of *vis major* and *casus fortuitus*.[89]

The test is not "could reasonably have been foreseen", for "if the parties had sat down to think out what changes might be introduced which would affect . . . the contract , they could no doubt think of the supervening occurrence", and that is not enough.[90] The test is "should have been foreseen"[91] or "ought to have foreseen"[92] or "must be taken to have foreseen"[93] in the circumstances prevailing at the time the

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87. (continued) insures himself against the accidental destruction of the subject-matter of that contract, he thereby takes the risk in question upon himself, it is submitted that this does not necessarily follow at all; take, for instance, a jockey insuring himself agai st the death of his mount.

88. *Lucerne Asbestos Co Ltd v Becker* 1928 WLD 311 at 337.

89. *Idem; Ward v Francis* (1896)8 HCG 82 at 85-6; *Wessels & Co v Abraham, Crosoie v Abraham* (1908) 10 HCG 225 at 244 (which Wessels *(Law of Contract in South Africa)* says (at § 2654) is not likely to be followed today on the facts; *Herman v Shapiro & Co* 1926 TPD 367 at 373 f; *Hoffand v Elgeti* 1949 (3) SA 91 (A) at 105; *Wilson v Smith* 1956 (1) SA 393 (W) at 396.

90. Paraphrase of Schreiner JA's remarks in *Bayley v Harwood (supra)* at 507A, although Hoexter JA, was prepared to apply that phrase (in a stronger sense) at 570B.

91. *Idem, per* Schreiner JA at 506C.

92. *Idem, per* Schreiner JA at 506G and Greenberg JA at 503H.

93. *Idem, per* Schreiner JA at 506G.

contract was entered into.[94]

It follows that the *id quod interest* is payable when the impossibility is foreseen, since the relieving effect of *vis major* and *casus fortuitus* does not obtain.[95]

It is submitted that the statement in *Talu Ranching Co (Pty) Ltd v Circle "A" Ranching Co (Pty) Ltd*,[96] that "[i]n giving the option, and in receiving it, the parties must have contemplated the possibility that the giver, in offering to sell the land at some future date, might be rendered absolutely incapable of performing because of an act of State, more particularly because of the expropriation of the land under statutory authority", perhaps goes a little too far in the absence of facts indicating the vulnerability of the particular land in question to such action.[97]

One writer, in analysing the decision in *Hersman v Shapiro*

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94. See also n 78 above and in particular *Mountstephens & Collins v Ohlsson's Cape Breweries (supra)* at la : pp 59-60. "lessees must have known of the warning given by the licensing court", hence the possibility of the licence not being renewed was one which was within the contemplation of the parties at the time of lease; *New Heriot General Mining Co Ltd v Union Government (Union of South African Railways and Harbours) (supra)*: "something unforeseen and which human foresight could not be expected to anticipate"; *Wilson v Smith (supra)* where the court held that the possibility was contemplated by the parties that the event which rendered performance impossible might occur. See also the submission by counsel in *Peters, Flamman and Co v Kokstad Municipality (supra)* at 430, to the effect that the legislation in that case (the Trading with the Enemy Act 39 of 1916) was entirely new and revolutionary, enemies being allowed by implied licence to carry on their business in previous wars.

95. *D* 19.1.62.1; 45.1.91.3; *C* 4.49.14; *Institutes* 3.23.5; Vinnius *ad Institutes* 3.24.5.2; Voet 18.1.21; Richard Ryck *Lehre von den Schuldverhältnissen* (1883-9) 420 (see Wessels *op cit* § 2717.)

96. *Supra* per Marais J at 613G-H.

97. See *Moffat v Rawstorne* 1927 TPD 435 at 437. See Voet's reference to the sale of land beyond the Rhine in 18.6.1.

& Co,[98] which concerned the sale of a *genus*, suggests that[99] the contract was a speculative one, and that the judgment goes to show that where "a scarcity, running to the point of absolute disappearance of production of the article sold, is contemplated, the contract is not terminated by the fact that performance becomes impossible". This viewpoint has been criticised[100] on the ground that it relies too much on English law and that its true formulation should rest on the principle *genus non perit (genus nunquam perit, genera non pereunt)*.

The criticism may be somewhat unfair. If the maxim *genus non* (or *nunquam*) *perit* means that the sale of generic goods can never result in supervening impossibility of performance on account of the unavailability of the goods, perhaps it would be fruitless to consider whether impossibility was within the contemplation of the parties at the time of contracting on account of the speculative nature of the contract; but can this be so?[101] If, for example, I had promised six rare zebra to a zoo and such zebra could be found only in the district where I farmed and then only in limited numbers, and thereafter a disease were to ravage the species so that the species of zebra, not only on my farm, but in the whole world, became extinct, making it impossible for me to fulfil my promise, it is submitted that the maxim *genus nunquam perit* would not apply, and impossibility of performance could be pleaded, unless the court

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98. 1926 TPD 367, following fairly closely the wording of the judgment at 374.

99. Though perhaps "hinted" might be a more accurate description. The writer is J T R Gibson *South African Mercantile and Company Law* 5 ed (1983) 72.

100. J C de Wet en J P Yeats *Suid-Afrikaanse Kontraktereg en Handelsreg* 4de uitg (1978) 130 n 68. *Norden v Shaw* (1847) 2 Menz 150 and *Combrink & Co v The British South Africa Co* (1901) 18 SC 45 fall within the same criticism.

101. See also below at pp 116f.

& Co,[98] which concerned the sale of a *genus*, suggests that[99] the contract was a speculative one, and that the judgment goes to show that where "a scarcity, running to the point of absolute disappearance of production of the article sold, is contemplated, the contract is not terminated by the fact that performance becomes impossible". This viewpoint has been criticised[100] on the ground that it relies too much on English law and that its true formulation should rest on the principle *genus non perit (genus nunquam perit, genera non pereunt)*.

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101. See also below at pp 116f.

came to the conclusion on a consideration of the contract in the light of the surrounding circumstances that it was of such a speculative nature that I must be held to have guaranteed performance or to have undertaken to be liable in any event, or some other excluding factor obtains. Furthermore, the principle of *Hersman v Shapiro & Co*[102] referred to above was endorsed by the Appellate Division in *Hoffend v Elgeti*.[103]

Both these cases, however, really turned largely on the question whether the impossibility was absolute, which, it is submitted, is also the basis of the maxim *genus non pereat*. A more detailed discussion of this matter will take place when I come to deal with the topic.

(b) Fault

Fault may be looked at from two points of view, viz

(a) fault of the debtor (including *mora debitoris*) and

(b) fault of the creditor (including *mora creditoris*).[104]

As *mora* is an entirely separate question from other fault, it will be considered separately.

(a) If the debtor commits a deliberate act (whether wrongful or not) or is negligent, and his act or negligence results in performance of the debtor's obligation becoming impossible,[105] there is certainly no unavoidable misfortune as required by

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102. *Ibid*

103. 1949 (3) SA 91 (A), per Centlivres JA at 105.

104. *D* 46.1.91.2; *S A Crushers (Pty) Ltd v Randass* 1951 (2) S A 543 (N) at 546-7; *Wirsohms S A (Pty) Ltd v Greenblatt* 1959 (3) SA 909 (C).

105. Sometimes called "self-created impossibility".

the concepts of *vis major* or *casus fortuitus*.[106] The same applies where a member of the debtor's family or his agent or some other person for whom he is responsible (such as a servant) is negligent.[107]

It is submitted that, just as impecuniosity can never constitute impossibility,[108] so the inevitable results of impoverishment cannot constitute impossibility, since the individual could have avoided such results by remaining in a position to pay his debts; hence the vesting of property of

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106. *D* 12.1.5; 16.3.14.1; 18.1.8, 50; 19.2.9.1; 21.1.31.12; 35.1.24; 45.1.23, 33; 45.1.51; 45.1.41.82.1; 45.1.85.7; 45.1.91, 2, 3; (45.1.91.1 implies lack of fault, as also do 45.1.83.5 pr & 50.17.23); *C* 4.49.14; Brunneman *op cit* 18.1.8; 45.1.91; Grotius 3.47.1; Van der Linden *Koopman's Handboek* 1.14.9 (2); Pothier *Pandects ad D* 4.6.3.106; *Obligs* § 212; *Louage* § 309; *Contrats* 2.3.1.3; *Mposelo v Banks* (1902) 19 SC 370; *Van der Merwe v Colonial Government* (1904) 21 SC 520 at 523; *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 SC 957 at 965 and 1909 TS 865; *Boyd v Stuttaford & Co* 1910 AD 101 at 117; *Daly v Chisholm & Co Ltd* 1916 CPD 562 at 571; *Schlengemann v Meyer, Bridgens & Co Ltd* 1920 CPD 494 at 503; *McCabe v Burisch* 1930 TPD 261; *Loubser v Vorster* 1944 CPD 380; *Benjamin v Myers* 1946 CPD 655 at 661; *Hoffend v Elgeti* 1949 (3) SA 91 (SA) at 102; *Wireohms S A (Pty) Ltd v Greenblatt* 1959 (3) SA 909 (C) at 912; *S A Crushers (Pty) Ltd v Ramdass* 1951 (2) SA 543 (N) at 546-7; *Grobbelaar N O v Bosch*, 1964 (3) SA 687 (E) at 691; *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) at 239; *Dryland Farms (Pty) Ltd v Botha* 1969 (2) SA 617 (G) at 621. The principle is also implicit in the cases dealing with fictional fulfilment, such as *Fagan v Pretorius* 1921 CPD 502 at 506-7; *Marquard & Co v Biccard* 1921 AD 366, per counsel at 368; *MacDuff & Co (Liquidator of) v Johannesburg Consolidated Investment Company Ltd* 1924 AD 573 at 607-8, 610-11 (but cf *Boose v Zeederberg & Duncan* 1918 CPD 283 at 292-3, where the principle was excluded by the laws of agency); see *Dryland Farms (Pty) Ltd v Botha* 1969 (2) SA 617 (G) at 621. It is submitted that a "consent" to expropriation (see *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C)) is insufficient, since the owner has no choice in the matter.

107. *Daly v Chisholm & Co Ltd* 1916 CPD 562 at 570-1.

108. See page 31 *supra*.

the promisor which is the subject-matter of a contract in a trustee or liquidator, or a *curator bonis* in the case of his prodigality, or its sale in execution to satisfy his unpaid debts can be said to be attributable to his own fault. In *Van den Heever v Bester*[109] it was assumed that these circumstances did not constitute impossibility of performance, and the debtor was held liable for the *id quod interest* on the ground that he had failed to prove that he would not be in a position to give transfer of the property in the future.

If the debtor is at fault *perpetuatio obligatio* obtains, and he remains liable for the *id quod interest*,[110] because his failure to perform constitutes a breach of contract in such a case.[111] Sureties for the payment of the debt or performance of the obligation are accordingly not released,[112] though the creditor would be obliged to pay for, or to set off, any benefits he has received from the contract up to the occurrence of the supervening event.[113] What has been said applies even if the action of the debtor has merely resulted in his obligations under the contract becoming partially impossible of performance.[114]

(b) Where the creditor is at fault and this results in the performance promised by the debtor becoming impossible, again

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109. 1961 (3) SA 625 (O) at 627.

110. See above at pp 18f and *D* 45.1.91.3; Pothier *Obligs* § 625.

111. *D* 45.1.91.3; *C* 1.49.14; Voet 19.1.4; Pothier *Obligs* § 625; *Graham v Estate of Alcock* 1906 TH 38; *Frenkel v Ohlsson's Cape Breweries* 1909 TS 957; *Dryland Farms (Pty) Ltd v Botha* 1969 (2) SA 617 (G) at 621.

112. *McCabe v Burisch* 1930 TPD 261; *Loubser v Vorster* 1944 CPD 380.

113. *D* 45.1.91.4; 45.2.18; 46.1.58.1; Pothier *Obligs* §§ 273, 629, 631.

114. *Spencer v Costelow* 1920 AD 617.

the impossibility cannot be said to be due to *vis major*[115] or *casus fortuitus*, and so it does not operate to discharge the contract.[116] The debtor will be discharged from his obligation and will not be liable for the creditor's *id quod interest*.[117] Furthermore, by reason of fictional fulfilment[118] or the terms of the particular contract[119] he may be entitled to performance or at least compensation from the creditor as a result of the latter's *dolus*.[120]

(c) *Mora*.

(i) *Mora creditoris*: If the creditor is *in mora*, the loss falls on him, the contract is not terminated, and he continues to be liable to the debtor for his counter-performance or the *id quod interest*.[121] It would appear that if there

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115. *Wirsohms SA (Pty) Ltd v Greenblatt* 1959 (3) S A 909 (C) at 912. As to partial impossibility of performance see pp 150f below.

116. *D* 45.1.136.1 and Donnellus *op cit ad D* 45.1.136.1. (See J W Wessels *op cit* § 2686.)

117. *D* 45.1.23.

118. *D* 35.1.21; 35.1.81.1; 40.7.38; 45.1.85; 50.17.161; Von Savigny *op cit* 2.3.119; Brunneman *op cit* 35.1.24; Pothier *Oblig* 233; *Fagan v Pretorius* 1921 CPD 502; *Gowan v Bowern* 1924 AD 550; *MacDuff & Co (Liquidator of) v Johannesburg Consolidated Investment Co* 1924 AD 573; *Eschini v Jones* 1929 CPD 26; *East Asiatic Co v Hansen* 1933 NPD 297; *Lorentz v Rabinowitz* 1938 CPD 143; *Koenig v Johnson & Co Ltd* 1935 AD 262; *Vos v Cronje & Duminy* 1947 (4) SA 873 (C); *Van Heerden v Hermann* 1953 (3) SA 180 (T); *Bank v Boesch* 1959 (2) SA 377 (T); *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 639 (A); *Scott v Poupard* 1971 (2) SA 373 (A).

119. *Boose v Zeederberg & Duncan* 1918 CPD 283 at 288f and cases referred to in n 118.

120. *Gowan v Bowern* 1924 AD 550 at 571; *Harrismith Building Society No 2 v Taylor* 1938 OPD 36.

121. *D* 45.1.105; Pothier *Oblig* § 621.

has been a valid tender of performance by the debtor but the creditor is *in mora* to receive it, and the thing so tendered is afterwards accidentally destroyed, the impossibility of performance is not due to the accident but to the refusal of the creditor to accept that performance when it was both due and possible. Hence it became impossible on account of the fault of the creditor, and not on account of the supervening event.

(ii) *Mora debitoris:* Where the debtor is *in mora*, he is not generally released from the duty to perform by the occurrence of the supervening event of *vis major* or *casus fortuitus*, because *mora* perpetuates the obligation[122] just as it does where the debtor's own act incapacitates him from performing under the contract.[123] If he had performed in time he would have performed before the occurrence of the supervening event that incapacitated him from performing. Hence the impossibility is not due to *vis major* or *casus fortuitus* but to his failure to perform timeously.

Mora, then, is intimately connected with the question of the causal connection between the *vis major* or *casus fortuitus* and the inability to perform the obligation under the contract. It follows, therefore, that if after the debtor is *in mora* he makes a valid tender to perform his obligations under the contract, but the creditor is *in mora* in accepting such tender, it will be the creditor's *mora* that will be the proximate cause of the failure to perform, not the debtor's *mora*; hence the position which will obtain is that outlined under para

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122. *D* 16.3.12.3.14; 30.108.11; 45.1.8.2; Grotius 3.7.10; 3.4.7.1; Voet *ad D* 16.3.12.3.14 n 6; Pothier *Obligs* §§625, 627; Karl Otto von Madai *Die Lehre von der Mora* (1837) pp 270f; Wessels *op cit* § 2704; but cf *Momsen v Mostert* (1881) 1 SC 185.

123. See above p 102.

(c) (i) above.[124]

Conversely, if the creditor is *in mora* but goods which the creditor is obliged to deliver under the contract thereafter perish owing to the negligence of the debtor, the debtor should continue to be liable under the *perpetuatio obligationis* principle, since it is his negligence that is the proximate cause of the failure to perform.[125]

Joint debtors are not responsible for one another's *mora*[126] unless they are co-debtors *in solidum*.[127] Of course, an agreement by the creditor to accept delivery at a later date can purge a debtor's *mora*.[128]

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124. *D* 45.1.91.3.

125. It is sometimes said that it is a defence for a debtor *in mora* to counter that the *res* which he should have delivered to the creditor would have perished in the creditor's hands anyway. This rule flows from the rules of risk in sale, which, although closely associated with the question of supervening impossibility of performance, are quite distinct from it, and will be considered below at pp 180f.

126. *D* 22.1.3.2.4.

127. *D* 45.2.18; Pothier *Oblig*s §§273, 629, 631.

128. *D* 45.1.91.3.

CHAPTER 5

ABSOLUTE IMPOSSIBILITY

A. Interpretation of the Contract

Once it has been ascertained that an event has occurred which constitutes *vis major* or *casus fortuitus*, it is necessary to see whether it was such as to make performance under the contract impossible. In order to determine this, it must first be established what exactly was promised under the contract, and then whether in fact the event renders this promised performance substantially impossible to achieve.

Vis major or *casus fortuitus* can affect the performance in many ways; for example it may render the promised performance

(a) illegal, either because of

(i) new legislation,[1] even of foreign states[2] and subordinate legislative bodies,[3] which prohibits the performance of the promised act, or otherwise makes it impossible to carry out; or

(ii) an act of state, such as a declaration of

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1. Leyser *Meditationes* 1904; Wessels *op cit* § 2645; *Witwatersrand Township Estates & Finance Corporation Ltd v Rand Water Board* 1907 TS 231; *Naidoo v Rammarain* 1962 (3) SA 903 (D); *Wylook v Milford Investments (Pty) Ltd* 1962 (4) SA 298 (C) (a case of initial impossibility, but the principle is the same); *Bekker NO v Duvenhage* 1977 (3) SA 884 (E) at 888-9; *Ornelas v Andrew's Café* 1980 (1) SA 378 (W) at 394F; but if the legislative prohibition is not absolute so that performance can be effected under the authority of a permit, it is necessary to allege expressly or impliedly (*Naidoo v Rammarain supra*) that such permit has been refused (*Soorju v Pillay* 1962 (3) SA 906 (N)); and see above at pp 93f.

2. Wessels *op cit* §§ 2675-8 and above at pp 94 f.

3. *Mountstephens & Collins v Ohlsson's Cape Breweries* 1907 TH 56; *Bayley v Harwood* 1954 (3) SA 498 (A).

war[4] or the expropriation of property[5]; or

(iii) other changes in the legal situation such as

(i) the creditor acquires *ex lucrativa causa*[6] full title[7] to the thing owed by the debtor;[8]

(ii) the thing owed becomes *extra commercium*;[9]

(iii) performance under the contract becomes *contra bonos mores*, for example, where it would be immoral to perform,[10] or otherwise

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4. A. von Gail *Practicarum Observationem, tam ad Processum Judiciarum quam Causarum Decisiones pertinentium* 2.2.3; Pothier *Oblig*s § 614; *Landmark v Van der Walt* (1884) 3 SC 300, *Norden v Shaw* (1847) 2 Menz 150; *Rubridge v Hadley* (1848) 2 Menz 174; *Treasurer-General v Loxton* (1881) SC 304; *Van Druten v Cloete* (1885) 3 HCG 276; *Stockham & De Jong v Kaplansky & Co* (1901) 18 SC 156; *Davy v Walker & Sons* 1902 TH 114; *North-Western Hotel Ltd v Rolfes, Nebel & Co* 1902 TS 324; *Kopelowitz v Hansen, Schrader & Co* 1903 TH 134; *Goldberg v Nante* 1903 TH 150; *Zweigenhaft v Rolfes, Nebel & Co* 1903 TH 242; *Godfrey & Aronstein v Bernberg & Co* 1903 TH 372; *Fleming v Johnson & Richardson* 1903 TH 319; *Van der Merwe v Colonial Government* (1904) 21 SC 520; *Joe v Mahomet* (1901) 11 CTR 816; *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427; *Beretta v Rhodesia Railways* 1947 (2) SA 1075 (SR).

5. Pothier *Oblig*s § 614; *Joubert v Baster* 1977 (4) SA 560 (T); and see above at p 100.

6. *D* 30.34.8; 44.7.19.

7. *D* 50.17.139.1.

8. *Institts* 2.20.6; *D* 44.7.17; Pothier *Oblig*s § 616; unless it is owed in the alternative, when the alternative performance remains due (*D* 45.1.16 pr; 45.1.83; and see below at p 116.

9. *D* 45.1.51; 45.1.91.1.3.

10. For example where research now indicates that the drug to be supplied is harmful. See also *Institts* 3.19.24; *D* 2.14.27.3; 12.5.2; Grotius 3.1.4.2; Van der Kessel *Th* 480-1; 2.14.16; and *Jordan v Mines and Minerals Exploration Syndicate Ltd* 1904 TH 227 (this is really a case where *initial* impossibility of performance occurred, but the principle is the same.) See also *Koenig v Johnson & Co Ltd* 1935 AD 262.

> contrary to public policy,[11] for instarce, one of the parties to a contract becomes an alien enemy of the other because of the outbreak of war or performance under the contract by one party is to be made on what, to him, is enemy territory.

It is submitted that the parties cannot contract to perform in spite of supervening illegality, as such a provision would be contrary to public policy, though if a party has "guaranteed" performance he may nevertheless be liable in damages for failure to perform even in the case of supervening illegality, unless such undertaking is itself illegal *ab initio*, for instance, to supply arms even if a war should break out between the parties' respective countries.[12]

(b) physically impossible, for example

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11. *The Treasury v Sundelfinger & Kaumheimer* 1919 TPD 329; *Enselelt v Enselelt* 1952 (2) SA 385 (T). In *Haynes v Kingwilliamstown Municipality* 1950 (3) SA 841 (E) at 847-8 the court considered the question of impossibility of performance, but held that it did not obtain in that case on the facts. It is submitted that it would have been justified in holding that in view of the *casus fortuitus* which it found had occurred it would have been contrary to public policy to perform under the contract, had the circumstances been a little different -for instance, had there been barely sufficient water to support life in the town, and performance to the applicant would have been suspended until conditions improved.

12. It is submitted that if the contract in *Haynes v Kingwilliamstown Municipality (supra)* had obliged the municipality to supply water to the applicant "as long as there is water in the dam" or "in preference to all other users" it would not have been illegal *ab initio*, and Haynes would still have been entitled to damages.

(i) the subject-matter of the contract is destroyed[13] without fault on the part of either party or those for whom either party is responsible;

(ii) something or someone essential for performance becomes unavailable for at least a critical period of time, for example, the subject-matter of the contract is lost (but here the contract is terminated only if such subject-matter is not recovered within a reasonable time[14]), beneficial occupation for the purposes of the lease is impossible,[15] the death, serious (but not trifling[16]) illness, insanity, internment or imprisonment of a person (without his fault) where his personal performance is essential under the

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13. *D* 19.2.33; 22.1.3.2.4; 45.1.33; 46.3.107; 50.17.23 pr; Voet 19.2.23; Van der Linden 1.15.12; Pothier *Louage* § 138f, 194, 197, 309; Windscheid *op cit* 2.264 & 315; Toullier 4.449; *The Salisbury Building & Investment Society v The British South Africa Co* (1904) 21 SC 238; *Holtshausen v Minnaar* 10 HCG 50; *The Benoni Produce Co v Minister of Railways & Harbours* 1914 W L D 31; *Daly v Chisolm & Co Ltd* 1916 C P D 562 at 569.

14. . 45.1.37; Voet 18.6.1, n2; Pothier *Oblig*s§ 620.

15. Voet 19.2.223; Pothier *Louage* § 112; *United Mines of Bultfontein v De Beers Consolidated Mines* (1900) 17 S C 419; *Northwestern Hotel Ltd v Rolfes, Nebel & Co* 1902 T S 324 at 331; *Frankel v Ohlsson's Cape Breweries Ltd* 1909 TS 957; *Stansfield v Kuhn* 1940 NPD 238 at 246; *Jordan v Mines & Minerals Exploration Syndicate Ltd* 190[illegible] TH 227 at 237; provided that "substantial" performance is not possible.

16. *D* 19.2.27.1; 40.7.45; Voet 19.2.27; Huber *Praelectiones Juris Civilis* 19.2.23; *Hedendaagse Rechtsgeleerdheyt* 3.8.20; Pothier *Louage* § 168; *Thorne, Stuttaford & Co v McNally* (1891) 8 SC 143; *Boyd v Stuttaford & Co* 1910 AD 101.

contract,[17] in the absence of an agreement to the contrary, of course;[18]

(iii) the premises in which, or thing on which, the work has to be done is destroyed.[19]

In addition, it has been suggested[20] that a fundamental change

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17. *D* 27.1.108; Voet 17.1.15, 16; 19.2.23; Grotius 3.12.11; 3.21.8; *Heartley v Poupart* (1829) 1 Menzies 400; *Bell v Estate Douglas* (1906) 23 SC 661; *Boyd v Stuttaford & Co* 1910 AD 101; *Ex parte Dunoon's Executor* 1910 TS 883; *Fairclough v Buckland* 1913 SR 186; *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427; *Pelunsky v Pestoll* 1920 WTD 32; *Steyn v Steyn* 1939 WLD 234; *Schlengemann v Meyer, Bridgens & Co Ltd* 1920 CPD 494; *Beretta v Rhodesia Railways Ltd* 1947 (2) SA 1075 (SR).

18. Voet 17.1.15 (but cf Voet 17.1.23); Van der Linden 4.1.14.3; Bynkershoek *Quaes Jur Priv* 3.10; Pothier *Société* § 145; *Torbet v Executors of Attwell* 1879 Buch 195; *Boyd v Stuttaford & Co* 1910 A D 101; *Ex parte Becker's Executors* 1939 CPD 496; *Ex parte Wolman NO* 1946 CPD 672 (except possibly in the case of a husband-and-wife partnership, *Ex parte Weinrich's Executors* 1929 CPD 37 at 39.)

19. Voet 19.2.37; Pothier *Louage* 7.3; see also *Appleby v Myers* (1867) LR 2 CP 651, 36 LJCP 331, 16 LT 665 Ex Ch, referred to by Wessels *op cit* at § 2736; and *B v Bremer Rolandmauhle, Reichsgericht* (11 *Zivilsenat*) 21 March 1916 88 ERG (Z) 172. (See W A Ramsden "Supervening Impossibility of Performance and Changed Circumstance in German Law" (1976) 39 *THR-HR* 367 To some extent this depends upon the terms of the contract itself, for example in the case of building contracts whether it is a "lump sum" contract or one *per aversionem* (see *D* 19.2.51.1; Voet 17.2.37; *Kyte v McLeod* (1891) 6 EDC 43; *Hitchins v Breslin* 1913 TPD 677; *Bothwell v Union Government (Minister of Lands)* 1917 AD 262; *Jacobs v Evans and Campbell* 1937 (2) PH J 21; *Oerlikon SA (Pty) Ltd v Johannesburg City Council* 1970 (3) SA 579 (A).

20. Maasdorp *Institts of S A Law* 9th ed (1978) III p 57; Kerr *Principles of the Law of Contract* (3rd ed 1980) p 323.

in circumstances which results in a failure of the underlying common understanding of the parties regarding the basis of the contract will also result in supervening impossibility of performance under the contract so as to bring the contract to an end. This contention, however, requires very careful consideration. It will be considered presently after a consideration of the performance required as indicated by the contract which the parties have entered into.

The performance required by the contract is, of course, a matter of interpretation, and the ordinary rules of interpretation apply. Thus, the court will endeavour, as far as possible, to give effect to the agreement of the parties. Hence, it will interpret the contract so as to avoid holding that performance under it is impossible, if this can fairly be done in the circumstances of the particular case,[21] for example, to avoid the performance being illegal.[22] Furthermore, if the contract can be substantially performed, it is submitted that the rules of supervening impossibility of performance will not be applied. Thus if A lets to B a farm and a substantial herd of cattle on it, together with all the buildings and other livestock on it and before the lease is due to commence, lightning destroys a fowl-run adjoining the farmhouse and the half-dozen fowls in it, this happening would not entitle B to claim the lease to be at an end on the

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21. *Novick v Comair Holdings Ltd* 1979 (2) S A 116 (W) at 130-3, a case of suspected *initial* impossibility of performance, but it is submitted that the principle is the same, because of the requirement in supervening impossibility of performance that the impossibility must be absolute - see post at pp 11 f.

22. *Corondimas v Badat* 1946 AD 548; *Cross v Wishahn* 1954 (1) SA 216 (N) *Reynolds v Kinsey* 1959 (4) SA 50 (FC); *Swart v Smuts* 1971 (1) SA 819 (A) at 829-30; *Ornelas v Andrew's Café* 1980 (1) SA 378 (W) at 392-3. But where it is capable of being performed in a legal way, if the parties intended it to have an illegal result, it will still be void (*Reynolds v Kinsey* 1959 (4) SA 50 (FC)).

grounds that full performance under the agreement by B is no longer possible.[23] This approach appears to be what O'Hagan J had in mind in the case of *Grobbelaar NO v Bosch*[24] when he stated that

> "[i]n the present case it can be said that an integral and material part of the subject-matter of the agreement between the parties - the assets available for distribution upon dissolution of the partnership - has been lost as a result of SANLAM's repudiation of the insurance policy."

The rules of supervening impossibility would not have been relevant if an integral and material part of the subject-matter of the contract had not been lost.

What will amount to an "integral and material part" of the bargain contracted for and what will not lies in the view of the court on the facts of the case. In cases of doubt the court should find the part of the performance in issue to be an integral part of the bargain, so that the contract will be partially impossible of performance. The promisee will then

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23. Of course, he will only want to do this if he regrets the bargain, for, as will be seen, in a case of partial impossibility of performance he can accept what remains possible and claim an appropriate reduction in his counter-prestation; see below at pp 150f. See *D* 18.1.58; 44.2.25.1; Pothier *Vente* n 4; *Code Civil* para 1636; Stockmans *Decis* 97 n 3; A Bechmann *Der Kauf nach gemeinen Recht* (1876-1905) 2 455, 464; Wessels *op cit* § 392.

24. 1964 (3) SA 687 (E) at 691. See also *D* 19.2.25.6; Pothier *Louage* § 156; *Hansen Schrader & Co v Kopelowitz* 1903 TS 707 at 718; *Witwatersrand Township Estate and Finance Corporation Ltd v Rand Water Board* 1907 TS 231 at 237-8, 239-40; *Daly v Chisholm & Co Ltd* 1916 CPD 562; *Hayes v Field* (1923) 44 NLR 311; *Weinberg v Weinberg Bros (Pty) Ltd* 1951 (3) SA 266 (C) at 271-2; *Bayley v Harwood* 1954 (3) SA 498 (A); *Acacia Mines Ltd v F[illegible]* 1957 (1) SA 93 (T) at 101 (a case of *initial* i[illegible]lity, but the principle is the same); *Wireohms SA ([illegible]td v Greenblatt & Anor* 1959 (3) SA 909 (C); *Joubert v Bester* 1977 (4) SA 560 (T); and above at p 30.

be given the opportunity of choosing whether he will accept less than full performance, rather than being left to his remedy for damages for defective or incomplete performance, which would otherwise normally be his only remedy in the case of a non-material or non-essential breach.[25] The courts tend to apply the rule requiring the impossibility to be absolute rather strictly. In *Algoa Milling Co Ltd v Arkell & Douglas*[26] Maasdorp JA considered the question whether "an impossibility arising from changed circumstances after a contract has been entered into would excuse a party from performing the conditions of the contract", and came to the conclusion that it did not. Maasdorp JA, however, relied heavily on the English authorities as well as two early South African cases,[27] both of which were criticised and departed from in the following year in the seminal decision of *Peters, Flamman & Co v Kokstad Municipality*.[28] Nevertheless, *Algoa Milling Co Ltd v Arkell & Douglas*[29] does indicate, correctly, that even absolute impossibility personal to the promisor is not legally effective to bring about a termination of the contract.[30] A classic example of this in the old authorities is impecuniosity on the part of the promisor.[31] It is otherwise if the

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25. *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1.

26. 1918 AD 145 at 171-2.

27. *Norden v Shaw* (1847) 2 Menzies 150 and *Hay v Divisional Council of King William's Town* (1880) 1 EDC 97.

28. 1919 AD 427 at 436.

29. *Supra*.

30. The case actually turned on the wording of the particular contract and not upon the rules relating to supervening impossibility of performance, and it is submitted, was correctly decided, despite the misleading authorities referred to by Maasdorp JA.

31. See note 39 below.

impossibility is personal to the promisee.[32]

B. Performances Owed in the Alternative

It follows from what has been said that in a contract *ad dandum* the accidental destruction of one of the *res* owed in the alternative will not result in the termination of the contract by reason of supervening impossibility of performance, as long as the alternative method of performance remains possible,[33] unless the creditor is *in mora* in respect of the *res* destroyed,[34] or the party who is to make the choice under the contract[35] has chosen the alternative that is subsequently destroyed.[36]

C. Promise of a *Genus*

So, too, where what is promised is a *genus* or indeterminate

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32. *Noidoo v Ramnarain* 1962 (3) SA 903 (D); *Sooju v Pillay* 1962 (3) SA 906 (N); *Wylock v Milford Investments (Pty) Ltd* 1962 (4) SA 298 (C); *Ornelas v Andrew's Café* 1980 (1) SA 378 (W) - all cases of initial impossibility of performance, yet on this point the principle is the same.

33. *D* 18.1.34.6; 45.1.28; 46.3.72.4; 46.3.95 pr; 45.126 pr; 23.3.10.6; 30.47.3; 31.4.1; Vinnius *ad Instit* 3.14 (15).2.6; Pothier *Oblig* § 250; *Dryland Farms (Pty) Ltd v Botha* 1969 (2) SA 617 (G) at 621.

34. *D* 45.1.105; Pothier *Oblig* § 621; for example, it was validly tendered before destruction and the tender was unjustifiably refused.

35. For example, a specific parcel of money (*D* 45.1.37.)

36. *Instit* 4.6.33; *D* 134.2.3; 18.1.25; 23.3.10.6; 30.8.2; 30.109.1; 31.15; 34.6; 45.1.75.8; 84.9.11; P van Wetter *Les Obligations en droit romain* § 326.

and not a specific *res*,[37] and other specimens of the *genus* exist, the contract is not impossible of performance, for it can be carried out by substituting an appropriate number of the remaining *res* of the same *genus* which match up to the description of the things promised.[38] It does not matter how difficult or expensive it may be to obtain them. Poverty is no excuse.[39]

D. Difficulty or Inconvenience or Risk in Performing

Performance must be impossible, not merely inconvenient, costly or difficult, even if extremely so,[40] or even risky.[41]

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37. *D* 30.84.9; 31.11.1.

38. See above at p 30; see *D* 45.1.9,35; *C* 4.2.11; the Commentator on *C* 4.2.11; Neostadius *Supr Cur* 82; Christinaeus 1.172; *Cons van Hol Rechtsgeleerden* 1.2.14; Pothier *Pand* 46.3 n 106 (g); *Combrinck & Co v The British South Africa Co* (1901) 18 SC 45; *Yodaiken V Angehrn & Piel* 1914 TPD 254 at 261-2; *Hersman v Shapiro & Co* 1926 TPD 367 at 375f.

39. *C* 4.2.11; *Hersman v Shapiro & Co* 1926 TPD 367 at 375f.

40. *D* 45.1.2.2; 45.1.137.4; Voet 19.1.14; 19.2.15; 22.1.9; *Adler v Bloemfontein Town Council* (1894) 11 CLJ 69; *Ward v Francis* (1896) 8 HCG 82; *Muller's Estate v Colonial Government* (1902) 12 CTR 947; *Yodaiken v Angehrn & Piel* 1914 TPD 254 at 260; *MacDuff & Co Ltd (In Liquidation) v Johannesburg Consolidated Investment Co* 1924 AD 573, at 601-2, 606; *Hersman v Shapiro & Co* 1926 TPD 367 at 375-7; *Lucerne Asbestos Co Ltd v Becker* 1928 WLD 311; *Weinberg v Weinberg Bros (Pty) Ltd* 1951 (3) SA 266 (C) at 273f; *Van Diggelen v De Bruin* 1954 (1) SA 188 (SW) at 193; *Iscor Pension Fund v Balbern Holdings (Pty) Ltd* 1973 (4) SA 515 (T); cf *MacDuff's* case and the *Lucerne Asbestos* case with *Jordan v Mines & Minerals Exploration Syndicate Ltd* 1904 TH 227, where the formation of the company would have been immoral and hence was *totally* impossible to effect. See also W A Ramsden "Breach, Supervening Impossibility and Risk" (1976) 95 *SALJ* 16.

41. *Muller's Estate v Colonial Govt* (1902) 12 CTR 947, but see above at p 94.

What is possible, and what is not possible, of course, is a question of fact and must depend upon the circumstances, for example the scientific knowledge possessed by mankind at the particular time. It may be that the courts will regard something as being impossible to do when it is not absolutely impossible but to all intents and purposes so. For example, if I promise to lend or sell to you a valuable diamond ring to be the centre of attraction for an important exhibition, but, through no fault on the part of anyone, the boat carrying the ring to you founders in a storm, there may be a possibility that the ring could be recovered in time for the exhibition by modern methods of salvage if a vast amount of money and effort were devoted to the task, but the chances of recovery could be slim. The court will surely hold that the loan or lease of the ring was impossible in the circumstances and that the contract is at an end.

There can be no exact or absolute standard of impossibility. To determine whether a promised performance has become absolutely impossible the courts must look at the relevant contract in the light of the surrounding circumstances. The factors that can be material in deciding the question may be

(a) extrinsic to the contract, such as the stage of advancement of scientific knowledge or technology or even world climatic and other conditions; or,

(b) the terms of the contract itself.

In *Bayley v Harwood* [42] Harwood owned certain property which he had used as a health and pleasure resort until the first of May 1950, when he let the property to Bayley, who intended using it for the same purpose. In terms of the lease the lessor undertook to transfer to the lessee all trading licences held by him in respect of the property let and the lessee

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42. 1953 (3) SA 239 (T); 1954 (3) SA 498 (A).

undertook to re-transfer them to the lessor at the end of the lease. In February 1951 the Peri-Urban Areas Health Board promulgated new bye-laws in terms of which substantial structural alterations and additions would be required to be made on the leased property if it was to continue to be used as a health and pleasure resort. In the same month the lessee applied to the licensing board for licences which would enable him to carry on using the property as a health and pleasure resort during 1951. This application was refused because the provisions of the new bye-laws had not been complied with. The lessee requested the lessor to carry out the necessary structural alterations and additions,which the lessor refused to do. The lessee then vacated the leased premises, tendering rent up to the date of vacating the property. The lessor sued for rent alleged to be payable up to the end of July 1951. The lessee pleaded that owing to the default of the lessor in not making the required alterations and additions he had been unable to use the property as a pleasure resort. (Indeed,he had been successfully prosecuted for having attempted to do so.) He claimed in the alternative that as he could not lawfully use the property as a pleasure resort he was entitled to cancel the lease.

The Transvaal Provincial Division, on appeal from a magistrate's court decision, found for the lessor, but the decision was reversed on a further appeal to the Appellate Division,which held the lease to be terminated by supervening impossibility of performance with effect from the date on which the lessee vacated the leased premises.[43]

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43. It could be argued that the impossibility arose before this date, in fact from the time of the promulgation of the new health by -laws in February, 1951. Whilst that is true, it is clear that the lease was still partially possible of performance, since the lessee could derive from it a use less extensive than that contemplated by the lease. Hence, in accordance with the rules of partial impossibility (see below) the decision of the Appellate Division would seem to be the correct one, because the lease would remain in force until the lessee had made his election whether to accept what performance was possible under the lease or not.

De Wet J, delivering the judgment in the court *a quo*,[44] stated:

> "If in fact there was a duty on the appellant to procure and maintain the licence he has not shown that this was impossible, he has merely shown that it would be an expense for him to make the alterations necessary to satisfy the requirements of the licensing authorities,"

and found himself unable to read an implied term in the contract that the contract should endure only as long as the licences were procurable.

However, in the Appellate Division, Schreiner JA[45] concluded that

> "[t]he defendant could not reasonably have been expected to make the substantial additions to the plaintiff's buildings that had to be made if he was to be able to continue to enjoy for the short period of his lease the use of the premises for the purpose for which they were let, despite the change in the law; he was therefore entitled to the remission of rent that he claimed."

The fact that it was impossible for the business to be carried on otherwise than at a loss, whilst no doubt it weighed with the judges of appeal, was not the factor on which their decisions ultimately rested. Greenberg JA said:[46]

> "Viewing the matter purely from an equitable point of view, it seems to me that when, through *vis major*, damage has been caused to leased property, it is

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44. At 244. Malan J concurred.

45. 1954 (3) SA 498 (A) at 508. See also *Greenberg v Meds Veterinary Laboratories (Pty) Ltd* 1977 (2) SA 277 (T) and A J Kerr "The Effect on Leases of Supervening Impossibility of Performance" (1977) 94 *SALJ* 389.

46. At 504.

> the lessor who should repair the damage as it is his property that is improved by the repair, rather than that the lessee should have the alternative either of repairing the damage at his own cost or continuing to pay rent under a lease from which he derives no benefit. . . .
>
> "When I say the lessor should repair the damage, I do not mean that there is a legal duty on him, the non-observance of which would entitle the lessee to an action for breach of contract, but that the lessor, if he wishes to hold the lessee to the obligations under the lease, should repair the damage."

Greenberg JA pointed out[47] that there was nothing in the lease requiring the lessee to do anything to the premises other than to keep them in good repair and added:

> "If the condition which prevented the obtaining of the licence was due to lack of repair, then the failure to obtain the licence would be ascribable to his non-observance of his duties under the lease, but that is not the position. The failure is because, structurally, the premises do not comply with the legislative requirements."

Hoexter JA said:[48]

> "Indeed the position of the appellant appears to be the same as it would have been if the bye-laws in question had already been in existence and the improvements had already been made at the time when the parties entered into the lease and thereafter the improvements had been destroyed by lightning.

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47. At 502.

48. At 510.

> In that case the respondent could not have resisted a claim for remission on the ground that the appellant could at his own expense have restored the improvements himself. Similarly the respondent cannot resist the claim for remission on the ground that the appellant could have obtained the licences for the year 1951[49] by making the improvements himself. The making of the improvements would have resulted in a new contract of lease, because the premises would no longer have been the premises specified in the original contract and the rent, by reason of the appellant's expenditure in making the improvements, would in effect have been higher than that stipulated for in the original contract."

In other words, the change in the requirements of the municipality for licensing the premises for use for the purpose for which they were let was something which could not reasonably be foreseen, and therefore was a *casus fortuitus*. Neither party was in law, either contractually or otherwise, obliged to effect the necessary structural alterations required for the purposes of complying with the new requirements; hence the contract as it stood was impossible of performance, because the premises could not be used for the purpose for which they were let, and neither party was obliged to rectify the position.

In other words, in determining whether an obligation is absolutely impossible of performance, the court may have regard to the contract itself to see whether what was required to be done in order to make performance possible was something which fall within its ambit or whether an order imposing the

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49. The court found that the lessee was contractually bound to maintain the licence in force during the currency of the agreement and "re-transfer" it to the lessor at the expiry of the lease (at 505).

additional burden on one of the contracting parties would have the effect of totally altering their contract and subjecting the parties to an entirely new contract - one that could never have been within their contemplation at the time of contracting.

Thus the court was able to say that to compel either party to make the structural alterations necessary for compliance with the requirements for a licence would be to substitute an entirely new lease for the one the parties had entered into. So, too, to revert to the example given on page 118 above, to order the borrower of a diamond ring to compensate the owner if the ring was lost at sea, because it was sunk in a place where salvage was totally out of the question, would be to impose upon him a contract carrying very nearly absolute liability in the place of one which merely imposed upon him the exercise of great care.

It is clear, too, that when the court is examining the nature of the contract it can take into account the magnitude of the work involved. In *Bayley v Harwood*,[50] as was shown, Schreiner JA took into account the magnitude of the alterations required and the expense involved in making them. This is also implicit in the judgment of Hoexter JA when he referred (quite unexceptionably) to the fact that the rent would in effect have been higher than that originally stipulated for, and so a new contract of lease would have resulted.

This view is also inherent in the judgment of Greenberg JA (with whom Centlivres CJ concurred) where he said:[51]

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50. *Supra*. See also Windscheid *Lehrbuch des Pandektenrechts* § 264 2 referred to at p 39 *supra*.

51. At 502-3.

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51. At 502-3.

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