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Supervening impossibility of performance in the South African law of contract

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As in earlier times, the debtor was obliged to cede to the creditor any claims he had against others and to hand over all moneys received in respect of the performance rendered impossible, such as insurance payments,[179] compensation received for property expropriated, and so on,[180] provided that the compensation was in respect of the very thing the debtor had to perform.[181] Nor did it matter whether his rights were acquired by operation of law or through some special relationship.[182]

Naturally, the supervening impossibility of performance did not operate to release the debtor if he had undertaken to bear the risk in any event.[183]

Nor was he released where

(a) the obligation was in the alternative, unless all alternatives were impossible;[184]

(b) the subject-matter was indeterminate or unspecific,[185] and not part of a determinate set of things, all of

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179. Windscheid *op cit* 264.6.

180. Pothier *op cit* 3.6.1 para 635; Windscheid *op cit* 264 n 2 & 5; and the creditor had a corresponding obligation (Windscheid *op cit* 264 n 2) & 18; *ibid* 3.6.1.621; Windscheid *op cit* 264 n 2 & 7.

181. Windscheid *op cit* 264 n 2, 5; thus a tenant can make no demand on the compensation the landlord receives for the destroyed premises, though he can if the landlord receives insurance for loss of rentals. The creditor may very well be able to bring a direct action in his own name anyway (Windscheid *op cit* 264 n 2, 5).

182. *Ibid* 264 n 2, 7

183. Pothier *op cit* 3.6.1. para 633.

184. *Idem* 3.6.1. para 621; Windscheid *op cit* 264 nn 2, 7 and see above.

185. Pothier *op cit* 3.6.1 § 622; Windscheid *op cit* 264 nn 2 & 7. Van der Linden *op cit* 1.18.6; Grotius *op cit* 3.47.1, 2; and see above.

> which had perished.[186] It had, however, to be clear that the words were indeed restrictive in their effect and not merely illustrative, if it were sought to show that it was indeed part of a determinate set of things which was not extinct.[187]

The foregoing statement is not meant to be a comprehensive exposition of Roman law and Roman-Dutch law but rather a brief account of the history and development of the law in the field of supervening impossibility of performance in early times. There are, for example, two very important matters that have not been touched upon. They are

(a) the question of reimbursement of expenses incurred before the advent of the supervening event; and,

(b) the development during the Middle Ages of the important notion of *clausula rebus sic stantibus*.

It will be more convenient, however, to deal with both these topics in the next chapter, where the applicability of foreign legal sources will be considered.

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186. Pothier *op cit* 3.6.1 para 623.

187. *Ibid.*

CHAPTER 3

THE APPLICABILITY OR RELEVANCE OF FOREIGN LAW

Before one can enter upon a detailed discussion of present-day South African law on the topic of supervening impossibility of performance it is necessary to determine to what extent; if any, we are entitled to rely upon foreign sources of law for guidance.

Our courts have frequently referred to English cases and materials and have also on occasion referred to Continental writers. Many of the latter are undoubtedly authentic sources of South African law even if only in a secondary sense. The treatises of Pothier and Windscheid, for instance, cannot be regarded as foreign-law sources. The writings of others, whose authority in our law is perhaps not quite so unimpeachable, such as Naber, Mottzner and R Leonhard, have also been cited.[1]

In addition, it would be as well to discuss in general the relevance of foreign-law sources.

A. English-law Sources

English law was often applied in our courts more or less indiscriminately prior to 1919,[2] when, in the case of *Peters, Flamman & Co. v Kokstad Municipality*,[3] Solomon ACJ, delivering

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1. In *African Realty Trust Ltd v Holmes* 1922 AD 389 at 402.
2. See LW Murcott "Oormag in die Engelse en in die Suid-Afrikaanse Reg" (1942) 5 *THR-HR* 169 and the cases therein discussed.
3. 1910 AD 427.

the unanimous judgment of the court,[4] drew attention to this fact in these words:

> "Unfortunately, the rules of the Civil Law appear to have been ignored in several cases on this subject which have come before our Courts, which have been guided entirely by the decisions of the English Courts."

The learned Acting Chief Justice then referred to a number of South African decisions[5] which had followed the principle laid down in the English case of *Paradine v Jane*,[6] which he held to be "not consistent with the principles of the Civil Law".[7]

This statement of the law runs counter to that of Maasdorp JA in the case of *Algoa Milling Co v Arkell & Douglas*,[8] decided by the Appellate Division some ten months earlier. In the *Algoa Milling* case, Maasdorp JA expressly approved[9] of the rule of *Paradine v Jane*[10] in these words: "There is nothing in our authorities inconsistent with this rule." Earlier[11] he had found the Roman-Dutch authorities[12] inapplicable.

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4. At 435, CG Maasdorp JA and De Villiers AJA concurring (see at 438).

5. Viz *Hay v The Divisional Council of King William's Town* (1880) 1 EDC 97; *Norden v Shaw* (1847) 2 Menzies 150; *Morgan and Ramsay v Cornelius and Hollis* (1910) 31 NLR 447; *Coombs v Muller* 1913 EDL 433.

6. (1647) Aleyn 26; 82 ER 897 (KB).

7. At 436.

8. 1918 AD 145.

9. At 171-2.

10. *op cit.*

11. At 171.

12. Viz Van Leeuwen 4.3.5; Decker's note to Van Leeuwen 4.1.3; *Instits* 3.19.11; Voet 28.7.9. and 16; and Grotius 3.47.1-3.

Furthermore, he expressly approved of two of the South African cases which had invoked this rule as part of our law, both of which cases were subsequently disapproved of by the court in the *Peters, Flamman* case.

The *Algoa Milling* case was not even referred to in the judgment of the court in *Peters, Flamman & Co v Kokstad Municipality*.[13] But this is not surprising, even though Solomon JA (as he then was) had himself been a member of that court, because Maasdorp JA's remarks were clearly *obiter*, since the case turned upon the interpretation of the specific contract between the parties and it was unnecessary to apply any rule f law relating to supervening impossibility of performance.

The *Algoa Milling* case related to a consignment of wheat which had been despatched late owing to the existence of war conditions. The court held that the contract made shipment of the wheat in July essential and that the plaintiffs could not compel acceptance of wheat shipped after July. It was further held that as it was impossible, through no fault of either party, but owing solely to the war conditions then prevailing, to ship the wheat in July, both parties were released from their liability to perform their obligations under the contract. This was, however, not due to the application of the rules of supervening impossibility of performance but because of the operation of a specific contingency clause inserted as "marginal conditions" into the contract.

In any event, the rule of English law referred to by Maasdorp JA was clearly disapproved of by the Appellate Division in the later case and the cases relied upon by him were there overruled.

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13. *op cit.*

The *Peters, Flamman* case, moreover, has been relied upon by our courts in many subsequent cases and is clearly the leading case on the subject.

What is not entirely clear, however, is the exact extent to which the judgment goes in disapproving of English law as a source of inspiration and guidance to our courts.

Solomon ACJ, after pointing out that the rule in *Paradine v Jane*[14] has been greatly modified by later decisions of the English courts, said:

> ". . . although the English law looks at the subject from a different point of view from ours, in the result the difference between the two systems is not very great. And indeed, if this case had been tried in an English Court of Justice, I am disposed to think that the defendants would have been held to have been discharged from their obligations under the contract."[15]

The meaning of these remarks was considered by Stratford J in the Transvaal case of *Herman v Shapiro & Co*[16] in these words:

> "A careful perusal of the judgment leads me to think that the learned Judge never meant to say that the defence of impossibility of performance is so absolute as to override the terms or the implications of the contract in regard to which the defence is invoked. It seems to me obvious, from the semi-approval which was given to the

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14. *op cit.*

15. The same result as that arrived at in the *Peters, Flamman* case by application of the principles of our own law.

16. 1926 TPD 367 at 372-3.

English cases, that the learned Judge always had in mind that a contract in respect of which a dispute arises, and its implications, must always be given due weight to. That is what I think he means when he says, 'It will be seen, therefore, that although the English law looks at the subject from a different point of view from ours, in the result the difference between the two systems is not very great.' If I suppose the difference to be so radical that in our law the impossibility of performance is an unqualified and absolute defence in all cases and that in English law, as these cases show, you look entirely at the contract, to see what the implications of that contract are - if that were the distinction between the two systems of law - then far from there being, as the learned Judge says, very little difference between the two systems, there would be all the difference in the world. It is clear to me, therefore, that the difference in the two systems really is this, that in our law you look to the rule in the Civil Law as quoted by his Lordship in this case, and then to the contract, to see how that rule should be applied in regard to the specific facts of the particular contract involved, whereas in English law you start with the contract and remain with the contract throughout, looking entirely and solely at it to see what the effect of any supervening conditions should be in law. That is what Lord Parker said when he used the words which are quoted in this judgment, namely: 'This principle is one of contract law depending upon some term or condition to be implied in the contract itself and not on something entirely *dehors* the contract which brings the contract to an end,' and when Lord Loreburn said: 'An examination of the decisions confirms me in the view that when our Courts have held innocent parties absolved from

> further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise.' Indeed, it seems clear that it is impossible to disregard the nature not only of the contract, but of the causes of the impossibility, because those causes might be in the contemplation of the parties; or, again, they might be such as no human foresight could have foreseen. That distinction between different kinds of causes of impossibility must be a feature to be regarded before applying this doctrine of impossibility of performance without qualification."

In this passage Stratford J says two things:

(a) that in the *Peters, Flamman* case Solomon ACJ said that there was "very little difference between the two systems" of English and South African law; and

(b) how they differ.

Consideration will be given to (b) later. As regards (a), this would appear to be a complete misunderstanding of the words contained in the judgment in the *Peters, Flamman* case.

What Solomon ACJ said was not that there was very little difference between the two legal systems, but only that "*in the result* the difference between the two systems is not very great", which is quite a different thing and clearly means merely that the end result achieved by the two systems would be similar, at least in that case, as evidenced by the words which follow immediately thereafter, viz:

> "And indeed, if this case had been tried in an

> further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise.' Indeed, it seems clear that it is impossible to disregard the nature not only of the contract, but of the causes of the impossibility, because those causes might be in the contemplation of the parties; or, again, they might be such as no human foresight could have foreseen. That distinction between different kinds of causes of impossibility must be a feature to be regarded before applying this doctrine of impossibility of performance without qualification."

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> "And indeed, if this case had been tried in an

> English Court of Justice, I am disposed to think that the defendants would have been held to have been discharged from their obligations under the contract."

It does not follow that the rules themselves are similar. Two other cases, *Beretta v Rhodesia Railways Ltd*[17] and *Bayley v Harwood*,[18] state that the English doctrine of frustration is not a part of our law or has no parallel in our law.[19]

In at least one other case, *Grobbelaar NO v Bosch*,[20] the court has shown a reluctance to apply English cases.

In each of these three cases the courts relied upon the decision in the case of *Peters, Flamman v Kokstad Municipality*[21] to support these statements. However, an examination of the judgment in the *Peters Flamman* case reveals that it does not say that English cases are unhelpful or even inapplicable. It merely says that we should not be "guided entirely by the decisions of the English Courts" and ignore "the rules of the Civil Law." It certainly says nothing whatsoever about the English law doctrine of "frustration", even by implication, despite the statement to the contrary in *Bayley v Harwood*.[22] The decision in the *Peters, Flamman* case is merely to the effect that the strict rule of *Paradine v Jane*[23] is not

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17. 1947 (2) SA 1075 (SR) at 1078-81, per Tredgold J.
18. 1953 (3) SA 239 (T) at 244.
19. This question is examined more thoroughly below, at pp 62 f.
20. 1964 (3) SA 687 (E) at 691.
21. *op cit.*
22. *op cit.*
23. *op cit.*

applicable in our law, and it then proceeds to set forth the general rule which does obtain in our law and apply it to the facts of the case.

Indeed, counsel[24] in the *Peters, Flamman* case argued that the English case of *Taylor v Caldwell*[25] is founded on the Roman law. This was also pointed out by Watermeyer J in *The Salisbury Building and Investment Society v The British South Africa Company*[26] and Bristowe J in *Witwatersrand Township Estate and Finance Corporation Ltd v Rand Water Board.*[27] Moreover, *Taylor v Caldwell* had already been approved by Solomon J (as he then was) himself in *Frenkel v Ohlsson's Cape Breweries Ltd.*[28] Although all of these cases antedate the decision in the *Peters, Flamman* case and hence belong to an era when our law was without doubt influenced too greatly by rules of English law, the Appellate Division itself in the case of *African Realty Trust Ltd v Holmes*[29] in 1922 pointed out that English law has been influenced by Roman law and the writings of Pothier.[30] And in *Schlengemann v Meyer, Bridgens & Co Ltd*[31] the court said that the principles involved "are principles not specially applicable to English law, but

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24. CW Rorich at 431, who also stated at 430 that the facts in the *Peters Flamman* case were very similar to those in the English case of *Metropolitan Water Board v Dick Kerr & Co* [1918]AC 140, 34 TLR 178.

25. (1863) 3 B and S 826; 122 ER 309 (KB).

26. (1904) 21 SC 238 at 240.

27. 1907 TS 231 at 241.

28. 1909 TS 957 at 972.

29. 1922 AD 389.

30. Per De Villiers JA at 402.

31. 1920 CPD 494.

principles which must be at the root of any contract".[32]

Not only *African Realty Trust Ltd v Holmes*[33] but other Appellate Division cases have referred to the English law with approval and even applied it in the area of supervening impossibility of performance in more recent times,[34] and cases decided by the Cape Provincial Division have done likewise.[35]

It will be necessary to examine in some detail the principles of South African law and also those of English law on the topic of supervening impossibility of performance to see to what extent they coincide or diverge. In carrying out this task it is necessary to examine in particular four important areas which can, perhaps, be briefly referred to under the following headings:

(a) *Pacta sunt servanda.*
(b) Loss lies where it falls.
(c) The doctrine of "frustration".
(d) Temporary impossibility of performance.

(a) *Pacta sunt servanda*

In effect, the rule in *Paradine v Jane*[36] is an application

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32. Per Gardiner J at 501. This case was criticised in *Beretta v Rhodesia Railways* 1947 (2) S A 1075 (SR), concerning which see below at p163f.

33. *op cit.*

34. *Fluxman v Brittain* 1941 AD 273, per Tindall JA at 291-2; *Oerlikon SA (Pty) Ltd v Johannesburg City Council* 1970 (3) SA 579 (A), per Rumpff JA at 585 (delivering the unanimous judgment of the court).

35. *Benjamin v Myers* 1946 CPD 655, per Herbstein AJ at 662-3 (delivering the unanimous judgment of the court) and *Rousseau v Haumann* 1949 (4) SA 796 (C), per Herbstein J at 799-801. *Oerlikon*'s case was principally concerned with the interpretation of the contract in that case, but it is submitted that that is a very important aspect of supervening impossibility of performance, as we shall see later; see below, chapter 5.

36. *op cit.*

of the rule *pacta sunt servanda*.[37] In that case a lessee had been expelled from and deprived of possession of leased property for some three years by an invading army under the command of the German prince, Rupert. The lessor sued for the rental. Impossibility of performance was not set up as a defence to the action, for performance on the part of the defendant had not been rendered impossible by the invaders, since all that he was called upon to do was to pay the rent to the lessor, which had become neither impossible nor even difficult to do. His defence was therefore that as he had been deprived of the beneficial enjoyment of the leased property he should be excused from paying rent for that period. The case accordingly belongs to the "failure of consideration" or "frustration of the purpose of the contract" category of cases in English law, and the court merely decided that in English law the risk of failure of consideration in such circumstances falls on the lessee. This is still the law in England, but, as has been seen,[38] the risk would have fallen on the landlord in Roman law, and, as will be shown later, the legal position in South Africa is also different from that under English law.

However, despite the fact that the case did not directly concern impossibility of performance, it is still accepted[39] as stating the basic principle of the English law on that subject in these oft-quoted words:

> "And this difference was taken, that when the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath

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37. Although, as Julius Stone points out in *Social Dimensions of Law and Justice* (Sydney 1966) at p 260, *pacta sunt servanda* in the strict sense has never been fully implemented by any legal system.

38. Above, at p 44.

39. See below at p 55.

> no remedy over, then the law will excuse him . . but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."[40]

In other words, the general rule in English law is that a man is bound to fulfil his contractual obligations and cannot plead that they have become impossible of implementation if by his contract he could have made provision for the eventuality which has rendered them impossible of performance.

HWR Wade[41] argues that the words "if he may" used in the above-quoted dictum from *Paradine v Jane*[42] constitute an important qualification to the application of the rule, and mean that "the duty to perform his undertaking rests always upon the promisor *while performance is still within the bounds of human possibility*". In other words, unexpected hardship is ruled out as a defence, but not true impossibility. This, however, is not the way the courts have construed the passage.[43]

In *Jacobs, Marcus & Co v Crédit Lyonnais*[44] the court (per Bowen LJ) said: " . . . one of the incidents which the English law attaches to a contract is that (except in certain excepted cases as that of common carriers and bailees, of

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40. At 27.

41. *The Principle of Impossibility in Contract* (1940) 56 *LQR* 519 at 525.

42. *op cit.*

43. Cf *Constantine (Joseph) S S Line v Imperial Smelting Corporation Ltd* [1942] AC 154, [1941] 2 All ER 589 per Lord Wright at 185.

44. (1884) 12 QBD 589 at 603, approved by Lord Atkinson in *Matthew v Curling* [1922] AC 180 at 234; 91 LJKB 593.

> which this is not one), a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by vis major."

This statement is in accordance with our own rules. In our law, too, it is clear that a debtor can assume the *periculum solutionis*[45] even impliedly,[46] which is a question of interpretation of contract in each case. In England, however, it was almost a legal presumption that if a party had undertaken to perform a certain act, without anything further being stated, he must be taken to have promised absolutely to do it.

The rule has been somewhat ameliorated in more recent times. As McElroy and Glanville Williams point out,[47]

> "[at] the same time, it must, of course, always be a matter of construction what the contractual obligation was. To say that 'a person who contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by *vis major*', assumes that the contract was an absolute one. Frequently the only obligation under a contract is an obligation to use care to perform, and in that case impossibility of performance is clearly a defence to an action for breach of contract.

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45. D 50.17.185; Pothier, *op cit* 3.6.1.633; *Hollandsche Consultatien* 1.201; see also below pp 95 f.

46. *Hoffend v Elgeti* 1949 (3) SA 91 (A).

47. *Impossibility of Performance - A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration and Frustration* (Cambridge University Press 1941) at 6.

"Thus a servant does not normally contract to obey his master's commands in all events: his promise is to use due care in obeying, and if he is prevented from obeying through an event for which he is not responsible in fact, whether it be his death or his illness or (presumably) the failure of a train service, he is not liable for breach of contract. It is true that this is usually stated in the books as a special rule for death or illness, but it can hardly be doubted that the exemption is wider than this, and would cover, for instance, the servant's inability to perform his master's orders through the break-down of a train service. There is no need here of any special doctrine of impossibility of performance, nor is the principle of sanctity of contract in peril: the servant is not liable in such cases for the simple reason that he has not broken his contract."

Hence the English courts are coming to recognise ever more that upon a proper construction many promises are not "absolute", particularly in contracts of a personal nature,[48] when a specific thing which is the subject-matter of the contract has been destroyed,[49] or where the impossibility is

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48. *Cuckson v Stones* (1858) 1 E1 & E1 248, 120 ER 902; *Boast v Firth* (1868) LRCP 1; *Robinson v Davidson* (1871) LR 6 Ex 269; *Ottoman Bank v Chakarian* [1930] AC 277, *et alia*.

49. *Taylor v Caldwell* (*supra*); *Nicholl v Ashton* [1901] 2 KB 126); *Howell v Coupland* (1876) 1 QBD 258; *DS. A/S Gulnes v Imperial Chemical Industries Ltd* [1938] 1 All ER 24, 59 Ll LR 144, 54 TLR 194, 158 C.T. 134, 43 Com Cas 96.

brought about by operation of law[50] or is caused by the promisee.[51] In all these cases our rules are very similar, as will be shown, and, indeed, the English cases may prove helpful.

Solomon ACJ in the case of *Peters, Flamman and Co v Kokstad Municipality*[52] stated furthermore that the rule in *Paradine v Jane* had been considerably modified by later English decisions. He quoted passages from the judgments in *Horlock v Beal*[54] and *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd*[55] in support of this statement. These cases refer to the fictitious condition imported into a contract as a result of the so-called Coronation cases.[56] This condition has confusingly been called the "doctrine of frustration", thereby giving it the same title as a number of other quite distinct and separate rules.[57] I shall consider this legal fiction in more detail later, as it is very

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50. *Brewster v Kitchell* (1698) 1 Salk 198, 91 ER 177, 1 Ld Raym 317 at 321, 91 ER 1108 at 1110; *Wynn v Shropshire Union Railways and Canal Co* (1850) 5 Ex 420, 155 ER 183; *Brown v Mayor of London* (1863) 13 CBNS 828, 143 ER 327; *Baily v De Crespigny* (1869) LR 4 QB 180; *Anglo-Russian Merchant Traders and John Batt & Co's Arbitration* [1917] 2 KB 679; *Ertel Bieber v Rio Tinto* [1918] AC 286; *Ralli Bros v Compañia Naviera Sota y Asnar* [1920] 2 KB 287; *Foster v Driscoll* [1929] 1 KB 470.

51. *Austin v Moyle* (1605) Noy 118, 74 ER 1083; *Pringle v Taylor* (1809) 2 Taunt 150, 127 ER 1034; *Mackay v Dick* (1881) 6 App Cas 251; *Dodd v Churton* [1897] 1 QB 562; *et alia.*

52. *op cit* at 436.

53. *op cit.*

54. [1916] 1 AC 525.

55. [1916] 2 AC 397 at 422.

56. *Krell v Henry* [1903] 2 KB 740; *Chandler v Webster* [1904] 1 KB 493; *Blakeley v Muller* [1903] 2 KB 760; and other cases arising out of the postponement of the Coronation processions in June 1902 owing to the illness of King Edward VII.

57. See below at pp 62f.

similar to the *clausula rebus sic stantibus* of medieval law. At this stage it can safely be said that it is not a part of our law.

What conclusions are to be derived from a study of *Paradine v Jane*[58] then? With confidence, the following:

(a) Despite the more liberal approach of the English courts to the interpretation of contracts, the rule of *Paradine v Jane*[59] still obtains in England. As Lord Buckmaster said in *Grant, Smith & Co v Seattle Co*,[60]

> "[t]here is no phrase more frequently misused than the statement that impossibility of performance excuses breach of contract. Without further qualification such a statement is not accurate; and, indeed, if it were necessary to express the law in a sentence, it would be more exact to say that precisely the opposite was the real rule."

(b) The rule involves

(i) a "presumption" that a party has bound himself absolutely to perform if he does not take steps to insert qualifying words to the contrary; and

(ii) a rule that where a person has bound himself absolutely he cannot escape liability for subsequent impossibility of performance.

(c) The portion of the rule set out in (b) (i) is not a part of our law,[61] but the part set out in (b) (ii) is.[62]

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58. *op cit.*

59. *op cit.*

60. [1920] AC 162 at 169

61. *Peters, Flamman & Co v cal Municipality (supra).*

62. Notes 45 and 46 above.

(d) It follows that the rule does not apply in English law where

(i) a party has not bound himself absolutely to perform, where, generally speaking, impossibility will excuse; or

(ii) a fictional condition is imported into the contract which excuses performance.

(e) It is submitted that the legal fiction referred to in (d) (ii) is not a part of our law.[63]

(f) The exception referred to in (d) (i) above is based on an interpretation of the contract that the parties promised no more than that they would "use care to perform" and are therefore not in breach if performance becomes impossible. The English law has here been strongly influenced by Roman law and the writings of Pothier.[64]

The last paragraph above requires further examination. It will be remembered that in *Herseman v Shapiro*[65] Stratford J, besides indicating that there was "very little difference" between South African and English law on the question of supervening impossibility of performance, went on to attempt to explain how they differ. He said "that in our law you look to the rule in the Civil Law as quoted [by Solomon, ACJ in the *Peters, Flamman* case] and then to the contract, to see how the rule should be applied in regard to the specific facts of the particular contract involved, whereas in English law you start with the contract and remain with the contract throughout, looking entirely and solely at it to see what the effect of any supervening conditions should be in law."[66]

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63. See below at p 77.

64. See above at p 48.

65. *Supra*.

66. See also *Bischofberger v Van Eyk* 1981 (2) SA 607 (W) at 610-12.

The rule in the civil law quoted by Solomon ACJ is based on *D* 50.17.185 and 45.1.140.2, and may briefly be stated as follows:

> Where a contract has become impossible of performance after it has been entered into the general rule was that it then ceases to be binding.[67]

The texts all stress that impossibility excuses only if the promissor is not at fault. It has been shown that originally this was because the fiction of *perpetuatio obligationis* applied,[68] and that the doctrine of release in the absence of *dolus*, *culpa* or *mora* may be ascribed to the principle of *condemnatio pecuniaria*.[69] Clearly it is a legal rule, whether originally dictated by the limitations of the Roman procedural system or not, and not a question of interpretation of contract, though there is some evidence that lends credence to the latter view.

In *Hollandsche Consultatien*,[70] an opinion is given concerning a case between the Heeren Burgermeesteren of Amsterdam and one Gerrit Cornelisz. Cornelisz had agreed to manufacture gunpowder for the City of Amsterdam at a rate of payment of seven guilders for each one hundred pounds of gunpowder delivered. The Burgermeesteren had provided him with two thousand pounds of saltpetre and agreed to pay for the charcoal used. After having delivered a batch of fourteen and a half barrels of gunpowder, he made another of eight and a half barrels, which he thought weighed about nine hundred pounds. This second batch was drying in the Convent of the Old Nuns when it was ignited and destroyed by a spark blown accidentally

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67. See also *Wilson v Smith* 1956 (1) SA 393 (W) at 396.

68. Above at pp 17 f.

69. Above at pp 20f.

70. 1 214.

from a crucible of embers being carried by a passing nun. R van Amstelredam was of opinion that the Burgermeesteren were not liable to pay Cornelisz for the gunpowder at the rate provided for in the contract, nor for the value of the charcoal used by him in making that batch. Nor was Cornelisz liable to compensate the Burgermeesteren for the saltpetre used in that batch, "*because there is no evidence that he expressly took upon himself the duty to make a certain number of barrels of gunpowder or a certain weight of gunpowder for his own risk from the two thousand pounds of saltpetre*" given him by the Burgermeesteren but had simply accepted the task of turning the saltpetre into gunpowder at the rate of seven guilders for every one hundred pounds delivered. He was also of opinion that in this case "*it was sufficient that he acted in the normal way in dealing with the gunpowder, that is, he used the normal care and supervision he usually exercised*, and that it was not his fault that a spark by chance" destroyed the second batch.

This would appear to come close to the approach suggested by McElroy and Glanville Williams,[71] but it is submitted that our courts always have to look carefully at the contract to determine the extent of the liability assumed by the contracting parties, as is exemplified by a number of reported cases.[72]

Stratford J also stressed this in the quotation set out above[73] when he said:

> "Indeed,it seems clear that it is impossible to disregard the nature not only of the contract, but

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71. *op cit.* See below at p 52.

72. For example, *Oerlikon SA (Pty) Ltd v Johannesburg City Council* 1970 (3) SA 579 (A); *Bayley v Harwood* 1954 (3) SA 498 (A); *Hoffend v Elgeti* 1959 (3) SA 91 (A).

73. At pp 44f.

> of the causes of the impossibility, because those causes might be in the contemplation of the parties; or again, they might be such as no human foresight could have foreseen. That distinction between different kinds of causes of impossibility must be a feature to be regarded before applying this doctrine of impossibility of performance without qualification."

Hence one first looks to the rule in the civil law, then to the contract as well as the causes of the impossibility, before applying the rule. In any event, it is clear that the contract and the rule are closely interrelated, and indeed the whole problem should be viewed in its totality. Whether one looks at the rule first or last is of little importance so long as all relevant factors are considered together.

Stratford J's statement that in English law you "start with the contract and remain with the contract throughout, looking entirely and solely at it to see what the effect of any supervening conditions should be in law," would appear to be an oversimplification of the position. Where the legal fiction is applied, this is in fact a rule of law which takes little account of the terms of the contract and, indeed, flies in the face of the normal rules of interpretation. The approach of the English courts in cases of "non-absolute" contracts (which seem to be growing more numerous as time passes) and in which the legal fiction is not employed seems to be very similar to that of our own courts. However, even here caution needs to be exercised. For example, in a number of cases[74] the court purports to apply the doctrine of "frustration" when in reality it is merely applying the principle laid down in *Taylor v Caldwell*,[75] which, as has been seen, is

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74. For example, *In re Badische Company Ltd* [1921] 2 Ch 383.

75. *Supra*.

founded on the principles of Roman law; and in England the rules relating to risk, which can affect liability in cases of supervening impossibility of performance, are different from ours.

(b) Loss lies where it falls

The "Coronation" cases gave rise to the rule that when a contract is terminated by reason of supervening impossibility under English law, the "loss lies where it falls". In none of the reported cases arising out of the postponement of King Edward VII's coronation was the action brought against a party who sought to be excused performance on the grounds of impossibility of performance. The defendants were either people who refused to pay for their seats along the route of the cancelled procession,[76] or else the hirers of seats who refused to refund the price received by them when the procession was postponed.[77] In other words, the real issue was whether the consideration had failed or not. Nevertheless, these cases were argued and decided as though the only question were one of impossibility of performance, which led to the importation of the fiction of an implied condition and also gave birth to the much-criticised rule laid down in *Chandler v Webster*[78] that when a contract is terminated by impossibility of performance the "loss lies where it falls".[79]

In the cases concerned this means that if, at the time of the

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76. For example, *Krell v Henry* (*supra*) and *Herne Bay Steamboat Co v Hutton* [1903] 2 KB 583.

77. *Chandler v Webster* (*supra*) and *Lumsden v Barton* [1902] 19 TLR 53.

78. *Supra*.

79. Unless there is a *total* failure of consideration; *Fibrosa Spolka Akcyjna v Fairbairn, Lawson, Combe, Barbour Ltd* [1943] AC 32, [1942] 2 ALL ER 122, 111 LJKB 433, 167 LT 101, 58 TLR 308. See now the Law Reform (Frustrated Contracts) Act 1943 (6 & 7 Geo 6 c 40).

occurrence of the supervening event the rental was due and payable, there was a legal obligation to pay it even though no benefit had been derived from the contract. Similarly, if it had already been paid in such circumstances it could not be recovered. On the other hand, if the rental was payable in arrear so that it was not due and payable at the time when the frustrating event happened, then it could not legally be demanded, and if already paid could be recovered by the hirer.

In other words, the legal position of the parties was frozen as at the time of the event which terminated the contract (the postponement of the procession in these cases) and all rights already accrued up to that time were enforceable, others not.

These cases led to hardships and anomalies, and the rule was particularly heavily criticised by Scottish judges,[80] because the law of Scotland, being Roman-law based, recognised the doctrine of unjust enrichment and came to quite a different conclusion on the matter by the application of the *condictio causa data causa non secuta*, as would our own courts.[81]

As a result of this pressure the Law Reform (Frustrated Contracts) Act 1943[82] was passed in England to make provision for release or a refund of moneys paid even where there has been a partial failure of consideration.

Hence, although English law and our own law would probably

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80. See *Fibrosa Spolka Akayjna v Fairbairn, Lawson, Combe, Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, 111 LJKB 433, 167 LT 101, 58 TLR 308.

81. *Idem*.

82. 6 & 7 Geo 6 c 40.

now arrive at very much the same result so far as compensation and part payment are concerned in cases of supervening impossibility of performance, they arrive there by quite different routes, and the English cases would be of little or no assistance to us here.

(c) The doctrine of "frustration"

Our courts, in the cases of *Beretta v Rhodesia Railways Ltd*[83] and *Bayley v Harwood*,[84] have stated that the English doctrine of frustration is not a part of our law.

It is difficult to know what is intended by these statements, for in English law the label "doctrine of frustration" has been applied to a number of quite different concepts. As McElroy and Glanville Williams say:[85]

> "According to current usage the term 'frustration' has an embarrassing width of meaning. It is commonly applied to any and every case in which any question of impossibility, delay in performance, or failure of consideration is involved. If this is its proper meaning it evidently does not need special treatment. More narrowly, the term may be used as a cloak for introducing anew the doctrine of 'commercial impossibility', which under that name is now discredited . . . . Frustration, in the meaning attached to it in this work, differs

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83. 1947 (2) SA 1075 (SR) at 1082.

84. 1955 (3) SA 239 (T) at 244.

85. *Impossibility of Performance -A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration and Frustration* by Roy Granville McElroy, Ph.D. (Cantab.) LLD (N.Z.), edited with additional chapters by Glanville L Williams, LL.B., M.A., Ph.D. Cambridge University Press 1941 XXXII..

> from both these rules in that a contractor may be discharged from performance on the ground of frustration even th . performance has not been rendered altogether impossible."

The term "frustration" seems to have been first used in maritime cases.[86] It arose in cases where specific clauses in agreements of charterparty or affreightment made provision for suspension of performance on the occurrence of certain supervening events. Such clauses are often called suspension claus s or extension-of-time c auses, and are commonly found ' . such agreements.

They generally refer to "excepted perils", such as the restraint of princes, perils of the seas, acts of the Queen's enemies, acts of God, *force majeure(casus fortuitus)* and the like, and provide that. during the continuance of the events mentioned, the obligations of one or other or both of the parties to the contract will be suspended or that during such events an extension of time will be granted for the performance of such obligations. In other words, in the case of a delay arising from an "excepted" cause the shipowner was excused but remained liable to continue performing after the delay had terminated.[87]

The question which arose for decision is what the position was if the events contemplated continued for an inordinate length of time, in the absence of any agreement on the matter. The answer is that the courts regarded the agreement between the parties as an incomplete expression of their contractual intentions, because the exception clause did not adequately express their true intentions in relation to the permissible

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86. WA Ramsden "Temporary Supervening Impossibility of Performance" (1977) 94 *SALJ* 162 at 163.

87. *Hadley v Clarke* (1799) 8 TR 259, 101 ER 1377.

duration of an interruption by the unforeseen event. Business contracts must generally be performed within a reasonable time,[88] and the parties must therefore have intended that the contract should be performed within a reasonable time, although they did not say so.

Hence the courts implied a term that had the effect of terminating the contract if performance remained impossible for an unreasonably long period of time.

It is important to bear in mind that charterparties are often lengthy printed documents containing a number of terms to which, usually, provisos and exceptions are attached. The signing of such a contract evinces a contractual intention to be bound by it, even if the parties have given no particular attention to all its terms, for example, to the clauses relating to excepted perils.[89] The occurrence of such a contingency could therefore be described as a possibility "within the contemplation of the contract" of charterparty which was "not actually present to the minds of the parties

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88. See *Geipel v Smith* (1872) LR n QB 404. See also *Laljee v Ornadutt* (1883) 4 NLR 117; *Cronje v Standard Bank* (1891) 4 SAR 145; *Benoni Produce and Coal Co Ltd v Gandelfinger* 1918 TPD 453; *Concrete Products Co (Pty) Ltd v Natal Leather Industries* 1946 NPD 377; *Lanificio Varam SA v Masurel Fils (Pty) Ltd* 1952 (4) SA 655 (A); *Broderick Properties Ltd v Rood* 1962 (4) SA 447 (T).

89. The rule is the same in our law (*Burger v Central South African Railways* 1903 TS 571 at 578, followed in a number of cases, including *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 470) This is so even if they signed it without even bothering to read it (*Bhikhagee v Southern Aviation (Pty) Ltd* 1949 (4) SA 105 (E); *Mathole v Mothle* 1951 (1) SA 256 (T)).

at the time of making it".[90]

In such instances, then, the courts interpret the contract so as to give it "business efficacy",[91] as, indeed, would our own courts,[92] but it is permissible only when it is "within the contemplation of the contract", for otherwise it could be argued that the courts are making a new agreement for the parties.

In *Geipel v Smith*[93] the defendant had contracted to ship coal from Newcastle to Hamburg, restraint of princes excepted, as soon as wind and weather would permit. Before performance could be effected war was declared, and Hamburg was blockaded. This was clearly a "restraint of princes". It was held that the contract contemplated a commercial

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90. See *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, per Lord Watson at 59. See also *Dobbs v Verran* 1923 EDL 176; *Barnabas Plein & Co v Sol Jacobson & Son* 1928 AD 25; *Administrator (Transvaal) v Industrial and Commercial Timber & Supply Co Ltd* 1932 AD 25; *Rapp & Maister v Aronovsky* 1943 WLD 68; *Graham v McGee* 1949 (2) SA 770(D); *Mullin (Pty) Ltd v Benade Ltd* 1952 (1) SA 211(A); *Dutch Reformed Church Council v Crocker* 1953 (4) SA 53 (C); *SA Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A); *Montesse Township & Investment Corporation (Pty) Ltd v Standard Bank of SA Ltd* 1964 (3) SA 221 (T); *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W); *Novick v Benjamin* 1972 (2) SA 842 (A); *Chamotte (Pty) Ltd v Carl Coetzee (Pty) Ltd* 1973 (1) SA 644 (A); *North Beach Garage (Pty) Ltd v Durban City Council* 1973 (3) SA 318 (D); *A McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A); *Uitenhage Municipality v Uys* 1974 (3) SA 800 (E).

91. *Lamb v Evans* [1893] 1 Ch 218; *The Moorcock* (1889) 14 PD 64; *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 K B 592 (CA), [1918] A11 ER Rep 193, 87 LJKB 724.

92. *West Witwatersrand Areas Ltd v Roos* 1936 AD 62; *Mullin (Pty) Ltd v Benade Ltd* 1952 (1) SA 211 (A).

93. *Supra.*

speculation "within a reasonable time"[94] and, as the blockade was likely to continue for some considerable time, the contract was not merely suspended but dissolved. In effect the court read the express provision relating to restraint of princes with a tacit term requiring performance to be made within reasonable time, and, in doing so, had, therefore, merely supplemented a contractual provision that had been imperfectly expressed with a tacit term in order to give business efficacy to the contract.

In this sense "frustration" is the product of the proper application of the normal rules of interpretation of contracts which would also be applicable in our law.

The application of the rule in English law was very well expressed by Scrutton LJ in *Acetylene Corporation of Great Britain v Canada Carbide Co*[95] in these words:

> "It may be put that there is an implied term in any contract with any clause in the nature of a suspension clause, excepted peril or allowance of extra time, which may extend the performance of the contract, that the suspension which is ancillary to the main contract, shall only be valid for a reasonable time; and that a time is unreasonable which makes the resumed contract an entirely different one from the interrupted contract."

It is submitted that this is the kernel of the true doctrine of frustration. As will appear presently, it has been extended and applied to other situations. It applies, then, where impossibility supervenes to make performance of a

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94. Per Blackburn J at 412 and Cockburn CJ at 410.

95. (1921) 8 Ll LR 456 at 460.

contractual obligation impossible either for a past or future period, when either party may wish to contend that even at the end of the period of impossibility the obligation, owing to the undue delay, no longer remains in being.

McElroy and Glanville Williams[96] state:

> "The rule here is that in certain circumstances, if the delay fundamentally changes the character of performance required, having regard to the known commercial object of the promisor, the contract is 'frustrated' by the delay and the obligation to perform is therefore discharged even though the impossibility ultimately ceases. This is the proper statement of the doctrine of frustration, and, so stated, it is evidently not a mode of discharge for undue delay caused by impossibility. In short, it may be said with some measure of truth that frustration begins where impossibility ends."[97]

They add that:[98]

> "This special meaning of the term 'frustration' is clearly explained by Rowlatt, J in *Chinese Mining and Engineering Co v Sale*,[99] but he does not draw the further distinction [adopted by the learned authors] between frustration discharging the party who was to do the act that becomes temporarily impossible and failure of consideration discharging the party who was to render the consideration."

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96. *op cit* XXXIV.

97. Though, as they point out, there may be "anticipatory frustration", which discharges the contract before the impossibility ceases.

98. *Ibid* n 3.

99. [1917] 2 KB 599 at 602.

It is difficult to agree with these views. If the court can legitimately imply a term, by the use of ordinary rules of interpretation of contract, which would require the contract to be performed within a reasonable time, then after that time has elapsed further performance is not possible under that contract without further agreement between the parties, perhaps in the form of condonation, any more than it would have been if a time clause had originally been inserte. in the contract, as in the case of *Algoa Milling Co Ltd v Arkell & Douglas.*[100] Of course, where an extension-of-time clause has been inserted into the agreement, difficulties in reconciling the provisions of the agreement might arise. However, it would seem that the same principle has been applied where the contract has become temporarily impossible of performance by operation of law(for example because of a short-lived illegality or a temporary disability) in English law,[101] and in such a case there can be no problems of interpretation; the final date by which performance is to be effected will clearly prevail.

Parties cannot be held bound by a suspended contract for ever, even a non-commercial contract. The application of this principle to such cases would seem to fall within the rule laid down in *Dahl v Nelson, Donkim & Co.*[102] The rule must surely be the same in our law also, since it would seem

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100. 1918 AD 145. Whilst this case espouses the "absolute rule" laid down in *Norden v Shaw (supra)* and *Hay v Divisional Council of King William's Town (op cit)* and is therefore wrong on this point, it was actually decided on the interpretation of the contract, it is submitted correctly, and is thus of great relevance here.

101. See for example, *Andrew Miller & Co Ltd v Taylor & Co Ltd* [1916] 1 KB 402 (CA); *Leiston Gas Co v Leiston-cum-Sizewell UDC* [1916] 2 KB 428 (CA); *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119,34 TLR 178 and *Tatem Ltd v Gamboa* [1939]1 KB 132, [1938] 3 All ER 135.

102. (1881) 6 App Cas 38.

irrelevant whether the parties have made express provision for the temporary suspension of their obligations, because the law has done that for them and cannot continue to hold them bound to a sterile contract indefinitely.

McElroy and Glanville Williams say:[103]

> "It may be that the rule as to frustration is no more than an application of the rule that a contract, where no time for performance is specified, must be performed within a reasonable time. But perhaps there are really two rules, each devised for the benefit of different parties. The rule that a promise must be performed within a reasonable time is one for the benefit of the promisee. It is a breach of contract, in the absence of excuse, if the promisor does not perform within a reasonable time. The rule as to frustration, on the other hand, is one for the benefit of the promisor."

This view tends to run counter to the English case law. For example, in *Dahl v Nelson Donkin & Co*[104] Lord Blackburn said[105] that "a delay in carrying out a charterparty, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the venture, entitled either of them, at least while the contract was executory, to consider it at an end". Again, in *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France*[106] Lord Shaw of Dunfermline

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103. *op cit* XXXIV n 3.

104. *op cit*.

105. At 53. See also G D Goldberg "Is Frustration Invariably Automatic?" (1972) 88 *LQR* 464 and McElroy and Glanville Williams *op cit* 221.

106. [1919] AC 1 at 13.

said:

> ". . . such contracts are voidable by both or either when the impossibility to complete or deliver was something for which neither was responsible. Each party is innocent, neither is in default: the conduct of neither has brought about the event, and in such a case the contract is interpreted with even and equal justice to both sides; and the law does not allow one party to avoid while the other is held bound. If both parties go on, that is another and their own affair. But either can claim that the contract is void, and then both are free."

If the contract has to be carried out within a reasonable time then it would seem that the contract was intended by both parties to continue in being for a reasonable time only. If the party who has to perform is at fault and therefore unable to execute his side of the bargain within the period contemplated by the agreement, he is in breach of his contract. If he is prevented from performing during the time contemplated by the contract through *vis major* or *casus fortuitus*, he is excused from performance. The only question which remains is, can the promisee enforce performance when it becomes possible ever though the period contemplated by the contract has expired? The answer of the English courts is a definite "no", and it is submitted that our courts would give the same answer. If in the case of *Geipel v Smith*[107] the war had lasted for ten years the charterer could not thereafter compel the carrier to convey coal to Hamburg under the terms of agreement entered into some ten years earlier. It seems inconceivable that our courts would compel him to do so.

The reason given by the English courts is that the performance which now becomes possible is quite different from that originally promised. Even a few months' delay has led to

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107. *Supra*.

this conclusion, for example where the parties intended the voyage "to be a spring voyage, while the one after the repair would be an autumn voyage".[108] The principle has been expressed in different ways, but in essence the test is the same. For example, in *Bush v Whitehaven Town and Harbour Trustees* [109] Lindley LJ stated that the delay must be "so great as not to be fairly within the terms of the contract at all; that is to say, . . . so great that the contract cannot apply to the state of things to which the contractor and the defendants had imagined it did". And in the case of *Metropolitan Water Board v Dick Kerr & Co Ltd*[110] Lord Dunedin expressed the test in a familiar and oft-quoted[111] passage that it must be a delay "so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted". Obviously this depends upon the facts of each particular case. None of the cases refers to the double rules mentioned by McElroy and Glanville Williams[112] (one in favour of the promisee, the other in favour of the promisor). They seem to assume that the time limits of the contract were intended by the parties to operate for the benefit of both of them or that the contract was intended to endure only for the period contemplated and no longer.

Whatever is the correct underlying basis,it would appear to be a matter of interpreting the contract in the circumstances

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108. *Jackson v Union Marine Insurance Co* (1874) 10 CP 125.

109. (1888) 52 JP 392.

110. *Supra* at p 128.

111. For example, *Federal Steam Navigation Co v Dixon* (1919) 1 Ll LR 63; *Woodfield Steam Shipping Co v Thompson* (1919) 1 Ll LR 126;and *Fisher, Renwick & Co v Tyne Shipbuilding Co* (1920) 3 Ll LR 253, all shipbuilding contracts.

112. *op cit* 70.

of the case according to the ordinary rules of interpretation.[113]

McElroy and Glanville Williams[114] contend that in order for a contract to be dissolved on the grounds of frustration -

> "two conditions must co-exist:
>
> (i) There must be a finding of fact that certain circumstances amount to frustration, i.e., to inordinate delay.
>
> (ii) There must be a finding of law that the cause of that 'frustration' is either -
>
> (a) some event covered in the contract either by an excepted peril clause (which is the commonest form) or by some other 'language in the contract'[115] disclosing a 'common intention'[116] which is imperfectly expressed,[117] or else is

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113. See the observations of Lords Sumner and Atkinson and also of McCardie J (approved in the House of Lords by Viscount Findlay at 9) in *Larrinaga & Co Ltd v Société Franco-Americans des Phosphates de Médulla* (1922) 28 Com Cas 1; affirmed (1923) 92 LJKB 455; [1923] All ER Rep 1 and *Blackburn Bobbin v Allen* [1918] 1 KB 540 at 552, affirmed [1918] 2 KB 467 and *In re Comptoir Commercial Anversois v Powerson & Co* [1920] 1 KB 868 at 878-9, though the latter two are not cases of "frustration" in the sense used here.

114. *op cit* at 202-3.

115. See Lush J in *Churchward v The Queen* (1866) LR 1 QB 173 at 211; Kay LJ in *Hamlyn v Wood* (1891) 2 QB 488 at 494; and Atkinson LJ in *Larrinaga & Co Ltd v Société Franco-Americane des Phosphates de Médulla (supra)*.

116. See Lord Denman CJ in *Aspdin v Austin* (1844) 5 QB 671 at 684, 114 ER 1402 at 1407.

117. See Lord Sumner in *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435.

(b) some event for which the party is not otherwise responsible in law - e.g. where the cause of the delay is caused by operation of law."

The learned authors point out that "[s]ome cases fall within both (a) and (b). Thus the cases of Government requisition of ships were always covered by the exception of 'restraint of princes'."[118]

Certainly the principles applicable in (a) are equally applicable in our own law, and these principles would seem to cover the great majority of the English cases. Whilst, however, the principles contained in these cases are directly applicable to our law, nevertheless it is doubtful whether such cases would be of great value to us, since each case must turn upon the interpretation of the particular agreement read in the light of its own individual set of circumstances, and the principles themselves are well established in our own law. Nevertheless, caution should be used in applying them for two reasons:

(a) Because a court can never be certain that one or both of the parties have not intentionally failed to provide for the eventuality, a court cannot imply a term unless there is some 'language in the contract' indicating an unexpressed contractual intention to provide for the eventuality.

(b) A thoughtless implication of terms may

(i) undermine the certainty of contracts;

(ii) result in the creation of legal fictions and so depart from our existing legal principles;[119] and,

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118. *op cit* 203 n 1.

119. As occurred in England following the case of *Krell v Henry* [1903] 2 K B 740.

(iii) cause repercussions upon dependent contracts.

As McCardie J said in *Larrinaga & Co Ltd v Société Franco-Americane des Phosphates de Médulla:*[120]

> "The principle of frustration is valuable. It may solve many cases. But if carried too far it may greatly weaken the notion of contractual obligation. Nor should it be forgotten that commerce involves not only head contracts but a chain of subcontracts. The effects of holding that a dissolution has taken place may be greater than a judge foresees."

As regards the second leg of the formulation by McElroy and Glanville Williams, the one that applies where an event occurs for which the promisor is not responsible in law, I would submit that here, too, our law would agree, but a more detailed examination of that question must wait until later.[121]

Frustration in English law did not, however, stop at this point. The principles referred to above were, unfortunately, not well understood by the English courts during the latter half of the nineteenth century and the first half of the twentieth century, with the result that they came to be confused with cases of supervening impossibility which was not of a temporary nature.

The effect was a series of cases which sought to extend the rule in *Taylor v Caldwell*[122] beyond the limits laid down for its operation in that case - that is, from the perishing of a specific person or thing necessary for performance of the contract to the "perishing" of a "state of things" which was

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120. *Supra*.

121. Below, chap 4.

122. (1863) 3 B & S 826; 122 ER 309 (KB).

the foundation of the contract between the parties.[123] This was done by the courts purporting to interpret the intentions of the parties and so implying a term in their contract that should the basic underlying circumstances change the agreement would be at an end.

Thus in the "Coronation" cases[124] as a rule a room was hired for a day or so which would enable the lessee to view the coronation procession of Edward VII, as it was scheduled to pass close by on that day. Owing to the monarch's illness the procession was postponed indefinitely. Strictly speaking, the contract could still be carried out, but there was no further point in it since the underlying common assumption of the parties, that the lease would enable the lessee to view the procession, was no longer valid. The courts inferred a term that the lease was to be subject to the coronation arrangement proceeding as expected.

"Implied condition" may mean one of three things:[125]

(i) that the parties contemplated the event and tacitly agreed that in such case the contract should come to an end;[126]

(ii) that, though they did not actually contemplate the

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123. See the so called Coronation cases of *Krell v Henry (supra)*, *Chandler v Webster (supra)* et alia. In *Sir Lindsay Parkinson Ltd v Commissioner of Works* [1949] 2 KB 632 it is said (at 635) that a contract is discharged even if still possible of performance where later events destroy "some basic, though tacit assumption on which the parties have contracted".

124. *Ibid.*

125. See L J Sturge "The Doctrine of Implied Condition" (1925) 41 *LQR* 170.

126. The view adopted by Scutton LJ in the *Comptoir* case [1920] 1 KB 868 at 899-900.

event, they would both, if they had thought about the matter, have agreed that it should have that effect; [127] or

(iii) that, whatever the parties may have really thought, the law imports such an intention to them as reasonable men. [128]

In the third meaning the condition is not, strictly speaking, "implied", though it can loosely be said to be "implied by law". It is really imputed to the parties by the court, regardless of what their intention was, that is, the law imposes the term to do justice between the parties. It can, therefore, perhaps more correctly be spoken of as a "constructive condition". [129]

In such cases, of course, the "implication" of the term is wholly unjustified, as there were no words in the contract to give rise to the implied condition and it cannot be said with any certainty that the parties had any intention regarding it. Even the courts have come to recognise that the principles of interpretation of contract are not involved, but that what has happened is that a new principle of substantive law has been created through the use of a legal fiction. [130]

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127. The view adopted by Earl Loreburn in the *Tamplin* case [1916] 2 AC 397 at 404.

128. The view adopted by Lord Sumner in *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 at 455 and 459 and *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1916] AC 497 at 505-510.

129. See G J Webber *The Effect of War on Contracts* 2 ed (1946).

130. See also Lord Wright *Legal Essays and Addresses* (1939), L J Sturge "The Doctrine of Implied Condition" (1925) 41 *LQR* 170 and Arnold McNair "Frustration of Contract by War" (1940) 56 *LQR* 173.

Thus, Atkin LJ in *Russkoe Obschestvo D'Lia Izgstovenia Snariadov I'Voennick Pripassov v John Stirk & Sons Ltd*[131] said:

> "It is a little unfortunate that this doctrine of the termination of a contract by reason of frustration should ever have been based upon the theory of an implied contract."

He indicated that the so-called "implied term is merely something imputed by law to both parties". Lord Sands in *James Scott & Sons Ltd v R & N Del Sel*[132] called the doctrine a "pious fiction", saying that it is

> " . . . somewhat far-fetched to hold that the non-occurrence of some event, which was not within the contemplation or even the imagination of the parties, was an implied term of the contract".

I think it can safely be said that our courts would not follow the "implied-term" approach of the English courts, for to do so would alter the principles of our own law. In this regard, it is necessary to refer to the case of *African Realty Trust Ltd v Holmes*,[133] which will have to be examined in more detail later.[134] The contract concerned in that case contained express provisions dealing with the situation. Innes CJ ,[135] with proper judicial restraint, contented himself by saying:

> "Had these provisions not been inserted, a difficult question might have arisen as to whether the nature of the work was so basic to the agreement

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131. (1922) 10 Ll LR 214 at 216-17.

132. 1922 SC 592 at 596-7.

133. 1922 AD 389.

134. Below at pp 126f.

135. At 393.

> and so obviously in the contemplation of the parties that a condition as to their character should be implied. But the matter having been expressly dealt with, the question does not present itself; one's sole task is to construe the provisions imposed."

De Villiers JA, however, was not quite so cautious, and in an *obiter dictum* favoured the existence of the implied-condition approach in our law, referring to the "Coronation" cases as well as to passages of the Digest, relating to the promise of a *dos*, and to certain German jurists, namely Leonhard, Naber, Motzer and Windscheid,to support his views. I feel certain in this he erred and shall examine his arguments in more detail later.[136]

The case of *Bayley v Harwood*[137] would also seem, by implication, to lend possible support to the view adopted by De Villiers JA in *African Realty Trust Ltd v Holmes*,[138] and that case too will be considered in more detail later.[139]

The implied-condition theory seems to have given place in English law to the "failure-of-consideration" theory. Strangely enough, in *Krell v Henry*[140] counsel argued that there had been a failure of consideration, and although that argument did not find favour with the court in that case it appears to be the view generally favoured now.

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136. Below at pp 126f.

137. 1953 (3) SA 239 (T).

138. *Supra*.

139. See below at pp 117f.

140. *Supra*.

The only factors from which one could imply a condition in *Krell v Henry*[141] were these:

(i) The defendant agreed to hire a flat in Pall Mall, a place which was on the proclaimed route of the proposed coronation processions;

(ii) the flat was to be hired for the days of 26 and 27 June 1902, which happened to be the days scheduled for the processions; and

(iii) the rental was to be £75, a sum far in excess of the rental such a flat would normally be expected to fetch.

The contract contained no express reference to the coronation processions, or to any other purpose, but it was fairly clear from the above facts that the defendant's motive in hiring the flat was to use it as a vantage-point from which to view the procession, and it is also fairly clear that the plaintiff must have known this. An implied term is not possible on these facts alone, any more than it would be if I had ordered a wedding cake made or invitations to be printed for my daughter's wedding, which can no longer take place because of her tragic death in a road accident. Many other examples could be and have been posed.[142] Here much depends on what it was intended should be supplied, let or sold, as the case may be. In *Krell v Henry*[143] the Court of

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141. *Supra.*

142. See, for example, McElroy and Glanville Williams *op cit* 89; McNair *op cit* (1919) 35 *LQR* at 95; *Carter v Carter* (1733) Cas T Talbot 271,25 ER 773; *Knowles v Bovill Ltd* (1870) 22 LT 70; *Minnevitch v Café de Paris (Londres) Ltd* [1936] 1 All ER 884 52 TLR 413, and other cases referred to in R G McElroy and Glanville Williams "The Coronation Cases I" (1941) 4 *Modern LR* 241.

143. *Supra.*

Appeal apparently thought that what was to be supplied was a view of the procession, and that view the defendant certainly did not get; hence there was a failure of consideration.

Of course not every disappointment of an expectation under a contract is a failure of consideration. Whether it is so depends upon the particular contract and the particular expectation under it.

The *American Restatement of the Law of Contract* [144] in the first edition expressed it rather well as follows:

> "It is not enough in order to make the rule stated in the section applicable, that one party to the contract has in view a specific object or effect without which he would not have entered into the contract, and that the other party knows this. The object or effect to be gained must be so completely the basis of the contract that, as both parties know, without it the contract would have little meaning."

In other words, the specific object or effect must be part of what was bargained for, an intrinsic part of the performance required by one and undertaken by the other party. Our courts might arrive at the same result on a similar interpretation of the contract, but we would, if the submissions I make in Chapter 5 are correct,[145] hold that it was no longer possible for the lessor to supply the lessee with what he had bargained for, namely,a view of the procession, or, perhaps more correctly, a vantage-point from which he would be able to see the procession. *Bayley v Harwood*[146] could

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144. At § 288 Comment (a) (1932). There appears to be no parallel passage in the second edition (1981).

145. Below at pp 119f.

146. *Supra.*

probably be correctly interpreted in the light of this principle.

Again much turns upon the interpretation of the individual contract in each particular case, so that the English cases would not be of much help to us. Indeed, the insistence of some of them upon an "implied condition" and the indiscriminate use of the word "frustration" to cover a number of quite different rules may make reliance upon them undesirable.

B. Other Foreign-law Sources

The law of most European countries and even of other Western countries, such as those of South America, are derived to a greater or less extent from Roman law. These countries may be divided into four categories for convenience.

(a) The *Code Napoleon* countries, such as France (where the Code was born), Belgium, the Netherlands, Italy, Spain, Portugal and the countries in South America which derived their law as dependencies of Spain and Portugal.

The main provision of the French Code Civil, setting forth the general principle, is article 1148, which reads as follows:

> "There is no action for damages when, as a result of *force majeure* or *cas fortuit* the debtor has been prevented from giving or doing what he is bound to do, or has done that which he was bound not to do."[147]

Application of this principle to particular cases are set out in articles 1302, 1647, 1733, 1929 and 1954.

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147. My translation.

Similar provisions appear in the laws of the other countries referred to.

(b) The *Bürgerliche Gesetzbuch (BGB)* countries, such as Germany (where the *BGB* was born), Switzerland, the Scandinavian countries and Japan. The provisions of these codes, though based on the same general principles that supervening impossibility is *prima facie* an excuse for non-performance, are quite different in form and lead to different results in application.[148]

(c) Countries with a legal system, codified or uncodified, that was strongly influenced by Roman law: Greece (and, to a lesser extent, Scotland). The law in Greece up to 1948 was modified Roman law. The Greek Civil Code of 1948 was intended to be a codification of the pre-1948 Greek law. It is, of course, not influenced by Dutch law or Germanic custom. The common law of Scotland has a strong Roman-law base, but has been considerably influenced by notions derived from English law.

(d) Other countries, for instance the so-called Iron-Curtain countries of Eastern Europe.

Our courts and writers have seldom referred to any of the four categories of foreign law mentioned above, apart from the *BGB*.[149] This is understandable because

(i) foreign law sources are not always readily available;

(ii) even where they are available, language problems create difficulties in accurate interpretation and understanding;

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148. See W A Ramsden "Supervening Impossibility of Performance and Changed Circumstances in German Law" (1976) 39 *THR-HR* 367.

149. *African Realty Trust v Holmes* 1922 AD 389.

(iii) a thorough mastery of the foreign law is essential if mistakes are to be avoided,[150] because of the complexity of the law relating to supervening impossibility;

(iv) the laws in the various countries have developed in diverging directions since codification, and particularly in recent years to meet the demands of a war-ravaged Europe. For example, the views on *rebus sic stantibus* of Windscheid, which were derived largely from the Canonists and Thomas Aquinas in particular, found no favour with the Roman-Dutch jurists except Grotius, and then only in the field of public international law in his *De Jure Belli ac Pacis*, but subsequently received a limited acceptance into the Prussian Code.[151] However, when the *BGB* was drawn up, Windscheid's views were specifically rejected. Nevertheless, under the pressure of the economic collapse in Germany in the 1920s, modified forms of his views as proposed by Kückmann and Oertmann, together with a very liberal view of certain sections of the Code, such as the *Trau und Glauben* clause, were utilised by the courts to extend their discretion to enable them to tailor contracts to the needs of the parties and of the times.[152] However, recently, under the influence of other writers[153] the courts have returned to the stricter *pacta sunt servanda* attitude, which also obtains in French law.

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150. As, it is submitted, occurred in *Beretta v Rhodesia Railways Ltd* 1947 (2) SA 1075 (SR).

151. R Feenstra "Verandering van Omstandigheden en Trouw aan het Gegeven Woord. Enkele Historische Kantteke ingen" *Rechtsgeleerd Magasijn Themis* 1972 493 at pp 511f.

152. See W A Ramsden "Supervening Impossibility of Performance and Changed Circumstances in German Law", 1976 THR-HR 367 and 1977 *THR-HR* 68 at 1976 *THR-HR* 197-9.

153. O Palandt § 324 *BGB*.

CHAPTER 4

VIS MAJOR AND *CASUS FORTUITUS*

A. The Basic Rule

The basic rule of our law is set out in *D* 50.17.185,[1] which states, quite simply, "No obligation is binding which is impossible"[to perform].[2] This passage would appear to apply to both initial and supervening impossibility of performance,[3] and although the passage is stated to relate to miscellaneous rules of ancient law, it clearly covers reciprocal stipulations,[4] and in the developed system of Roman law was extended to consensual contracts.[5]

There are many other passages in the Digest in which this basic rule is adverted to, relating to loan,[6] sale,[7] lease,[8] betrothals,[9] marriage,[10] dowry,[11] agreements concerning

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1. Referred to in *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 at 434. See also Josephus Averanius *Interpretatio Juris Civilis* (1746) 3.8.34; 4.24.2; Donellus *Commentarius De Jure Civilis* 4.16.1.6; Windscheid *Lehrbuch Des Pandekten Rechts* (9th edition by Theodore Kipp 1930) 2.315.
2. My translation.
3. Averanius *op cit* 4.24.2; *Peters, Flamman & Co v Kokstad Municipality (supra).*
4. See above at pp 9f.
5. See above at pp 12f,
6. *D* 12.1.32; 13.6.5.4, 13; 44.7.1.4.
7. *D* 18.1.15 pr; 18.1.57.pr; 18.1.16 pr.
8. *D* 19.2.19.9, 10; and *lex* 38.
9. *D* 23.1.8.
10. *D* 23.1.45.6; 23.2.12 pr; 23.2.16.2.
11. *D* 23.3.5.14; 23.3.10.5; 23.3.12.1; 23.3.33; 23.3.35; 23.3.42; 23.3.46; 23.3.56 pr; 23.3.78.3.

dos,[12] the *condictio*,[13] vindication,[14] oral agreements;[15] and so on.[16] Some bring in special rules of the contract they relate to, such as the rules of risk in sale,[17] the rather special considerations relating to *dos* and other matters relating to marriage.[18]

This basic rule of Roman law is endorsed by the Commentators,[19] by the Roman-Dutch writers,[20] by the Pandectists,[21] and by Pothier[22] and other Continental scholars.[23] These writings largely deal also with particular areas of the law, such as

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12. *D* 23.4.6.

13. *D* 13.1.20.

14. *D* 6.1.15.3; 6.1.49.

15. *D* 44.1.23, 33; 45.1.37, 51.91.115; 46.3.98.8; 46.3.107.

16. *D* 12.1.5; 10.4.12.4; 44.1.23.

17. For example *D* 18.1.57 pr.

18. See nn 8, 9 and 10 above.

19. Averanius *op. cit.* 4.24.2; 4.26.5; Donellus *Commentarius De Jure Civilis* 16.1.6; Vinnius *Ad Institutiones* 3.14 (15) 2 n 6

20. Grotius *Inleiding tot de Hollandsche Rechtsgeleerdheyt*, 3.19.12; 3.47.1; 3.47.3; Van der Linden *Koopmans Handboek* 1.15.12; 1.18.6; Van Leeuwen *Censura Forensis* 1.4.39.1.3; *Het Roomsch Hollandsche Recht* 4.3.5; 4.14.4; 4.40.7; Voet 18.6.2; 19.1.14; 19.2.24, 27, 28, 29; 45.1.24; *Hollandse Consultatien* 1.66.201, 210, 214; 4.87.

21. J E Goudsmit *Pandekten Systeem* 2.68.212; C F von Glück *Pandekten* 4.317; Windscheid *Lehrbuch des Pandekten Recht* 2.264.2; 2.265.

22. *Contrat de Louage* § 457.

23. Hilliger Notes on Donellus' *Opera Omnia* 4.603; Koch *Recht de Forderungen* 2.136; Unterholzner *Schuldwerk* 1.241; Palandt at § 324 *BGB*.

sale,[24] lease,[25] and the *condictiones*,[26] and with particular problems, such as *mora*,[27] negligence,[28] the effect of impossible conditions,[29] and the physical destruction of the thing promised.[30]

From a consideration of the Roman and Roman-Dutch authorities, it would appear that the basic rule of our law is that if performance of an obligation promised under a contract becomes wholly impossible after the contract has been entered into through no fault of any party to it, the person promising to perform that obligation is excused performance, and the counter-prestation of the other party or parties to the contract is also excused.[31]

This basic rule is thus different from the corresponding basic

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24. Voet 18.6.1.2; 19.1.14.

25. Voet 19.2.24, 25, 27, 28, 29; Van der Linden *Koopmans Handboek* 1.15.12; Grotius *Inleiding* 3.19.12.

26. Van Leeuwen *Het Roomsch Hollandsche Recht* 4.14.4.

27. Voet 18.6.2; Grotius *Inleiding* 3.47.1, 3

28. Voet 18.6.2; 19.1.14; 19.2.24, 27, 28, 29; Van der Linden *Koopmans Handboek* 1.18.6; Grotius *Inleiding* 3.47.1, 3; Van Leeuwen *Het Roomsch Hollandsche Recht* 4.14.4.

29. Van Leeuwen, *Het Roomsch Hollandsche Recht* 4.3.5.

30. Voet 45.1.24; Van der Linden *Koopmans Handboek* 1.18.6; Grotius *Inleiding* 3.47.1.

31. J W Wessels *The Law of Contract in South Africa* 2 ed (1951) § 2632 expresses it thus: "The Civil Law draws no fine distinctions as to whether the party bound may or may not have foreseen that the performance of the contract would become impossible. It provides that as a general rule an obligation, whether *ad dandum* or *ad faciendum*, is extinguished as soon as its performance becomes objectively impossible either physically or legally . . . "; but as will be shown (below at pp 90f) foreseeability is in fact very relevant in our law to determine whether the event is *vis major* or *casus fortuitus*, and also whether performance was guaranteed or the risk assumed.

rule of English law, which contains a presumption to the opposite effect, namely, that *prima facie* the contractual obligations remain binding upon the parties in the absence of an indication arising out of the contract itself or the circumstances in which it was entered into which would indicate that the contract was to be regarded as at an end,[32] although, in effect, the result of the rule in both systems would appear to be very similar.[33]

This general rule has been adopted by a number of South African authorities, starting with the watershed decision of *Peters, Flamman & Co v Kokstad Municipality*[34] in 1919 and continuing right up to the present time.[35]

However, as indicated in *Hersman v Shapiro & Co*,[36] this rule is subject to exceptions and it is necessary to

> " . . . look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied".

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32. *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 at 434-7; *Hersman v Shapiro & Co* 1926 TPD 367 at 371-3; *Bischofberger v Van Eyk* 1981 (2) SA 607 (W) at 610-11.

33. *Peters, Flamman & Co v Kokstad Municipality (supra)* at 437; *Hersman v Shapiro & Co (supra)* at 372.

34. *Peters, Flamman & Co v Kokstad Municipality (supra)* at 434-5.

35. See *Schlengemann v Meyer, Bridgens & Co Ltd* 1920 CPD 494 at 500; *MacDuff & Co (Liquidator of) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 600-11; *Hersman v Shapiro & Co (supra)* at 371-3; *Wilson v Smith* 1956 (1) SA 393 (W) at 396; *Oerlikon SA (Pty) Ltd v Johannesburg City Council* 1970 (3) SA 579 (A) at 585; *Bekker NO v Duvenhage* 1977(3) SA 884(E) at 889; *Bischofberger v Van Eyk (supra)* at 610-11.

36. At 373.

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