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Supervening impossibility of performance in the South African law of contract

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In *Beretta v Rhodesia Railways Ltd*[1] the court found that the contract of service under consideration had become temporarily impossible of performance but nevertheless applied principles very similar to the rules of partial impossibility discussed in the last chapter. This case will be considered in rather more detail below.[2]

The general rule in regard to temporary impossibility is that it does not extinguish the obligation but merely suspends it until such time as it once more becomes possible of performance, when full performance, if that is possible, may be demanded.[3] If full performance is not possible, the creditor is entitled to demand what performance is possible in accordance with the rules governing partial impossibility of performance discussed in the last chapter, provided that to enforce such performance would not in effect amount to imposing an obligation on the debtor different from that which he originally undertook to perform, for in such a case the obligation would have become wholly impossible of performance.[4] The Digest appears to have placed no time limit upon the duty to perform, but certainly in modern times it seems to be important to determine whether time is of the essence of the contract, and if not, then what part it does play in the contract.

In *Weyl v United Restaurants Ltd*[5] the plaintiff was engaged

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1. 1947 (2) SA 1075 (SR).
2. *Post* at p 169.
3. *D* 46.3.98.8. See also Unterholzner *Schuldverhältnissen* § 241; Wessels *The Law of Contract in South Africa* § 2634; *Spencer v Gostelow* 1920 AD 617 at 626.
4. *Post* at p 173.
5. 1903 TH 161.

as a restaurant manager for a period of twc years from 1 September 1902. He was absent from work without leave for three months on account of illness. The court held that the contract implied that he would serve the defendant company *de die in diem* for the specified time except for such reasonable periods as might be necessitated through illness or incapacity, and that three months' absence was in the circumstances unreasonable and entitled the employer "to consider [his] obligations at an end".

It can be seen from what has been said above that this case is really one of partial impossibility, rather than one of temporary impossibility, for after three months' absence from work the manager could not complete two years' continuous service *de die in diem* before 1 September 1904, when the contract was due to expire. Furthermore, the restaurant was, it appears, not managed for the three months the plaintiff was away from work. This is not work that can accumulate and be done by the employee on his resumption of duty, perhaps by deferring or forfeiting holidays, or working longer hours. Full performance in this case has become absolutely impossible, despite the fact that the contract itself impliedly recognised the possibility of short absences owing to indisposition, and so had a certain amount of flexibility built into it - perhaps in addition to the concept of "substantial" performance that has already been considered.[6]

It was pointed out in *Van der Merwe v Colonial Government*[7] that the "nature of the plaintiff's work [which was intermittent in nature] will affect the legal position of this case", and that "th re is also this further circumstance, that the work might have been accumulating during

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6. *Supra* at pp 160f.

7. (1904) 21 SC 520 at 524-5. See also *Lubbe v Colonial Government* (1906) 16 CTR 125, 2 Buch AC 277.

the period when the services ceased, and that first accumulation of work might have been disposed of later on". In that case, mainly on the ground that the plaintiff had not received notification that his services had been terminated, it was held that the interruption in his work caused by the military authorities had not had any legal effect upon his contract of employment.

One of the problems which bedevils *locatio conductio operarum* is the fact that examples derived from the letting and hiring of property are often uncritically applied.

In *Myers v Sieradzki*[8] the court said, quite correctly, that

> "[t]he principles which guide the Court in the case of *locatio operarum* are similar to those which are applied to a *locatio rei*. A lessee of a house is entitled to terminate the contract and to leave the house if he be not afforded a convenient use or enjoyment of the property let (Voet, 19, 2, 23; Grotius, 3, 19, 12.)[9] Now in the case of a letting of services, the *locator* is the servant, the *conductor* the master, and the services which the *locator* is to perform are in the same position as the *res* in a *locatio rei*. Hence the services themselves, and not the workman, take the place of the house. If, therefore, the master does not obtain from the servant the proper enjoyment of the services let, then he may, like the lessee of a house, who is deprived of the use of the property, terminate the lease of the services (*locatio operarum*)."

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8. 1910 TPD 869 at 873-4.

9. See also *D* 19.11.24 and Voet 19.11.26.

The court confirmed that

> "[i]t matters not in such a case whether the employer is deprived of these services by the illness of the servant or by any other act for which the master is not responsible . . . . It is not for every trifling deprivation of services that a rescission may take place, but only for such an interruption as the law considers considerable under the particular circumstances of the case."

This approach has been followed in later cases,[10] but it is submitted that the last two sentences quoted above are too widely stated. It does not follow that because *locatio conductio rei* and *locatio conductio operarum* (or, for that matter, *opera faciendi*) are species of the same genus and governed by the same legal principles that the legal consequences following upon partial impossibility in the case of a *locatio conductio rei* should be transferred to a situation of temporary impossibility in a case of *locatio conductio operarum*.

In most cases of *locatio conductio rei* the property is let for a fixed period, and if the lessee is deprived of its use and occupation for a portion of that period full performance of the obligation under the contract is impossible.[11]

Furthermore, the contract of lease does not envisage temporary loss of use of the premises. Even when the lessee goes on holiday he retains use of the premises let.

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10. See *Boyd v Stuttaford & Co* (1910) 4 Buch AC 141 at 150; *Boyd v Stuttaford & Co* 1910 AD 101 at 116; *Beretta v Rhodesia Railways Ltd* 1947 (2) SA 1075 (SR) at 1080.

11. Though it may be possible to extend the lease to make up for the period of deprivation, this would be a new contract and would depend upon the will of the parties.

B. Analysis of Temporary Impossibility

In *locatio conductio operarum* the position can be quite different.[12] The contract itself contemplates, as has been shown, the possibility that the employer may not have the services of his employee for short periods owing to his illness, leave, etc. Furthermore, a great many contracts are of the permanent and pensionable variety, which contemplate service over a great many years up to a certain retirement age, and in many cases may even be extended for a period beyond that, subject to certain conditions, such as a medical certificate.

The correct view seems to be that a break in a contract of service of this kind should be treated as a case of temporary impossibility of service, provided that the break does not endure for so long as to make the performance under the original contract wholly or at least partially impossible of performance . It is clear that the ratio which the break in service bears to the length of the contract is important here.

In *Pelunsky v Pastoli*[13] Bristowe J said:

> "The case might have been different if the partnership were going on for two or three years longer and there were a reasonable certainty of the respondent's being restored to health within a comparatively short time; but as it is, the partnership must expire in any event within six months, the respondent has been away five months already and there is no evidence from which it can be said when he will be able to resume work."

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12. As Solomon J pointed out in *Boyd v Stuttaford & Co* 1910 AD 101 at 150, a "rigid application of that principle would . . . cause grave injustice, and would be quite inconsistent with the idea that *locatio conductio* is a *bona fide* contract."

13. 1920 WLD 32 at 35.

In that case the partnership was for a period of some five years and required the regular attendance of the respondent partner to act as cattle auctioneer. At the date of the action it was thought that the respondent would not be fit for work for at least another six weeks, which would have made his absence from duty nearly seven months out of the five years of the contract.

In *Beretta v Rhodesia Railways Ltd*[14] the plaintiff, who had been in the employ of the defendant and its predecessors in title for a continuous period of more than thirty-three years, was interned purely because he was an enemy subject. He was released less than eight months later. Immediately before his release he communicated with the defendant with regard to his position and was informed by the defendant that it was of the opinion that his internment had automatically terminated his services and that as he had not yet qualified for a pension, he could not be granted one. It would seem that at the date of his internment he had 97 days leave due to him. At the time of his internment the plaintiff had only some eighteen months to serve to qualify for a pension. His duties were those of a way inspector, which, it would seem, meant that duties could not be accumulated as a backlog and worked off later. However, his conditions of service are not well enough evidenced in the report to enable one to determine whether they were flexible enough to permit him to make up for lost service.

Had he applied immediately to the court for an order of reinstatement in his permanent and pensionable position, the court might very well have treated the measure as causing temporary impossibility of performance, and granted his request. As it was, he seems to have waited some six years

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14. 1947 (2) SA 1075 (SR).

before going to court to claim a pension on a "modified scale" under regulation 148 (5), which had been applicable to him as an employee of the defendant. Such pension could be granted to him only if the defendant was found to have "dispensed with" his services before he had reached pensionable age. This was the difficulty facing Tredgold J. It is not suggested that his decision that, in the circumstances, the defendant had "dispensed with" the services of the plaintiff, was not right,[15] or that the result of this decision was not equitable in the circumstances, but the process of reasoning in regard to the principles of the law relating to supervening impossibility of performance, with respect, leaves much to be desired.

If Tredgold J had come to the conclusion that the temporary impossibility had continued so long that full performance of the plaintiff's obligations under the contract had now become impossible, and that therefore the defendant had the right to elect whether or not it would accept the partial performance under the contract which remained possible, and that it had in fact elected to terminate the contract, one might have queried his findings of fact, but not his decision on the law applicable. Instead, he found in effect that in cases of temporary impossibility of performance the remedies appropriate for partial impossibility of performance are available. Following this line of reasoning, several writers on the law of contract have adopted this approach.[16]

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15. Though that is open to some doubt, see Ramsden "Temporary Supervening Impossibility of Performance" (1977) 94 *SALJ* 162 at 163, 169 n 147. Clearly, however, by the time of the case the plaintiff had acquiesced in the termination of his service see *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 952.

16. De Wet and Yeats *Kontraktereg en Handelsreg* 160; Christie *The Law of Contract in South Africa* 466 (though the latter's statement of the law referred to here is not as such inaccurate, it fails to tell the whole story).

Tredgold J's reasoning has been criticised by me elsewhere[17] in some detail, and I do not propose to repeat those criticisms here except to say that temporary impossibility neither terminates an obligation nor gives rise to a right to terminate an obligation.

Three important points need to be borne in mind regarding temporary impossibility:

(i) The position would seem to be that temporary impossibility suspends the duty to perform the obligation thus rendered temporarily impossible, as long as the impossibility continues.[18] Because of the synallagmatic nature of reciprocal contracts, however, the party thus deprived of the benefit of performance can withold his counter-prestation and even recover under a *condictio* any performance already rendered in respect of the obligation temporarily made impossible; for instance, he can obtain a *pro rata* refund of rental already paid by him in respect of premises that he has been unable to occupy.[19] In addition, the time for completion may be extended,[20] unless time is of the essence of the

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17. "Temporary Supervening Impossibility of Performance" (1977) 94 *SALJ* 162.

18. See note 3 above.

19. Donellus 12.21.4, commenting on *D* 19.2.58.1.

20. Building contracts often oblige the architect to extend the time in such circumstances (see H S McKenzie *The Law of Building Contracts and Arbitration in South Africa* 3rd ed (1977) 186). In England it has been held that this obtains even in the absence of such a clause (*King v Parker* (1876) 34 LT 887). In my view our law would take a similar view in appropriate cases, owing to the suspensive nature of temporary impossibility. It is also interesting to note that section 7(1) of the Prescription Act 18 of 1943 provided that extinctive prescription was suspended so long as the performance of an obligation was delayed by *vis major* or the debtor was lawfully entitled to delay the performance on any other ground. (See *Montasse Township & Investment Corporation (Pty) Ltd v Standard Bank of S A Ltd* 1964 (3) SA 221 (T) at 236; *Parity Insurance Co Ltd (in li m) v Mohunu* 1967 (2) SA 459 (A)
(continued)

contract[21] or the delay would be unreasonable.[22]

(ii) On the termination of the temporary impossibility the situation has to be examined to see whether the obligation is now

(a) capable of being substantially performed, in which case not only is the creditor entitled to demand the performance but he is obliged to accept it;[23]

(b) capable of being performed only in part, which means that the contract is now partially impossible of performance and the creditor may elect to accept what is possible or to treat the contract as at an end;[24]

(c) no longer capable of being performed in whole or in part, in which event the temporary impossibility will have

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20. (continued) 459 (A) at 467; *Govender v The Master* 1971 (2) SA 434 (D) at 435; *Volkskas Bpk v The Master* 1975 (1) SA 69 (T) at 74-5. See also sections 3(1) and 13 of the Prescription Act 68 of 1969, which provide for prescription to be postponed or delayed where superior force prevents the judicial interruption of the running of prescription in certain cases (and *Marais v Commercial Union Assurance Co of S A Ltd* 1977 (2) SA 269 (T).)

21. 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 138; *Tatem Ltd v Gamboa* [1939] 1 KB 132, [1938] 3 All ER 135. Although these are English cases it is submitted that the position would be the same in our law, since it is a question of interpretation of the contract, see *Algoa Milling Co Ltd v Arkell & Douglas* 1918 AD 145 at 166-7.

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

23. See above at pp 150f.

24. See above at pp 152f.

become total and absolute and either party may regard the contract as at an end,[25] that is, neither party can insist on performance,[26] though, of course, a substituted performance can be agreed upon.

(iii) If at any stage during the continuance of the temporary impossibility it becomes apparent that the original obligation will no longer be capable of being performed in full, then it may be evident that

(a) substantial performance will be impossible, having regard in particular to the nature of the obligation which had originally been promised and to the question of the materiality of the time of performance; again, *either* party should be entitled to elect to treat the contract as at an end;[27]

(b) the original obligation can be performed only partially, in which event two courses are open to the creditor: he may immediately treat the contract as at an end; or he may postpone his decision until the temporary impossibility has ended, to enable him then to make up his mind whether to accept the performance which still remains possible or to terminate the contract.[28]

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25. See W A Ramsden "Temporary Supervening Impossibility of Performance" (1977) 94 *SALJ* 162 at 165.

26. See W A Ramsden "Temporary Supervening Impossibility of Performance" *op cit* and the cases there cited in support of this proposition, especially *Boyd v Stuttaford & Co* 1910 AD 101 and *Schlengemann v Meyer, Bridgens & Co Ltd* 1920 CPD 494.

27. See W A Ramsden "Temporary Supervening Impossibility of Performance" (1977) 94 *SALJ* 162 at 168.

28. See above at pp 152f. This might be thought to be hard on the debtor, but it must be remembered that normally performance has to be made within a reasonable time, so that if the delay is unreasonable the debtor can elect to treat the contract as at an end: see para (ii)(c) above.

It will thus be seen that whilst temporary impossibility of performance merely suspends the obligation to perform during the continuance of the impossibility, it can ripen into either partial or total impossibility.

It would seem that where a party has an election to treat the contract as at an end, he ought to notify the other party to the contract that he is exercising his right of election and of his decision. This appears to be the general practice in England.[29] However, notice may not always be possible or necessary.[30]

It is a question of fact in each case when the creditor is entitled to conclude that temporary impossibility has hardened into absolute impossibility (whether partial or entire) so as to enable him to notify the debtor that he considers the contract to be at an end.[31]

If the parties take different views on whether the circumstances entitle the contract to be regarded as at an end, the party contending that they do has the burden of establishing that he was justified in his belief.[32]

Temporary impossibility of performance does not only arise in

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29. R G McElroy & Glanville Williams *Impossibility of Performance* (Cambridge Univ Press 1941) at 231, and it appears to have been one of the principal concerns of Tredgold J in *Beretta's* case (*supra*).

30. A J Kerr "The Effect on Leases of Supervening Impossibility of Performance" (1977) 94 *SALJ* 389 at 395.

31. *Myers v Sieradzki* 1910 TPD 869 at 876; *Yodaiken v Angehrn & Fiel* 1914 TPD 254 at 259-60; *Schlengemann v Meyer, Bridgens & Co Ltd* 1920 CPD 494 at 502.

32. R G McElroy & Glanville Williams *op cit* at 229.

contracts that require continuity of performance,[33] such as a contract of employment[34] or a working partnership[35] or a lease,[36] but it also arises in contracts of sale and delivery of goods,[37] and contracts of carriage of goods by sea,[38] as well as other contracts that do not require continuity of performance. The rules outlined above should apply equally to all kinds of contract rendered temporarily impossible of performance through the advent of a supervening *casus fortuitus* or *vis major*.

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33. In the words of R H Christie *The Law of Contract in South Africa* at 466.

34. See *Van der Merwe v Colonial Government* (1904) 21 SC 520; *Boyd v Stuttaford & Co* (1910) 4 Buch AC 141; *Boyd v Stuttaford* 1910 AD 101; *Myers v Sieradzki* 1910 TPD 869; *Silicosis Board v City Deep* 1949 (2) SA 813 (T); *Beretta v Rhodesia Railways Ltd* 1947 (2) SA 1075 (SR).

35. See *Pelunsky v Pastoll* 1920 WLD 32; *Schlengemann v Meyer, Bridgens & Co Ltd* 1920 CPD 494.

36. Voet 19.2.27; 19.11.27; Pothier *Louage* §§ 120, 121, 152; *Johannesburg Consolidated Investment Co v Mendelssohn & Bruce Ltd* 1903 TH 286; *Hansen Schrader & Co v Kopelowitz* 1903 TS 707; cf Cooper *The S A Law of Landlord & Tenant* at 180, who predicates "a supposition upon which the parties contracted," on the failure of which a remission of rental is claimable. The wording is redolent of the English rule of frustration in cases such as *Krell v Henry* [1903] 2 K B 740 and *Chandler v Webster* [1904] 1 KB 493 (CA), and in effect means that the landlord is unable to perform all that he has promised to perform, albeit tacitly or by implication of law.

37. *Yodaiken v Angehrn & Piel* 1914 TPD 254 at 259-60 - a customer cannot be expected to wait for an indefinite time for a strike to end and coal to be available.

38. *Algoa Milling Co Ltd v Arkell & Douglas* 1918 AD 145.

CHAPTER 8

THE EFFECT OF SUPERVENING IMPOSSIBILITY OF PERFORMANCE

A. Modification of the Contract

The general rule is that a party to a contract may not invoke the doctrine of impossibility of performance to excuse himself from the performance of one term of the contract while seeking to keep the contract otherwise in force,[1] if this would result in the parties being bound to an entirely different contract.

In *African Realty Trust Ltd v Holmes*[2] the court said that there "is authority for the proposition that when the basis of a contract falls away the contract falls away with it". Although the court referred to a number of English cases on this point, it also referred to some Roman and Roman-Dutch texts. The Roman texts are concerned with the stipulation for a *dos*, which as has been seen,[3] was a very special case, and to the perishing of a *res* upon whose continued existence the obligations of the parties depend.[4] The writings of Leonhard, Naber, Moltzer and Windscheid were also referred to.[5] This principle, which was accepted as a part of our law in *Schlengemann v Meyer, Bridgens & Co Ltd*[6], was assumed to be so in

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1. *Benjamin v Myers* 1946 CPD 655 at 662-3.
2. 1922 AD 389 at 400.
3. Above at p 10.
4. And about which there can be no quarrel. Besides the authorities there quoted, see *D* 46.3.107.
5. Discussed above at p 78.
6. 1920 CPD 494.

MacDuff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd.[7] I have dealt with this question earlier in this work[8] and have submitted that, despite these weighty dicta, the doctrine of changed circumstances is not applicable in our law.

Certainly the courts cannot go so far as to make a new contract for the parties, as they did at one time in Germany,[9] in an endeavour to give effect to the intentions of the parties so far as was possible in the circumstances. This rule is absolutely clear in our law,[10] unless in effect the performance ordered by the court is no more than was impliedly owed under the original contract itself, whether tacitly contracted for or by implication of law.[11]

Kerr,[12] however, draws attention to a certain permissible substituted performance adverted to by Pothier,[13] where he says that if the lessee is deprived of the use and enjoyment of the property let, or a part of it, during the currency of the lease as a result of *vis major*, "the lessor is entitled to offer to lodge the lessee in another house pending

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7. 1924 AD 573 at 603.

8. Above at pp 74f.

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

10. *Algoa Milling Co Ltd v Arkell & Douglas* 1918 AD 145 at 159, 166-7; *Bayley v Harwood* 1954 (3) SA 498 (A) at 510-1; *Bahadur v Phillipson* 1956 (4) SA 638 (FC) at 643; *Talu Ranching Co (Pty) Ltd v Circle "A" Ranching Co (Pty) Ltd* 1975 (3) SA 612 (W) at 615.

11. *Cash Wholesalers (Pvt) Ltd v Marcuse* 1961 (2) SA 347 (SR) at 351; thus it seems that in a case of temporary impossibility of performance an extension of time may be allowed. (See above at p 167.)

12. A J Kerr "The Effect on Leases of Supervening Impossibility of Performance" (1977) 94 *SALJ* 389 at 394.

13. *Louage* §§ 147, 149.

execution of the repairs", and that if he does, such "an offer would prevent the esolution of the lease". If he does not, "the lessee is discharged from liability for rent during the whole of the remaining period of the lease, even though the lessor, after having restored the house, offers it to him; for the lessee is not compelled to take back the house, when he has been forced to procure another one".[14]

However, in view of the observations of our courts,[15] it is extremely doubtful if these views of Pothier[16] would find favour today, for they would have the effect of substituting new leased premises for those originally let under the contract.

B. Contract Extinguished

Generally, supervening impossibility that complies with the requirements outlined in this work discharges the obligations of both parties to the contract if the impossibility is entire,[17] whatever the type of contract involved.[18] It

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14. The translation is by Mulligan *Pothier's Treatise on the contract of Letting and Hiring*.

15. See note 10 above.

16. In *Louage* § 147.

17. *D* 45.1.37; 45.1.83.5 pr; 45.1.91.1; 45.1.140.2; 50.17.23; Leyser *Meditationes* especially 190 (4); *Bischofberger v Van Eyk* 1981 (2) SA 607 (W).

18. For example, sale and delivery of goods (*Yodaiken v Angehrn & Piel* 1914 TPD 254); *locatio conductio* in its various forms (see p 166 above);carriage of goods *(Algoa Milling Co Ltd v Arkell & Douglas* 1918 AD 145); exchange (Donellus Vol 11 c 1656 (*ad D de verb Obig lex* 140.2.8) c 1758 of 1847 ed); Voet 19.4.1; Wessels *The Law of Contract in South Africa* § 2712,)etc.

extinguishes their obligations by operation of law;[19] hence there is no breach of contract[20] and reliance on the impossibility is not affected by reliance on the other subsequent acts of the other party.[21]

The case of *Beretta v Rhodesia Railways Ltd*[22] tends to contradict this proposition (with regard to temporary impossibility at least), but this approach, as has been shown, appears to be wrong.[23]

Exceptions

There are some exceptions to this rule.

(1) The first exception is more apparent than real, namely, that where the obligation is valid at its inception it remains valid in spite of the fact that circumstances have changed to produce a situation where such an obligation could no longer come into existence, provided that performance remains both physically and legally possible.[24]

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19. Supervening impossibility of performance does not necessarily have the effect of discharging the contract in all legal systems, for example, it does not have this effect in French law (Toullier 4.156 n 447).

20. Van der Linden 1.15.2; Pothier *Louage* § 309; *Daly v Chisholm & Co Ltd* 1916 CPD 562 at 569; *Peters Flamman & Co v Kokstad Municipality* 1919 AD 427 at 437-8; *Schlengemann v Meyer, Bridgens & Co Ltd* 1920 CPD 494 at 500; *Wilson v Smith* 1956 (1) SA 393 (W) at 396; *Strauss v Van Zyl* 1958 (3) SA 563 (O) at 566 (though obiter because the common-law position was excluded by statute); *Bekker NO v Duvenhage* 1977 (3) SA 884 (E) at 889.

21. *Schlengemann v Meyer, Bridgens & Co Ltd* 1920 CPD 494 at 504.

22. 1947 (2) SA 1075 (SR) at 1081.

23. See W A Ramsden "Temporary Supervening Impossibility of Performance" (1977) 94 *SALJ* 162 at 166-70 and A J Kerr "The Effect on Leases of Supervening Impossibility of Performance" (1977) 94 *SALJ* 389 at 394-5.

24. D 50.17.85.1; Wessels *The Law of Contract in South Africa* § 2631.

extinguishes their obligations by operation of law;[19] hence there is no breach of contract[20] and reliance on the impossibility is not affected by reliance on the other subsequent acts of the other party.[21]

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24. *D* 50.17.85.1; Wessels *The Law of Contract in South Africa* § 2531.

(ii) Where there is a rule of the substantive law that relates to the particular contract in question and governs the position in relation to risk, that rule will prevail over the principles relating to supervening impossibility of performance. Such rules exist, for example, in sale,[25] *locatio conductio operis faciendi*[26] and *mutuum*[27] (loan for consumption, such as a loan of money.)[28]

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25. *D* 18.6.8.pr; 19.2.13.5; *C* 4.23.1; Voet 18.6.1.2; 18.6.3.4; 18.6.7.8; Grotius 3.14.34; Van der Keessel *Thesis Selectae* § 639 n; Van Leeuwen *Het Roomsch Hollandsche Recht* 2.131; Van der Linden *Koopmans Handboek* 1.15.9;*Terrington v Simpson* (1841) 2 Menzies 110; *Cohen v Wessels* (1886) 4 SC 123; *Wolff & Co v Bruce, Mavers & Co* (1889) 7 SC 133; *W W Barrett v Ngazana* (1901) 22 NLR 223; *De Kock v Frieham* (1902) 19 SC 136; *Couzyn v The Government* 1909 TS 444; *Rood's Trustee v Scott & De Villiers* 1910 TS 47; *Horne v Hutt* 1915 CPD 331; *Juta & Co v Rorich* 1924 TPD 730; *Goldstein v Haripersad* 1942 NPD 158; *Benjamin v Myers* 1946 CPD 655; *Pahad v Director of Food Supplies* 1949 (3) SA 703 (A) at 709; *Van der Merwe v Viljoen* 1953 (1) SA 60(A); *Kitwell Clothing v Quorn Hotel* 1966 (3) SA 407 (RAD).

26. Voet 19.2.30; *Murray v Roome & Sorey* (1855) 2 Searle 157; *Maberley v Searle* (1902) 19 SC 540; *Hughes v Fletcher* 1957 (1) SA 326 (SR).

27. Voet 12.1.4; Grotius 3.10.1.5; Van der Linden 1.15.2; Van Leeuwen *Censura Forensis* 144.

28. In addition certain statutes, such as the General Law Amendment Act 8 of 1879 of the Cape of Good Hope (see *United Mines of Bultfontein v De Beers Consolidated Mines* (1900) 17 SC 419) and its equivalent in the Orange Free State (though in the latter statute the words "war and insurrection" were inserted into the sentence "through inundation, tempest or such like considerable misfortune the land has produced nothing"), namely Ordinance 5 of 1902 (see *Strauss v Van Zyl*, 1958 (3) SA 563 (O)) disallowed "any deduction or abatement whatever" of rent on account of the loss of use or occupation of premises as a result of certain events which could undoubtedly constitute *vis major* or *casus fortuitus*. However, these statutes were repealed by the Pre-Union Statute Law Revision Act 43 of 1977.

I do not propose to consider such rules in detail, for they are outside the scope of this enquiry and are so complicated as to be impossible for me to treat of them adequately. For example, the rule *periculum emptoris* in sale requires that the sale be *perfecta*, not an easy concept to define,[29] the passing of risk is affected by suspensive and resolutive conditions in the agreement[30] and by the requirements relating to counting and measuring generic goods sold,[31] and so on. In every contract, whether it be one of sale, *locatio conductio*, *mutuum* or any other type of contract, the parties can, of course, exclude the rules of risk, in which event the principles

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29. *Institis* 2.23.3; 3.23.1; *D* 18.1.35.6; 18.6.1.1; 18.6.8.pr; *C* 4.38.15; 4.48.2; Cujacius *ad D* 18.13.5.5; Voet 18.6.1; 18.6.3.4; Pothier *Vente* § 308; *Combrink & Co v The British South Africa Co* (1901) 18 SC 45; *Page NO v Blieden & Kaplan* 1916 TPD 606; *Goldstein v Harripersad* 1942 NPD 158 at 162; *Wingeren v Ross* 1951 (2) SA 82 (C); *Kitwell Clothing v Quorm Hotel* 1966 (3) SA 407 (RAD) at 409; *Dale v Fun Fares* 1968 (3) SA 264 (O). See also *Mackeurtan's Sale of Goods in South Africa* 4 ed (1972) § 221ff and *Norman's Purchase & Sale in South Africa* 4 ed (1972) at 194ff

30. *D* 18.1.3; 18.6.8.pr; 20.4.11.1; Faber *ad C* 4.41.8.2; Voet 18.3.1; 18.6.5; Grotius *Inleiding* 3.14.29; Pothier *Oblig* § 220; Pothier *Vente* § 311-12; Goudsmit *Pandekten-systeem* § 51; Schorer n 366; *Keyter v Barry's Executor* 1879 Buch 175; *Wessels & Co v Abraham, Crosbie v Abraham* (1908) 10 HCG 225; *Fazi Booy v Short* (1882) 2 EDC 301 at 305; *Jacob v Petersen* 1914 CPD 705; *Schultz v Morton & Co* 1918 TPD 343; *Peri-Urban Areas Health Board v Tomaselli* 1962 (3) SA 346 (A) at 351.

31. *D* 18.1.25; 18.1.35.7; 19.1.35 and 6; Cujacius *ad D* 18.1.35.5; Brunnerman *ad D* 18.6.5; Voet 18.6.4; Grotius *Inleiding* 3.14.35; Van Leeuwen *Censura Forensis* 1.4.19.9; Pothier *Vente* § 310; *Stewart & Co v Benjamin & Co* (1871) 2 Roscoe 58; *Poppe, Schumhoff & Guttery v Mosenthal & Co* (1879) 9 Buch 91; *Jamieson v Goodliffe* (1881) 1 SC 206; *Combrink v The British South Africa Co* (1901) 18 SC 45; *Fisher v Harrison* (1901) 18 SC 78; *Page NO v Blieden & Kaplan* 1916 TPD 606.

of supervening impossibility will apply with full effect[32] unless the parties have clearly and specifically provided for risk in their agreement.[33]

If the principles of supervening impossibility of performance are inapplicable and the rules of risk do not govern the situation, the creditor will have all the normal remedies available to him for a breach of contract, such as a claim for specific performance or damages or both.[34] It is not proposed to examine these remedies here, for similar reasons to those mentioned already in relation to the rules of risk.

C. Acquired Rights

The extinction of the contract does not affect, or, rather, prejudice, rights already acquired under the contract or acts performed under it before it was ended by supervening impossibility of performance.[35] In particular the following rules apply:

(a) Recovery of part performance

Part performance may be recovered in whole or in part to compensate for the corresponding loss in counter-vailing performance, either by the *condictio sine causa*[36]

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32. Voet 18.6.3; *Gengan v Pather* 1977 (1) SA 826 (D).

33. *D* 18.1.78.3; 18.6.1.pr; Voet 18.6.2; *Horne v Hutt* 1915 CPD 331.

34. *Lucerne Asbestos Co Ltd v Becker* 1928 WLD 311 at 331; *Joubert v Bester* 1977 (4) SA 560 (T) at 566-9; *Ornelas v Andrews Cafe* 1980 (1) SA 378 (W) at 397-8, 401.

35. *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427; *Wylock v Milford Investments (Pty) Ltd* 1962 (4) SA 298 (C).

36. *D* 4.5.1.37; 45.1.51; 45.1.91.1; Pothier *Oblig* § 614; *Cloete v Union Corporation Ltd* 1929 TPD 508 at 521.

or the *condictio causa data causa non secuta*.[37] These are remedies that are of general application outside the sphere of supervening impossibility of performance and so will not be examined in any greater detail here.[38]

(b) Part payment for work part done

A part payment may be claimed for work or services part performed where the employer has benefited[39] on the principle that *"aequum est neminem cum alterius detrimento fieri locupletiorem."*[40]

(c) Remission of amount payable

On the same principle a remission of the amount payable can be claimed where performance of the other party to the contract cannot be entire, owing to supervening impossibility of performance; for example, a remission of rent to take account of a substantially diminished use and occupation of the leased premises as a result of

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37. Also called the *condictio ob causam datorum*. *D* 12.4. 3, 2, 3; 12.4.3.5.pr,1, 2; 12.7.1; 12.4.3.16; *C* 4.6.1, 2, 8, 9.

38. See for more information on these remedies Wouter de Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 2 ed 243 ff ; J C De Wet "Die Sogenaamde *'Exceptio non adimpleti contractus'* in die Praktyk van Vandag" (1945) 8 *THR-HR* 239.

39. Often referred to as a *quantum meruit*. Voet 19.2.27; *Myers v Sieradzki* 1910 TPD 869 at 872; *Boyd v Stuttaford & Co* 1910 AD 101 at 105, 114, 122-23; *Hitchins v Breslin* 1913 TPD 677 at 685; *Breslin v Hitchins* 1914 AD 312; *Hauman v Nortje* 1914 AD 293 at 296, 304; *Laidlow v Crowe* 1935 NPD 241; *Dave v Birrell* 1936 TPD 192; *Elite Electrical Contractors v The Covered Wagon Restaurant* 1973 (1) SA 195 (RAD); *Chamotte (Pty) Ltd v Carl Coetzee (Pty) Ltd* 1973 (1) SA 644 (A); *Joubert v Bester* 1977 (4) SA 560 (T); Kerr *The Principles of the Law of Contract* 3 ed 384-90. But see P&K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A).

40. *Hitchins v Breslin* 1913 TPD 677 at 685.

the supervening event,[41] or a reduction in the purchase price payable because of a substantial diminution of the property as a result of *casus fortuitus* or *vis major*.[42]

(d) Position where no enrichment occurs

Problems arise where no right has accrued and no countervailing enrichment has enured. For example, in a building contract *per aversionem*[43] the contractor is not entitled to be paid until the entire work has been satisfacorily completed. Hence, until then the risk of *casus fortuitus* or *vis major* lies upon the contractor, who must bear the loss.[44] The only time he is entitled to compensation is when the owner receives a benefit from his part performance or what remains of it, and when the recognised rules of enrichment apply.[45]

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41. *D* 19.2.25.6; Pothier *Louage* § 157; *Rubridge v Hadley* (1848) 2 Menzies 174; *Northwestern Hotel Ltd v Rolfes, Nebel & Co* 1902 TS 324; *Rolfes, Nebel & Co v Zweigenhaft* 1903 TH 242; *Johannesburg Consolidated Investment Co Ltd v Mendelssohn & Bruce Ltd* 1903 TH 286 at 292; *Morris v Mappin & Webb Ltd* 1903 TS 244; *Fleming v Johnson & Richardson* 1903 TS 319; *Hansen, Schrader & Co v Kopelowitz* 1903 TS 707 at 712-13, 718; *Bayley v Harwood* 1954 (3) SA 498 (A) at 499-500.

42. *Daly v Chisholm & Co Ltd* 1916 CPD 562; *Stansfield v Kuhn* 1940 NPD 84; *Mnyandu v Mnyandu NO* 1964 (1) SA 418 (N) at 424; *Joubert v Bester* 1977 (4) SA 560 (T) at 568; and see above at pp 160f.

43. That is to say, an "entire" or "lump-sum" contract, as it is generally called.

44. *D* 19.2.36; Donnellus *Com de Jure Civ* 13.9.14; Voet 19.2.37; Glück *ad Pand* 19.2.10.55; Brunnemann *Com ad Pand* 19.2.36; *Bothwell v Union Govt (Min of Lands)* 1917 AD 262 at 280; *Oerlikon SA (Pty) Ltd v Johannesburg City Council* 1970 (3) SA 579 (A) at 583-84. See also H S Chanock "Impossibility of Performance and the Passing of Risk with Special Reference to Building Contracts" (1936) 53 *SALJ* 306 at 310.

45. See above at p 160 (unless there is an express provision in the contract dealing with the matter).

There are a number of different kinds of contract under which one party may incur expenses without enriching the other, where it would seem equitable for the court to order reimbursement of these expenses. For example, supposing the owners of a ship were to request a salvage company to go to the rescue of their ship and the salvors were to dispatch a tug, perhaps hundreds of miles, to the spot where the ship was stated to be positioned, only to discover that the ship had sunk to the bottom of the ocean before the tug's arrival, could the salvors claim their expenses in the absence of any express term to that effect? It is possible that, unknown to either party, the contract could have become impossible of performance shortly after the tug was dispatched on its rescue mission. Furthermore, the salvage agreement might merely provide that the salvors were to be paid a proportion of the value of the vessel and cargo salvaged.

In such cases a reference to established custom or a close scrutiny of the agreement might very well persuade the court that the salvor is entitled to expenses reasonably incurred in an attempt to safeguard another's property and interests in circumstances where it is quite possible that the whole enterprise might well turn out to be fruitless.

The problem with such an approach is that where the venture is a hazardous one and the hazards can be foreseen but the parties have made no provision for them, a court will fairly readily conclude that the risks were assumed by the person undertaking to do the work.[46] Furthermore, a foreseen risk or one that could reasonably have been anticipated by definition cannot constitute *vis major* or *casus fortuitus*.[47]

In the United States of America there have been a number of

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46. See above at pp 101-2.

47. See above at pp 98f.

Space Administration, Defence and other government contracts that fall into the difficult area described here.[48] In each case a contract for the manufacture of a specific item was awarded by the government to a manufacturer, who, after years of research in some cases, and considerable expense, had been forced to face the unpalatable fact that what he had contracted to make and to deliver to the government was, in the state of scientific knowledge and technology at that time, incapable of achievement. In some of these cases the courts awarded the contractors compensation for their fruitless task.[49]

It is submitted that where a new product is to be developed or an existing one is to be manufactured to new and untried

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48. See John D. Calamari & Joseph M Perillo *Contracts* § 186, 187 and 199; Walter F Pettit "Impossibility of Performance-Basic Principles and Guidelines" 63.1, *The Briefing Papers Collection* Vol 1, 1963-1969 with 1970 revision notes, Federal Publications Inc 13; R Nash "Impossibility of Performance" *Government Contracts Monologue* 4 p 24-27 George Washington University (1962); *American Restatement of the Law of Contract* § 454, 456 and 468; and especially the much-discussed case of *National Presto Industries Inc v United States* 169 Ct Cl 749, 338 F2d 99 (1964) (see especially (1965) 65 *Columbia Law Review* 542 and 33 (1965) 33 *Fordham Law Review* 507).

49. Many of these cases were treated by the American courts as cases of supervening impossibility of performance. It is submitted that this would not be so in our law. Although the parties were unaware of it at the time of contracting, their contracts were in fact impossible of implementation from the very outset. Impossibility of performance in our law does not depend upon the state of mind of the parties, that is, whether they were aware of the impossibility or not (*Sarutton & Sarutton v Ehrlich & Co* 1908 TS 300; *Theron Ltd (in liquidation) v Goss* 1929 CPD 345; *Dickenson's Motors (Pty) Ltd v Oberholser* 1952 (1) SA 443 (A); *Wilson v Smith* 1956 (1) SA 393 (W); as also in English law (*Strickland v Turner* (1852) 7 Ex 208, 155 ER 919; *Couturier v Hastie* (1852) 8 Ex 40, 155 ER 1250; *Scott v Coulson* [1903] 2 Ch 249; *Galloway v Galloway* (1914) 30 TLR 531).

specifications (such as the manufacture of an unusually lightweight bullet-proof vest capable of stopping bullets of a very high velocity), the contract is as hazardous as sending a tug to rescue a ship in stormy seas, so that the general rule applicable will be that the manufacturer took upon himself the risk that he might not be able to develop and produce the article promised.[50] It is nevertheless possible that our courts, like the American courts, will closely scrutinise the agreement to see whether a warranty could be implied that the expenses reasonably incurred by the manufacturer on behalf of the employer should be reimbursed to him, that is, the expenses incurred up to the point when he should have realised that it was fruitless to proceed further.

A view which the American courts could possibly have taken, but did not take, is that the contract really embraced two separate contracts, the first to conduct research with a view to developing a process for the manufacture of the article, and second to manufacture it when that process had been developed. The second would then have proved to be initially impossible of performance, but the first had been carried out and payment for the work performed in that regard was due.

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50. This was the view taken in earlier cases, such as *Superintendent & Trustees v Bennett* 27 NJ 513 (1859) and *Stees v Leonard* 20 Minn 494 (1874), but later cases have tended to take the view that the employer warrants that the plans and specifications are adequate to produce the desired result (for example, *North American Phillips Co v United States* 175 Ct Cl 71, 358 F 2d 980 (1966) and *Simpson Timber Co v Palmberg Construction Co* 377 F 2d 380 (9th Cir 1967) unless the contractor had reason to know of the inadequacy, as in *Banducci v Hickey* 93 Cal App 2d 658, 209 P 2d 398, 399 (Distr Ct App 1949). However, some American courts appear to have proceeded on negligence rather than warranty as a basis (*Kinser Construction Co v State* 204 NY 381, 97 NE 871 (1912)).

However, it is submitted that no general rule can be laid down and each case must be considered on its own facts. There are unfortunately no South African cases that could serve as guidelines, although the statements of the members of the bench of the Appellate Division in *Bayley v Harwood*[51] to the effect that it would be unreasonable in the circumstances of that case to expect either party to incur the considerable expense required to make the premises let comply with the new regulations indicate that in the appropriate case our courts may very well adopt the line of reasoning suggested here.

D. Effect of Specific Terms in the Contract

As has been pointed out,[52] a risk may be expressly or impliedly assumed by one of the parties to the contract.

Where there is an express provision, whether it covers the situation is a matter of construction. In the words of Voet:[53]

> "If a vendor takes on himself the risk of fortuitous accident, he is not considered liable for ordinary accidents but only for such as occur rarely and are out of the ordinary course . . . ."

For it must be remembered that in our law the general rule that impossibility excuses applies unless the contract excludes it.[54]

The determination of the scope and effect of such a provision

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51. 1954 (3) SA 498 (A) at 504.

52. See above at pp 98f.

53. Voet 18.6.2. The translation is taken from Wessels *Law of Contract* § 2664.

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

calls for its being read in its context in the agreement.[55] A voetstoots clause has been held to be insufficient to overcome the operation of a zoning under the Group Areas Act of 1966.[56]

Similarly, a provision exempting the promisor from his duty to perform in the case of *casus fortuitus* is also possible, indeed common,[57] and the scope and effect of such a provision must be determined in the same way.[58]

Where the common-law rules relating to the passing of risk have been excluded by the terms of the contract, it follows that the provisions of the law relating to supervening impossibility of performance are free to operate and may obtain.[59]

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55. *D* 50.16.1.26; Van der Linden 1.14.4.

56. *Ornelas v Andrews Cafe* 1980 (1) SA 378 (W).

57. *Algoa Milling Co Ltd v Arkell & Douglas* 1918 AD 145.

58. Since the rules for ascertaining the intention of the parties are in accordance with the general rules of interpretation, they are not set out here.

59. *Gengan v Pather* 1977 (1) SA 826 (D).

CHAPTER 9

PLEADING AND ONUS OF PROOF

A. Pleading

It is not necessary to allege supervening impossibility of performance in one's pleadings, so long as one alleges facts from which such impossibility can be inferred.[1] Nor does it matter whether the plaintiff, after alleging the facts relevant to his case, claims that the agreement has become invalid and asks the court to find and to declare that he was entitled to regard the agreement as invalid, or whether he avers that he cancelled the agreement as a result of the facts alleged and asks that such cancellation be confirmed; the purpose and result are the same.[2]

B. Onus of Proof

The onus of establishing that a duty is owed lies upon the person alleging that such duty is owed, and the onus of establishing a defence which will excuse him from performing that duty lies upon the person setting up that defence. This is in accordance with the normal rules relating to onus in civil actions, which follow the principle that he who avers must prove.[3] This is the legal burden of proof, as opposed to the evidential burden,[4] which falls outside the purview

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1. *Kroba v Burisch* 1930 TPD 261. See also above p 140.

2. *Robert v Bester* 1977 (4) SA 560 (T).

3. 1.12; *Pillay v Krishna* 1946 AD 946 at 952-3.

4. Schmann & Zeffertt *The South African Law of Evidence* 3rd ed [illegible].

of this chapter.

The onus of establishing that an event amounts to *vis major* or *casus fortuitus* for example, that a storm was so violent that the debtor could not reasonably have been expected to provide against it, lies upon the debtor.[5] The mere fact that an independent person or agency has intervened will not necessarily suffice to indicate *vis major* however if the act of that person or agency could have been influenced by the conduct of the debtor. In such a case the debtor will have to go further and prove that the acts of that person or agency were not in fact the result of his own conduct.[6]

Once *vis major* or *casus fortuitus* has been established, the presumption is that the debtor was not guilty of negligence and it is for the creditor to show he was, where such negligence would entitle him to relief,[7] except in the case of a contract of deposit, when the depositary bears the legal burden of showing that the property deposited was lost or destroyed without negligence on his part,[8] or a contract

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5. *D* 22.3.19.pr; Pothier *Oblig* § 620; *New Heriot Gold Mining Co Ltd v Union Government (Minister of South African Railways & Harbours)* 1916 AD 415 at 438 & 462. And see above pp 96-[illegible].

6. *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957 at 965-6. See also *Benjamin v Myers* 1946 CPD 655 at 661-2.

7. Schorer n 332 *ad* Grotius 3.84; Van der Keessel *Theses Selectae* 540; *Frenkel v Ohlsson's Cape Breweries Ltd (supra); Benjamin v Myers (supra).*

8. *D* 17.2.52.3 and Gothofredus's note thereon; *D* 19.2.9.4; Vinnius *ad Instit* 3.15.2 comm no 5; Grotius *Inleiding* 3.7.9; 3.8.4; Van Leeuwen *Censura Forensis* 1.4.10.10 & 11; Van der Keessel *Thesis Selectae* 540; Pothier *Oblig* § 620; Schorer n 332 *ad* Grotius 3.8.4; *Mposelo v Banks* (1902) 19 SC 370; *Shakazi v Gurr* 1906 TS 303; *Parsons v MacDonald* 1908 TS 809; *Lithuli v Omar* 1909 TS 1[illegible]; *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957; *Enslin v Meyer* 1925 OPD 125 at 131; *Weiner v Calderbank* 1929 TPD 654 at 663-8; *Hoffend v Elgeti* 1949 (3) SA 91 (A) at 104.

of loan, where the borrower bears a similar onus[9]. The same applies to contracts of pledge[10] and hire,[11] where the onus would appear to lie on the pledgee and lessee respectively to establish that the loss or destruction of the thing pledged or hired was not a result of his negligence. In the case of hire, however, there are authorities which tend to show that the burden of proof lies upon the lessor to show that a fire which destroyed the premises let was caused by the negligence of the lessee or someone for whom he was responsible,[12] although the better view would appear to be that set out above.[13]

Hence, in the case of an action to recover articles handed over under a contract of *depositum*, *commodatum*, pledge etc, or their value, the plaintiff need not allege negligence, since the onus will lie on the defendant to show that he is not liable for their loss, either by *culpa* or *dolus*.[14] I am not

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9. Grotius 3.8.4 and Schorer's note thereon; *Medallie & Schiff v Roux* (1903) 20 SC 438; *Marks v Model Hire Motor Service Ltd* 1928 CPD 476; *Sulaiman v Amardien* 1931 CPD 509; *Van der Merwe v Scribante* 1940 GWL 36 at 43-4.

10. Grotius 3.8.4; Van der Keessel *Theses Selectae* § 540; Voet 13.7.5 (citing Grotius and Van Leeuwen); Windscheid *Pand* 3.2.6.5; *Daly v Chisholm & Co Ltd* 1916 CPD 562 at 566-8.

11. *D* 1.15.3.1; 9.2.9; 18.6.11; 19.9.3; 19.11.1; 44.7.1.4; 54.17.23; *C* 4.24.5; *Hollandsche Consultatien* 1.256; *Mposelo v Banks* (1902) 19 SC 370 at 373; *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957 at 963-5; *Daly v Chisholm & Co Ltd* 1916 CPD 562 at 566-8.

12. Schorer's note to Grotius 3.8.4 (Maasdorp's translation at p 668); Voet 9.2.20-3. (Though in Voet 19.2.29-31 the onus is placed on the *lessee* when he is sued *ex contractu*, the author stating that the lessee is not liable for *levissima culpa* - Voet 19.2.3).

13. See n 11.

14. *Lithuli v Omar* 1909 TS 192; *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957 at 965-6.

concerned here with the extent of the liability of the defendant if he fails to discharge that onus, for *ex hypothesi* supervening impossibility of performance will not obtain and hence such a consideration would fall outside the scope of this work.[15]

The standard of care required to be established by the defendant in order to escape liability differs from contract to contract. Voet,[16] it has been shown, is of the opinion that a lessee is not liable for *culpa levissima*.

Culpa lata, like all forms of negligence, is relative, and depends upon the circumstances surrounding the particular case.[17] In a gratuitous deposit the depositary is responsible only for *culpa lata in abstracto*,[18] and not *culpa levissima* or even *culpa levis*.[19] Where, however, it is not gratuitous, he will be liable for *culpa levis*,[20] and possibly even *culpa*

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15. It may, however, be a matter of some doubt, for example in the case of a lessee (see *D* 9.2.9; Grotius 3.8.4; 3.19.11; Voet 9.2.20; Van Leeuwen *Censura Forensis* 1.4.10.10; Vinnius *Select Quaest* 11 C 33; Sande *Dec Fris* 3.6.9; Pothier *Louage* § 199 and the other authorities referred to in *Daly v Chisholm & Co Ltd* 1916 CPD 562 at 566.)

16. See n 12 above. See also Voet 18.6.2, where he states that in contracts involving delivery which are entered into for the benefit of both parties such as lease, the lessee is liable only for *culpa levis in abstracto*.

17. *Shakazi v Carr* 1906 TS 303.

18. Van der Keessel *Theses Selectae* 531.

19. *D* 16.3.32; 50.17.23; Voet 16.3.7; Grotius *Inleiding* 3.7.9, which according to Voet means that he must exercise the same degree of care as he does in relation to his own affairs, where clearly, he is not liable; *Nederlandsche Advys Boek* 1.305; *Rama Narotam v Natha Dullabh* (1914) 35 NLR 227.

20. Voet 16.3.7; *Crocker v Doig & Murray* (1880) 1 NLR 111; *Nauman v Johnson* (1895) 2 OR 188; *Maberley v Searle* (1902) 19 SC 540; *Fruhauf v Morrison & Co* 1911 TPD 963; *Boshoff v McDonald* (1916) 37 NLR 414. (Though in Voet 19.2.30 it is implied that he may even be liable for *culpa levissima*.)

levissima where he has offered himself as a depositary[21] (though the generally held view is that *culpa levis* will be sufficient even here[22]). Where the deposit is made almost entirely for the benefit of the depositary, for example where he accepts custody in order to use it, he is treated in effect like a borrower.[23] And where he is *in mora*, he becomes liable even for accidental loss,[24] unless he can show that the goods would have perished in the hands of the depositor in any event.[25]

In *commodatum* the borrower is even liable for *culpa levissima*, since it is assumed that the loan is for the sole benefit of the borrower,[26] and also for accident if he uses it outside the area of use contemplated by the contract[27] or if he is *in mora*.[28] The position is different if it can be shown that the loan is for the benefit of both the lender and the borrower, for here the borrower is liable only for *culpa levis*.[29]

In *New Heriot Gold Mining Co Ltd v Union Government (Minister of South African Railways and Harbours)*[31] Innes CJ said that "a defence of *vis major* should not be upheld save on

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21. Grotius *Inleiding* 3.7.10.

22. *D* 16.3.1.35; *Marais v Anders* 1901 EDC 76.

23. Pothier *Oblig* § 142.

24. Grotius *Inleiding* 3.1.10.

25. *Mossen v Mostert* (1881) 1 SC 185.

26. *D* 13.6.5.2; 13.6.18; Grotius *Inleiding* 3.9.7; Voet 13.6.4.

27. *D* 13.6.5.2-9; Grotius *Inleiding* 3.9.7.

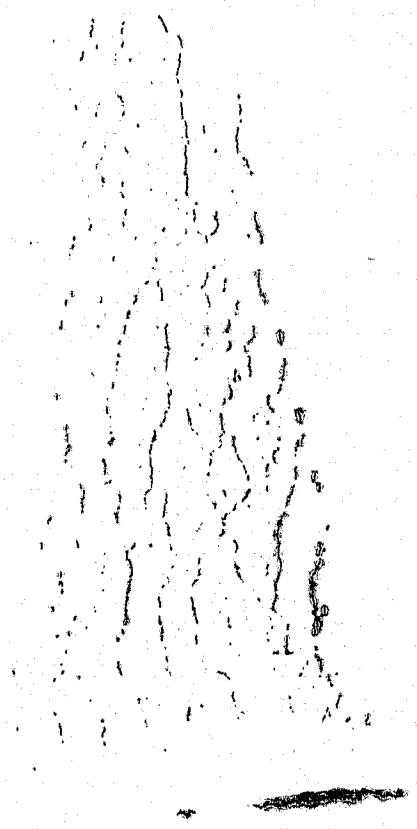
28. Grotius *Inleiding* 3.9.7, 8.

29. *D* 13.6.18.

30. Grotius *Inleiding* 3.8.4, and Schorer's note thereto n 332; Voet 13.7.5; Van der Keessel *Theses Selectae* 540.

31. 1916 AD 415 at 438. See also *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 at 263, where similar remarks were made in another connection.

the clearest evidence". It is submitted that this was not meant to suggest that a higher standard of proof is required in such cases, but that the ordinary civil standard of proving facts on a balance of probabilities obtains.[32]



32. *National Employers Mutual General Insurance Association v Gary* 1931 AD 187 at 199; Hoffmann & Zeffertt *The S A Law of Evidence* 3 ed at 411f.

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