COVID-19 AND SUPERVENING IMPOSSIBILITY

Much has been written in the past few weeks on the effect of unanticipated occurrences on contractual obligations to perform. Here follows a brief discussion of the principle of supervening impossibility and some of the important case law that are relevant in the context.

AN OVERVIEW

Supervening impossibility

If, after a contract has been entered into, circumstances arise which makes it physically or legally impossible for the debtor to render his performance, he is by law excused from doing so.

- The 1919 Appellate Division (as it was then called) decision in *Peters, Flamman and Company v Kokstad Municipality* is usually cited as the *locus classicus*. Peters Flamman & Co had entered into a twenty year contract with the municipality to light its street lamps. It managed this without trouble for more than ten years, at which point World War I broke out. The company was run and staffed by Germans, who were designated enemies of state and interned forthwith in prisoner-of-war camps. The company was handed over to and wound up by the state. The company was clearly unable to continue with its contractual obligations, so Kokstad Municipality sued for breach of contract. The Appeal Court determined that, owing the supervening circumstances, performance was objectively impossible (*casus fortuitus*), and that the contract should therefore be terminated. The company's failure to perform was excused, "as no-one in those circumstances would be able to perform the contract and the impossibility is not due to his or her [that is, the company's] fault."

What does "impossibility" really mean in this context?

Physical impossibility does not necessarily mean literal physical impossibility. The standard of the expectation of reasonable persons in business is applied here.

- The facts in *MV Snow Crystal Transnet Ltd t/a National Ports Authority v The MV Snow Crystal* demonstrate this. MV Snow Crystal, a company registered in the Cayman Islands, was booked to enter the Sturrock dry dock in Cape Town harbour on 1 December 2002 and to remain there until 14 December 2002. The booking was made in June of that year and the operators of the vessel had planned the schedule for the vessel around this period. The Snow Crystal was, however, unable to enter the dock on 1 December because it was occupied by another vessel whose owner refused to move her to the smaller Robinson dry dock which was big enough to accommodate that vessel but too small to accommodate the Snow Crystal. Although the dock master had the power under the harbour regulations to give the owner of the smaller vessel 24 hours' notice to vacate the harbour he declined to do so. The owner of the Snow Crystal sued Transnet in the Cape High Court for damages for breach of contract. Transnet maintained that it was excused from liability on the basis of impossibility of performance. Subsequently the Supreme Court of Appeal Court rejected the defence holding that it was not established that performance was rendered impossible.

An obligation becomes *legally impossible* to execute where the law ceases to recognize or make provision for the performance in question or where the promise is not to do an act and the law is changed as to make it obligatory to do that act.

- The illustrative case here is *Gordon v Pietermaritzburg-Msunduzi Transitional Local Council and Another (2001).* The facts were as follows: Gordon had entered into a contract with the now defunct Department of Development Aid to carry out valuations of property in Edendale Township for the purposes of compiling a

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valuation roll. The power of the Department to enter into the contract, by appointing Gordon as a valuator, arose from the Regulations Governing the Administration and Control of Designated Areas. The regulations were intended to promote and reinforce the previous government's policy of so-called separate development, to the extent, for example, that Edendale was designated as a 'black area' to be administered by a township manager. The regulations also set forth the criteria according to which any future re-valuation of property in black areas such as Edendale had to take place. Based on a quotation submitted by Gordon, the contract had two parts, namely (a) expressing Gordon's obligation to compile a valuation roll for the township, and (b) expressing Gordon's obligation to undertake interim valuations 'for the period up to the next revaluation'. Thus, Gordon had secured a very favourable and open-ended contract, because, while the regulations endured and until such time as the administration called for a re-valuation of property in Edendale, his obligation to undertake interim valuations (part (b) of the contract) would simply be perpetuated. With the advent of South Africa's new constitutional dispensation, momentous changes were brought about to local government. The regulations were repealed and Edendale was incorporated into the Pietermaritzburg-Msunduzi Transitional Local Council. The effect of certain new legislation was also that no re-valuation of Edendale properties could ever take place in terms of the criteria set forth in the now defunct regulations. In light of these changes the Local Council adopted the attitude that no contract existed between it and Gordon and that his services were no longer required. Gordon thereupon instituted action for damages, based on repudiation of the contract.

- The Court held that when the parties concluded the contract, they contemplated that the process of re-valuation, if it were ever to take place, would be in the context of the regulations only. If, objectively judged, that event could never occur, the contract would terminate on the basis of impossibility of performance from the date when that objective judgment could be made. *In casu* that date was, at the earliest, the date of repeal of the regulations and, at the latest, the date of the establishment of the Local Council. The contract was impossible of performance, but was not a case of self-created impossibility of performance. It was true that the State was bound by ordinary commercial contracts concluded by it and that, if it used a legislative stratagem to avoid its obligations in terms of a contract, this would constitute self-created impossibility. However, the circumstances here were entirely different. The repeal of the regulations took place in the context of an entirely new and equitable constitutional dispensation which included local government. The old order was entirely discarded and that included all the legislation which underpinned it. It could hardly be argued that the repeal of the regulations was a legislative stratagem or an instance of self-created impossibility, to avoid the Local Council's obligations under the contract.

Assumption of risk of impossibility means that the debtor expressly or tacitly guaranteed performance or assumed the risk that performance might become impossible.

- A debtor will in these circumstances remain liable, as explained in *Hersman v Shapiro & Co (1926)*. In this case the seller contracted to deliver a certain quantity of sorghum to the buyer and, at the time performance was required, the seller argued that his obligation was discharged due to supervening impossibility because there was no sorghum available in the immediate area. The Court held that this did not discharge the seller's obligation. The Court asked whether the seller had looked outside of the immediate area for sorghum to supply to the buyer and, as he had not done so, it was not an absolute objective impossibility. Rather, it was simply more difficult or onerous to perform which meant, under the law of supervening impossibility, that the seller was not discharged.

Partial impossibility does not relieve a debtor of his obligations, for example, where a portion of land that was sold by a seller to a purchaser, is expropriated by the government for the purpose of constructing a road. If the creditor cannot reasonably be expected to accept only partial performance, he is entitled to terminate the contract, but he is not obliged to do so.

- In *Bob's Shoe Centre v Heneways Freight Services (Pty)Ltd (1995)*, Bob's Shoe Centre imported a

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consignment of merchandise from Portugal. The shoes were collected from the Portuguese factory where they had been manufactured by a Portuguese forwarding agent and placed on board an aircraft to travel to Johannesburg. At the (then) Jan Smuts Airport, the goods were placed in a bonded warehouse to await customs clearance. It was common cause that Heneways' clearing agent had contracted with Bob's Shoe Centre to obtain this clearance and to transport the shoes from the warehouse to the retail premises in Johannesburg. Heneways obtained customs clearance for the goods, but when its employees arrived at the warehouse, the shoes had been stolen. As a result of the theft, Heneways argued that its remaining obligations were discharged due to supervening impossibility. Bob's Shoe Centre argued that Heneways' responsibilities extended right back to the collection of the shoes from the Portuguese factory, but Heneways disputed this. Heneways then contended that the performance obligation was divisible and claimed payment for services rendered up to that point; Bob's Shoe Centre maintained that performance was indivisible and that supervening impossibility had discharged its obligation to pay Heneways at all under the contract. The Court upheld Heneways' claim, noting that the obligation to obtain customs clearance and the obligation to transport the goods were separate and distinct and could be severed. It followed that Bob's Shoe Centre was not entitled to reject the performance Heneways had rendered in obtaining customs clearance and had to pay for it, notwithstanding that the rest of the contract had become impossible of performance.

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