SUPERVENING IMPOSSIBILITY AND THE INTERPRETATION AND USE OF *FORCE MAJEURE* CLAUSES IN CONTRACTS DURING A PANDEMIC

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by

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Dedicated to my mother, who showed me that through perseverance anything is possible.

“little by little, a little becomes a lot”

Abstract

This dissertation aims to assess and deal with the common law doctrine of supervening impossibility and the use of *force majeure* clauses in contracts, specifically during a pandemic such as the COVID-19 pandemic. Since the South African contract law does not consider *force majeure, per se,* it is necessary to fall back on the common law which regulates performance of a contract. When parties enter into a contract which does not make provisions for unforeseeable events or circumstances, they are bound by the common law doctrine of supervening impossibility. The reason for this is that the contracting parties have some protection or recourse in times of crises.

It is, however, important to keep in mind the intention of the parties and thus consider a more flexible clause such as a *force majeure* clause which is specific to the parties' contract and makes provisions that suit the parties needs and can avoid the termination of the contract in the event of an unforeseeable event beyond the parties' control.

This dissertation thus investigates performance of contracts in South Africa and the effectiveness of the South African common law.

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CHAPTER 1: Introduction

2020 was a year that changed the perspective of contractual relationships and performance of contracts globally. The sudden COVID-19 pandemic, in March 2020, caused major business disruptions, specifically on contractual relationships which resulted in, trade disruptions, economic losses and business closures. As a result, thereof, the COVID-19 pandemic saw many contracting parties relying on *force majeure* as a means of excusing themselves from their contractual duties and obligations. The COVID-19 pandemic highlighted the importance of *force majeure* clauses in contracts.

The COVID-19 pandemic emerged as a widespread health crisis due to the rapid spread of a virus[1]. In an effort to mitigate the spread of the disease, the World Health Organisation (the "WHO") collaborated with governments across the world and implemented a range of measures, including national lockdowns[2], curfews, compulsory social distancing and vaccination drives. As a result of these abrupt and sudden lockdowns, beyond the parties' control, businesses were restricted and unable to perform in terms of their contractual duties and in turn suffered.

The COVID-19 pandemic highlighted the dynamic nature of contract practices, demonstrating that the fulfilment of the parties' obligations can be affected by the sudden unforeseeable events or circumstances which are beyond the parties' control. These events and/or circumstances are commonly described as by the contractual term of *force majeure*.

[1] The SARS-CoV-2 virus.
[2] Lockdowns are imposed by government authorities in an attempt to minimise and contain the spread of a disease, such as the COVID-19 virus, by restricting people to stay in their homes and minimise contact with other people.

Force majeure is a contractual term that describes an event or circumstance which renders contractual performance impossible. The expression originates from Article 1218 of the French Civil code[3] and finds its application during acts of God, human actions, armed conflict, where government has introduced new legislation, and/or through government action which renders performance impossible.[4] It provides that an unforeseeable event or circumstance, which is beyond the control of the parties', is sufficient to justify the termination and/or suspension of the parties' contractual obligations. It allows both contracting parties to be freed from any liability and/or any obligations after the conclusion of a contract.[5] In other words, the unforeseeable event or circumstance renders the contractual performance impossible and interrupts the expected course of events after the parties have agreed to and concluded a contract.[6]

Authors, such as Pothier and Huber, have many different opinions on whether such impossibility should be measured objectively or subjectively.[7] However, what is evident with all authors opinions is that the impossibility of performance is a definite requirement for *force majeure* and can either be temporary or permanent in nature.

The pandemic has proven that it is of utmost importance for contracting parties to prepare for any unforeseeable event, or a change in circumstances, which is beyond the parties' control, in an effort to avoid the consequences of non-compliance with one's contractual obligations and falling into breach of contract. The inclusion of the *force majeure* clause in contracts allows parties to regulate the common law

[3] Art 1218 of the French Civil Code; The French Civil Code (Translated Cachard, H) (1930).
[4] Nichols B *The French Law of Contract* (1992), 2nd ed 196.
[5] Booley A & Potberg C "Can COVID-19 be classified as *Force Majeure* in South Africa" 2020 *Without Prejudice* 21.
[6] as above.
[7] Pothier M & Evans WD *A Treatise on the law of obligations or contracts* (1806) 28 - 40; Huber U *Zur Haftung des Verkäufers wegen positiver Vertragsverletzung* (1977) *JSTOR* 293; Ramsden WA "Some Historical Aspects of Supervening impossibility of Performance of contract" 1975 *THRHR* 370.

consequences and effects where the reason for non-performance and/or the breach of contract is caused by a change in circumstances.

This dissertation will discuss supervening impossibility and the interpretation of *force majeure clauses* in contracts during a pandemic. While many contracting parties are aware of the existence of the contractual clause of *force majeure* they often neglect to include it into their contracts due to a mere oversight and/or lack of perceived significance and benefits thereof. Yet, parties may still try raise *force majeure* as a defence when the need arises. Although the South African common law doctrine of supervening impossibility shares similarities with the French concept of *force majeure*, which is not recognised as such in South Africa, parties frequently exercise their contractual autonomy by including *force majeure* clauses in their contracts, which are recognised and upheld by the South African law.

This dissertation will also compare and elaborate on the various other principles, specifically the English law doctrine of frustration, the doctrine of changed circumstances also known as the doctrine of hardship and South African common law principle of supervening impossibility. The aim of this dissertation is to assess the use of and the interpretation of *force majeure* clauses in contracts specifically during a pandemic, such as the COVID-19 pandemic.

CHAPTER 2: The origin and purpose of the principle of *force majeure* and a historical overview of the principle of supervening impossibility

2.1 Introduction

A contract is entered into by two or more persons, with the intention of creating a legally binding obligation.[8] Parties have been concluding contracts from time immemorial and as such, there has been tension between parties as to what is reasonable and fair and whether supervening events obstruct parties from fulfilling their contractual obligations.[9]

The fundamental concepts when parties enter into agreements are that the parties enter into it freely, *bona fide*, with privity[10] and lastly that the sanctity of contract be honoured.[11] Sanctity of contract, also referred to as *pacta sunt servanda*, is the concept that when parties enter into an agreement they do so freely, seriously and with the intention to honour their obligations. Christie and Bradfield in Chrisite's Law of Contract in South Africa[12] correctly state that it is a necessary general principle which is consistent with the constitutional values of dignity and autonomy. Hutchison *et al* further confirms that where parties enter into agreements freely and voluntarily, that contract should be held sacred and enforceable by the courts of justice.[13] Contracts therefore, should not be easily terminated and parties should be held accountable and bound by their word once they have entered into an agreement. Only

[8] Hutchison D et al. *The Law of Contract in South Africa* (2012) 2nd ed 5.
[9] van Dunné J "The Change of the Guards. Force Majeure and Frustration in Construction Contracts: The Foreseeability requirement replaced by Normative Risk Allocation" (2002) *International Construction Law Review* 165.
[10] Privity of contract is the idea that the contract creates rights and duties only for the parties to the agreement, and not to any third party.
[11] Hutchison D et al. (2012) 2nd ed 21.
[12] Christie RH & Bradfield GB *Christie's the Law of Contract in South Africa* (2016) 7th ed 12.
[13] Christie RH & Bradfield GB (2016) 7th ed 23.

in exceptional circumstances can/should parties be excused from their obligations and liabilities as the principle of *pacta sunt servanda* exists and is a cornerstone of our contract law. Thus, it is of paramount importance to preserve contracts and its enforceability when entering into any agreement at any time.[14]

The specific exceptional circumstances which permit parties to be excused from performance are *force majeure* events. *Force majeure* is a creature of contract which entitles a party to suspend or terminate the contract on the occurrence of an event which is beyond the control of the parties and which prevents or delays the performance of the contract.[15] A party is relieved from his/her contractual obligations when such an unforeseeable event beyond their control takes place and the contract itself contains a *force majeure* clause.[16] However, in circumstances where the parties omitted to include a *force majeure* clause in their contract the common law doctrine of supervening impossibility will apply.[17] To have a better understanding of the contractual principle of *force majeure* this chapter will look at its historical context.

2.2 The origin of *Force Majeure*

The principle of *force majeure* finds its origins in French and Roman law[18] and refers to acts of God or unforeseeable events which renders performance impossible.[19] When raised, it serves as a form of relief for contracting parties, releasing them from

[14] Christie RH & Bradfield GB (2016) 7th ed 122.
[15] McKendrick E *Contract Law: Text, Cases and Materials* (2010) 399.
[16] McKendrick E *Force Majeure and Frustration of Contract* (1991) 6. One is relieved from these certain circumstances under *force majeure* only where the contract contains such a *force majeure* clause.
[17] Specifically in South Africa.
[18] Lombardi R "Force majeure in European Union law" 1997 *International Trade & Business Law* 82 - 87.
[19] Nichols B (1992) 2nd ed 196.

performing their contractual obligations. As an exception to the foundational contract law principle of *pacta sunt servanda,*[20] *force majeure* provides an escape from the parties' contractual obligations and also shields parties from the consequences of committing a breach of contract only if the non-performance was caused by a change in circumstances which was beyond the control of the parties.

The COVID-19 pandemic proved that the consequences of an unforeseeable event which is beyond the parties' control may be sudden and severe, prompting parties to include *force majeure* clauses in their contracts. The *force majeure* clause is advantageous in that it is a creature of contract and the parties are free to determine what the consequences of such an unforeseeable event or occurrence would be in their specific agreement. This enables them to prepare, calculate and asses for both unforeseeable and foreseeable risks, depending on their specific contract. Thus, to enhance and maximise the contracting parties' protection and ensure readiness for unforeseeable events or circumstances it is vital that the contracting parties draft the *force majeure* clause themselves and specifically tailor the clause to their specific contract.

Force majeure is a concept rooted in civil law and shares many similarities with the common law doctrines of supervening impossibility, frustration and hardship.[21] While its origins stems from Roman law, it has been adopted by civil law countries and is still present in the French Civil Code today.[22] Article 1148 of the Code Napoléon provides that "there is no occasion for any damages where a debtor was prevented

[20] *Pacta sunt servanda* refers to the sanctity of contracts. It is an accepted principle in contract law that all legal contracts which are entered into freely and fairly should be upheld and enforced. It is regarded as one of the foundational principles of the South African law of contract. Christie RH & Bradfield GB (2016) 7th ed 12; Hutchison *et al*. (2012) 2nd ed 12–13, 21.
[21] Azfar F "The Force Majeure Excuse" 2012 *Arab Law Quarterly* 251.
[22] Art 1148 of the French Civil Code.

from transferring or from doing that to which he was bound, or did what was forbidden to him, by reason of *force majeure* or of a *fortuitous* event.[23] The term "*force majeure"* translates from French as 'superior strength' offering protection to debtors who are unable to fulfil their contractual obligations due to an unforeseeable event which is referred to as an act of God.[24] In other words, if the contracting party cannot fulfil his/her contractual obligations due to an unforeseeable event or circumstance, he/she should not be liable for damages as the event or occurrence was beyond his/her control.

It is vital to understand that, in South Africa, *force majeure* is used as a contractual clause which frees both contracting parties from any liability and/or any obligations when an extraordinary event or circumstance beyond the parties' control occurs.

While it is becoming common practice to include *force majeure* clauses in contracts in South Africa, it is not formally recognised as part of the South African legal system. South Africa has a mixed legal system with its roots in Roman, Roman Dutch and English law. Therefore, a closer examination of the development of the *force majeure* principle from Roman law is required.

2.2.1 Overview of the principle of *force majeure* in Roman Law

Roman law never developed a fully generalised theory of contract where the meeting of certain general requirements was seen as an enforceable contract.[25] It rather recognised four distinct categories of contracts, namely *emptio vendito* (sale*), locatio*

[23] Art 1148 of the French Civil Code; The French Civil Code (Translated Cachard, H) (1930). *Cas fortuit* and *force majeure* are terms used interchangeably. There is no distinction between the two.
[24] McKendrick E (1991) 6.
[25] Macmillan C *Mistakes in Contract Law* (2010) 14. Hutchison *et al*. (2012) 2nd ed 11.

conductio (lease and hire), *societas* (partnership) and *mandatum* (mandate).[26] A general feature of all roman contracts was the meeting of the minds of the parties and that the validity of the contract relied on the parties acting in good faith.[27] The Roman contracts were classified as being either *stricti iuris* or *bonae fidei*.[28] The earlier unilateral contracts were *stricti iuris* as they were characterised by strict and rigid formalism.[29] The later bilateral contracts which included all the consensual contracts were *bonae fidei*, in other words disputes arising out of them had to be settled by the judge in accordance with the flexible principle of good faith.[30] Throughout the various contracts in Roman law it is clear that the sanctity of contract and the principle of good faith have a long history and deep roots in Roman law. Essentially, when parties entered into an agreement, they made a promise to the other party that they would fulfil their obligations.[31] Such a promise was not only a legal requirement but also a matter of personal honour and social responsibility. Through keeping this promise and fulfilling their promised obligations the contracting party would be recognised as an "honourable man" in society, who maintains the fundamental social infrastructure.[32] Yet, where there was a change in circumstances, caused by an unforeseeable event or circumstance beyond either parties' control, and parties were no longer able to fulfil and honour their obligations as promised the honourability was questionable.

The general rule in Roman law was *impossibilium nulla obligatio est*, which translates to "there is no obligation for the impossible".[33] Thomas explains that the test for

[26] Frier BW *A Casebook on the Roman Law of Contracts - Chapter V: Other Consensual Contracts: Problems in Execution* (2021) 1; Macmillan C (2010), 14.
[27] Frier BW (2021) 2.
[28] Hutchison *et al*. (2012) 2nd ed 12.
[29] Hutchison *et al*. (2012) 2nd ed 12.
[30] Hutchison *et al*. (2012) 2nd ed 12.
[31] Promises can be referred to contracts. Where a party promised to do something he/she agreed to doing this.
[32] Schultz F *Principles of Roman Law* (1936) 231 – 232.
[33] Thomas PJ *Introduction to Roman Law* (1986) 78.

impossibility of performance is objective. However, where performance became impossible after the conclusion of the contract, i.e. supervening impossibility, merely applying the general rule of *impossibilium nulla obligatio est* would lead to unjust consequences, as the reasons for the impossibility may be due to various reasons.[34] The reasons include, (i) that impossibility was intentionally caused by the debtor; (ii) the impossibility arose as a result of the debtor's negligence; (iii) the impossibility of performance became impossible through *causus fortuitus*/accident; or (iv) the impossibility of performance was a result of *vis maior*/an act of God.[35] Thus, because of the numerous reasons for the impossibility Roman law developed exceptions to the general rule. Such exceptions include where an overwhelming force of nature or human intervention influenced the obligations and liabilities of an agreement.[36] The Roman law sources refer to such overwhelming forces and events as *vis maior* and *casus fortuitus*.[37] Although these principles are similar to and together encompass the essence of *force majeure,* they should not be used synonymously with the contractual clause of *force majeure* as they differ from one another.

Vis maior is described as "a superior force which is beyond resistance or control" and refers to events caused by nature, such as earthquakes, storms and fires.[38] A practical example hereof illustrates the principle clearly. If a sea merchant had an agreement to transport goods by sea on his ship and the ship sunk due to a storm, the sea merchant would not be liable for the loss of the goods due to the force of nature which was beyond his control.

[34] Thomas PJ *Introduction to Roman Law* (1986) 79.
[35] Thomas PJ *Introduction to Roman Law* (1986) 79.
[36] D 13. 6. 5. 4.18; D 45.1.83.5; D 46.3.98.8.
[37] D 18. 1. 35. 4; D 21.2.31.
[38] Cooper WE *The South African Law of Landlord and Tenant* (1973) 2nd ed 181.

Casus fortuitus on the other hand describes an accidental occurrence caused by persons, such as theft, strikes and arson. It is caused by actions not attributable to natural events or acts of God. A practical example hereof is if a crops farmer entered into an agreement to deliver a certain amount of his crops to a buyer but due to theft all crops were stolen. The crops farmer would not be in breach of contract as the occurrence was not foreseeable, it was an accidental occurrence.

Both the principle of *vis maior* and the principle of *casus fortuitus* cover events and or occurrences which are unforeseeable and beyond the control of any of the contracting parties. In South African law today, *casus fortuitus* has been described as "a species of *vis maior* which imports something exceptional, extraordinary or unforeseen and which human foresight cannot be expected to anticipate, or if it can be foreseen it cannot be avoided by the exercise of reasonable care or caution".[39] Christie further explains that the limits of these events, which include any happening, whether due to natural causes or human agency, that is unforeseeable with reasonable foresight and unavoidable with reasonable care, have not been authoritatively defined but extend to legislative changes introduced after the conclusion of a contract which renders performance impossible.[40] Other South African legal authors such as van der Merwe, van Huyssteen, Reinecke and Lubbe describe these events as "events arising from nature or human causation, which cannot be resisted, which are beyond the control of a normal person, and which is unforeseen or unforeseeable by the relevant party".[41] Death, natural disasters, sickness and disease, war, strike action or intervention by authorities, as discussed above are examples thereof.[42] Hutchison gives a wider and

[39] Du Bois F *Wille's Principles of South African Law* (2007) 9th ed 850.
[40] Christie R.H & Bradfield G.B (2016) 7th ed 549.
[41] Van der Merwe et al. *Kontraktereg: Algemene Beginsels* (2007) 3de uitgawe 575. Van der Merwe et al. *Contract General Principles* (2012) 4th ed 315.
[42] Van der Merwe et al. (2012) 4th ed 315.

all-encompassing definition of these concepts namely that they include all unavoidable acts of nature and by humans.[43]

2.2.2 Overview of the principle of *force majeure* in general

The general rule, in almost all legal systems today, is that non-performance of any contractual obligation constitutes a breach of contract. Where a party breaches the terms of an agreement and does not fulfil his/her obligations certain consequences will arise and the disadvantaged party may use the remedies available to him/her to rectify said breach of the other party.[44] This is in accordance with the principle of *pacta sunt servanda*. However, when such contractual principles are strictly enforced the contractual playing fields may become very detrimental and unfair, as the reason for the breach and non-performance is due to an extraordinary event or circumstance which is beyond the control of the parties.[45] Therefore, the contractual clause of *force majeure* is vital as it focuses on these specific extraordinary events or circumstances which allow parties to be excused from a breach of contract without putting fault on either party.

Force majeure clauses are used to protect each party from extraordinary events/circumstances which are beyond the control of the parties as well as "to relax the obligation and set a strict liability imposed on a party in terms of a contract in the event of certain circumstances, which prevent or have an effect on a parties' ability to perform in terms thereof".[46]

[43] Hutchison D et al. (2012) 2nd ed 384.
[44] Van der Merwe et al. (2012) 4th ed 317; Treitel GH (1994) 419.
[45] Christie R.H & Bradfield G.B (2016) 7th ed 547.
[46] Lombardi R 1997 *International Trade & Business Law* 84.

The contractual clause of *force majeure* can be described as a hold and/or an escape from his/her contractual liability when an extraordinary event/circumstance which is beyond the control of the parties control takes place. When inserted into contracts it enables the contracting parties to include a measure of certainty into their contractual dealings and more specifically allows parties to be able to plan for the future and enjoy better freedom of actions, especially in the case of unforeseeable events or circumstances."[47] Theroux and Grosse reiterate that the purpose and intention of a *force majeure* clause is to allocate risk for future events that, should they occur, parties are protected.[48]

Force majeure clauses are a form of contractual safeguard against supervening and unexpected events and the objective of a *force majeure* clause is to allow parties to bring the contract to an end or excuse performance of the contract entirely or partially, or suspend that performance, on the occurrence of specified circumstances beyond their control.[49] Fairgrieve and Langlois explain that a *force majeure* clause typically consists of five key elements, namely:[50]

1. The definition of the clause. While the wording may differ from contract to contract the main requirements is that an external, unforeseeable and unavoidable supervening event occurs. A *force majeure* clause must show three characteristics, namely that (a) the impediment is beyond the parties' reasonable control; (b) the event or circumstance could not have reasonably been foreseen at the time of the conclusion of the contract; and (c) the effects

[47] McKendrick E (1991) 11.
[48] Theroux MP & Grosse AD "Force majeure in Canadian Law" 2011 *Alta Law Review* 398.
[49] Fairgrieve D & Langlois N "Frustration and Hardship in Commercial Contracts: A comparative Law Perspective" 2020 *The Jersey & Guernsey Law Review* 143.
[50] Fairgrieve D & Langlois N "Frustration and Hardship in Commercial Contracts: A comparative Law Perspective" 2020 *The Jersey & Guernsey Law Review* 143-146.

of the event or circumstance could not have been avoided by the affected contracting parties.

2. The triggering event which activates the clause into operation. Specifying the possible events which could arise (such as war, riots, natural disasters, acts of God, epidemics such as COVID-19 etc.) allows parties to prepare for such events. Parties tend to draft these clauses and events with a "catch-all" phrase to broaden the ambit of the *force majeure* clause. Parties should however, be cautious when using the "catch-all" phrases as they are not always successful as was highlighted and illustrated in the case of *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC*[51].
3. The impact of the triggering event on performance of the contracting parties' obligations. The triggering event renders performance impossible. The clause may be drafted in such a way that merely requires performance to become "impracticable", "delayed" or "hindered".
4. Notification of impossibility to perform. The affected contracting party must inform the other party of the impact of the triggering event and inability to perform.
5. The effect of the enforcement of the *force majeure* clause. Invoking the clause may either terminate or temporarily pause the contractual obligations of the parties to the agreement or where specified allow for the renegotiation of the contractual obligations.

As the *force majeure* clause is a creature of contract it is flexible and can be drafted to the liking of the contracting parties. In the absence of such a clause the contracting parties will rely on the common law doctrines of supervening impossibility. Although it

[51] *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm).

has been argued in French Courts and by French commentators whether a pandemic indeed qualifies as a *force majeure*, it is immaterial as parties have the right to and are free to include any events they deem fit in their clause when drafting the *force majeure* clause.[52] When enforced, a *force majeure* event can either temporarily or permanently end the contracting parties' obligations, however, a *force majeure* clause makes provisions for the renegotiation of a contract where possible. This aligns with the French theory of *imprevision* which is enshrined in the French Civil Code, specifically in Article 1195 CC. Article 1195 CC encourages the renegotiation of contracts to resolve disputes independently to avoid judicial interference.[53]

Force majeure clauses are powerful clauses which enable parties to allocate risk for future events, to be protected.[54] Unlike the English doctrine of frustration, parties have the choice to renegotiate the contract and or to cancel the contractual obligations as they deem fit and necessary.

2.3 Overview of the doctrine of supervening impossibility

Supervening impossibility is the South African common law principle which excuses a party from performing their contractual obligations when an unforeseeable event or circumstance occurs, beyond the control of the contracting parties. It is often confused and/or mistaken with the concept of *force majeure*, although supervening impossibility is not as flexible as the contractual clause of *force majeure.*[55]

[52] Fairgrieve D & Langlois N "Frustration and Hardship in Commercial Contracts: A comparative Law Perspective" 2020 *The Jersey & Guernsey Law Review* 151.
[53] Pedemon C "The paradoxes of the theory of imprevision in the new French Law of Contract: a judicial deterrent?" 2017 *Amicus Curiae Issue 112,* 13-14.
[54] Theroux MP & Grosse AD "Force majeure in Canadian Law" 2011 *Alta Law Review* 398.
[55] McKendrick E & Parker M "Drafting Force Majeure Clauses: Some Practical Considerations" 2000 *International Company and Commercial Law Review* 132.

In the South African contract law, the common law principle of supervening impossibility is used and relied upon, when contracting parties fail to include a *force majeure* clause in their contract and/or where there is a change in circumstances. While supervening impossibility overlaps with and has links to the principle of *force majeure*, it also possesses distinct differences which cannot be ignored and/or overlooked.

In order for the doctrine of supervening impossibility to be applied the following three conditions should be met:

1. The event or circumstance must be unforeseeable;
2. The performance of the contractual obligation must be objectively impossible; and
3. The impossibility must be supervening.

Thus, when an unforeseeable event or circumstance occurs, the contractual performance of the contracting parties' must firstly be objectively impossible. In other words, it must be substantially impossible, and not merely partially impossible or due to personal circumstances. [56] Therefore, where there is an obstacle and/or a difficulty in performing one's contractual obligations one cannot simply enforce the principle of supervening impossibility to avoid one's obligations. Medicus summarised it well and said "nullity doesn't apply if the disturbed transaction remains performable with reasonable changes".[57] Thus it is clear that mere difficulty or personal incapability to perform is insufficient. [58]

[56] Theroux MP & Grosse AD "Force majeure in Canadian Law" 2011 *Alta Law Review* 398.
[57] Ramsden WA "Some Historical Aspects of Supervening impossibility of Performance of contract" 1975 *THRHR* 372.
[58] Ramsden WA 1975 *THRHR* 372.

In the absence of a *force majeure* clause and when the above three conditions are met, the doctrine of supervening impossibility serves as a valid ground to excuse a party from performing and fulfilling his/her contractual obligations, without falling into breach of contract. Supervening impossibility is somewhat of a safety net for contracting parties who failed to include a contractual clause, such as a *force majeure* clause, into their agreements for unforeseeable events or circumstances.

2.4 Conclusion

It is clear that the contractual clause of *force majeure* is a creature of contract. Its flexibility and ability to allocate risk for future events should they occur, and provide parties with protection is far more favourable than that of the common law doctrine of supervening impossibility.

While the doctrine of supervening impossibility shares similarities with the principle of *force majeure*, it lacks the flexibility, certainty, and predictability offered by a *force majeure* clause. It is clear that a *force majeure* clause provides greater flexibility as contracting parties can specifically agree on events that constitute "*force majeure"* events, allowing for a broader range of circumstances to excuse non-performance. In contrast, the doctrine of supervening impossibility is more rigid and may only be applied if it meets the specific conditions outlined above. The inclusion of a *force majeure* clause in a contract allows parties to anticipate and allocate risks associated with unforeseen events, providing greater certainty and predictability in terms of contractual performance. On the other hand, the doctrine of supervening impossibility

relies on the general principles of South African common law, which may be subject to interpretation and may lack the same level of certainty.

Thus, while the doctrine of supervening impossibility and the principle of *force majeure* overlap in certain aspects, the presence of a *force majeure* clause offers greater flexibility, certainty, and predictability in addressing unforeseen events in contractual relationships.

CHAPTER 3 - Other related legal doctrines and the international law guidelines relating to performance of contracts

3.1 Introduction

In most jurisdictions around the world, it is common practice that if any party to a contractual agreement fails to fulfil his/her contractual obligations he/she will fall into breach of contract. However, during the COVID-19 pandemic many parties were unable to fulfil their contractual obligations due to the unforeseeable pandemic and government-imposed regulations which prevented the parties from completing their duties as they had agreed upon. As such parties raised *force majeure* as their defence, to escape the contractual consequences of breach of contract.[59] Although *force majeure* is a well-known concept; parties mistakenly believe that this contractual clause automatically applies to all contracts, in the event of an unforeseeable event or occurrence, which is beyond the parties' control.

As was discussed in chapter 2 above, the contractual clause of *force majeure* operates to release both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties occurs and prevents one or both of them form fulfilling their contractual obligations.[60]

Due to the limitations of the common law principle of supervening impossibility, and *force majeure* clauses being a creature of contract it is of utmost importance to look at other doctrines that can assist in closing the "gap" and developing the common law to provide for a wider more useful application. This chapter will delve into and elaborate

[59] Hutchison D et al. (2012) 2nd ed 23; Burnett HG & Bret LA *Arbitration of International Mining Disputes* (2017) 243.
[60] Burnett HG & Bret LA (2017) 243.

on other legal doctrines which are closely related to *force majeure*, specifically the doctrine of frustration and the doctrine of hardship. It will further analyse when and how each doctrine is applicable.

3.2 The English law doctrine of Frustration

The English common law does not recognise *force majeure*, but rather adopts frustration of contract which is similar in nature and serves a similar purpose. The doctrine of frustration originates from English law and was first introduced and recognised by the court in 1863 with the case of *Taylor v Caldwell.*[61] Here the court acknowledged for the first time that a supervening event or circumstance, beyond the control of the parties, may terminate a contract.[62] While the oft-cited case of *Taylor v Caldwell*[63] was decided under the doctrine of impossibility scholars and commentators' debate that it created a new doctrine, namely the doctrine of frustration.[64]

The doctrine is used to cover cases of impossibility of performance, as well as instances where the reason for performance has fallen away,[65] i.e. where the aim of the agreement is regarded as frustrated. The foundational elements of the contract play the central role, and since the aim or purpose of the contract no longer exists due to reasons unforeseen and beyond the parties' control, the contract will be seen as

[61] *Taylor v Caldwell* 1863 3 B & S 826 ET 309.
[62] The Plaintiff hired a hall from the Defendant to hold a music concert. However, a few days prior to the concert an unforeseeable event occurred and the rented hall burnt down. As a result of this event the Plaintiff was unable to hold his music concert in the rented hall and the Defendant's performance in terms of the contract was impossible.
[63] *Taylor v Caldwell* 1863 3 B & S 826 ET 309.
[64] Liu F "The Doctrine of Frustration: An overview of English Law" 1988 *Journal Maritime Law & Commerce* 264.
[65] Perillo JM "Force majeure and hardship under the UNIDROIT principles of international commercial contracts" 1997 *Tulane Journal of International and Comparative Law* 7.

discharged and will automatically end.[66] There is no room or possibility for the renegotiation of the contract with the doctrine of frustration. Once the contract is terminated both parties are relieved from their obligations and liabilities towards one another.[67] In essence the, the doctrine of frustration stipulates that each party is obliged to perform on time and in terms of its obligations.[68]

The doctrine of frustration came from the principle of "absolute contract".[69] Under this principle the contracting party was *absolutely* bound to perform any obligation which he/she had undertaken; notwithstanding the fact that performance had subsequently become extremely burdensome or even impossible due to certain intervening events.[70] Scholars say that the doctrine derives from the case of *Paradine v Jane*[71] where the court held that:

> *"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."*

In essence the court reiterates that a party was obligated to perform in terms of the contract he/she entered into, immaterial of the circumstances the party may find itself in.

It is also important to note that where the performance or fulfilment of the parties' obligations becomes redundant or senseless, because of an event or circumstance

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[66] Firoozmand MR "Changed circumstances and the immutability of contracts: A comparative analysis of force majeure and related doctrines" 2007 *Business Law International* 178.
[67] Coetzee J "The case for economic hardship in South Africa: Lessons to be learnt from international practice and economic theory" 2011 *Journal for Juridical Science* 9
[68] Beale H & Twigg-Flesner C "Covid-19 and frustration in English law" 2020 Sergio Garcia Long, Derecho de los Desastres: Covid-19 2.
[69] Liu F "The Doctrine of Frustration: An overview of English Law" 1988 *Journal Maritime Law & Commerce* 262.
[70] Liu F "The Doctrine of Frustration: An overview of English Law" 1988 *Journal Maritime Law & Commerce* 263; *Taylor v Caldwell* 1863 3 B & S 826 ET 309.
[71] *Paradine v Jane* 082 Eng. Rep. 897 K.B. 1647.

beyond their control, yet still remains possible, the doctrine of frustration is not applicable and cannot be relied upon.[72] Thus, it only applies where the reason for performance has fallen away.

English law recognises three (3) different types of frustrating events, namely (i) objective impossibility – which includes destruction of the object of the contract, death of a party, or physical impossibility; (ii) legal impossibility – which is also referred to as supervening illegality; and (iii) frustration of purpose – which covers instances where the purpose of the contract was shared by both parties.[73]

The COVID-19 pandemic can be seen and considered as objective impossibility as it was outside of the control of both parties and the government-imposed regulations made it physically impossible for parties to perform. As such, it is clear that during the COVID-19 pandemic parties could have raised frustration of contract and thus terminate the contract and be discharged of any liability in terms thereof, when looking at this doctrine. It is, however, important to note that the doctrine of frustration does not form part of the South African common law.

The case *of Taylor v Caldwell*[74] was the first to recognise and acknowledge that a supervening event and/or circumstance caused by an unforeseeable and/or extraordinary event, beyond the parties' control, may discharge a contract and end both parties' obligations and liabilities towards each other. The 1903 English case of *Krell v Henry*[75] is the *locus classicus* and portrays the doctrine of frustration well.[76] This matter dealt with a lessee and lessor relationship whereby the lessee rented an

[72] Kiley R "The doctrine of "Frustration" 1960 *American Bar Association Journal* 1293; Perillo JM 1997 *Tulane Journal of International and Comparative Law* 6.
[73] Burnett HG & Bret LA (2017) 243; Treitel GH *Frustration and Force Majeure* (1994) 425.
[74] *Taylor v Caldwell* 1863 3 B & S 826 ET 309.
[75] *Krell v Henry* 1903 2 KB 740.
[76] *Krell v Henry* 1903 2 KB 740.

apartment specifically to observe the procession of the coronation of King Edward VII. However, due to unforeseen medical reasons the coronation was postponed to a later date.[77] Even though, objectively, it was still possible for the lessee to rent the apartment for that specific day, the essential reason and initial purpose of entering into the agreement and leasing the apartment had ceased to exist, even though the contract itself made no reference to the coronation.[78] Due to this fundamental part and reason for the contract no longer existing, the contract was regarded as frustrated and it was subsequently terminated. The court then determined that the doctrine of frustration does not allow for the possibility of renegotiation or amendment to save the existence of the contract. Where a claim of frustration is successful the contract is automatically discharged.[79]

Thus, when applying frustration to the unforeseeable event of the COVID-19 pandemic it is clear that the contracts could not be renegotiated but would rather be discharged. *Force majeure* on the other hand would allow for the parties to "pause" the contract before terminating and exempting both parties from their obligations.[80] It is also important to note that where performance merely becomes more difficult but not radically different, the doctrine will also not apply.[81]

On the other hand, and as a comparison, some states in the United States of America (USA) have adopted a very different and more limited view on such frustration, specifically where performance is still objectively possible but would be senseless to

[77] Croxley Green History Project, "Coronation of Edward VII and Queen Alexandra 1902" https://www.croxleygreenhistory.co.uk/coronation-edward-vii-1902.html#:~:text=The%20Coronation%20of%20King%20Edward,for%209th%20August%20that%20year (last accessed 2022-06-12).
[78] Liu F "The Doctrine of Frustration: An overview of English Law" 1988 *Journal Maritime Law & Commerce* 265.
[79] Firoozmand MR 2007 *Business Law International* 177.
[80] Art 1148 of the French Civil Code.
[81] *Davies Contractors Ltd v Fareham Urban District Council* [1956] AC 696.

fulfil.[82] These states thus do not follow a standard of strict impossibility but have rather adopted the form of unforeseen severe hardship.[83] Coetzee correctly states that the term "impossibility" in American law is a broad term and does not only include actual factual or objective impossibility, but also instances where performance is extraordinarily difficult to perform. This type of "impossibility" is referred to as "impracticability". Therefore, the USA has rather adapted a principle of impracticability, which is closely linked to the principle of hardship and changed circumstances rather than the doctrine of frustration.[84]

Frustration forms part of the common law and is not as flexible as the contractual clause of *force majeure.* Frustration allows for the termination of contracts where the frustration is caused by an unforeseeable event or circumstance. *Force majeure* on the other hand covers both foreseeable and unforeseeable events and circumstances which may be temporary or permanent in nature.[85] *Force majeure* is a creature of contract which is adaptable to parties needs and the ever-changing world whereas frustration terminates a contract where frustration was caused by an unforeseeable event or circumstance.

Looking at the doctrine of frustration it is clear that parties in the relevant and applicable jurisdictions would not have been able to renegotiate their contract during the COVID-19 pandemic, but would rather have had to be discharged of their obligations in terms of the agreement.

3.3 The Doctrine of Hardship

[82] Perillo JM 1997 *Tulane Journal of International and Comparative Law* 6.
[83] Coetzee J 2011 *Journal for Juridical Science* 10.
[84] Coetzee J 2011 *Journal for Juridical Science* 10.
[85] Burnett HG & Bret LA (2017) 243.

The doctrine of hardship, also known as the principle of changed circumstances, is relied upon by contracting parties where the contractual terms on which consensus was reached, has fundamentally changed to such an extent that the equilibrium of the contractual exchange is upset[86] and the disadvantaged parties' performance has become more burdensome but not necessarily impossible.[87]

Unlike the doctrine of frustration, hardship makes provisions for and allows the aggrieved party to renegotiate the contract where a change, due to an unforeseeable event or circumstance beyond the parties' control, occurs/takes place.[88] The doctrine of hardship seeks to avoid the termination of a contract and encourages the renegotiation of a contract.

In order for parties' to successfully rely on this doctrine as a defence, the aggrieved party must prove that the impediment of completing/fulfilling his/her contractual obligation need not make the performance impossible but rather that it "fundamentally alters the equilibrium of the contract" and his/her obligations become more onerous.[89]

However, a party cannot rely on the doctrine where performance has merely become more difficult and onerous, than initially agreed upon. Thus, hardship is only found if performance has become excessively onerous, senseless, impractical or where the equilibrium of the contract has fundamentally been changed. [90] It would otherwise be unfair and unjust to enforce a contract in such circumstances as the burden of the

[86] Hutchison A "Gap filling to address changed circumstances in contract law – when it comes to losses and gains, sharing is the fair solution" 2010 *Stell LR* 414.
[87] Hutchison A 2010 *Stell LR* 414.
[88] Burnett HG & Bret LA (2017) 246.
[89] Burnett HG & Bret LA (2017) 246; Schwenzer I "Force majeure and hardship in international sales contracts" 2008 *Victoria University of Wellington Law Review* 715.
[90] The UNIDROIT Principles of International Commercial Contracts Article 6.22.

changed circumstances caused by the unforeseen event would be allocated to either one of the parties by chance.[91]

The essence of hardship is to try uphold the contract by renegotiating the obligations rather than terminating the contract as a whole. Although the doctrine does not specify how a contract should be renegotiated it provides the mechanism through which it is possible.

The international trade community has also accepted the need to address this principle and has specifically included provisions on hardship in chapter 6 of the *UNIDROIT Principles of International Commercial Contracts (PICC)*,[92] as well as the *Principles of European Contract Law (PECL)*[93] and the *Draft Common Frame of Reference (DCFR)*.[94] All three of the above international contract law guidelines elucidate basic rules and principles which underpin contract law and the model rules of contract law. For purposes of this dissertation, we will examine the *PICC* in more detail below.

The jurisdictions which recognise and make use of the doctrine of hardship make use of a threshold test.[95] This threshold test requires a fundamental alteration of the cost of performance/benefit received. This threshold, in terms of international arbitration practice and *lex mercatoria*[96] is generally required to be equal to or greater than 100% of the original contemplated cost/benefit.[97] The threshold required in different jurisdictions varies between 50% to 110%. Therefore, it is clear that hardship can only

[91] Hutchison A 2010 *Stell LR* 416.
[92] Art 6.1 and 6.2 of the UNIDROIT Principles of International Commercial Contracts, in the section which deals with performance.
[93] Art 6:111 of the Principles of European Contract Law.
[94] Book III Art 1:110 of the Draft Common Frame of Reference.
[95] This includes Civil Law Jurisdictions such as Germany, Switzerland and the United States of America.
[96] The law merchant.
[97] Burnett HG & Bret LA (2017) 254; Brunner C "Force Majeure and Hardship Under General Contract Principles – Exemption for Non-Performance in International Arbitration" 2009 *Kluwer Law International* 397.

be found if performance has become excessively onerous, senseless, impractical or when the equilibrium of the contract has fundamentally been changed.[98] Furthermore, where the aggrieved party's contractual possibility of performing his/her obligations has been upset and/or such performance is now impractical the enforcement of such a contract would be unfair and unjust.[99] Therefore, it is accepted and seen as the correct legal approach to adapt the contract to the changed circumstances, if the need arises and if it is possible and fair.[100]

It is clear that the aim and purpose of this doctrine is thus to rather re-negotiate and try uphold the contract, rather than to suspend and/or terminate the parties' obligation and liability as a whole. The principle of changed circumstances/ doctrine of hardship, be it the common law principles or codified regulations and law, specifically provides the framework within which such obligations can be altered.[101] It does not change the contracting parties' obligations directly nor does it provide the solution for parties but it rather provides a way in which the parties can work through the changes which occurred or in which the parties find themselves, due to the unforeseen circumstances/event and it assists in avoiding terminating the parties' obligations and liability.

In many jurisdictions, including South Africa, the principle of changed circumstances is incorporated into the law of contract as an implied term. This means that the principle will be applied to a contract even if the contract does not expressly provide for it. In

[98] The UNIDROIT Principles of International Commercial Contracts (PICC) Art 6.22; Schwenzer 2008 *Victoria University of Wellington Law Review* 715.
[99] Hutchison A 2010 *Stell LR* 416.
[100] Maskow D "Hardship and force majeure" 1992 *The American Journal of Comparative Law* 658.
[101] Maskow D 1992 *The American Journal of Comparative Law* 658.

South Africa, the principle of changed circumstances is also referred to as the principle of supervening impossibility.

3.4 The Principles of International Commercial Contracts regarding performance and non-performance

The *UNIDROIT Principles of International Commercial Contracts (PICC)* plays an important role for international contracts. It functions as global background law and provides a balanced and internationally recognised set of rules for all important contract law topics.[102] It can be seen as both a model for contracts and as a checklist for contract drafting.[103] Although parties rarely choose to use it as their chosen applicable law, in practice courts tend to rely on it and find it applicable in the absence of parties' choice of law. Some courts[104] refer to the *PICC* as custom and make explicit reference to the *PICC*.[105] Thus, it is rather referred to as and seen as a *rule of law* than seen as law. The *PICC* is useful and finds its application where individual provisions are used, such as performance.

When looking at an unforeseeable event and/or occurrence such as the COVID-19 pandemic it is important to look at the *PICC* for guidance on performance. Chapter 6 of the *PICC* specifically deals with performance in contracts and Section 2 looks at the specific doctrine of hardship and the effects thereof in contracts.[106] Although the *PICC* serves a universal purpose; it merges the various principles and doctrines that relate

[102] Michaels R "The UNIDROIT Principles as global background law" 2014 *Uniform Law Review* 643.
[103] Michaels R 2014 *Uniform Law Review* 644.
[104] Specifically, the Supreme Economic Court in Ukraine and courts in China, Russia, Spain, Australia, Italy, Netherlands, United Kingdom, Argentina and United States of America.
[105] Michaels R 2014 *Uniform Law Review* 649.
[106] Chapter 6, S2 of the UNIDROIT Principles of International Commercial Contracts.

to performance or the lack thereof due to unforeseen events which change the circumstances of the contracting parties. This is the only section that deals with excusing a party from his/her obligations to perform in terms of the contract. Chapter 7 later deals with the principle of *force majeure* and non-performance.[107] As discussed in chapter two above, *force majeure* excuses a party from performance either permanently or temporarily where an unforeseeable event beyond the contracting parties control occurs. However, the *PICC*'s provisions relating to *force majeure* are rigid and only allow for an excuse in instances where performance becomes completely impossible. It is clear, through the *PICC*, that the international perspective differentiates *force majeure* from the other doctrines and principles which relate to performance in contracts.

The *PICC* clearly shows and highlights that the principle of *pacta sunt servanda* should be upheld in all contracts.[108] However, as the principle[109] is not absolute and sudden changes, such as the unforeseeable COVID-19 pandemic, arise without warning or foresight changes and amendments are permissible and needed.

The *PICC* defines the doctrine of hardship[110] and its effects[111] in detail and it is clear that it links to and has similarities to similar principles in German, English and French law.[112] These principles should be considered when developing South African contract law.

The *PICC* explains that hardship occurs where there is a fundamental change in the equilibrium of a contract which is caused by an increase in cost or a decrease in the

[107] Chapter 7, Art 7.1.7 of the UNIDROIT Principles of International Commercial Contracts.
[108] Chapter 6, S2, Art 6.2.1 of the PICC. The sanctity of contract should only in extraordinary circumstances be overlooked and changed.
[109] The principle of *pacta sunt servanda.*
[110] Art 6.2.2 of the PICC.
[111] Art 6.2.3 of the PICC.
[112] Maskow D 1992 *The American Journal of Comparative Law* 661.

value of the performance.[113] Although not identical hardship is very similar to *force majeure* and shares three requirements; namely that:

1. the unforeseeable event/circumstance, which caused the fundamental change in the equilibrium, occurred after the conclusion of the contract;
2. the event was not reasonably foreseeable by the contracting parties; and
3. the unforeseeable event/circumstance should be beyond the reasonable control of the parties.

Where hardship occurs, the disadvantaged party is entitled to request the renegotiation of the contract, on the condition that same is done without undue delay and with clear reasons and grounds that he/she relies upon.[114] However, where contracting parties permit the use of hardship the other party may not withhold performance and rely on the principle of *exceptio non adimpleti contractus*.[115]

Where the contracting parties are at a "dead-end" and are unable to renegotiate the contract, with consideration of the new and previously unforeseen circumstances in mind, the parties may refer the matter to a court of law, where the court will make an order that it deems suitable in the circumstances by either terminating the contract, or by adapting the contract in order to restore the equilibrium.[116] The aim of the doctrine of hardship and *force majeure* is to uphold the contract.[117] The German principle of

[113] Art 6.2.2 of the PICC.
[114] Art 6.2.3 of the PICC.
[115] The principle of *exceptio non adimpleti contractus* is a common law defence available to a party to a contract when performance is claimed under the contract and the other party has not tendered or made counter-performance. This is available in instances where the latter party is obliged to perform first or both parties are obliged to perform simultaneously.
[116] Art 6.2.3 of the PICC.
[117] Maskow D 1992 *The American Journal of Comparative Law* 657.

Wegfallen der Geschäftsgrundlage, similarly allows for the adaptation in contracts where circumstances have changed after the conclusion of the agreement.[118]

The German law made room for these circumstances after World War I, to ensure and allow for the change in circumstances especially where performance became more onerous for one of the parties, yet not impossible.[119] This shows the development of contract law, and the sanctity of contract. Contracts should be upheld as far as possible to further ensure justice, fairness and that the interests of the contracting parties are maintained.[120]

3.5 Conclusion

When entering into contracts parties are required to do so freely and *bona fide*. Thus, where parties wish to renegotiate the contract same must be done in good faith. Hutchison states that the concept of intervention in instances of changed circumstances is based on the desire to do what is fair, and therefore the concept of good faith stands central to the principle of changed circumstances. Although good faith is a principle which is fundamental to South African contract law, it is regarded as an abstract value and not a substantive rule that can be used as a reason for courts to interfere with contractual relationships.[121] The Supreme Court of Appeal in *Brisley v Drotsky*[122] held that the principle of good faith is an abstract value and underpins the substantive law of contract and therefore performs the function of legitimising rules and doctrines. The notion of good faith cannot be acted on directly to strike down or

[118] S313(1) of the German Civil Code, 1900; Coetzee J 2011 *Journal for Juridical Science* 12.
[119] Coetzee J 2011 *Journal for Juridical Science* 12.
[120] Firoozmand MR 2007 *Business Law International* 172.
[121] *Brisley v Drotsky* 2002 (4) SA 1 (SCA).
[122] *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

to refuse to uphold an otherwise valid contract. Such discretionary power in the hands of judges would give rise to legal and commercial uncertainty. Therefore, in the South African context, the duty to renegotiate the terms and obligations of a contract will be based on the specific clause and will therefore be a contractual obligation which is separate from the general duty of good faith.

Hardship, as defined in the *PICC*, is not as limited as the other similar principles and doctrines. It permits wider protection and relief to the aggrieved parties when events or circumstances beyond their control occur.

CHAPTER 4: The need for the development of the South African common law to address the void relating to a change in circumstances

4.1 Introduction

Where a change of circumstances, caused by an unforeseeable event, occurs in South Africa and there is an absence of a *force majeure* clause in the contract, the common law principle of supervening impossibility will apply. As discussed above, the South African common law is far more limited compared to the contractual clause of *force majeure* and does not allow for any flexibility. The COVID-19 pandemic highlighted how limiting the common law is in South Africa and that there is a need for it to be developed in order for the gap to be closed and for it to have a wider application. This chapter will review the South African common law of supervening impossibility and investigate how it should be developed from pre-COVID-19 to now, to best benefit all contracting parties.

4.2 The Common law position pre-COVID-19 pandemic

The common law doctrine of supervening impossibility in South Africa serves as a legal defence for contractual agreements when there is no *force majeure* clause inserted in the contract. It applies when an unforeseeable event or circumstance occurs, significantly impacting the ability of the contracting parties to perform their obligations.[123]

[123] McKendrick E (1991) 6.

Before the COVID-19 pandemic in 2020, the doctrine of supervening impossibility allowed for the discharge of a contract if certain requirements were met, even if the contracting parties were willing to perform. The case of *South African Forestry Company Limited v York Timbers Limited*[124] provides a notable example of this.

In the 1970s, the South African government entered into long-term contracts with private parties in the sawmilling industry, aiming to foster investment. These contracts contained two salient provisions:

1. Clause 3.2 outlined a procedure for price revisions. If the parties failed to agree on price revisions, the matter would be referred to the Minister for Environmental Affairs. If the minister determined that no agreement could be reached, the matter would proceed to arbitration.

2. Clause 4.4 specified the procedure for contract cancellation. If the minister believed it was in the best interest of the wood industry or the country as a whole, SAFCOL would have the right to cancel the contract with five years' notice.

Starting from 1993, SAFCOL sought to increase prices every twelve (12) months, but York Timbers disagreed with these increases and employed various tactics to avoid arbitration. These strategies included initiating unrelated litigation, delaying the minister's opinion on price revisions until after the litigation was resolved, falsely claiming that an agreement could be reached, and asserting that the wrong minister was being approached. Consequently, the minister refused to express an opinion, making a referral to arbitration, and ultimately a price increase, impossible.

[124] *South African Forestry Company Limited v York Timbers Limited* 2005 3 SA 323 (SCA).

On the 10th of November 1998, SAFCOL sent a cancellation notice to York Timbers, and subsequently, SAFCOL filed a lawsuit seeking a declaratory order to terminate the contract on two grounds:

1) The contract had become void due to supervening impossibility, as the minister had refused to provide an opinion on the possibility of a price agreement; and

2) York Timbers had breached an implied *ex lege* term in the contract, which required acting in accordance with reasonableness, fairness, and good faith. SAFCOL argued that this breach justified their valid cancellation of the contract.

It is important to note that if a contract becomes impossible due to a third party's refusal or inability to fulfil and perform a contractual obligation, the contract may terminate for supervening impossibility, unless that impossibility was brought about by the plaintiff's own conduct.[125]

The court also highlighted and emphasised that the doctrine of good faith in a contract is not a self-standing principle that can be applied by the courts, to intervene in valid contracts. The court may, however, establish new implied terms for contracts or specific contract types based on the doctrine of good faith, particularly in cases of ambiguous contract terms. When one party's duty is imposed, it logically imposes an obligation on the other party not to hinder the fulfilment of that duty.

In the case of *SAFCOL v York Timbers*[126], Brand AJ agreed with SAFCOL's first argument of supervening impossibility, but noted a distinction from the case of Kudu Granite[127]. In SAFCOL v York Timbers, the impossibility arose from the government's

[125] *Kudu Granite Operations v Caterna* 2003 (%) SA 193 (SCA).
[126] *South African Forestry Company Limited v York Timbers Limited* 2005 3 SA 323 (SCA).
[127] *Kudu Granite Operations v Caterna* 2003 (%) SA 193 (SCA).

own conduct, rather than an independent private third party. The government was obligated to provide an opinion on the agreement under clause 3.2 while it was a party to the contract. However, after the contract was ceded to SAFCOL, the government repealed the statute requiring the minister's opinion. Therefore, the government's own conduct led to the impossibility, and SAFCOL couldn't rely on supervening impossibility as a defence.

SAFCOL presented two arguments against this conclusion, both of which the court rejected. First, SAFCOL argued that they should not be held responsible for the government's legislation. The court disagreed, emphasizing that SAFCOL, as the cessionary, should not possess greater rights than the original party, cedent. Second, SAFCOL argued that legislation that makes the performance of a government contract impossible should only be regarded as self-created impossibility if it is an insidious stratagem to avoid its obligations. The court disagreed, clarifying that fault is not a requirement for self-created impossibility.

Secondly, SAFCOL further argued that there was a breach of contract. SAFCOL contended that an implied term in the contract obligated York Timbers to act in accordance with the dictates of reasonableness, fairness and good faith. The court held that, although good faith cannot be applied to intervene in contractual relationships, it can be used to create new implied terms for all contracts or for certain classes of contracts. Provided that it is good in law, not specific to the parties involved in a particular case. SAFCOL failed to prove that such an implied term was good in law in general, and as such there was no implied term.

The court further held that good faith can be used as an interpretative tool when the contract’s terms are ambiguous. When applying this law to the facts, the court found

that, as a matter of interpretation, the ordinary meaning of clauses 3.2 and 4.4 conferred on SAFCOL a right to approach the minister for a price adjustment and cancellation opinions respectively, and that this conveyed, as a matter of logic, a duty on York Timbers not to frustrate that right, which York Timbers had breached. Alternatively, if there had been interpretative ambiguity as to whether this duty existed, it was removed by considerations of good faith. The court then held that York Timber's breach of duty could amount to positive malperformance, as it had failed to comply with its negative duty not to interfere in SAFCOL's rights; and to repudiation, as it had exhibited a clear intention not to comply with the contract in the future.

The court considered that both were material enough to warrant a cancellation of the contract, and that SAFCOL therefore had the right to validly terminate the contract on the 10th of November 1998. Consequently, the contract was terminated.

It is evident that even prior to the COVID-19 pandemic, the use and requirements of supervening impossibility were limited and had to be satisfied for a party to successfully rely on this defence.

4.3 The common law position during and post-COVID-19 pandemic

The COVID-19 pandemic came suddenly and unexpectedly. Much like before March 2020 the doctrine of supervening impossibility also played a vital role during the pandemic and continues to play a role after the pandemic. As stated above, the principle of supervening impossibility extinguishes the parties' obligations, if performance of the contract has become impossible through no fault of either party

concerned.[128] It is, however, important to note that the doctrine is not absolute, it may thus be overridden by the terms or the implications of the agreement in regard to which the defence is invoked[129] and is not available where the impossibility of performance is self-created.[130]

The COVID-19 pandemic brought to light the rapid changes in contractual relationships and obligations especially when parties are confronted with circumstances which are beyond the contracting parties control.

The case of *Freestone Property Investment (Pty) Ltd vs Remake Consultants CC*[131] highlights the common law position during the pandemic well. Freestone Property Investment (Pty) Ltd (hereinafter referred to as "Freestone") and Remake Consultants CC (hereinafter referred to as "Remake Consultants") had entered into two commercial lease agreements in respect of premises owned by Freestone in a shopping mall. Remake Consultants operated and traded from the leased premises in providing expertise in building, renovations and interior decoration.

Although the South African government declared a national state of disaster[132] on the 15th of March 2020, to combat the COVID-19 pandemic and implemented lockdowns which restricted people's movement[133] Remake Consultants lapsed on their rental payments and other charges in November 2020. As a result of their default Freestone cancelled the lease agreements.

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[128] Par 11 of *Freestone Property Investment (Pty) Ltd vs Remake Consultants CC and another* 2021 (6) SA 470 (GJ).
[129] Par 1206B of *Hersman v Shapiro & Co* 1926 TPD 367 at 372, cited with approval in *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (A).
[130] Par 28 of *King Sabata Dalindyebo Municipality v Landmark Mthatha (Pty) Ltd and another* [2013] 3 All SA 251 (SCA).
[131] *Freestone Property Investment (Pty) Ltd vs Remake Consultants CC and another* 2021 (6) SA 470 (GJ).
[132] In terms of the Disaster Management Act 57 of 2002.
[133] With the exception of essential workers who were not limited to their homes but were able to go to work.

South Africa was in a "hard" lockdown from 15 March 2020 to 30 April 2020. During this "hard" lockdown Remake Consultants did not trade.[134] Remake Consultants only recommenced trading in August of 2020.

In the midst of the COVID-19 pandemic Freestone approached the court for an order ejecting Remake Consultants from the two commercial premises and for the arrear rental and other charges. Remake Consultants, however, defended the action and raised the defence that the respective obligations of Freestone and Remake Consultants, as landlord and tenant, were suspended from March 2020 to June 2020. Thus, Freestone was excused from tendering occupation of the premises and Remake Consultants was excused from paying rentals. Remake Consultants further argued that the parties' respective obligations were impossible due to supervening impossibility which was caused by the government imposed national state of disaster and the regulations associated with it. As a result of this supervening impossibility Remake Consultants alleged that Freestone was neither entitled to rentals for the period of March to June 2020 nor were they entitled to terminate the lease agreements. The court considered the effect of the government imposed national state of disaster and its associated regulations on the lease agreements and held that

> "a consideration of a defence of supervening impossibility of performance in the context of the regulations passed pursuant to the state of disaster should be approached from the perspective of its effects on the performance by [Freestone's] obligations as lessor and on the performance by [Remake Consultants] obligations as lessee, rather than approached solely from the

[134] This was due to the regulations imposed during the national state of disaster which prevented non-essential workers from going to work.

> perspective of whether [Remake Consultants] was able to perform its side of the bargain, particularly to pay rentals."[135]

While applying the above approach, in determining whether Remake Consultants was entitled to rely on the doctrine of supervening impossibility of performance, the court held that the arrear rental and other charges related to the period went beyond the hard lockdown (i.e., after the 30th of April 2020). The court further held that supervening impossibility can only be invoked if it was totally and objectively impossible to perform, as it typically was during the "hard lockdown".

Therefore, the doctrine of supervening impossibility during the COVID-19 pandemic, like before the pandemic, was only applicable in circumstances where performance of the contracting parties' obligations become impossible, through no fault of either party. The obligations as a result thereof thus became extinguished.

When looking at the COVID-19 pandemic and the case of *Freestone Property Investment (Pty) Ltd vs Remake Consultants CC*[136] it is clear that there is no clear-cut answer. One must have sight of both sides, in this specific example both lessor and lessee.

The "hard lockdown" imposed by the South African government gave rise to a more nuanced situation than where only one party was unable to perform. The regulations[137] during the COVID-19 pandemic and at the time of the lockdown stipulated that everyone was confined to his or her place of residence "unless strictly for the purposes of performing an essential service" and "all businesses ceased operations, except for

[135] Par 12 of *Freestone Property Investment (Pty) Ltd vs Remake Consultants CC and another* 2021 (6) SA 470 (GJ).
[136] *Freestone Property Investment (Pty) Ltd vs Remake Consultants CC and another* 2021 (6) SA 470 (GJ).
[137] Specifically, Regulation 11B(1)(a)(i) and Regulation 11B(1)(b) of the South African Government Gazette No. 43096 on 15 March 2020.

any business or entity involved in an essential good or service"[138]. During this "hard lockdown" shops in malls were also closed, save for the grocery stores. This highlights the predicament of the matter. On the one hand Freestone was unable to tender lawful occupation of the leased premises, and on the other hand Remake Consultants was unable to conduct its business and take up lawful occupation of the leased premises. It is clear that both parties found themselves unable to perform their obligations. It is thus wrong and narrow-minded to place the blame solely on the tenants/lessee, especially where the lessor, too, may have encountered difficulties in meeting its obligations, which should not be ignored.

Therefore, a more nuanced/balanced approach is needed in these circumstances. It is vital to consider the potential impossibility of performance of both parties.

When applying the nuanced approach to the case it is clear that Remake Consultants cannot legally justify its failure to make payment of rentals and other charges for the period of March 2020 to October 2020. The COVID-19 restrictions which may have prevented the parties from performing their duties during the "hard lockdown" did not persist until October 2020 but rather until the 30th of April 2020. The South African government progressively eased the restrictions/regulations from the 1st of May 2020, thus the supervening impossibility of performance did not continue for the entire period of Remake Consultants default in rental payments and other charges. Thus, the defence of supervening impossibility cannot be raised successfully by Remake Consultants for the entire period.

In the case of *Hansen*, *Schrader and Co v Kopelowitz*[139] the court correctly stated that a lessee cannot be exempted from paying rent simply because they experienced

[138] Government Gazette No. 11063 volume 657 (25 March 2020).
[139] *Hansen*, *Schrader and Co v Kopelowitz* 1903 TS 707.

losses due to the country being at war. It further emphasised that the significant decrease in possible tenants, does not warrant a valid reason for rent remission, because the principle upon which the court grants the remission is that the *vis major* must be the direct and immediate cause of a lessee being deprived of the use of leased premises. The court further stated that *"in this case vis major would not be the direct and immediate cause of his leaving the house. It was not a necessary effect of the outbreak of war that these particular premises were not hired by persons. There were people in Johannesburg and bedrooms were occupied, only there were not enough people to occupy all the available bedrooms in the town. The war no doubt was the indirect cause of the dearth of tenants, and a heavy and continued fall in the market may also produce an exodus of people, and lessees of rooms may find themselves without subtenants, but the falling stock would not be the direct, immediate and necessary cause of particular bedrooms not being let."* Therefore, where performance is still possible parties cannot raise supervening impossibility as a valid defence.

When comparing the case of *Hansen*, *Schrader and Co v Kopelowitz* with *Freestone Property Investment (Pty) Ltd v Remake Consultants CC* the declaration of a state of disaster and the ongoing impact of the COVID-19 pandemic may have caused a decline in customer traffic in the shopping centre where the leased premises was located but it did not provide a valid defence for the Remake Consultants.

Even after Remake Consultants was legally able to recommence and open its business and operate/trade in the mall after the regulations were eased and relaxed it was on their own accord that they chose not to operate. Therefore, their choice to remain closed was neither due to the government regulations implemented during the COVID-19 pandemic nor as a consequence of a *force majeure* and thus cannot be used as a defence as it was their prerogative to do so. Thus, it is clear that Remake

Consultants could not raise supervening impossibility as a valid defence for their non-payment of the rental and other charges as their non-payment extended beyond the "hard lockdown". Freestone's cancellation of the lease agreements in November 2020 was therefore lawful and the court granted Freestone the ejectment.

This case clearly illustrates how parties who were in a similar position to Remake Consultants attempted to use the doctrine of supervening impossibility even when it was not applicable.

The common law position is clear. In order for parties to use it the requirements must be met. Even during the COVID-19 pandemic the rules regarding the doctrine were not eased and the court did not develop it as parties attempted to take advantage of the doctrine and their clear breach of contract. During the COVID-19 pandemic and now, post-COVID-19 pandemic, it is of utmost importance that the parties who wish to keep a party liable despite impossibility brought about by COVID-19 and the lockdowns arising pursuant thereto must be very clear and identify COVID-19 as a specific *force majeure* event. Parties cannot extend the supervening event which made their performance impossible to suit them.

4.4 The current South African common law position

The South African legal system is made up of a mixed legal system.[140] It is based on both Roman-Dutch law and English law, however, when it comes to performance in contracts some may argue that the South African legal system is still somewhat behind other jurisdictions, specifically those from which it gains its origins.

[140] Hutchison A 2010 *Stell LR* 414.

In terms of South African contract law, where parties cannot perform in terms of their contractual obligations and no provisions were made in the contract for a *force majeure* clause, the parties must rely on the common law principle of supervening impossibility. Due to the common law principle of supervening impossibility being followed in South Africa parties may be discharged from their obligations and their liability will be extinguished, where there is a change in circumstances. It thus does not address or allow for any renegotiation of the contract like the doctrine of hardship does.[141]

It is clear that South Africa is lagging behind other jurisdictions, in this regard. As circumstances are constantly changing and unforeseen events and/or circumstances, such as the COVID-19 pandemic, have brought this issue of changed circumstances to the forefront in South Africa. Through the COVID-19 pandemic it is evident that it is now more important than ever for the South African common law to develop its contract law provisions. As Hutchison correctly suggests, the solution lies in the development of the common law rather than in legislation.[142]

The concept and principle of changed circumstances is to some extent controversial as it conflicts with the fundamental principle of *pacta sunt servanda* and the principle of contractual certainty.[143] Should the concept and principle of changed circumstances be strictly enforced such enforcement can lead to injustice and unfairness.[144] Therefore, when looking at the other doctrines and principles together with the internationally recognised principles it is recommended that the existing

[141] Hutchison A 2010 *Stell LR* 415.
[142] Hutchison A 2010 *Stell LR* 419.
[143] Declercq PJM "Modern analysis of the legal effect of force majeure clauses in situations of commercial impracticability" 1996 *Journal of Law and Commerce* 213.
[144] Hutchison A 2010 *Stell LR* 422. Firoozmans MR 2007 *Business Law International* 184.

common law doctrine of supervening impossibility[145] be developed by expanding its application.[146] Coetzee and Hutchison suggest the following requirement to broaden such application and assist with the development of the South African common law:[147]

a) a fundamental change in the equilibrium of the contract which is to be judged on whether performance has become excessively onerous for one party;

b) the hardship should have occurred after the conclusion of the contract;

c) the hardship should be beyond the party's control; and

d) the hardship should not have been foreseeable or within the limits of the party's assumed risk.

Should the contracting parties meet these recommended requirements, they have an independent duty, which is not necessarily based on good faith,[148] to re-negotiate the contract, based on the new circumstances of the parties. Such re-negotiation is done in an effort to restore equilibrium of the contract.[149] Furthermore, where parties are unable to come to a fair and just agreement, they may approach the court for further relief.[150] Where the court orders to amend a contract in an effort to save it and reach equilibrium between the parties - the court must include guidelines as to what factors it takes into consideration when making such an order. The common law principle of supervening impossibility merely discharges the parties' liability and obligations which is an all-or-nothing approach[151] which runs the risk of enriching one party and giving

[145] Coetzee J 2011 *Journal for Juridical Science* 17.
[146] This is in line with S39(2) and S173 of the Constitution of the Republic of South Africa, 1996.
[147] Coetzee J 2011 *Journal for Juridical Science* 18; Hutchison A 2010 *Stell LR* 422; Firoozmans MR, 2007 *Business Law International* 419–425.
[148] The South African law of contract does not yet recognise the principle of good faith as a substantive principle to be applied independently.
[149] Coetzee J 2011 *Journal for Juridical Science* 21.
[150] Hutchison A 2010 *Stell LR* 415.
[151] Hutchison A 2010 *Stell LR* 426.

rise to contractual difficulties. Thus, when comparing the principles and doctrines with each other, discharge of a contract should only be a remedy of last resort in instances of changed circumstances.

Parties enter into contractual agreements to formalize and outline each other's contractual obligations and liabilities to one another; therefore, it is always recommended that before any termination of any agreement *bona fide* re-negotiations take place. More often than not such re-negotiation results in equitable solutions, as the parties, to some extent, still require the obligations to be fulfilled. South African courts should enforce such re-negotiation as it would not only assist with the principle of *pacta sunt servanda* but also with certainty of the contract being completed and fulfilled.[152] Much like the principle of *force majeure* parties will through re-negotiation be able to suspend their obligations and liability until such time that the unforeseen event and/or circumstance has ceased. Should such re-negotiation not suffice and fail then the parties may revert to having the contract terminated.

4.5 Overview of recent case law in South Africa

The COVID-19 pandemic highlighted the challenges imposed by unforeseen events and circumstances, in contracts. As a result, thereof there was a surge in legal disputes which needed the courts assistance in interpreting and applying legal principles, specifically that of supervening impossibility.

This chapter will focus on recent case law in South Africa and analyse how the courts interpreted and applied the legal principle to the contracts, specifically looking at

[152] Coetzee J 2011 *Journal for Juridical Science* 21.

performance of the parties' obligations in circumstances where contractual obligations were affected by the sudden unforeseeable events or circumstances which were beyond the parties' control.

4.5.1 Analyses of South African Case Law

4.5.1.1 Santam Limited v Ma-Afrika Hotels (Pty) Ltd and Another[153]

In the recent case of *Santam Limited v Ma-Afrika Hotels (Pty) Ltd and Another*[154], the Applicant, Santam Limited, sought to challenge the South African common law application of supervening impossibility in response to the impact of the COVID-19 pandemic. Prior to filing the appeal, Santam Limited was directed to compensate Ma-Afrika Hotels for an 18-month business interruption coverage triggered by the unforeseeable and unavoidable event of the COVID-19 pandemic.

Ma-Afrika Hotels, as the Respondent, has contested the common law and has petitioned the Constitutional Court to refine the legal position on supervening impossibility and lease law. Their request urges the court to permit a tenant, in the interest of justice and public policy, to assert partial remission of rent as a defence when faced with eviction for non-payment of the full rental.

The basis of Ma-Afrika's argument for the development of common law lies in the concept of *force majeure*. Naturally, post COVID-19 pandemic, many contracts, including leases, now incorporate and include *force majeure* clauses to address unforeseen events or "acts of God". In the absence of such a clause, the default

[153] [2021] ZASCA 141.

[154] [2021] ZASCA 141.

recourse is the common law doctrine of supervening impossibility, such as an "act of God," affecting the contractual arrangement.

The outcome of this case holds significant importance for the development of common law, potentially establishing a precedent that acknowledges partial performance of obligations as sufficient during periods of supervening impossibility. This could alleviate some of the hardships arising from unforeseeable events beyond the parties' control. Additionally, the court's decision may provide a concrete definition or an acceptable, open, and interpretive list of what constitutes an "act of God".

4.5.1.2 Post Office Retirement Fund v South African Post Office SOC Ltd and Others[155]

Another case of importance which came about during the COVID-19 pandemic was the *Post Office Retirement Fund v South African Post Office SOC Ltd and Others*[156] case. In the case the South African Post Office (hereinafter referred to as “SAPO”) and the Post Office Retirement Fund faced serious allegations regarding its failure to fulfil its obligation of monthly contributions to the Fund, as stipulated in Rule 3 of the Fund's rules. SAPO, however, raised three primary defences in response to these allegations.

Firstly, SAPO claimed that there was an alleged agreement with the Fund to defer payments. The court, however, dismantled this argument by highlighting the absence of a valid agreement, the Fund's denial of such an arrangement, and procedural shortcomings in SAPO's assertions.

[155] [2022] 2 All SA 71 (SCA)
[156] [2022] 2 All SA 71 (SCA).

Secondly, SAPO presented a constitutional argument, contending that even if Rule 3 mandated payment, it possessed an unrestricted power derived from the Constitution to prioritize payments to creditors, specifically emphasizing social grants. The court dismissed this argument, emphasizing the constitutional constraints imposed on public bodies like SAPO, which are bound by the rule of law and the principle that they can't exceed the powers conferred upon them by law.

The third defence SAPO relied on, was based on supervening impossibility, attributing its failure to pay the Fund to the onset of the COVID-19 pandemic and associated lockdowns. The court thoroughly examined this defence, scrutinizing the evidence provided by SAPO. It found that SAPO's financial troubles existed prior to the pandemic, emphasizing managerial failures as the root cause. The court also questioned the genuineness of SAPO's financial distress claims, pointing out its failure to provide comprehensive historical financial data. The supervening impossibility defence was further undermined by SAPO's payment prioritization plans, which demonstrated a lack of objective impossibility.

The court concluded by ordering SAPO's conduct as opportunistic and cynical. It highlighted SAPO's attempt to evade financial challenges and vilify the Fund, emphasizing the importance of the rule of law. The judgment upheld the appeal.

This case emphasised the importance of the courts commitment to upholding legal obligations and scrutinised parties attempting to hide behind COVID-19 and arguing that unforeseeable events, beyond the parties' control is not a reason to not fulfil one's contractual obligations. Both contractual and legal obligations cannot be circumvented through legal tactics during unforeseeable events and/or circumstances. Such attempts are condemned and this judgment reinforces that.

4.5.1.3 Gauteng Refinery (Pty) Ltd v Eloff[157]

In this matter, the appellant, a former employer, appealed against the summary judgment granted to the respondent, a former employee, in a dispute over unpaid salary and travel expenses. The appellant initially defended the action, citing the impossibility of performance due to the unforeseeable COVID-19 lockdown and pandemic, and counterclaimed for damages. However, the appellant later abandoned these defences and only raised specific issues in the appeal.

The appellant contended that the respondent failed to comply with Rule 14(2)(b) by not explaining in the affidavit why the counterclaim did not raise an issue for trial. The main argument centred on whether this failure should prevent the grant of summary judgment. The court emphasized that the appellant's affidavit opposing summary judgment lacked substantive facts supporting its opposition.

The magistrate considered the counterclaim as the primary reason for opposition, stating it appeared to be an attempt to hinder the respondent's claim and was not bona fide. The court thus highlighted that the appellant didn't rely on substantive grounds for the appeal, and established that, for summary judgment, formal requirements must be fulfilled before considering the merits.

The court rejected the appellant's argument, noting that the failure to explain why the counterclaim didn't raise a triable issue should not invalidate the affidavit. It emphasized that the counterclaim should be considered when evaluating the merits of the summary judgment application, and the failure to explain should be addressed in that context. The court dismissed the appeal with costs.

[157] 2023 (2) SA 223 (GJ).

This case once again highlights that impossibility of performance cannot be used as a mere defence to not fulfil once contractual and legal obligations.

4.5.1.4 SA Taxi Finance Solutions (Pty) Limited v Mokobi[158]

In this matter the court addressed the Defendant's arguments against summary judgment, particularly focusing on the supervening impossibility defence. The Defendant claimed that the COVID-19 pandemic and the introduction of a competing bus service made it impossible for him to fulfil his contractual payment obligations. However, the court dismissed this defence, emphasizing that mere financial difficulty does not constitute objective impossibility. The Defendant's own statement about an expected increase in income further weakened this argument.

The court also scrutinized the *bona fide* defence presented by the Defendant, asserting that it failed to meet the legal criteria. Despite the defendant's denial of indebtedness, the court noted his arrears and the absence of any agreement altering the lease terms.

In considering its discretion, the court referred to a precedent of Jili v FirstRand Bank Ltd t/a Wesbank[159] and highlighted that when a Defendant's affidavit shows a defence with no reasonable possibility of success, summary judgment should not be denied. Consequently, the court found the Defendant's points without merit, granting summary judgment in favour of the Plaintiff.

The court ordered that the agreement had terminated, and instructed the return of the minibus taxi. Thus, highlighting that a party's inability to fulfil its contractual obligations

[158] [2023] ZAGPJHC 751.
[159] *Jili v Firstrand Bank Ltd* [2014] ZASCA 183.

cannot be excused by an unforeseeable event or circumstance such as the COVID-19 pandemic.

It is evident through the recent case law that the defence of supervening impossibility cannot be raised due to an unforeseeable event. It is important to note further that the rule of law must still be adhered to and the courts are enforcing same while judging matters on a case-by-case basis.

4.6 Conclusion

Force majeure caters to situations of changed circumstances.[160] The use of *force majeure* clauses in contrast to other similar principles and doctrines is becoming more evident in other jurisdictions around the world, due to its flexibility. When comparing the doctrine of frustration, hardship, changed circumstances and the common law principle of supervening impossibility to *force majeure* these other doctrines and principles are far more limited than that of *force majeure.* The South African common law should be more flexible and thus be developed to allow for the re-negotiation of contracts in changed circumstances which are caused by unforeseeable events or circumstances beyond the parties control. However, when looking at the recent case law it is vital that the common law is not developed in such a way that contracting parties can merely avoid their obligations. Stringent rules should still be applied to cases where performance is impossible. Courts should, within their limits, develop and have consequent judicial control of contractual performance and enforcement and not superimpose, as stated in *Brisley v Drotsky* and *Afrox Healthcare Beperk v Strydom.*

[160] Burnett HG & Bret LA (2017) 243.

The court further held that York Timbers conduct amounted to breach in the form of failure to comply with its obligations in terms of clauses 3.2 and 4.4 of the contract. It also amounted to a repudiation as they conveyed a clear indication to SAFCOL of their intention to not comply with future obligations. Thus, the contract was repudiated when SAFCOL accepted York Timbers repudiation in the letter on 10 November 1998. The court thus held that where a contract has been repudiated it has terminated and therefore, this specific contract does not rely on supervening impossibility but rather on the repudiation of a contract.

CHAPTER 5: Conclusion and Recommendations

The principle of *pacta sunt servanda* states that parties should enter into contracts willingly, in good faith, with privity and with the intention of upholding the sanctity of contract and fulfilling their obligations. Therefore, it is vital that parties perform in terms of their contract and avoid the unnecessary termination of the contract.

However, as was evident in 2020, performance of one's obligations is sometimes hindered by unforeseeable events or circumstances which are beyond the contracting parties' control.

Most legal jurisdictions make provisions to address such unforeseeable events and/or circumstances, which allow the contracting party to be released from his/her obligations. The South African common law specifically makes provisions for such events and/or circumstances and allows contracting parties to be released from their obligations only when the strict requirements for the doctrine of supervening impossibility are met.

In order for contracting parties to avoid the strict and rigid rules of supervening impossibility and the termination of the contract, parties should familiarise themselves with and include a *force majeure* clause in their agreements. Although the doctrine of *force majeure* is not formally recognised in South African law, the contractual term is a well-established and accepted custom in contract law, which is used globally.

While the rigid common law doctrine of supervening impossibility differs from the contractual clause of *force majeure* it does make provisions to release a party from

performing his/her contractual obligations when an unforeseeable event or circumstance occurs beyond his/her control.[161]

However, in an effort to avoid contracting parties from relying on the common law doctrine of supervening impossibility and to ensure that they are adequately protected or somewhat prepared for events or circumstances which are beyond their control, contracting parties are encouraged to include a well-drafted *force majeure* clause in their contracts. The inclusion of a specifically tailored *force majeure* clause in contracts allows parties to somewhat prepare for unforeseeable events or circumstances; and in some circumstances, as and how the parties deem fit, to merely pause the contract temporarily instead of terminating the agreement as a whole, due to an unforeseeable event or circumstance. It provides more certainty in times of crisis and the essence of *pacta sunt servanda* can be observed.

The challenge, however, with the contractual clause of *force majeure* is that it is a creature of contract. Thus, parties are free to determine what will constitute a "*force majeure*" in terms of their specific agreement. While contractual freedom is a fundamental cornerstone in South African contract law and parties are free to include any clauses they wish and deem fit into their agreements[162] parties often neglect the need for and disregard the importance of well-tailored clauses in their contracts. Parties need to understand the effects of inserting and/or omitted clauses in contracts.

Regrettably, many instances witness the mechanical insertion of standard *force majeure* clauses into the contract or copy-paste them from foreign sources.[163] Such "one-size-fits-all" practices often overlook the unique circumstances and requirements

[161] McKendrick E & Parker M 2000 *International Company and Commercial Law Review* 132.
[162] Hutchison D et al. (2012) 2nd ed 22–24. Lubbe & Murray *Farlam & Hathaway Contract Cases, Materials & Commentary* (1988) 3rd ed 321.
[163] Cornelius SJ *Principles of the Interpretation of Contracts in South Africa* (2016) 3rd ed 5.

of the parties, leaving them ill-prepared to handle the consequences of unforeseen future events effectively.[164] In some circumstances the vagueness, or like Cornelius says "the fuzziness is intentional, as parties skirt issues for the sake of reaching consensus".[165] Moreover, an inherent inequality in bargaining power may render these clauses in contracts unfair, favouring one party over the other in terms of relief and remedies, if no effort is made to tailor it to the specific contract and needs of the parties. In drafting such clauses, it is crucial for the contracting parties to consider the most likely interpretation of similar clauses, ensuring their efficacy when invoked during unforeseeable circumstances.

Force majeure clauses should be contract specific and thus be tailored to the needs and obligations of the specific contract in question. The true purpose and intent of the parties must not be overshadowed and forgotten when including and drafting the specific clause or the parties run the risk of relying on the common law, should their contract make no provisions for the event or circumstance.

In 2020, the unprecedented and unforeseeable COVID-19 pandemic brought the world to a stand-still. It caught many contracting parties off guard and unprepared, especially those who did not make or include any provisions, in their specific contract, for such an unforeseeable event or circumstance beyond the parties' control. Parties were thus forced to rely on the common law doctrine of supervening impossibility and as such their contractual obligations were extinguished. Today, in the "post" COVID-19 pandemic era, many parties still avoid and/or forget to include vital clauses such as the *force majeure* clause into their contract to safeguard themselves from unforeseeable events and circumstances beyond their control. The reasons as to why

[164] Cornelius SJ (2016) 3rd ed 5.
[165] Cornelius SJ (2016) 3rd ed 5.

parties do this is unclear and could be mere oversight and/or laziness. As indicated above, the contractual clause of *force majeure* offers superior flexibility in allocating risk for unforeseeable events or circumstances. It allows parties to agree on events which may or may not constitute a *force majeure* thus broadening the range of circumstances that can excuse a party from performing his/her obligations in terms of the contract.

The drafting of a well-tailored *force majeure* clause considers various factors; such as the specific industry the contract will apply to, the specific circumstances of the parties in general, the specific circumstances in existence at the time of contract conclusion, established business practices and ethical considerations, as well as customs and cultures. While there are various international conventions it is advisable that contracting parties consider the UNIDROIT Principles of International Commercial Contracts. (PICC). As discussed in chapter 2 above, the PICC serves as a valuable reference and functions as global background law and provides balanced internationally recognised set of rules for all important contract law topics.[166] Using these guidelines will assist parties in such trying times like a pandemic and it can further be used as a model for contracts and as a checklist for contract drafting.[167] This will further assist parties in ensuring that they are covered and protected in all circumstances.

Often the consequences of an unknown future event are far from the parties' minds when the contract is concluded; or *force majeure* clauses may also be foreign to parties and thus parties would be hesitant to include such a *force majeure* clause in

[166] Michaels R 2014 *Uniform Law Review* 643.
[167] Michaels R 2014 *Uniform Law Review* 644.

their contracts; or the parties entered into a verbal agreement. Therefore, there is a need for the development of the South African common law. The strict and rigid doctrine of supervening impossibility does not make room for or allow for the renegotiation of contracts while other doctrines such as the doctrine of hardship which is also contained in the PICC provides for such instances. The aim should be to try uphold the contract and only in special and extraordinary circumstances, as a last resort terminate it. The development of the common law can serve as a helpful recourse. Accommodating situations of changed circumstances in a fair and equitable manner, while respecting the parties' intentions, the courts can fill the void in South African common law and avoid the termination of contracts unnecessarily due to an event beyond the parties' control.

The courts must be proactive and develop the common law as envisioned in the Constitution[168] to allow the doctrine to be more flexible and thus allow for the re-negotiation of contracts in changed circumstances which are caused by unforeseeable events or circumstances beyond the parties control. Taking inspiration from related principles like hardship and frustration, amalgamating elements of both, can develop the common law doctrine with greater flexibility and favourability. This approach will protect parties from the necessity of terminating agreements solely due to events beyond their control. Such development will thus protect contracting parties in a more fair and equitable way and allow the essence of the contract to be fulfilled. Contracts should be upheld and the termination thereof should be circumvented as far as possible.

[168] The Constitution of the Republic of South Africa, 1996.

While it is more advisable for parties to draft a contract specific *force majeure* clause in their agreements, the need to develop the common law to address the void is necessary. The allocation of risk for future events in the agreement, should they occur, and the protection a *force majeure* clause provides is far more favourable than that of the common law doctrine of supervening impossibility. The principle of *pacta sunt servanda* should be kept in mind by the courts when applying and developing the common law.

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