

CAN DAY ZERO BE CLASSIFIED AS A *FORCE MAJEURE*?

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CHAPTER 1

BACKGROUND, PROBLEM STATEMENT AND METHODOLOGY

1.1. Background

In order to address the topic of this dissertation, an in-depth look must be taken at the principle of *force majeure*, its origin and application by South African courts. It is also essential to explore the tourism industry to understand the various forms of relationships that exist between parties and the obligations that arise to determine the effect of a *force majeure* event thereupon.

“Tourism” is defined by the United Nations World Tourism Organisation as –

‘a social, cultural and economic phenomenon which entails the movement of people to countries or places outside their natural environment for personal or business/professional purposes. These people are called visitors (which may be either tourists or excursionists; residents or non-residents) and tourism has to do with their activities, some of which imply tourism expenditure.’¹

Tourism is a complex industry in which various role players are working together on different levels to provide a complete tourism package. Each role player contributes to the overall holiday experience of the customer.²

The various role-players may include a combination of the following: travel agent, tour operator/wholesaler, accommodation provider (i.e. hotels, lodges and bed and breakfasts), transportation provider, airlines, tour guides and visitor centres. Each of these role players has their respective obligations towards the customer

¹ BCampus “Introduction to Tourism and Hospitality in B.C.” (June 2019) [Opentextbc.ca/introtourism/chapter/chapter-1-history-and-overview](https://opentextbc.ca/introtourism/chapter/chapter-1-history-and-overview) (last date accessed 31 August 2019).

² Tourism Council Western Australia “The Broader Tourism Industry” www.tourismcouncilwa.co.au/broader-tourism-industry (last date accessed 31 August 2019).

“tourist”) and *vice versa*. The tourist is required to pay the role player, and the role player is required to perform specific actions in return for the payment.

This dissertation seeks to look at the effect of a *force majeure* event on the performance of the role players, specifically focusing on Day Zero, the impact it will have on the performance of the role players and to determine whether such role players will be able to rely on Day Zero qualifying as a *force majeure* defence.

“Day Zero” refers to the date identified by the City of Cape Town in South Africa as the day on which the regular water supply to Cape Town’s homes and businesses will be switched off by the City of Cape Town as a result of severe water shortages. Cape Town started to experience a drought in 2015, which continued for three years due to El Nino and climate change.³ In early 2018, it was predicted that the dam levels would decline to a critically low level by April 2018, during which the City of Cape Town announced plans for the mitigation of Day Zero.⁴

The drought, being one of the worst droughts in recent history, has left the region severely water-stressed. The City of Cape Town issued a critical water shortages disaster plan (“Plan”) which was to be rolled out in multiple phases based on the severity of the water shortage. The Plan followed a pessimistic approach assuming minimal additional sources of water will become available. This is meant to ensure preparation for the worst-case scenario. The Plan makes provision for 3 phases to deal with progressive levels of severity and disruption. The phases embody options to ration water usage.⁵

³ Africa Check “Frequently asked questions about South Africa’s drought” (3 February 2016) www.africacheck.org/2016/02/03/frequently-asked-questions-about-south-africas-drought (last date accessed 31 August 2019).

⁴ City of Cape Town “Statement by the City’s Executive Mayor, Patricia de Lille” (18 January 2018) <http://resource.capetown.gov.za/documentcentre/Documents/Speeches%20and%20statements/18%20January%202018-%20Day%20Zero%20new%20emergency%20measures.pdf> (last date accessed 31 August 2019).

⁵ City of Cape Town “Critical Water Shortages Disaster Plan – Public Summary” (October 2017) <http://resource.capetown.gov.za/documentcentre/Documents/City%20strategies,%20plans%20and%20frameworks/Critical%20Water%20Shortages%20Disaster%20Plan%20Summary.pdf> (last date accessed 31 August 2019).

Phase 1 was implemented immediately and consisted of “water rationing through extreme pressure reduction”. This phase contained specific operational actions to avoid escalating the crisis into Phase 2. The National Department of Water and Sanitation required the City to achieve a 40% saving across urbanised areas by the end of September 2017. Water use consumption had to decrease to 500 million litres of collective use per day, which was to be achieved by setting a target of 50 litres per person per day for all domestic applications, i.e. cooking, cleaning, bathing and sanitary purposes.⁶ Water rationing was instituted through means of limiting supply by manually closing valves to sub-districts in the City, and advanced pressure management, limiting water into the water reticulation system through automatic controllers at specific choke points. This phase does not result in a complete shutdown of the water reticulation system; however, some areas did experience water shortages, and it severely limited available water supply in the system per day. There were short periods of water outages to some neighbourhoods and residents were advised to make alternative arrangements for water.⁷

Phase 2, which is also Day Zero, will be implemented when the City’s total available surface water storage allocation from the Western Cape Water Supply System reaches a point where intensive daily rationing is required to ensure there is enough water supply for the City to safely reach the next rainfall season or the activation of non-surface augmentation⁸. The primary purpose of this phase is to maintain human life and critical services and to prevent the implementation of Phase 3. Residents will be required to collect a predefined quantity of drinking

⁶ City of Cape Town “Day Zero now likely to happen – new emergency measures” (18 January 2018) <http://www.capetown.gov.za/Media-andnews/Day%20Zero%20now%20likely%20to%20happen%20%E2%80%93%20new%20emergency%20measures> (last date accessed 20 September 2019).

⁷ City of Cape Town “Critical Water Shortages Disaster Plan – Public Summary” (October 2017) <http://resource.capetown.gov.za/documentcentre/Documents/City%20strategies,%20plans%20and%20frameworks/Critical%20Water%20Shortages%20Disaster%20Plan%20Summary.pdf> (last date accessed 2 September 2019).

⁸ Forms of water augmentation include desalination and increased ground water abstraction. *Ibid.* It is in very basic terms a form of water recycling.

water per person per day⁹ at one of the 200 water collection sites situated across the City. The first date identified as Day Zero was 21 April 2018¹⁰, whereafter it shifted to 12 April 2018, 16 April 2018¹¹ and 11 May 2018¹². Various households and businesses will be unable to access drinking water from their homes and places of work. Businesses were advised to prepare for Day Zero by the Western Cape Government by developing a business continuity plan, which required firms to determine their water needs, reduce water consumption as low as possible while maintaining production, consider how water is being stored and what else is being done to provide own water supplies, what is their emergency plan for potable water supplier and sanitation and so forth.¹³ Strategic commercial areas, high-density areas with a significant risk of an increased burden of disease, i.e. informal settlements, and critical services, i.e. hospitals, will continue to receive drinking water through normal channels where possible.¹⁴

Phase 3, which follows on Day Zero and which is referred to as emergency disaster management, will be implemented when the extreme disaster scenario occurs, in which the Western Cape Water Supply will no longer have surface water supply which the City can access, and water must be trucked into the City. Non-surface drinking water supplies which are sourced from groundwater

⁹ The daily ratio allocated per person is 25 litres. World Wildlife Fund “Wednesday Water File #1: Day Zero” (17 January 2018) https://www.wwf.org.za/bucket_list.cfm?23981/wednesday-water-file-01 (last date accessed 7 September 2019).

¹⁰ City of Cape Town “Day Zero now likely to happen – new emergency measures” (18 January 2018) <http://www.capetown.gov.za/Media-and-news/Day%20Zero%20now%20likely%20to%20happen%20%E2%80%93%20new%20emergency%20measures> (last date accessed 20 September 2019).

¹¹ City of Cape Town “50 litres per day will help us to avoid Day Zero” (29 January 2018) <http://www.capetown.gov.za/Media-and-news/50%20litres%20per%20day%20will%20help%20us%20to%20avoid%20Day%20Zero> (last date accessed 20 September 2019).

¹² City of Cape Town “Day Zero projection moves out due to declining agricultural usage” (05 February 2018) <http://www.capetown.gov.za/Media-and-news/Day%20Zero%20projection%20moves%20out%20due%20to%20declining%20agricultural%20usage> (last date accessed 20 September 2019)

¹³ Western Cape Government “Drought Economic Security: Basic Business Continuity Planning” (2018) <https://www.westerncape.gov.za/110green/files/atoms/files/Business%20Continuity%20Plan%20Guide.pdf> (last date accessed 21 September 2019)

¹⁴ City of Cape Town “Critical Water Shortages Disaster Plan – Public Summary” (October 2017) www.resource.capetown.gov.za/documentcentre/Documents/4 (last date accessed 20 September 2019).

subtraction of various aquifers and spring water will only be provided for drinking water purposes. This will be supplemented with bottled water and will be distributed to residents through water distribution points. The water provision to critical services will also be significantly reduced.¹⁵

Day Zero was wildly publicised and reported on, both on a local and international level, as it was the first of its kind, with the United Kingdom newspaper, the Independent¹⁶ and BBC News¹⁷ reporting on the matter extensively.

Various dates have been identified for the implementation of Day Zero; however, due to strict water restrictions, favourable weather conditions and monitoring of weekly water use by Cape Town, the implementation date has been continuously shifted, with no specific date currently identified¹⁸. It is therefore clear that Day Zero is not an unforeseen event.¹⁹

An unforeseen event or occurrence that prevents a party from performing their contractual obligations is referred to as a *force majeure*. It is an event or circumstance that arises after the conclusion of the contract and falls outside of the reasonable control of one of the parties. It is generally governed under the *force majeure* clause included in contracts which seeks to relieve the parties from performing their obligations in the event of the occurrence of a *force majeure* event. It does not necessarily completely release the parties from fulfilling their

¹⁵ City of Cape Town “Critical Water Shortages Disaster Plan – Public Summary” (October 2017) <http://resource.capetown.gov.za/documentcentre/Documents/City%20strategies,%20plans%20and%20frameworks/Critical%20Water%20Shortages%20Disaster%20Plan%20Summary.pdf>

¹⁶ Chambers D “Day Zero: the city of Cape Town is about to run out of water – its main reservoir is only 12% full” (06 February 2018) https://www.independent.co.uk/news/long_reads/day-zero-cape-town-drought-no-water-run-out-reservoir-supply-12-per-cent-16-april-south-africa-a8195011.html (last date accessed 04 September 2019).

¹⁷ A Harding “Why is Cape Town turning off its taps” (30 January 2018) https://www.bbc.com/news/video_and_audio/headlines/42866178/why-cape-town-is-shutting-off-its-water-supply (last date accessed 04 September 2019).

¹⁸ As of date of submission of this dissertation there has been no specific date identified for the implementation of Day Zero.

¹⁹ The website How many days of water does Cape Town have left predicts when the Cape’s dam levels will reach 10%. As at the date last accessed it was 416 days. “How many days of water does Cape Town have left” <http://www.howmanydaysofwaterdoescapetownhaveleft.co.za/> (last date accessed 20 September 2019).

obligations; it merely suspends the performance thereof for the duration of the *force majeure* event. The parties will generally resume their obligations once the *force majeure* event has ended.

Hutchison²⁰ describes *force majeure* clauses as -

‘a clause in a contract that regulates the liability of the parties and the effect on the contract when an extraordinary event or circumstance beyond the control of the parties (e.g. war, strike, riot, crime), or an event described by the legal term ‘act of God’ (e.g. flooding, earthquake, volcano), prevents one or both parties from fulfilling their obligations under the contract.’

There exists a substantive law presumption that where a contract provides for reciprocal obligations, such obligations must be performed simultaneously, unless where it is clearly indicated otherwise.²¹ This forms the basis of the *exceptio non adimpleti contractus* in terms of which one party cannot call on the other to perform under a contract unless that party is prepared to perform their obligations under that contract. The *exceptio* serves as a defence for a party who is being sued for performance in terms of a contract who has not performed, or is not willing to perform, or has not performed in full in accordance with the provisions of the contract.²² This is slightly different from the defence of *force majeure* as the contracting party is willing to perform, but is prevented from doing so as a result of a particular event or circumstance.

Failure by a party to perform its obligations in terms of an agreement will result in a breach of contract, which gives rise to specific remedies, either provided for in the contract itself or in terms of the common law. The purpose of including a *force majeure* clause in a contract is to attempt to

²⁰ Hutchison *et al.* *The Law of Contract in South Africa* (2017) 3rd edition 514.

²¹ Christie RH *The Law of Contract in South Africa* (2006) 5th edition 421.

²² Cornelius S *Principles of the Interpretation of Contracts in South Africa* 3rd edition 14.

regulate these remedies where the non-performance is due to a *force majeure* event.

There is no specific format or template for a *force majeure* clause.²³ It will differ per drafter, depending on the industry and environment for which the provision is drafted, and depending on which risks it is prudent to cover in such industry or environment. The parties may decide to define it broadly in terms of which all forms of unforeseen circumstances and events outside of the control of the party fall within the ambit of *force majeure*. Alternatively, they may limit the events or circumstances by specifically listing same, i.e. acts of God, war, strike, riot, acts of government. The parties may further include specific obligations in the *force majeure* clause in terms whereof (1) they are required to notify one another upon the *force majeure* event arising and the subsequent ending thereof; (2) the parties may be required to meet within a specific time period in order to discuss, and/or (3) it may provide the parties with the option to terminate the agreement should the *force majeure* event exceed a specific time period.

When drafting these clauses, parties must ensure that they take into consideration the industry in which the agreement will operate, and the risks attached to such sector in order to ensure they are protected against unforeseeable events and unexpected risks. In the tourism industry, time is of the essence for performance. A holiday or travel package is booked for a specific time period, which means the dates and times for performance are fixed. Whereas the purpose of a *force majeure* clause is to suspend the performance for the duration of the *force majeure* event, it may not be realistic to some contracts concluded within the tourism industry.

²³ Some standard form construction contracts provide examples of *force majeure* clauses.

A *force majeure* clause should be appropriately drafted and be fit for purpose. By merely making use of a standard term that is copied from another agreement, the interpretation thereof may be problematic when applying it to a specific situation.

1.2. Research question/problem statement

This paper seeks to determine whether the concept of Day Zero will be able to qualify as a *force majeure* event which prevents a party from performing its obligations under a contract. In doing so, the following aspects will be considered:

- a) the history of the doctrine of *force majeure*;
- b) the full extent of the application of *force majeure* in South Africa;
- c) the inclusion and exclusion of *force majeure* clauses in contracts;
- d) various circumstances and events of *force majeure*;
- e) the concept of Day Zero and the impact thereof.

1.3. Methodology and structure

This paper is based on literature studies that specifically focus on the principle of *force majeure* and makes use of academic articles, books, case law and best practice guidelines.

Chapter 2 will focus on the history and origin of the principle of *force majeure*. It will also discuss the applicability thereof by courts in South Africa and what the purpose and effect are of including such a clause in contracts. *Essentialia*, *naturalia* and *incidentalia* terms will be looked at. The principle of supervening impossibility will also be briefly addressed as an alternative defence in the event of non-inclusion of a *force majeure* clause.

Chapter 3 takes an in-depth look at the various types of *force majeure* events and circumstances that may arise and will specifically focus on

such events and circumstances within the tourism industry. This chapter will further address the question as to the effect of Day Zero on the two main role players in the tourism industry, being hotels and their guests.

Chapter 4 will look at the interpretation and drafting of *force majeure* clauses. It will look at some of the basic rules of interpretation that the individual drafting the contract must bear in mind. It will also provide some advice on the drafting of these clauses.

Chapter 5 concludes this paper and seeks to address the question as to whether Day Zero can be considered as a *force majeure* event and whether tourism industry role players will be able to rely on raising *force majeure* as a defence.

1.4. Delimitations

This paper will not discuss the conclusion of contracts or the requirements thereof, nor will it address forms of breach of contract and the remedies available. This paper will briefly refer to the interpretation and drafting of *force majeure* clauses; however, it will not address any other specific clauses, nor will it go into a detailed discussion regarding the rules of interpretation.

CHAPTER 2

THE HISTORY OF THE *FORCE MAJEURE* PRINCIPLE

2.1. Introduction

This chapter will discuss the history and origin of the principle of *force majeure* and its applicability as a defence for non-performance within the South African context.

The words *force majeure* translates to “superior or irresistible force” and “an event or effect that cannot be controlled or anticipated”.²⁴ The origin of the *force majeure* principle is Roman; however, civil law countries have adopted this concept.²⁵ The concept is an established principle in French law²⁶ and appears in the Code Napoleon²⁷ which states:

‘There is no occasion for damages where, in consequence of *force majeure* or *cas fortuit*²⁸ the debtor has been prevented from conveying or doing that to which he was obliged or has done what he was debarred from doing.’²⁹

The French law requires the following three criteria to be satisfied for an event can be considered as *force majeure*: it must be (1) unpredictable; (2) uncontrollable; and (3) external.³⁰ In terms of *Bayley v Harwood*³¹ there are essentially three elements regarding *force majeure*, namely: (1) it can occur with

²⁴ Merriam Webster Dictionary “*force majeure*” <https://www.merriam-webster.com/dictionary/force%20majeure> (last date accessed 07 September 2019)

²⁵ Azfar F “The *Force Majeure* Excuse” Arab Law Quarterly Vol 26 No, 2 (2012) 249.

²⁶ McKendrick E *Force Majeure and Frustration of Contract* 6 (1991).

²⁷ The Code Napoleon is the French Civil Code established under the French Consulate.

²⁸ Also referred to as a “fortuitous event” which is defined by FindLaw Legal Dictionary quoting Merriam-Webster’s Dictionary of Law 1996 as “an event of natural or human origin that count not have been reasonably foreseen or expected and is out of the control of the persons concerned (as parties to a contract)”. <https://dictionary.findlaw.com/definition/fortuitous-event.html> (last date accessed 07 September 2019).

²⁹ McKendrick 6.

³⁰ Azfar 249.

³¹ 1954 3 All SA 459 (A) and Mountstephens & Collins v Ohlssohn’s Cape Breweries 1907 TH 56.

or without human intervention, (2) it could not have been reasonably foreseen by the contracting parties, and (3) it must be completely beyond the parties' control and they could not have prevented the consequences. A *force majeure* therefore takes place upon the occurrence of an unforeseen event or circumstance, that is outside the reasonable control of a party, and prevents that party from performing its obligations in terms of the contract.

South Africa's common law does not provide for a precise definition of *force majeure*.³² A *force majeure* event will not be recognised by our courts where it has not been specifically included in the contract under a *force majeure* or similar clause. This requirement will be discussed in detail hereunder.

2.2. Application of the principle of *force majeure* in South Africa

In South Africa *force majeure* is only contractually observed.³³ An event or circumstance will only be regarded as a *force majeure* where a written contract contains an express *force majeure* clause or reference is made to it. The extent of the protection from liability in respect of non-performance is dependent on the ambit of the *force majeure* clause.

To successfully invoke the defence of *force majeure*, the debtor must show that performance is made impossible, and it is not merely more onerous.³⁴ Where the event has caused the performance by a party to become uneconomical, such performance has not become impossible.³⁵ In *Scoin Trading (Pty) Ltd v Bernstein NO*³⁶ the court stated the following –

³² Van Eck MM *The Drafting of Contracts in South Africa* 75 citing Pejovic *Civil Law and Common Law: Two Different Paths Leading to the Same Goal* VUWLK (2001).

³³ The South African Council for the Quantity Surveying Profession "Understand the Basic Principles of Construction Law in the Built Environment" (2017) https://cdn.ymaws.com/www.sacqsp.org.za/resource/collection/A9A9E5E2-ECEF-4D7A-AA41-E2D754534E6D/Module_15_-_Construction_Law.pdf. (last date accessed 19 September 2019).

³⁴ McKendrick 6.

³⁵ Christie 472.

³⁶ 2011 (2) SA 118 (SCA), para 22.

‘The law does not regard mere personal incapability to perform as constituting impossibility. [WA Ramsden *Supervening Impossibility of Performance in the South African law of Contract (1985)* at 17.] The payment of the debt is not rendered impossible by the death of the deceased – as performance of a personal nature, like singing in an opera, would have been.’

In *Unlocked Properties 4 (Pty) Ltd v A Commercial Properties CC*³⁷ the court went further and quoted the following from *LAWSA Vol 5(1)* –

‘The contract is void on the ground of impossibility of performance only if the impossibility is absolute (objective). This means, in principle, that it must not be possible for anyone to make that performance. If the impossibility is peculiar to a particular contracting party because of his personal situation, that is if the impossibility is merely relative (subjective), the contract is valid and the party who finds it impossible to render performance will be held liable for contract breach.’

The main purpose of a *force majeure* clause is to prevent the non-performance from resulting in a breach of the contract and contractual breach remedies becoming available to the non-defaulting party. It merely seeks to suspend the performance for the duration of the *force majeure* event, and it is not meant to absolve a party from performing where the performance has become more burdensome. The *force majeure* event should therefore completely render the performance impossible. Where technical performance is capable, the defence of *force majeure* may no longer be raised.³⁸

In *Unibank Savings and Loans*³⁹ the court held –

‘Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance

³⁷ (18549/2015) (2016) ZAGPJHC 373.

³⁸ McKendrick 6.

³⁹ *Unibank Savings and Loans (supra) (formerly Community Bank) v ABSA Bank 2000 (4) SA 191 (W)* at 198D-E.

with the contractual obligations to be difficult, expensive or unaffordable.’

From the above, it is evident that performance must be absolute or objectively impossible. It is important to distinguish between objective and subjective impossibility. Performance will be objectively impossible where the performance promised cannot be performed by anyone and will be subjectively impossible where the promisor himself cannot render the performance (due to some personal inability).⁴⁰ Where the performance is objectively impossible no contractual obligations can arise.⁴¹ The matter of *Unlocked Properties 4 (Pty) Ltd*⁴² deals with the question when performance is impossible and distinguishes between subjective and objective impossibility. The court reiterated that impossibility of performance would only be objective/absolute where no one can perform. Notwithstanding the aforementioned, Hutchison⁴³ points out that absolute factual impossibility is not always required. A court will come to the aid of a party where it has been determined that the performance has become so difficult it could not be reasonably expected from him or her to perform.⁴⁴

There have been various cases in South Africa where the courts have dismissed the defence of force majeure. In *Rumdel Cape v SA National Roads Agency Soc Ltd*⁴⁵ the court found the appellant ‘has not demonstrated that it will be prevented from performing any of its obligations under the contract by *force majeure*’ and it did not accept ‘that the point has been reached where the provisions relating to *force majeure* apply’. In the matter of *Joint Venture between Aveng (Africa) Pty Ltd and Strabag International GmbH v South African National Roads Agency SOC Ltd*⁴⁶ the applicant attempted to rely on *force majeure* where civil unrest and commotion prevented it from performing in terms of the contract; however, the court determined upon objectively assessing that the events giving rise to the

⁴⁰ Treitel *Frustration and Force Majeure* (1994) 64.

⁴¹ Hutchison *et al* 218.

⁴² (18549/2015) (2016) ZAGPJHC 373.

⁴³ Hutchison *et al* 396.

⁴⁴ *Ibid.*

⁴⁵ (234/2015) (2016) ZASCA 23 (18 March 2016).

⁴⁶ (8331/19) (2019) ZAGPPHC 97; (2019) 3 All SA 186 (GP) (22 March 2019) (para 127).

disturbances did not constitute *force majeure*. The court dismissed the application with costs.

Parties relying on the defence of *force majeure* must therefore be able to demonstrate that the event is causing the performance to be objectively impossible and anyone else in the position of the party relying on the defence would not be able to perform. Performance will also become objectively impossible where it is factually possible to perform, but the performance itself has become illegal, i.e. due to the introduction of new legislation.⁴⁷

As discussed above, *force majeure* will only be contractually observed. It is therefore important to distinguish between *essentialia*, *naturalia* and *incidentalia* terms in contracts in order to understand the extent of protection afforded in the event of non-performance due to an unforeseen event or circumstance where a *force majeure* has not been expressly provided for. “Terms” refer to 1) stipulations included by parties in their contract, and 2) provisions that are included in contracts by operations of law. The terms give rise to the obligations or legal consequences that arise from the contract. Parties can freely determine which terms they wish to include in their contract.⁴⁸

Essentialia are distinctive terms used to identify or classify a contract as one of the recognised common law specific contracts, i.e. a contract of sale in terms whereof it must contain terms stipulating the property being sold and the purchase price payable.⁴⁹ *Naturalia* refers to terms automatically included in a contract that belongs to one of recognised specific contracts, which terms can be said to be implied by law. These terms do not have to be negotiated between the parties; however, these terms can generally be expressly excluded from the contract.⁵⁰ Although the operation of the *naturalia* can be excluded, the *naturalia*

⁴⁷ Hutchison *et al* 396.

⁴⁸ Hutchison *et al* 246.

⁴⁹ Hutchison *et al* 247.

⁵⁰ *Ibid.*

itself cannot be an express term.⁵¹ *Incidental* are terms other than *essential* and *incidental*. These are additional terms agreed upon by the contracting parties in order to supplement or modify the rights or duties incorporated by law into the contract.⁵² A *force majeure* clause will be *incidental* as it modifies the consequences of supervening impossibility, which is provided for by common law.. A *force majeure* allows for the suspension of performance in the event that performance is impossible, whereas supervening impossibility will discharge the parties' obligations, resulting in termination of the contract, in the event that performance becomes impossible.

2.3. Supervening Impossibility

In the absence of a *force majeure* clause, the courts of South Africa will recognise the doctrine of supervening impossibility where a change in circumstance, after the conclusion of the contract, results in the objective impossibility to perform in terms of a contract.⁵³ The defaulting party can rely on the doctrine of supervening impossibility in the event that performance is objectively impossible. The Supreme Court of Appeal stated the following in *MV Snow Crystal: Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal*⁵⁴ as requirements for using the doctrine of supervening impossibility as a defence:

'As a general rule impossibility of performance brought about by *vis maior* or *casus fortuitous* will excuse performance of a contract. But it will not always do so. In each case it is necessary to 'look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied'. The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault.'

⁵¹ Van Eck 284.

⁵² Hutchison *et al* 248.

⁵³ Hutchison A *Fundamental Change of Circumstances in Contract Law* (2010) 8.

⁵⁴ 2008 (4) SA 111.

In the event that a party is prevented from performing his obligations as a result of supervening impossibility, the reciprocal obligations of the parties in terms of the contract will be discharged.⁵⁵ In terms of South Africa's common law *vis maior* (higher power or superior force beyond resistance or control by the ordinary individual)⁵⁶ and *casus fortuitus* (an event occurring by chance) are deemed to be the nature of events that can give rise to impossibility.⁵⁷ In *New Heriot Gold Mining Co Ltd v Union Government*⁵⁸, the court stated the following:

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

In light hereof, the impossibility must be as a result of an unforeseen event, or in the alternative, the performance must have been made impossible as a result of a legislative enactment which makes the performance legally impossible.⁵⁹

The courts have placed a strict threshold on the use of supervening impossibility as a defence for non-performance, due to the impossibility having to be objective.⁶⁰ Even though a change in circumstance may be unforeseen, such change must render the performance impossible in order for the non-performing party to be able to rely on supervening impossibility. Where the cause of the event or circumstance rendering the performance impossible was foreseeable,

⁵⁵ *Peters, Flamman and Company v Kokstad Municipality* 1919 AD 427.

⁵⁶ Willie G *Principles of South African Law* 9th Edition 2007 849.

⁵⁷ Hutchison (2010) 14.

⁵⁸ 1916 AD 415.

⁵⁹ Hutchison (2010) 14.

⁶⁰ Hutchison (2010) 15.

does not mean that supervening impossibility did not arise. The event or situation may still be unavoidable.⁶¹

As Christie⁶² points out, there is nothing that prevents parties from including special provisions in their contract for circumstances that would excuse non-performance.

2.4. The purpose of including a *force majeure* clause

As discussed above, parties can include special provisions in their contract to excuse non-performance, being a *force majeure* clause. The purpose of the inclusion of a *force majeure* clause is to enable the parties to temporarily suspend the performance of their obligations for the duration of the *force majeure* event. Through means of this clause, parties can alter the general remedies that become available in the event of contract breach.

In South Africa, the common law principle of *pacta sunt servanda*⁶³ is generally speaking adhered to. Where the parties have freely entered into a legal contract, they are required to perform their obligations in terms thereof adequately. Courts are more prone to give effect to the provisions of the contract as contractual obligations must be honoured where the contract was voluntarily and freely entered into. In *Brisley v Drotzky*⁶⁴ the court reminded judges that they must exercise 'perceptive restraint' to avoid common law of contract becoming unacceptably uncertain.

In terms of the above, where there is non-performance by a party of its obligations in terms of a contract, the court will be required to enforce the breach provisions in the contract itself, or in its absence, apply the common law

⁶¹ Hutchison *et al* 397.

⁶² Christie RH *The Law of Contract in South Africa* (2006) 5th edition 475.

⁶³ *Pacta sunt servanda* refers to the sanctity of contract in terms whereof all legal contracts that have been free entered into should be enforced. Christie 199.

⁶⁴ (2002) ZASCA 35, 2002 (4) SA 1 (SCA).

principles in relation to breach. A *force majeure* clause seeks to prevent this course of action by providing the non-performing party with the option to raise *force majeure* as a defence for its non-performance. The *force majeure* clause manipulates the usual consequences for contract breach. The purpose of including such a provision in the contract is to provide broader protection than what is being provided by common law on supervening impossibility.

In order to ensure parties are sufficiently protected from liability in terms of non-performance, parties must include specific *force majeure* clauses into contracts in order to manage their legal position. The parties will be able to rely on the *force majeure* clause where non-performance arises due to the existence of one of the events or circumstances described in such clauses. Courts must strictly adhere to the sanctity of the contract in terms of the *pacta sunt servanda* principle and enforce these clauses as strictly as possible. Where the *force majeure* clause does not include a specific event, the party will not be able to rely on *force majeure*.

The *force majeure* clause does not necessarily release the parties from their obligations in terms of the contract, but simply suspends the performance thereof for the duration of the *force majeure* event. The parties will resume their obligations once the *force majeure* event has ended. In some instances, parties may agree to terminate the agreement should the *force majeure* last for a specified period.

Where a *force majeure* clause is excluded from the contract and a change of circumstance occurs which prevents a party from performing, the parties may be able to rely on supervening impossibility. Supervening impossibility is generally brought on by *vis maior* or *casus fortuitus*.⁶⁵ Supervening impossibility not only affects the performance that has become impossible, but also the counter-performance.⁶⁶ Generally upon the occurrence of supervening impossibility the

⁶⁵ Van Eck 222.

⁶⁶ Hutchison *et al* 397.

obligations of the parties terminate and the contract will become void. It may not be the intention of the parties to terminate the agreement as it may result in economic hardship and prejudice to the business operations of the parties. It is for this reason parties would want to consider including a *force majeure* clause to alter the consequences of the common law principle of supervening impossibility.

CHAPTER 3

FORCE MAJEURE EVENTS AND CIRCUMSTANCES

3.1. Introduction

A *force majeure* clause is meant to cover events or circumstances that are unforeseen and outside of the control of the contracting parties and to ensure liability is properly allocated. This chapter will look at the various forms of *force majeure* events and circumstances, with specific reference to those that may arise and have an impact within the tourism industry and its multiple relationships as discussed under Chapter 1.

3.2. *Force Majeure* events and circumstances

Christie⁶⁷ summarises the definition of the *force majeure* concept to include:

“anything happening, whether due to natural causes or human agency, which is unforeseeable with reasonable foresight and unavoidable with reasonable care”.

Force majeure clauses generally tend to form part of the boilerplate provisions⁶⁸ included in contracts. These clauses are included to deal with how the agreement operates and the points that are relevant to most transactions. They can usually be found at the end of a contract. These clauses are often thought of as “standardised provisions”. However, this is problematic given the fact that boilerplate clauses generally tend to be the subject of litigation.⁶⁹

⁶⁷ Christie 475.

⁶⁸ Boilerplate clauses generally include i.e. recitals, definitions and interpretation, duration, confidentiality, *force majeure*, assignment, limitation of liability, dispute resolution and severability.

⁶⁹ LexisNexis “Boilerplate clauses – overview”

https://www.lexisnexis.com/uk/lexispsl/commercial/document/391297/594F-9S11-F186-64FY-00000-00/Boilerplate_clauses_overview (last date accessed 17 August 2019).

A *force majeure* clause must be tailored in order to ensure performance is suspended upon the occurrence of specific events and situations. Parties must therefore carefully consider not only the risks that are prevalent to the industry but also the type of relationship they will be entering into and all other underlying situations and events that may prevent performance. The wording of the *force majeure* clause must be such that it sufficiently limits the parties' liability in this regard.

In the tourism industry, a multitude of events and circumstances has rendered performance impossible, i.e.:

- a) The Syrian civil war which resulted in a disruption of service delivery in the hotel industry, the destruction of tourism attractions and the shutting down of air transport services;
- b) the eruption of the volcano Eyjafjallajökull in Iceland in 2010 which resulted in large-scale disruption of air travel;
- c) an earthquake in Haiti in January 2010 which resulted in the collapse of multiple buildings as well as the breakdown of public transportation services;
- d) the Greek debt crisis which resulted in disruptive political rallies and demonstrations. This impacted the ability of tourists to access public services and tourist attractions. It also had an impact on the availability of cash;⁷⁰
- e) The outbreak of Ebola in May 2014 negatively impacted the tourism industry of Sierra Leone, causing numerous hotels, guesthouses and restaurants to shut down. It also impacted on the availability of airline services;⁷¹
- f) Boeing's grounding of its entire fleet of 737 Max 8 planes affected tourists' flight schedules very negatively;

⁷⁰ Daily ATM withdrawals were limited to 60 Euros per day in June 2015. M Thompson "Greece shuts banks down in bid to prevent collapse" <https://money.cnn.com/2015/06/28/news/economy/greece-banks-ecb/index.html> 29 June 2015 (last date accessed 28 August 2019)

⁷¹ P Kongoley "The Impact of Ebola on the Tourism and Hospitality Industry in Sierra Leone" <http://www.ijsrp.org/research-paper-1215/ijsrp-p4882.pdf> (last date accessed 28 August 2019)

- g) Liquidation of the Thomas Cook Group which left various travellers stranded without replacement flights.⁷²

As previously discussed, the *force majeure* event must render performance objectively impossible. For it to be objectively impossible, no other person should be able to deliver the performance.⁷³ In addition to rendering performance impossible, the event must be unforeseeable; beyond the parties' reasonable control and not due to the fault of one of the parties.⁷⁴ It is clear from the list of events above that these were unforeseen, outside of the reasonable control of the parties and not due to the fault of one of the parties.

3.3. Forms of impossibility

The general rule is where performance is impossible the creation of obligations is prevented.⁷⁵ From the *force majeure* examples listed above, one can note that various forms of impossibility may exist which will prevent the creation of obligations. Hutchison has identified the following classifications of impossibility:⁷⁶

- a) subjective and objective impossibility;
- b) factual and practical impossibility;
- c) legal impossibility;
- d) initial impossibility;
- e) supervening impossibility; and
- f) making performance impossible.

All forms of impossibility discussed will relate to impossibility arising after the conclusion of the contract.

⁷² Finance Monthly "Thomas Cook Aftermath: When Liquidation Delays Take Off" (30 September 2019) <https://www.finance-monthly.com/2019/09/the-thomas-cook-aftermath-when-liquidation-delays-take-off/> (last date accessed 11 November 2019).

⁷³ *Unlocked Properties 4 (Pty) Ltd v A Commercial Properties* (18549/2015) (2016) ZAGPJHC 373.

⁷⁴ Hutchison *et al* 397.

⁷⁵ Hutchison *et al* 213.

⁷⁶ Hutchison *et al* 214.

Under subjective and objective impossibility, it will not suffice where a particular party cannot perform, merely being a subjective impossibility. The impossibility must be of such a nature that no other person will be able to render performance, therefore being objectively impossible.⁷⁷ Practical and factual impossibility relate to performance being factually impossible. Practical and factual impossibility will be discussed by looking at impossibility arising as a result of the subject-matter of the performance being affected in some manner in the first instance, and secondly, the physical performance of a party becoming impossible.

The most obvious manner in which performance becomes objectively impossible is the destruction of the subject matter of the contract between the time the contract is concluded and the time when performance must have taken place.⁷⁸ Performance would not be factually possible as the subject matter no longer exists. A practical example would be the destruction of hotels as a result of an earthquake or flood. The subject matter can either be the thing in question or the services to be rendered in relation to the thing in question.⁷⁹

It is further essential to distinguish between total and partial destruction of the subject matter. “Partial destruction” refers to where the subject matter has been partially damaged, meaning some severable part of the subject matter has been destroyed by an event that does not affect the physical integrity of the remaining portion of the subject matter.⁸⁰ “Total destruction”, as can be deduced from the word “total”, means the subject matter is destroyed in totality, and it can no longer serve its purpose. In terms of partial destruction, performance may still be possible and will therefore not be objectively impossible. Where performance is divisible and partial impossibility is present, the contract can remain intact.⁸¹ Parties will not be able to rely on the defence of *force majeure* in the event of partial destruction. In the event of total destruction, performance will be

⁷⁷ *Ibid.*

⁷⁸ Treitel 66.

⁷⁹ Treitel 66.

⁸⁰ Treitel 66-67.

⁸¹ Hutchison *et al* 218.

objectively impossible and the parties will be able to rely on it (if so included in their contract, or the alternative, on supervening impossibility).

Where the subject matter is unavailable for the purposes of performance, which unavailability is not due to destruction, performance will be impossible⁸² and the parties will be discharged from performing. Unavailability in this context refers to the subject matter no longer being at the disposal of the parties, which must be distinguished from circumstances where the subject matter is at the disposal of the parties, but it can no longer be used for its intended purpose.⁸³ A practical example of the former form of impossibility, in terms of the tourism industry, would be where a terrorist attack or shooting took place in a hotel, which has been sealed off by the authorities in order to conduct a criminal investigation. The hotel has not been destroyed, nor has its intended purpose been changed; it is simply no longer at the disposal of the parties for the period it has been sealed off.

Courts will also recognise practical or economic impossibility where performance is possible, but to do so would not be economically feasible, and hence, no obligations will arise.⁸⁴ Where the contract includes some form of a warranty for performance, the party will be liable for performance, regardless of practical or factual impossibility, as the party warranted such performance.⁸⁵

A further form of impossibility arises where the subject matter becomes unavailable (without being destroyed) as a result of the actions of a third party - particularly in the event of theft.⁸⁶ Should a tourist's passport be stolen before leaving a country but after entering into an agreement with a hotel in a different country, such tourist may be prevented from entering the last-mentioned country without his passport. Although the tourist's performance in terms of the agreement would be to pay the hotel, the tourist will not be able to receive or

⁸² Treitel 121.

⁸³ Treitel 121.

⁸⁴ Hutchison *et al* 215.

⁸⁵ Van Eck 219.

⁸⁶ Treitel 130.

enjoy the counter-performance, which may result in a claim for unjustified enrichment.

Impossibility may also arise where a party is prevented from performing specific actions in terms of its obligations flowing from the contract. The impossibility of the performance of obligations may be partial or in total. In the event of partial performance, the parties may not be able to rely on *force majeure* as performance is still possible, albeit partially. The effect of partial impossibility is dependent on whether the obligation is (1) divisible from the rest of the contract, and (2) whether it has become altogether impossible to perform.⁸⁷ Where the obligation is divisible, it must be separated from the contract, and the remaining part must remain in operation; the debtor will be released from performing those parts of the obligation that have become impossible.⁸⁸ Where the obligation is indivisible, the creditor has the option to either cancel the contract or accept the partial performance in exchange for reduced counter-performance.⁸⁹

As mentioned above in the event of partial performance, the parties may agree to a pro-rata reduction in the counter-performance; however, where this is not agreed to, the party who has already performed in full and who is in receipt of the partial counter-performance may have a claim for unjustified enrichment.⁹⁰

It is important to note that parties will only be able to cancel the contract or to accept a reduced counter-performance in the event of partial performance where the parties concluded a contract that requires continuity of performance, i.e. employment contract or working partnership, and the interruption continues or is likely to continue for an unreasonably long period.⁹¹

⁸⁷ Christie 474.

⁸⁸ Hutchison *et al* 398.

⁸⁹ Christie 474.

⁹⁰ Christie 472.

⁹¹ Christie 474.

Performance will also be impossible as a result of the death of one of the parties. Where a contract is of a personal nature, meaning personal performance is required by one or both of the parties, the death of one of the parties will result in the discharge of the contract.⁹² Contracts entered into by a tourist are all of a personal nature; they generally cannot be substituted with a different party. Some airlines or hotels may allow for substitution, but this usually comes at a fee depending on the period for performance; however, in relation to the specific tourist, the contract will be discharged as performance is no longer possible.

Legal impossibility will arise when the subject matter of the contract becomes unavailable, or where the party is prevented from performing as a result of a court order⁹³ or due to legislation, regulations or rules issued by regulating bodies or due to any other legal impositions. A recent example illustrating this form of impossibility was the grounding of the Boeing 737 MAX 8 planes. Following two separate aircraft crashes, killing 346 people, aviation authorities grounded the aircraft as a precautionary measure hanging formal investigations.⁹⁴

Impossibility of performance can be of a temporary or permanent nature. The effect of temporary impossibility will be dependent on the surrounding circumstances.⁹⁵ Temporary impossibility will arise where the thing or person essential for the performance become temporarily unavailable, or where the elements necessary for performance temporarily cease to exist, which may occur before performance is due or at a later stage during the performance.⁹⁶ This temporary form of impossibility will not in itself discharge the contract. In the matter of *World Leisure Holidays (Pty) Ltd v Georges*,⁹⁷ the Georges family booked a holiday to Mauritius. Their flight was suspended as a result of a tropical

⁹² Treitel 132-133.

⁹³ Treitel 129.

⁹⁴ The first aircraft crash befell Lion Air Flight 610 on 29 October 2019 and Ethiopian Airlines Flight 302 on 10 March 2019. China's Civil Aviation Administration ordered the first regulatory grounding, whereafter other authorities followed suit. The US Federal Aviation Administration grounded the planes on 13 March 2019. The groundings affected 59 airlines who had Boeing 737 Max's in their fleet.

⁹⁵ Hutchison *et al* 398.

⁹⁶ Treitel 211.

⁹⁷ 2002 (5) SA 531 (W).

cyclone, resulting in the family attempting to cancel their contract with the tour operator and to claim damages on the ground of supervening impossibility bringing the contract to an end. The court upheld the claim; however, on appeal, the court found that temporary impossibility in it itself does not bring the contract to an immediate end. Where the foundation of the contract has been destroyed or the performance is (or inevitably will become) impossible, the creditor will be entitled to regard the contract as being ended. There is no specific test to determine impossibility, and the court held that it is neither necessary nor desirable to lay down a concrete test –

‘The facts in some cases will lend themselves more readily to the application of one test, whereas other cases will more easily be disposed of by the application of another test. In every case a value judgment, based on objective criteria, will be required to establish whether it is just that the bargain should, to the extent still possible, be upheld and the obligations of the parties adjusted. On the one hand, the court should not make a new contract for the parties. On the other hand, neither party should be allowed to escape its obligations where the essence of the contract is still capable of performance.’

In circumstances where performance has become temporarily impossible, the general rule is that the performance is suspended for the duration of the impossibility. Where the impossibility continues to the extent that it is no longer reasonable to expect the creditor to continue with the contract, such creditor will have the option to terminate the contract.⁹⁸

Contracts in terms of which performance is temporarily impossible will only be discharged where the obligations can only be performed on the day or days over which the temporary impossibility extends. Although the

⁹⁸ Hutchison *et al* 399.

impossibility may only be temporary, in actuality the resulting impossibility can in the contractual context be said to be total impossibility where time is of the essence for the performance.⁹⁹ Practical examples will include the destruction of landmarks for which tourists have prepaid for access or damage to a hotel where tourists have already paid a deposit. The excursion or accommodation may form part of the tourist's travel package which was set to take place within a specified time period. It is generally not possible to suspend such travel packages for the duration of the period in which performance is rendered impossible. Although the landmark or hotel building requires repairs (that will make performance temporarily impossible), the temporariness will become total impossibility as time is of the essence under these travel packages. The landmark or hotel owner or will not be able to perform within the period of the travel package. Time is of the essence for performance in the majority of agreements concluded within the tourism and travel industry.

Initial impossibility relates to circumstances where a party's performance is not possible at the conclusion of the contract.¹⁰⁰ As a result, no obligations have been formed, and the parties will not be liable for breach of contract.¹⁰¹ Supervening impossibility occurs after the conclusion of the contract, where performance has become objectively impossible.¹⁰² Where performance is made impossible as a result of the fault of one of the parties, obligations will not terminate.¹⁰³

3.4. The effect of Day Zero on role players in the tourism industry

To determine whether Day Zero will qualify as a *force majeure* event, it is necessary to look at the effect and impact Day Zero and all its phases will have

⁹⁹ Treitel 212.

¹⁰⁰ Hutchison *et al* 216.

¹⁰¹ Van Eck 220.

¹⁰² Hutchison *et al* 216.

¹⁰³ *Ibid.*

on the two major tourism industry role players, being (1) hotels (and other forms of accommodation providers) and (2) the guests.

As discussed under Chapter 1, Day Zero refers to the day upon which the water supply to Cape Town homes and businesses will be switched off by the City of Cape Town. The various phases will influence accessibility to water. In terms of Phase 2,¹⁰⁴ which is Day Zero, water will be shut off to residential taps resulting in large numbers of households and businesses being unable to access water. To obtain drinking water, people will be required to collect their daily ration¹⁰⁵ at one of the 200 collection points set up across the City. The water provisioning to hotels and other accommodation providers will be limited. A stay at a luxury hotel may no longer be the five-star experience a guest anticipated when booking.

In terms of the Tourism Grading Council of South Africa Minimum Requirements,¹⁰⁶ there is no specific mention of a minimum supply of water required for guests. The only requirement is for all basins, baths and shower taps to be in working order with sufficient hot and cold water supply, of which the flow must be strong and easily adjustable.¹⁰⁷ It is interesting to note that additional points will be allocated to a hotel or lodge's star rating where it has implemented certain responsible water management practices, i.e. water-efficient dishwashers, water-saving fittings, no towel change and no linen change options for guests and so forth.

The United Kingdom's newspaper, *The Independent*, posed as a potential guest and contacted a few hotels in Cape Town in order to enquire about the impact of

¹⁰⁴ See Chapter 1 for the discussion of the various phases of Day Zero.

¹⁰⁵ In terms of the Water Services Regulations 2001 issued under Section 19(5) of the Water Services Act No. 108 of 1997, each person is entitled to a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month within 200 metres of the household with an effectiveness that no such consumer is without supply for more than 7 full days in any year.

¹⁰⁶ Tourism Grading Council of South Africa "Minimum Requirements: Formal Accommodation for Hotels and Lodges" (7 November 2013) www.tourismgrading.co.za/assets/assets/Formal-Accommodation-20131107 (last date accessed 09 September 2019).

¹⁰⁷ This requirement is applicable to all stars hotels and lodges.

the current water shortage,¹⁰⁸ which at the time refers to the implementation of the daily water limit of 50 litres per person.¹⁰⁹ The Kensington Place, a boutique hotel situated at the foot of Table Mountain, provided some of the most comprehensive rules in order to sparsely work with water which included asking guests to limit their showers to 90 seconds, use hand sanitizer instead of washing their hands, when brushing their teeth to use a glass of water instead of running water and to refrain from flushing the toilet after urinating by stating “If it’s yellow, let it mellow. If it’s brown, flush it down”. The hotel further advised that for stays for periods under five nights the bedding will not be changed and wet towels will be dried and returned without washing.

Cape Grace, a five-star hotel, advised that low-flow showerheads and aerators on taps have been installed to reduce the flow of running water, together with pressure reducing valves on the hot and cold-water feeds into each individual room. Water-based spa treatments have also been removed from the hotel’s spa menu.

There is no clarity or guidance on the exact processes to be followed by hotels and other accommodation providers in the event of the implementation of Day Zero in relation to their guests. Hotels have, however, been required to come up with innovative ways to save water and to ensure their guests have access to water prior to the implementation of Day Zero as a result of the water restrictions. Hotel Verde Cape Town Air has implemented the following sustainable features, which include a greywater recycling system, creating awareness by placing educational signage throughout the hotel informing guests of the water crises, encouraging shorter showers and enforcing the use of half-flush buttons on all toilets, which has had the effect of the hotel only using 35% of water required by a hotel of the same size, and which save a total of 65%.¹¹⁰ Tsogo Sun Hotels in Cape Town reduced its water usage by nearly 300 000 litres per day by removing

¹⁰⁸ H Coffey “Cape Town Drought: from not flushing the toilet to not washing your hands, here’s what you’ll experience at a luxury hotel” www.independent.co.uk (last date accessed 7 September 2019).

¹⁰⁹ This forms part of the water rationing exercise in terms of Phase 1 as discussed under Chapter 1.

¹¹⁰ U Nkanjeni “Water Crisis: Cape Hotels forced to get innovative” traveller24.co/Explore/Green/water-crisis-cape-town-hotels-forced-to-get-innovative-20170914 (last date accessed 25 August 2019).

bath plugs from bathrooms, encouraging shorter showers, changing bed linen only on guest departure, installing water restrictors on showerheads, replacing linen serviettes with paper serviettes, and issuing guests with water-saving tips at check-in.¹¹¹ Hotels appear to follow the same approach with their water-saving measures, with some going as far as to build desalination plants.¹¹²

Another role player in the tourism industry is the guest himself. In terms of a guest's obligations under the contract concluded with a hotel or lodge, he or she is required to pay for the accommodation service. Upon the occurrence of Day Zero, the guest's performance is not made objectively impossible. There is nothing preventing or restricting the guest from performing as he or she is still in a position to effect payment to the hotel. However, should the hotel be unable to perform in terms of the agreement, the guest will be able to rely on the *exceptio non adimpleti contractus*. In terms of this exception, recognition is given to the principle of reciprocity in terms of which the common intention of many contracts is the exchange of performance.¹¹³ This *exceptio* serves as a defence where a party to a reciprocal contract is sued for performance under the contract, where the other party has not made any counter-performance.¹¹⁴ The guest can simply refuse to perform until the hotel has performed in full. The guest will also be able to rely on this defence where the hotel has failed to properly perform.¹¹⁵ It is important to note that this defence is aimed at keeping the contract alive; it will no longer be applicable where a contract is cancelled, as the obligation to perform will thereby be terminated.¹¹⁶ Where a guest has already paid a deposit or the full amount and the performance rendered is only partly or none at all, the

¹¹¹ *Ibid.*

¹¹² A desalination plant (or reverse osmosis plant) desalinates seawater by removing the salt and impurities from the seawater to produce fresh drinkable water through a reverse osmosis process. Water Corporation "How does desalination work" watercorporation.com.au/water-supply/our-water-sources-desalination (last date accessed 25 August).

¹¹³ Christie 421. This is supported by *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A)

¹¹⁴ Hutchison *et al* 513.

¹¹⁵ Hutchison *et al* 330.

¹¹⁶ Hutchison *et al* 331.

guest will be able to claim from the hotel based on the *actio quanti minoris*¹¹⁷ or in the alternative, unjustified enrichment.

CHAPTER 4

INTERPRETATION OF *FORCE MAJEURE* CLAUSES

4.1. Interpretation of Contracts

When drafting a *force majeure* clause, one must bear in mind the principles of interpretation. The contract will only be interpreted by the courts where there is a dispute as to the interpretation thereof. The interpretation itself can prove to be difficult as parties are free to choose their words and the construction thereof in order to embody their agreement, and they are not obliged to follow the rules of grammar.¹¹⁸ As stated by Wallis JA in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹¹⁹ regarding the construction of a document:

‘The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production’¹²⁰

¹¹⁷ This action available to the contracting party making use of defective or incomplete performance for which he can pay a reduced amount to the party providing the defective or incomplete performance. Hutchison *et al* 332.

¹¹⁸ Cornelius 3.

¹¹⁹ 2012 (4) SA 593; (2012) ZASCA 13 (SCA).

¹²⁰ Par 18

and

‘Unlike the trial judge I have deliberately avoided using the conventional description of this process as one of ascertaining the intention of the legislature or the draftsman, nor would I use its counterpart in a contractual setting, ‘the intention of the contracting parties’, because these expressions are misnomers, insofar as they convey or are understood to convey that interpretation involves an enquiry into the mind of the legislature or the contracting parties. The reason is that the enquiry is restricted to ascertaining the meaning of the language of the provision itself.’¹²¹

Even though the purpose of interpreting the contract is to give effect to the intention of the parties,¹²² it is clear from the above that courts do not mean to interpret the intention of the contracting parties itself. The enquiry should not go beyond ascertaining the meaning of the language of the provision itself.¹²³ As per Cornelius¹²⁴, contracts are interpreted by taking account of “the theoretical basis of contractual liability as well as the legal framework underlined by substantive law and jurisprudential views”. Specific rules and presumptions of interpretation are applied to attribute meaning to the text and facilitate the process of interpretation.¹²⁵

In short, courts will look at the following factors when interpreting contracts, as summarised in the *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹²⁶ and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*¹²⁷:

¹²¹ Par 20.

¹²² *Hutchison et al* 267.

¹²³ *Hutchison et al* 267, quoting the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593; (2012) ZASCA 13 (SCA).

¹²⁴ Cornelius 2.

¹²⁵ Cornelius 26, 27.

¹²⁶ 2012 (4) SA 593 (SCA).

¹²⁷ 2014 (2) SA 494 (SCA).

- a) The language used by the parties, bearing in mind the ordinary rules of grammar and syntax;
- b) The context in which the provision appears;¹²⁸ and
- c) The apparent purpose to which it was directed.

In addition to the above, there are various other guidelines and rules courts may apply in order to interpret a contract. It is therefore essential that the contracting parties carefully select their wording to ensure that their intentions are correctly reflected and recorded in the *force majeure* clause. Words are generally open to different interpretations. One word may have various meanings depending on the context in which it was used. It is therefore not always possible to determine the precise intention of the party based on the words used.¹²⁹ Further factors complicating the interpretation of the words are where a word is not used in the correct context or in relation to the ordinary meaning assigned to it; the meaning of the word may vary based on its historical use; the document in which the word is contained has been poorly drafted; or the wording in the documents is not consistently used which may lead to internal contradictions.¹³⁰

An important rule to bear in mind when drafting a *force majeure* clause is the *eiusdem generis* rule. This rule will only be applied to interpret the contract where the wording is ambiguous. In terms hereof words with a general meaning are restricted when used in association with words relating to a specific definition or species.¹³¹ In other words, where general words follow specific words in the form of a list, such general words must be construed as only referring to the type of things identified by the specific words. This rule seeks to limit the general words by referring to the

¹²⁸ Judges are advised in terms of the *Natal Joint Municipal Pension Fund* matter to “be alert and guard against the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used, for to do so they will make a contract for the parties other than the one they in fact made”.

¹²⁹ Cornelius 4.

¹³⁰ Cornelius 4.

¹³¹ Hutchison *et al* 279.

accompanying specific word; however, where the specific words do not form part of the same genus the rule cannot be applied.¹³² This is supported by the *noscitur a sociis* rule which states words are known or understood by the company they keep.¹³³ The effect of this rule is where the meaning of a word or phrase does not have a general meaning it will be influenced by its association with other specific words or phrases.¹³⁴

Force majeure clauses generally tend to contain a list of events and circumstances that serve as examples of when a party will be able to rely on the *force majeure* defence. A contract may contain a definition for *force majeure* or may set out the *force majeure* events in the clause itself. A practical example may read “*Force Majeure* Event affecting any Airline or the Customer means, respectively, anything outside the reasonable control of any Airline or the Customer, including but not limited to fire, flood, drought, storm, lightning, act of God, peril of sea or air, explosion, sabotage, accident, embargo, labour dispute or shortage, epidemic, civil commotion, act of war or terrorism and war.”¹³⁵

Considering this, another rule to be noted by the individual drafting the contract is the *inclusio unius est exclusio alterius* rule in terms where if one is included, by implication, the other is excluded. This rule is based on the assumption that where a specific matter has been expressly addressed in a contract, the contracting parties intend to treat other similar matters that were not mentioned differently.¹³⁶ This rule plays an essential role in the interpretation of the list of events in a *force majeure* clause where specific events and circumstances are listed. It may lead to the exclusion of other events and situations. As from the practical example listed above reference is made to flood, storm and lightning, but no mention is made of rain, hail or snow. It may be interpreted to mean that the latter are to be excluded as

¹³² Cornelius 185.

¹³³ Hutchison *et al* 279.

¹³⁴ Cornelius 186.

¹³⁵ This *force majeure* clause has been copied from a Cathay Pacific Airline Corporate Travel Agreement 2018.

¹³⁶ Cornelius 186.

force majeure events. In addition to the rule described herein, parties must also be aware of the *ex contrariis* rule in terms of which if a specific provision is made for a case, it by implication makes a contrary provision for another or the opposite case. Where a particular matter is expressly provided for in a contract, it is understood that the contrary will apply for the reverse or a similar matter not mentioned.¹³⁷

There is an assumption that in the process of concluding their contract, the parties applied certain principles. This assumption is derived from the various presumptions that would give effect to these principles.¹³⁸ The presumptions are listed by Cornelius¹³⁹ and include –

- a) Words are used in their ordinary and everyday sense;
- b) Words were used to express the contracting parties' intention precisely and exactly;
- c) The same word or expression used in the same contract will have the same meaning throughout the contract;
- d) Different words or expressions in the same contract will indicate different meanings;
- e) There are no superfluous, tautological or meaningless words in a contract; and
- f) There is no *casus omissus*, meaning no words have been left out that should have been included.

It is therefore essential that parties consider the wording of a *force majeure* clause carefully to ensure that the text employed is comprehensive enough to cover all forms of events and situations that may lead to non-performance. In addition to ensuring the clause is comprehensive, the drafter must consider the audience of the contract. The contract will be reviewed and signed by customers or guests. One must be careful to not frighten off guests with long and detailed clauses in which they may be held

¹³⁷ Cornelius 187.

¹³⁸ Cornelius 95.

¹³⁹ Cornelius 99 – 102.

liable or where they provide indemnifications for certain liabilities. In terms of the Consumer Protection Act¹⁴⁰, a provision in a contract concluded with a consumer which limits the liability of the supplier, or provides an indemnification for the supplier or is an acknowledgement of fact, must be written in plain language.¹⁴¹

4.2. Drafting of *force majeure* clauses

Theoretically it is not necessary to include supervening impossibility, *vis maior*, *casus fortuitus* or *force majeure* provisions in a contract as they are provided for under the common law;¹⁴² however, as previously discussed,¹⁴³ parties include a *force majeure* clause in order to avoid the contract from being cancelled as a result of non-performance and the uncertainty that follows the application of supervening impossibility.¹⁴⁴

Generally, it is standard practice to find an example of someone else's *force majeure* clause and to copy it¹⁴⁵ as these clauses commonly form part of the boilerplate provisions of a contract.¹⁴⁶ The downside of this practice (in addition to plagiarism) is the fact that no real thought or consideration is given to the clause as it usually consists of standardised wording - a "one-size-fits-all" clause. However, parties should be cognisant when drafting these clauses that a poorly worded *force majeure* clause could lead to liability for non-performance - and ultimately to the payment of damages for a breach of contract. A well-drafted *force majeure* clause can avoid all of that.

¹⁴⁰ No 68 of 2008.

¹⁴¹ Section 49(1) to (3). In accordance with Section 2(2) the language will be plain where it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort.

¹⁴² Van Eck 224.

¹⁴³ See the discussion regarding the exclusion of a *force majeure* clause under Chapter 3.

¹⁴⁴ Van Eck p237.

¹⁴⁵ Treitel p21.

¹⁴⁶ See discussion on boilerplate clauses under Chapter 3.

Treitel¹⁴⁷ has set out some dynamics that must be considered when drafting a *force majeure* clause –

- a) The first step would be to define one's object. It is not appropriate to insert the same *force majeure* clause into each contract that requires such a provision. Treitel identifies two variables, the first of which is whether the draftsman acts on behalf of the seller, the buyer or some neutral trade association or similar body. *Force majeure* clauses will generally follow on the seller's obligation to deliver the performance instead of the buyer's responsibility to pay.
- b) The second step to consider is that a *force majeure* clause should make sense in relation to the business context for which it is drafted. Treitel recommends carefully discussing typical events that can delay performance with the party on whose behalf the contract, and clause, is being prepared.
- c) The third consideration is to have regard to the way in which the clause will be interpreted and construed by the courts.

Treitel¹⁴⁸ goes further and identifies four questions which a well-drafted *force majeure* clause should be able to provide an answer to, which are –

- a) The definition of the event;
- b) Obligations as to reporting;
- c) The effect of the event; and
- d) Questions of adjudication.

When defining an event there appear to be three alternatives, being (1) a general reference to "*force majeure*"; (2) a list of specific *force majeure* events, together with or without the all-encompassing wording at the end which refers to any other unspecified, unforeseen and uncontrollable circumstances or events; and (3) a general provision for unforeseen and uncontrollable events.¹⁴⁹

¹⁴⁷ Treitel p21.

¹⁴⁸ Treitel p23.

¹⁴⁹ *Ibid.*

As discussed under Chapter 2, a *force majeure* clause is only contractually observed, which in turn has the effect that only the events and circumstances listed under such clause will be observed. In order to ensure liability is properly allocated between the contracting parties in the event of a *force majeure*, the parties must ensure all applicable events and circumstances, foreseen and unforeseen, are provided for under the *force majeure* clause. It is clear from the rules of interpretation that attempting to list all such events and circumstances may prove to be more problematic than helpful if one specifically focuses on the *iusdem generis* rule - if general words are followed by specific words, such words must be construed as only referring to the type of things identified by the specific words. In this regard one should also take note of the *inclusio unius est exclusio alterius* rule which states where one is included, the other is by implication excluded. Hutchison¹⁵⁰ recommends drafters to refrain from attempting to describe or list the various events and circumstances for the risk of excluding a specific event or circumstance by failing to include it in the list. A specification should only be included where the parties' intention is to limit the application of the *force majeure* clause to only that specific event.¹⁵¹ The ambit and extent of the protection from liability created in a *force majeure* clause are dependent on the content of the clause.

Considering the above, it is recommended that the various events and circumstances that may lead to impossibility of performance under a specific contract should be grouped under general categories in the *force majeure* clause or definition, i.e. -

- a) "acts of God", which will provide for natural disasters such as floods, hail, tornadoes, earthquakes, hurricanes, drought, heatwave, storm, blizzard, landslide, fire, lightning, famine, epidemic, pandemic;
- b) "acts of government", which may include war, trade war, strikes, anticipated strikes, embargo, amendment in legislation, regulations or policies, issuing of new legislation, regulations or policies, refusal to grant licences, permits or authorisations;

¹⁵⁰ Hutchison *et al* 424.

¹⁵¹ *Ibid.*

- c) “economic activities” which may include economic downturn, credit crises, recessions, internal political instability which leads to drastic currency changes, economic downgrades.

By grouping the events and circumstances under a general category, the parties do not run the risk of excluding a specific event that may lead to non-performance. It may prove difficult for the drafter to identify each possible event and circumstance, especially where it is unforeseen as one will generally only become aware upon the occurrence thereof. The *force majeure* must be described as any occurrence or event that is beyond the control or fault of the parties and which cannot be avoided.¹⁵²

The following wording is recommended to be included in a *force majeure* clause for use by stakeholders in the tourism industry, with specific reference to hotels and accommodation providers as these are the parties that will be significantly affected by the implementation of Day Zero:

- a) Should either Party be unable to perform any of its obligations in terms of this Agreement as a result of any cause beyond its reasonable control, such as, but not limited to any act of God, act of Government or economic activities that may result in the performance being no longer economically feasible (“*Force Majeure* Event”) then the other Party shall not be entitled to terminate this Agreement nor shall the other Party have any claim for damages of whatsoever nature against the Party unable to perform its obligations.
- b) The Party claiming *Force Majeure* shall -
 - i) immediately give notice to the other Party detailing the circumstances on which it relies and an estimate of the likely duration of its inability to perform its obligations under the Agreement; and

¹⁵² Hutchison *et al* 424.

- ii) when that Party knows that such inability to perform its obligations under the Agreement is likely to terminate and again when it actually ends, immediately give notice thereof to the other Party.

- c) The Parties shall co-operate and use all reasonable endeavours to overcome, or failing which, to minimise the effect of such inability of either Party to perform its obligations under the Agreement due to a *Force Majeure* Event.

In the *force majeure* clause, or in the contract itself, it should be clearly recorded that where lists are included under a clause, the application of the clause or the contract itself is not limited to what is specifically recorded in that list, which is why wording such as “including without limitation” or “includes but is not limited to” is generally included.

It is also recommended that the drafter include the obligation that the contracting party relying on the *force majeure* defence will immediately notify the other party of its inability to perform and the likely duration thereof. A further recommendation would be to include a clause in terms of which either party will be able to terminate the contract after the *force majeure* event endures for a specific continuous period, i.e. 30 days. However, this may not necessarily be applicable within the tourism industry as time is of the essence for performance.

CHAPTER 5

CONCLUSION

5.1. Does Day Zero qualify as a *force majeure* event?

To address the question as to whether contracting parties will be able to rely on *force majeure* as a defence for non-performance in the event of Day Zero, one must determine whether the specific event or circumstance preventing the performance meets the various requirements of a *force majeure*. In order to rely on *force majeure*, the event or circumstance must be unforeseen and out of the reasonable control of the party. Performance must be objectively impossible, meaning no other person should be able to perform the obligations in terms of the contract.

In South Africa, as well as in the rest of the world, Day Zero was a highly publicised event as it was the first of its kind. It received a lot of widespread media coverage on both a local and international level¹⁵³. It is clear that Day Zero is not an unforeseen event. Not only is Day Zero foreseeable, but the drought which resulted in the critical water shortage was also reasonably foreseeable as it had been a reality over the past few years, alternatively a fact when the parties concluded the contract.

A further requirement for *force majeure* is that the event or circumstance must be outside of the reasonable control of the party, and they could not have prevented its consequences.¹⁵⁴ Upon the implementation of Day Zero, residential reticulation will be severely reduced or ceased and the daily water use of the city will be controlled through the distribution of water to residents through the 200 localised water collection points across the city. The decision to implement Day Zero lies in the hands of the City of Cape Town as based on the dam levels at

¹⁵³ CNN (American news-based television channel), The Independent (British newspaper), TIME (American weekly news magazine and news website), Khaleej Times (United Arab Emirates newspaper), The Herald (Zimbabwe newspaper) all published articles on Day Zero during 2018.

¹⁵⁴ *Bayley v Harwood* [1954] 3 All SA 459 (A).

the time of implementation. This decision is outside of the reasonable control of parties. There is no way the contracting parties will be able to stop or prevent the City from exercising its power. However, the consequences of Day Zero can be mitigated to a certain extent to ensure that performance remains possible. Parties have been well informed of the potential effects of Day Zero, as well as possible water-saving countermeasures, through means of numerous communications shared by the City of Cape Town,¹⁵⁵ the WWF,¹⁵⁶ the independent newspapers, social media pages and general news programmes.

A *force majeure* event or circumstance must render performance objectively impossible; subjective impossibility will not suffice. Performance in terms of the contracts concluded by hotels, guesthouses, airlines, restaurants and other role players in the tourism industry will not be objectively impossible as there is still water available; in the alternative, water can be accessed at one of the collection points, albeit in limited quantities. The tourism industry is fully aware and fully understands the effect the drought may have on its activities. They were aware that it is possible to mitigate the consequences of the drought by the implementation of alternative methods for the provisioning of water. Accordingly, the tourism industry was in the position to deal with Day Zero and the drought. Businesses, in preparation for Day Zero, have been advised to provide for alternative arrangements in terms of the accessing and storing of water and to have business continuity plans in place.¹⁵⁷

It is clear that Day Zero does not meet the requirements for *force majeure* and parties will not be able to rely thereon in the event of non-performance as a result of Day Zero. Although Day Zero is outside of the parties' reasonable control, it is a foreseeable event, due to the various dates that have been identified as the

¹⁵⁵ The City of Cape Town issued various statements and press releases on a continues basis throughout 2017 to 2019 to ensure the City and the rest of the country remain up to date on the status of the dam levels, together with the possible dates for Day Zero.

¹⁵⁶ The World Wildlife Fund (WWF) issued Weekly Wednesday Water Files which provided advice for Day Zero preparation and water-saving tips. World Wildlife Fund "Wednesday Water Files" https://www.wwf.org.za/bucket_list.cfm (last date accessed 9 September 2019).

¹⁵⁷ See discussion under Chapter 1 relating to business continuity plans.

implementation day, together with the widespread media coverage, and does not render performance objectively impossible. Day Zero may place a massive financial burden on one of the contracting parties. The estimated total capital cost of a desalination plant in 2014/2015 amounts to R46 277 351.00.¹⁵⁸ Price on its own will not result in objective impossibility. Performance is still possible, albeit at a cost. Courts are willing to recognise economic impossibility where performance is possible, but to do so would not be economically feasible which will result in no obligations arising.¹⁵⁹ Should Phase 3 of the critical water shortages plan be implemented, which is also referred to as emergency disaster management, parties may be able to rely on *force majeure* as there will be no water available in Cape Town. This differs markedly from Phase 2, also known as Day Zero. In terms of Phase 3, the supply of water will be switched off, and limited quantities will be distributed to individuals daily - there is still water available - however, the availability will be actively rationed by the City of Cape Town.

In order to ensure that the parties are adequately protected, it is recommended that parties include a *force majeure* clause in their contract where the possibility of non-performance exists due to a force majeure event. As discussed in Chapter 4 above, parties should refrain from attempting to list the various events and situations of when a force majeure clause could be invoked. Why? By doing this, a party runs the risk of accidentally excluding a specific event or condition by failing to include it in the list. The wording of the *force majeure* clause must therefore be broad enough that it provides for events or circumstances which the parties may be aware of that may prevent performance, but which arise unexpectedly and are therefore unforeseen, together with any other events or circumstances which the parties have no knowledge of and could not have been aware of at the time of conclusion of the contract. The *force majeure* clause must be tailored for the industry to which it will apply, bearing in mind all the risks associated with such sector of the economy. Where the parties wish to list

¹⁵⁸ KN Turner *et al* "Investigation into the Cost and Operation of Southern African Desalination and Water Reuse Plants" (September 2015) <http://www.wrc.org.za/wp-content/uploads/mdocs/TT%20638-15.pdf> (last date accessed 7 September 2019).

¹⁵⁹ Hutchison *et al* 215.

specific events or circumstances, it is essential to realise that the *force majeure* clause will be restrictively interpreted to be applicable only to those particular events. Under the circumstances and for the specific purpose of Day Zero, it may be worthwhile for the tourism industry role players to consider drafting their *force majeure* clauses in such a manner that they include drought and Day Zero as specific events of *force majeure*.

The various considerations to be taken into account, together with the complications when drafting a *force majeure* clause have been set out in this study. It is clear that notwithstanding the wording of any *force majeure* clause contained in a contract concluded by the various tourism industry role players, the parties will not be able to rely on the defence in the event of Day Zero, as it does not meet the requirements of *force majeure*, unless where it has been recorded explicitly as such in the *force majeure* clause. Day Zero does not necessarily lead to performance becoming impossible - it merely makes performance more burdensome.

There is no clarity on how hotels and other accommodation providers would have approached Day Zero in terms of the daily ration of water to be collected at one of the collection points across the City. To collect for a few guests, i.e. 10, should not prove to be problematic; however, where collection is to be done for a few hundred guests, it may be challenging and result in a heavy burden, which will have a financial impact on the hotel. It is not clear from the City of Cape Town whether hotels will be allowed to collect water on behalf of their guests, but should this be allowed and the larger hotel groups, i.e. Sun International¹⁶⁰, should queue for their daily rations for each guest, the performance may become physically impossible or it may cause performance to no longer be economically feasible resulting in the parties being able to rely on *force majeure*.

¹⁶⁰ The Table Bay Hotel in Cape Town, which forms part of the Sun International Hotel group, has a total of 329 rooms.

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