Force Majeure and Vis Major

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EXTRACTS OF CASES

An act of the State

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Restriction of carrying on of business

Peters Flamman and Co v Kokstad Municipality 1919 AD 427 at 434-437

By the Civil Law a contract is void if at the time of its inception its performance is impossible: *impossibilium nulla obligatio* (D. 50.17.185). So also where a contract has become impossible of performance after it had been entered into the general rule was that the position is then the same as if it had been impossible from the beginning: *etsi placeat extingui obligationem si in eum casum incideret a quo incipere non potest:* (D. 45.1.140, 2). *Averanius* states the law in the following terms: "*Quae initio*

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recte constiterunt, resolvuntur, si in eum casum recidunt, a quo incipere non potuissent. Haec regula primum obtinet, quoties res, quae initio erat eiusmodi, ut praestari posset, and de ea contrahi: postea in eum casum recidit, ut amplius praestari non possit. Etenim hoc casu necesse est, evanescere stipulationem, in quam deducta fuit, and alium quemcumque contractum, aut legatum: quia impossibilium nulla est obligatio." (Interpretatio Juris Civilis 4.24.2). It is true that there are exceptions to the general rule laid down in the *lex* of the Digest cited above, which concludes thus: *"Non tamen hoc in omnibus verum est."* For the purposes of this appeal, however, it is not necessary to discuss the exceptions, as there is no suggestion that the present case falls within any of them. Nor is it necessary to consider generally what are the circumstances in which it can be said that a contract has become impossible of performance. For the authorities are clear that if a person is prevented from performing his contract by *vis major* or *casus fortuitus,* under which would be included such an Act of State as we are concerned with in this appeal, he is discharged from liability. *Averanius* in discussing *casus fortuitus* (2.26.5) says: *"Itaque licet factum principis referatur inter casus fortuitos quia ei resisti non potest."*

Unfortunately the rules of the Civil Law appear to have been ignored in several cases on this subject which have come before our Courts, which have been guided entirely by the decisions of the English Courts. Thus in *Hay v Divisional Council of King William's Town* (1 EDC 100). SMITH, J., quoted with approval the law as laid down in *Paradine v Jane* (Aleyn 26) and in *Nicols v Marshland* (L.R. 2 Exchequer Div. 4), where the Appeal Court stated the ordinary rule of law to be "that when the law creates duty and the party is disabled from performing it with out any default of his own by the Act of God King's enemies, the law will excuse him but where a party by his own contract creates a duty he is bound to make it good notwithstanding an accident by inevitable necessity:" Later on, however, the learned Judge says: "I wish to guard myself against being supposed to imply that a party who has imposed upon himself a charge by his own contract is under the Roman-Dutch law bound in every case to make it good, notwithstanding the contingency that has arisen was caused by *vis major* or *actus Dei,* as it is called

1919 AD at Page 436

in the law books." In *Norden v Shaw* (2 M 150), the report of which is not very satisfactory, it was held that, where a Kaffir war prevented the defendant from fulfilling a contract to deliver Kafir gum, the plaintiff was nevertheless entitled to damages for breach of contract. The only authority quoted in the report is from Campbell's Reports, Vol. 2, page 58. In *Coombs v Muller* 1913 EDLD 433, it is said: "It is clear law that he,

the defendant, could not rely, as a defence to plaintiff's claim, against this impossibility which be might have provided against by his contract." The authorities referred to in support of that statement of the law are *Hay v Divisional Council of King William's Town* and other South African cases. Again in *Morgan and Ramsay v Cornelius and Hollis* (31 NPD 458) it is said: "The impossibility arose after the contract was made, and the case appears to fall within the rule that where a party by his own contract creates a duty or charge upon himself, he is bound to make it good notwithstanding any accident or inevitable necessity, because he might have provided against it by his contract." Again the cases of *Norden v Shaw* and *Hay v Divisional Council of King William's Town* are referred to as authorities for this statement of the law. This rule, however, as laid down in *Paradine v Jane,* is not consistent with the principles of the Civil Law, and indeed it has been considerably modified by later English decisions. Thus in *Horlock v Beal* (1916, 1 AC 525), LORD WRENBURY said: "Where a contract has been entered into and by a supervening cause beyond the control of either party its performance has become impossible, I take the law to be as follows, --- if a party has expressly contracted to do a lawful act *come what may* --- if in other words he has taken upon himself the risk of such a supervening cause --- he is liable if it occurs because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, then upon such a cause occurring both parties are excused from performance. In that case a condition is implied that, if performance becomes impossible, the contract shall not remain binding." And in *Tamplin Steamship Co. v Anglo Mexican Petroleum Products Co., Ltd.* (L.R. 1916, 2 AC 422),

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LORD PARKER said: "My Lords in considering the question arising on this appeal it is, I think, important to bear in mind the principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible. This principle is one of contract law depending upon some term or condition to be implied in the contract itself and not on something entirely *dehors* the contract which brings the contract to an end." And LORD LOREBURN said: "An examination of the decisions confirms me in the view that, when our Courts have held innocent parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise." It will be seen, therefore, that although the English law looks at the subject from a different point of view from ours, in the result the difference between the two systems is not very great. And indeed, if this case had been tried in an English Court of Justice, I am disposed to think that the defendants would have been held to have been discharged from their obligations under the contract. But, however that may be, it seems clear that by our law, which is based upon the Civil Law, the contract was extinguished so soon as it became impossible for the defendants to carry it on owing to the order of the Treasury winding up their business. And if the contract had come to an end, there could be no further breach of it, and consequently no action would lie for damages for breach of contract.

Conscription into army

No beneficial occupation of leased store

Petersen v Tobiansky and Tobiansky 1904 TH 73

The effect of the commandeering order made against the defendants was that their persons became appropriated to the military service of the State during the whole period of the war; and I am satisfied from

the evidence of Mr. Lombard, the Field-cornet who issued the order, that there was no legitimate means of escape from this duty. On the 15th October, therefore, the defendants became soldiers of the South African Republic, and as such saddled with duties which were incompatible with their remaining in occupation of their store and carrying on their trade. To have done so would have been an illegal and punishable act. It is true that they ran away. But this did not affect their position and obligations under the laws of the country. Their desertion on the 16th October did not to my mind affect their relationship with the plaintiff, any more than it would have been affected had they gone to the font and deserted in the face of the enemy,

1904 TH at Page 77

I come to the conclusion, therefore, that from the 16th October, 1899, the defendants were prevented by *vis major* from occupying the premises leased, and I think that they are entitled to a remission of rent from that date. The plaintiff is accordingly entitled to judgment only for the amount tendered as rent from the 1st to the 16th October, and on payment of this he will be ordered to deliver up the fittings and furniture to the defendants. The defendants are entitled to their costs.

Refusal of statutory consent

Bekker, NO v Duvenhage [1977] 3 All SA 130 (E)

Mr. *Jennett* went on to argue that, even if it were not possible for the Court to order the defendant to pass transfer of the property to the plaintiff,

Page 135 of [1977] 3 All SA 130 (E)
the defendant was still legally bound, if he could not pass transfer because of the terms of the Act, to pay the plaintiff the amount equivalent to the value of the property in other words, damages, and that the defendant's plea in that respect, at any rate, was excipiable.

In the case of *Peters, Flamman & Co.* v. *Kokstad Municipality*, 1919 A.D. 427, SOLOMON, A.C.J. (as he then was), after considering the Civil law and the law of England said at p. 437:

> "It is clear that by our law, which is based upon the Civil law, the contract became extinguished so soon as it became impossible for the defendants to carry on owing to the order of the Treasury winding up their business. And, if the contract had come to an end, there could be no further breach of it, and consequently no action would lie for damages for breach of contract."

This *dictum* has been consistently followed in our Courts. See, for example, *Wilson* v. *Smith and Another*, 1956 (1) S.A. 393 (W) at p. 396A, where KUPER, J., said:

> "The position is not that the contract is illegal, but that performance of the contract is impossible because of the bar imposed by the Ordinance against the possibility of the applicant obtaining the requisite approval for the subdivision of the lot in order to transfer portion of the lot sold."

Similarly in *Schlengemann* v. *Meyer, Bridgens & Co. Ltd.*, 1920 C.P.D. 494 at p. 500, GARDINER, J., said:

> "Now according to our law impossibility of performance, even when it arises after the conclusion of the contract, dissolves the contract, as Mr. Justice SOLOMON says in the case of *Peters, Flamman & Co.* v. *Kokstad Municipality*, 'for the authorities are clear that, if a person is prevented from performing his contract by *vis major* or *casus fortuitus*, under which would be included such an Act of State as we are concerned with in this appeal, he is discharged from liability'."

In *Schlengeman's* case reference was made to the case of *Marshall* v. *Glanville and Another*, 116 L.T. at p. 560. In that case Mr. Justice MCCARDIE said:

> "The true principle was laid down in *The Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.*, and the question was: Did the parties make their bargain on the footing that a particular state of things would continue to exist? Here it is clear that the parties contracted on the footing that it would continue to be lawful to perform and accept the contemplated service, but, from July 1916, that footing no longer existed, and the contract came to an end."

In my view the present case falls directly within the ambit of the judgment of the ACTING CHIEF JUSTICE in the *Peters, Flamman* case. By virtue of the provisions of the 1970 Act, the defendant is not only prevented from passing transfer of the property to the estate of the plaintiff, but no action by either party will lie against the other for damages arising from non-performance. In my view the exception taken by the plaintiff must fail.

Casus fortuitus

New Heriot Gold Mining Company Limited, Appellant v Union Government (Minister of Railways and Harbours), Respondent 1916 AD 415

Casus fortuitus, which is a species of *vis major,* 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.

Contract containing Force Majeure clause

Cancellation of contract

Need to establish actual Force Majeure

Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency SOC Ltd and another [2019] 3 All SA 186 (GP) at paras [122] – [129]

Whether there was a state of *force majeure* entitling cancellation of the contract

[122]

I am alive to the fact that I do not have to decide the presence or absence of a state of *force majeure*. There are three main issues here: (a) whether on the facts, and having regard to the definition of what constitute *force majeure* , the applicant would succeed in the intended dispute resolution forum to prove that indeed there was a state of "*force majeure* ", (b) whether on the facts the prescribed procedures were followed. The last issue is the validity of the cancellation. This depends on the answers to (a) and (b).

[123]

The difficulty that the applicant will have to overcome looking at the definition of "*force majeure* " is the following; (a) whether the protests or unrests could not reasonably have been avoided or overcome; (b) whether these incidents are not substantially attributable to SANRAL and (c) whether the alleged "*force majeure* " affected a substantial part of the works. It is clear from the determination of Claim 6 that "*force majeure* " applied to one claim. The reporting was also vague,

such that there is no indication of the extent of the affected areas. This should have been made clear, and absence evidence in this regard, the ASJV will face a difficulty to prove that indeed there was "*force majeure* ", as defined.

[124]

It appears from the correspondence that has been attached emanating from the protesters and the local authorities that there were some agreements or undertakings made by SANRAL with regard to the source of materials and employment opportunities for the local community.

These issues are similar to those that formed the subject matter of the first application in the matter of *Granbuild* that was before Schippers J and pending application for leave to appeal. The undertakings that SANRAL makes with the local service providers or even in terms of economic empowerment policies often lead to dissatisfaction, resulting in the nature of protests that the ASJV has described.

[125]

SANRAL repeatedly asked the ASJV to attend community meetings to resolve the dissatisfaction that was causing the unrests. From day one, the ASJV adopted a stance that the events constituted "*force majeure* " that entitled it certain rights in terms of the contract. The contract obliges the parties to make efforts to resolve the problems.

[126]

Indeed, no efforts were made by the ASJV to at least be party to the problem solving, which, in my view could reasonably have been anticipated and planned for. The ASJV contends that SANRAL's allegations that the matter of unrests was resolved in the meeting of 8 or 9 January are false at misleading because a day later (10 January 2019) Chief Khanyayo and Headman Jama addressed to the parties and the Mbizana Local Municipality and threatened to instruct the "people to stop

any truck bringing stone to the bridge site, until ASJV starts using the quarries in Madiba area."

[127]

Reading this letter and others directed to the parties by the local community suggest that the events giving rise to the unrests cannot, objectively assessed, be deemed as "*force majeure* ".

[128]

The next enquiry that I would undertake on this issue of *force majeure* is whether it was properly notified and dealt with in terms of the Contract. The ASJV was aware from the beginning that the engineer was not willing to classify the events as *force majeure* and did nothing about it except to refer to it in each and every letter and reserve its rights. This is not enough. The contract makes provision for referral of disputes that arises in the execution of the contract to the Dispute Appeal Board. It became even clearer when claim 6 was assessed and evaluated that there was no consensus on the classification of the events.

[129]

The questions with regard to termination of the contact on the basis of "*force majeure* " have become academic in view of what I have stated above with regard to the difficulties that the applicant will have to overcome.

Discussion and explanation of

Spolander v Ward 1940 CPD 24 at 27-32

I now come to consider the proper construction of this agreement. In the first edition of Professor Wille's *Landlord and Tenant* (at p. 440) the law is thus stated: "A tenant is exempted from liability for damages for injury to the leased premises --- (a) where there is no proof that the injury was caused by the negligence, express or implied, of the tenant. . . . (b) where the injury is caused by *vis major* or *casus fortuitus*, i.e. some unforeseen and extraordinary accident or circumstance." I quote from the first edition because this statement is not so succinctly made in the new edition (though it is to be found there in a different form at p. 232), doubtless because it was felt that the wording of the first exemption does not quite correctly set out the *onus*, which is ordinarily on the tenant. With that qualification, however, and the further qualification that, as will be seen later, the act of a third person is usually a *casus fortuitus*, the law is conveniently stated in the passage I have cited, and from it, it will at once be seen that the words in the arrangement in regard to the use of this car, such as

1940 CPD at Page 28

"fully responsible for its good condition", "responsible for the damage" and "responsible for the car" are ambiguous. They might refer merely to such damage as was occasioned by the bailee's negligence; they might, on the other hand, also extend to include the damage referred to under (a) above, or possibly even under (b). And in these circumstances we must turn to the surrounding circumstances to arrive at the meaning of the contract. There is ample authority for this course. In *Richter v Bloemfontein Town Council* 1922 AD 57 at p. 69) INNES, C.J., said, in a passage subsequently repeated with approval in *Garlick v Smartt & Another* 1928 AD 82 at p. 87) "every document should of course be read in the light of the circumstances existing at the time, and evidence may rightly be given of every material fact which will place the Court as near as may be in the situation of the parties to the instrument." I emphasise that this is only true in a general sense of ambiguous documents, although the statement of STRATFORD, J.A., in *Gravenor v Dunswart Iron Works* 1929 AD 299 at p. 303): "In construing a document such as this we must, of course, give to it the meaning which the parties to it intended it to have. That meaning must be extracted from the language employed read in the light of the surrounding circumstances" might, if taken too broadly, lead to a different conclusion. The law was authoritatively laid down by WATERMEYER, A.J.A., in *Rand Rietfontein Estates, Ltd. v Cohn* 1937 AD 317 at p. 328) when speaking of unambiguous words: "Now it is quite true that the Court may look at the surrounding circumstances in order to apply the words to the facts but, as I have pointed out, it is not entitled to make use of that evidence in order to vary the meaning of language, the grammatical meaning of which is clear." As it is said by INNES, C.J., in *Richter's* case (*supra* at p. 70) "the evidence admitted must relate to the ambiguity. For it is only allowed to explain the meaning of language which, as it stands, is capable of more than one meaning." Here the words used were *per se* certainly ambiguous: but the surrounding circumstances, which I have discussed in considering the probabilities of the case, make it, I suggest, abundantly clear to what the arrangement made with the uses of the car refers. It would be almost valueless if it referred only to damage caused by his own negligence: for that he was liable without any such agreement. What kind of damage, then, would be in the contemplation of the parties? They must have known that even the most careful

1940 CPD at Page 29

driver who takes a car out on to the public streets may have a wing crumpled without any fault of his. And this may occur by the action of a man of straw, or it may, unfortunately, even occur by the action of a person unknown, at a time when the driver of the car is absent, having left the car properly parked at some place where he was legally entitled to leave it. I do not think that I am overstating the position when I say

that everyone knows that it is impossible to take a car out and use it for any length of time without some harm befalling it: that harm may consist in anything between the car being entirely wrecked on the one hand or, on the other, no more than a scratch on the paint or a buckled number plate. But some injury or other it is bound to suffer.

When this arrangement with plaintiff --- and the other members of the family --- was made, that was in the contemplation of everyone. Here was an uninsured car, for any damage to which only one person --- the legal purchaser --- was in law liable, and he was not only not using the car himself, but was not even in the Cape Peninsula. It appears to me that all ordinary damage must necessarily have been included in the indemnity for it to have been of any practical efficacy and I am satisfied that this was what was intended. Whether also the third class of damage --- that due to *vis major* or *casus fortuitus* in the ordinary sense of the term --- could also be held to be included does not fall for decision here, but it is obvious that that stands on an entirely different footing. Presumably nobody, when this contract was made, contemplated the car being struck by lightning or commandeered by the King's enemies.

Mr. *Watermeyer* laid great stress on the case of *North Western Hotel, Ltd. v Rolfes, Nebel & Co.* 1902 TS 324, and that case requires careful examination. The facts of that case were wholly different from those of the present save in regard to certain terms of the hiring. A hotel lease provided that at its expiration the lessees should make good to the lessors the amount of the depreciation in the value of the furniture in the leased premises and that "goods that might be destroyed or missing should be paid for by the lessees" and further the lessee covenanted "to keep the premises and goods leased in the same good order and condition, and to hand them over in like good order and condition." The lease was entered into at the beginning of 1899; the Anglo-Boer War broke out in October, 1899; the hotel was commandeered by the British military authorities and used, first as a

1940 CPD at Page 30

shelter for refugees and burghers, and later as a store for the baggage of the Rand Rifles. During this period the hotel, which, when the British force took charge of it, was in an excellent state of repair, was so badly damaged that it was entirely unfit for hotel purposes. It will at once be evident that none of these facts could have been in the contemplation of the parties when, many months before the beginning of the war, they made their contract. Moreover, the context, of the two clauses --- the one making provision for the case where actual replacement, and not mere paying for depreciation, was necessary, and the other for the ordinary obligation to maintain and return in the same good order as received, made it clear that what the contract referred to was ordinary loss and breakages and ordinary wear and tear, and not liability for --- in the words of WESSELS, J. --- "loss or damage caused by those unforeseen and extraordinary accidents included under *casus fortuitus*." But in the judgment of that learned Judge there do occur passages which might seem at first sight to support the case put forward by Mr. *Watermeyer*, namely that in the absence of clear and express words, imposing further responsibility on a hirer (or other bailee), he is not responsible beyond his Common Law liability. Without such words, it was argued, he is never an insurer. But the whole tenor of the judgment shows that this is not so. Without a special stipulation to that effect, it is there laid down by WESSELS, J. (at p. 334), the hirers are not "complete insurers" (i.e. responsible for *casus fortuitus* and *vis major*), and are responsible only "for goods which are destroyed or lost by those ordinary mischances that parties usually contemplate." MASON, J. puts the matter thus crisply (at p.343): "It is clear that in Roman-Dutch jurisprudence an agreement of a general character, imposing upon the tenant liabilities which are cast upon the landlord by common law, will not make the tenant responsible for *vis major* or accidents of such a description as could not have been foreseen or apprehended by the parties at the time of making their contract." I shall not go through all the authorities given in the above case, but I may deal shortly with one or two of them. I shall first repeat the passage from *Matthaeus* (de Auct. 2.5.15.16), but with the passage immediately preceding, for that explains it. "*Nequaquam inter casum*

fortuitum & insolitum distinguendum eo quod casus fortuitus sit insolitus nec possit fortuitum dici quod solet accidere, sed quod raro accidit. Ego vero fateor quidem, fortuita non esse

1940 CPD at Page 31

quae solent accidere: sed tamen ex ipsis illis quae rarius accidunt, negari non potest, alia quidem meditata, & quasi praevisa esse: alia vero ita praeter spem omnem expectationem accidere, ut ne per somnium quidem cogitari potuerint. Etenim nives inmodicae, inundationes, siccitas, uredo, & si quid simile, sunt quidem fortuita, nec singulis annis recurrunt: non tamen ita insolita, quin singulis annis & timeamus illa, & meditemur. Enimvero in summa pace bellum, terrae motus, nubes locustarum ex oriente, irruptio Tartarorum, migrationes gentium barbarum, atque alia hujusmodi ita insolita sunt, ut in conducendo nemo fere ea timeat, aut meditetur. Quare non erit absurdum hanc conventionem ita interpretari, ut per casum fortuitum non intelligamus etiam insolitum, de quo omnino cogitatum non est, quive timeri non potuit tempore locationis." *Story* (Bailments, sec. 37) thus sums up the matter: "The general rule of the civil law would seem to be that the risk of casualties is never included under the general terms of a contract. But that, however general the undertaking may be, it includes only such risks as might be foreseen, and not those which there could be no room to apprehend" and he cites a passage from the *Code* (4.24.6) which is as follows: "*Quae fortuitis casibus accidunt cum praevideri non potuerint* (*in quibus etiam aggressura, latronum est*), *nullo bonae fidei judicio praestantur*." *Voet* (18.6.2) (*Berwick's* Translation) writes of fortuitous accidents, as being such "as occur rarely and are out of the ordinary course." He puts loss through force or theft, or injury by a third party, upon the same footing, but that is because with ordinary things, their damage by a third person's negligence is not usual nor the kind of happening which the parties would have contemplated at the time of the making of the contract. In Wessels' *Contract* the learned author, after citing *Vinnius'* (*Quaest. Sel.* 2.1.1) definition of *casus fortuitus: "Est autem, casus fortuitus id omne quod humano captu praevideri non potest, aut cui praeviso non potest resisti*," adds "*casus fortuitus,* however, is not confined to the cataclysms of nature, but also includes robberies and other human acts against which no diligence can provide." He then goes on as follows, in words entirely apposite to the present matter: "There must, however, be something extraordinary in the event before it can be regarded as a *casus fortuitus*. "*Qui suscepit casum fortuitum tempestatis, non videtur sentire de casu saepius contingente*" (*Brunneman*, *ad D.* 18.1.78.3). By inevitable accident, therefore, the civilians mean

1940 CPD at Page 32

an occurrence which could not reasonably have been foreseen (*inopinatus*) and which could not have been guarded against by ordinary diligence." I shall give only one more definition, viz. Boey *Woordentolk*, *s.v. casus fortuitus*: "een zaak die onverwagt, en onvoorzien gebeurt van hoogerhand, dat men nog voorzien, nog beletten kan." To sum up: in a *casus fortuitus* there must he present both the elements of unforseeability and inevitability. I consequently come to the conclusion that the nature of the liability which plaintiff had taken upon himself in relation to the legal purchaser must be gathered from what the parties contemplated at the time that they entered into the contract and that here it included the damage in respect of which the present claim was made, though it was occasioned through no fault of the plaintiff and solely as the result of the negligence of a third party.

Failure to obey a statutory instrument

Gassner NO v Minister Of Law and Order and Others [1995] 1 All SA 223 (C)

In his discussion of the maxim *lex non cogit ad impossibilia*, Broom *A Selection of Legal Maxims* (10th ed 1939) 162 translates it as: “The law does not compel a man to do that which he cannot possibly perform.”

The word "law" is used here in a general sense and is apparently not restricted to "a law" in the sense of a statutory enactment. I do not believe that this is an accurate translation, since "law" in a general sense would usually be rendered

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as *ius* rather than *lex.*

That *lex* does in fact refer to a statute or a law appears from *Broom's* (*loc cit*) equating the said maxim with *impotentia excusat legem*, in the sense that the inability to perform or comply with an obligation imposed by a legal provision excuses such failure to perform or non-compliance. This is the meaning accorded to *impotentia excusat legem* in the English case of *Eager v Furnivall* 17 ChD 115 at 121 (*per* Jessel MR).

A better approach than that of *Broom* may be found in *Craies on Statute Law* (7th ed 1971) 268, where it is said:

> "Under certain circumstances compliance with the provisions of statutes which prescribe how something is to be done will be excused. Thus, in accordance with the maxim of law, *Lex non cogit ad impossibilia*, if it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God or the King's enemies, these circumstances will be taken as a valid excuse."

This approach appears to have been acceptable in English law and has been applied in South African decisions from as early as 1880. I refer in this regard to *Hay v The Divisional Council of King William's Town* 1 EDC (1880) 97 at 100, where Smith J says:

> ". . . [W]hen a duty is imposed upon anyone by law, there must always be an implied condition that it is in his power to perform it. *Lex non cogit ad impossibilia* and *impotentia excusat legem* (*Coke on Littleton*), are very old maxims of law."

The learned judge refers to *Hadley v Clark* 8 TR 267 in which Lawrence J states that "where the law created a duty or charge, and the party is disabled to perform it without any fault in him and hath no remedy over, then the law will excuse him . . .".

In the concurring judgment of Barry J, reference is also made to the *dictum* of Mellish LJ in *Nichols v Marsland* LR 2 Ex Div 4 (1879):

> "The ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any default of his own, by the act of God or the Queen's enemies, the law will excuse him. . . ."

An "act of God" or circumstances brought about by the conduct of "the Queen's enemies" may otherwise be described as *vis maior*, a concept which has been associated with *vis divina, damnum fatale* and *casus fortuitus* in *Goldberg v Nante* 1903 TH 150 at 154-155. In that case a lessee of certain premises had been ordered, by a Resolution of the Executive Council of the Transvaal, published in the *Staatscourant* of 6 October 1899, to close a bar and billiard rooms on such premises. He obeyed the order and claimed a remission of rent. Solomon J cited a *dictum* of Wessels J in *North Western Hotel Ltd v Rolfes, Nebel & Co* 1902 TS 324 at 331:

> "It is perfectly clear by the Roman-Dutch law . . . that if a

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> lessee has no beneficial occupation of the property leased either because the property has been completely destroyed, or destroyed to such an extent as to be useless for the purposes let, then the lessee can claim remission of rent. The same principle applies where the lessee has been driven out by *incursus hostium*, or by an irresistible power, or, as the law books express it, by *vis major, vis divina, damnum fatale*, or *casus fortuitus.* Now the expulsion of the lessee by any superior power is considered to be *vis major*, and the act of the sovereign power, whether *de jure* or *de facto*, falls under *casus fortuitus.*"

Applying this *dictum* Solomon J held that the defendant had been deprived by *casus fortuitus* of the beneficial use of the premises for the purposes for which they were let, thus entitling him to a remission of rent.

The impossibility envisaged by the maxim *lex non cogit ad impossibilia* was hence associated, in these early cases, with an act of God (*vis maior*) or fortuitous circumstances (*casus fortuitus*). On the meaning of these concepts see *Bayley v Harwood* 1954(3) SA 498(A) at 505F-G, where Schreiner JA states that "[t]here seems to be no distinction that is relevant for present purposes between *vis maior* and *casus fortuitus*". In his judgment in the same matter, Hoexter JA (at 509H-510A) cites with approval the definition of *casus fortuitus* given in two earlier decisions:

> 'The meaning of these phrases appears from the following quotations:
>
> "*Casus fortuitus*, which is a species of *vis major*, 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'
>
> (*per* INNES, C.J., in *New Heriot Gold Mining Co. Ltd. v Union Government* (*Minister of S.A.R. & H.*), 1916 A.D. 415 at p. 433).
>
> 'Now in no case which has come before the courts has a definition of *casus fortuitus* been given; but the words themselves import something exceptional, something extraordinary, something unforeseen, and which human foresight could not be expected to anticipate . . ."
>
> (*per* SOLOMON J in the case of *Mountstephens and Collins v Ohlssohn's Cape Breweries,* 1907 T.H. 56 at p. 59)."

In *John Roderick's Motors Ltd v Viljoen* 1958(3) SA 575 (O) at 577H-578A the maxim is rendered as *lex non cogit ad impossibilia aut inutilia*, the *inutilia* presumably referring to "unreasonable things" or, simply, "unreasonableness". In this context *inutilia* is certainly not synonymous with *impossibilia* in that unreasonableness need not give rise to or even suggest impossibility. Smit AJP appears to have relied on Maxwell on *The Interpretation of Statutes* (8th ed 1937) 322 as a source for this rendition of the maxim. Counsel for the applicant referred the learned judge to the 9th ed (1946) 387. Neither of these editions was available to me but in the 12th ed by P St J Langan (1969) 326 the maxim is cited without the addition of the words *aut inutilia*, in the context of intentions attributed to

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the legislature when none is expressed. Under the heading "impossibility of compliance" the learned author states (*loc cit*):

> "Enactments which impose duties upon conditions are, when these are not construed as conditions precedent to the exercise of a jurisdiction, subject to the maxim, *lex non cogit ad impossibilia.* They are understood as dispensing with the performance of what is prescribed when performance of it is impossible."

No reference, by inference or otherwise, is made to unreasonableness in this context and it must be accepted that it cannot be associated with the impossibility at which the maxim is clearly directed.

The applicability of the maxim *lex non cogit ad impossibilia* was not considered in *Hartman v Minister van Polisie* 1981 (2) SA 149 (O), in which it was held that section 32(1) of the Police Act, No 7 of 1958, provided for an expiry period as opposed to a prescriptive period, and was hence not reconcilable with the provisions of chapter III, and more particularly section 13, of the Prescription Act, No 68 of 1969. De Wet J proceeds to say (at 152C-D):

> "Daar is geen ooreenkoms tussen die bewoording van Art 32 van die Polisiewet en art 13(1) saamgelees met art 11 van die Verjaringswet nie. Artikel 32 is 'n prosesregtelike bepaling wat betrekking het op opeising van skuld terwyl die Verjaringswet gaan om die uitwissing van skuld. Art 32 gaan om die beskerming van openbare instansies terwyl verjaring te make het met die bestrawwing van onaktiwiteit. In die onderhawige saak was dit dus gebiedend vir eiser om ingevolge die bepalings van art 32(1) van die Polisiewet sy eis in te stel binne ses maande nadat sy skuldoorsaak ontstaan het. . . .".

A contrary stance was adopted in *Magubane v Minister of Police* 1982(3) SA 542(N), in which impossibility in the form of superior force" (*vis maior*) was raised on the basis of the plaintiff's detention, which made it impossible for her to obtain legal advice or to institute an action while so detained. Leon J regarded it (at 549G-H) as an "affront" to his sense of justice if section 13 of the Prescription Act should not be applicable to section 32(1) of the Police Act. The learned judge found nothing in the latter section which could be regarded as inconsistent with the provisions of chapter III of the Prescription Act (552F-553B). As in the *Hartman* case (*supra*), the applicability of the maxim *lex non cogit ad impossibilia* was not considered.

The *ratio* in the *Hartman* case (*supra*) was followed by Myburgh J in *Brosens v Minister van Verdediging* 1983(3) SA 803 (T), with no reference to the contrary approach of Leon J in the *Magubane* case (*supra*).

On appeal to the Appellate Division the *Hartman* decision *supra* was upheld in *Hartman v Minister van Polisie* 1983(2) SA 489(A). Rabie CJ confirmed (at 496 G-H), with reference to *President Insurance Co Ltd v Yu Kwam* 1963(3) SA 766 (A), that section 32(1) of the Police Act was applicable also to minors. In this regard the learned Chief Justice observed (at 497F-498A):

> "Daar is 'n verdere oorweging wat ten gunste van die

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> mening dat art 32(1) van die Polisiewet ook op die aksies van minderjariges betrekking het, spreek. Dit is naamlik die oorweging dat, soos ek dit sien, dit die oogmerk van die artikel is om, met betrekking tot siviele gedinge teen die Staat of enige persoon ten opsigte van enigiets wat uit hoofde van die Polisiewet gedoen is, spesiale beskerming aan die Staat of so 'n persoon te verleen, en dat hierdie oogmerk verydel sou kon word indien daar toegelaat sou word dat, soos in die geval van minderjariges sou kon gebeur, aksies dalk eers etlike jare na die ontstaan van die betrokke skuldoorsaak ingestel kan word. Die Suid-Afrikaanse Polisie is 'n groot organisasie en die omstandighede waaronder, en die plekke waar, aanspreeklikheid deur sy lede of deur die Staat op grond van handelinge ingevolge die Polisiewet opgedoen sou kon word, is ledig, en dit behoef kwalik enige betoog dat dit vir sodanige lede en vir die Staat van belang is om so gou doenlik van voorgenome aksies teen hulle in kennis gestel te word, en ook dat sodanige aksies so gou doenlik ingestel moet word, ten einde hulle in staat te stel om die betrokke handeling betyds te kan ondersoek en getuienis daaroor te kan vind. Bepalings soos dié in art 32(1) van die Polisiewet kom meermale voor in wetgewing wat op openbare instansies of plaaslike owerhede betrekking het en

> is bedoel om sulke instansies of owerhede te beskerm teen aksies wat láát ingestel word en waarvan daar nie op 'n vroeë stadium kennis gegee is nie"

As might be expected, Rabie CJ did not agree (at 499 A) with the decision of Leon J in the *Magubane* case (*supra*) and held (at 500F) that the provisions of chapter III of the Prescription Act were not reconcilable with those of section 32(1) of the Police Act. See in this regard L J Boulle "Prescription and the Police" in *SALJ* 89 (1982) 509-515, in which the learned author opines (at 515) that the *Magubane* decision (*supra*) "was the only equitable judgment in the circumstances". Unfortunately he did not have the benefit of considering the *ratio* set forth in the judgment on appeal from the *Hartman* decision (*supra*).

A particularly significant development in the relevant law was the judgment of Rabie CJ in *Montsisi v Minister van Polisie* 1984(1) SA 619(A). In that matter the plaintiff had been detained in terms of section 6 of the Terrorism Act, No 83 of 1967, and had hence been unable to obtain legal advice or to institute an action whilst so detained. These facts are similar to those in the *Magubane* case (*supra*) but, otherwise than in such case, the court in the *Montsisi* matter did give consideration to the plea of *lex non cogit ad impossibilia*, as appears from the following *dictum* of the learned Chief Justice (at 634E-635A):

> "Dit behoef geen betoog dat dit onbillik sou wees indien iemand, vir wie dit vanweë sy aanhouding ingevolge artikel 6 van die Wet op Terrorisme onmoontlik was om aan die vereistes van artikel 32(1) te voldoen,

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> sy reg om vergoeding te eis weens onregmatige dade wat tydens sy aanhouding teenoor hom gepleeg is, ontsê sou word omdat hy nie aan die vereistes van art 32(1) voldoen het nie. Die Wetgewer het met art 32(1) klaarblyklik nie beoog om 'n persoon wat meen dat hy 'n eis teen die Minister het, sy eis te ontneem nie, maar wel dat hy daardie eis, op straf van verval, binne die betreklik kort tydperk van ses maande ná die ontstaan van sy eisoorsaak moet instel. Hierdie Hof het, soos reeds gesê, in *Hartman v Minister van Polisie* (*supra*), waar art 32(1) teen die eis van 'n minderjarige opgewerp is, beslis dat die bepalings van art 13(1)(a) van die Verjaringswet nie op die termyn van ses maande wat in art 32(1) bepaal word, van toepassing is nie, maar het terselfdertyd gesê (op 499A) dat hy hom nie uitspreek oor die vraag of daar in 'n geval soos dié wat in *Magubane v Minister of Police* (*supra*) voorgekom het spesiale oorwegings kan wees wat nie in *Hartman v Minister van Polisie* (*supra*) aanwesig was nie. (Die *Magubane*-saak was 'n geval soos die onderhawige: 'n spesiale pleit ingevolge die bepalings van art 32(1) is teen die eiseres opgewerp nadat dit vir haar, vanweë haar aanhouding, onmoontlik was om aan die vereistes van die artikel te voldoen.)
>
> Die vraag ontstaan nou of daar bevind kan word dat, hoewel die minderjarige eiser in *Hartman v Minister van Polisie* nie 'n antwoord op 'n spesiale pleit ingevolge art 32(1) gehad het nie, die appellant in die onderhawige geval wel kan sê dat sy eis deur die artikel belet word nie.
>
> Ek het tot die gevolgtrekking gekom dat wel so bevind kan word, en wel in die lig van die algemene oorwegings wat die spreuk *lex non cogit ad impossibilia* ten grondslag lê (*D* 50.17.185: *impossibilium nulla obligatio est*) en wat inhou dat iemand se versuim om 'n verpligting na te kom wanneer dit vir hom onmoontlik was om dit na te kom, hom nie tot sy nadeel toegereken word nie."

The Court found support for this statement of the law in English and Dutch law (at 636D-638G) and had no difficulty (at 638G-H) in distinguishing *Hartman v Minister van Polisie* 1983(2) SA 489(A).

In the recent past the principles enunciated in the *Montsisi* case (*supra*) have been recognised and, where appropriate, applied. See *Pizani v Minister of Defence* 1987(4) 592(A) at 602 G-I); *Mati v Minister of Justice,*

Police and Prisons, Ciskei 1988(3) SA 750(CkGD); *Minister of Law and Order and Another v Maserumele* 1993(4) SA 688(T).

In the last-mentioned case McCreath J suggests (at 691H-I) that the decision in the *Mati* case (*supra*) might be incorrect in that the relevant Ciskei legislation was not on all fours with the provisions of section 6 of the Terrorism Act. This criticism appears, with respect, to be justified since the detention of the plaintiff in the *Mati* case was in terms of section 26 of the Ciskei National Security Act, No 13 of 1982, which does not give

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rise to the same inaccessibility to legal advice and legal representation as that envisaged by section 6 of the Terrorism Act. The court held (at 755G) that the provisions of the said sections were "very similar" but did not analyse or compare such provisions for purposes of supporting such proposition. For present purposes it is not necessary to embark on such an analysis and comparison.

It is hence clear that the maxim *lex non cogit ad impossibilia* is firmly entrenched in our law relating to the enforcement of the expiry period provided for in section 32(1) of the Police Act. If, for whatever reason, it is impossible for a plaintiff to institute a civil action against the state, in terms of such section, within six months after the cause of action has arisen, resort may be had to the said maxim.

General principle stated

Transnet Ltd t/a National Ports Authority v Owner of mv Snow Crystal [2008] 3 All SA 255 (SCA)

[28]

> This brings me to the appellant's defence of supervening impossibility of performance. As a general rule impossibility of performance brought about by vis major or casus fortuitus 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".7 The rule will not avail a defendant if the impossibility is self-created;8 nor will it avail the defendant if the impossibility is due to his or her fault.9 Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant.10

In respect of business operations

Ex parte Lebowa Development Corporation Ltd [1989] 4 All SA 492 (T)

At this point it is necessary to draw attention to another relevant distinction. It is the distinction between ordinary business risks that are reasonably foreseeable in a general sense (although the details and extent may be unforeseen) on the one hand, and on the other the risk of calamities beyond the power of control of any entrepreneur, that are classified as *vis major* or *casus fortuitus* or *damnum fatale* (and often referred to in English terminology as acts of God or inevitable accident). In the law of contract, if *vis major* etc should render performance of a contractual obligation impossible then, unless the contract provides otherwise, the contract will be discharged to the extent of the impossibility and the loss will lie

where it falls. Cf *Peters, Flamman and Co v Kokstad Municipality* 1919 AD 427, and the discussion in Christie *Law of Contract in South Africa* at 464 - 7. In the modern world the ordinary risks of business that are reasonably foreseeable must presumably include the risks that the entrepreneur (or his company) may fail to meet the challenge of competition in the market-place; that public tastes and fashions change and may render older types of goods and services less attractive and

therefore less easily marketable than before; that there is constant research and development leading to new inventions and more efficient designs that render older products and methods obsolete; that there are cyclic fluctuations in the economy that affect trading conditions; that interest rates fluctuate; that inflation is a disruptive factor for which allowance must be made; that there is constant tension between management and labour over scales of remuneration and working conditions leading periodically to strikes and other disruptions; and many other hazards and variables that constitute familiar risks in the business world. That is not to say that some of such risks, if they eventuate with such suddenness, or on such an unforeseeable scale, as to defeat the reasonable expectations of prudent businessmen, may not qualify for classification as *vis major* etc: they may. The point of relevance to be noted at this stage is that all assets of all persons are inevitably exposed to risks flowing from *vis major* etc. No one has any real choice in the matter. The exposure of assets to other business risks not falling within those categories is, however, a matter of choice. An entrepreneur may of his own choice expose his assets to the danger of loss from business risks other than *vis major* etc for the sake of participating in business with a view to making profits. But nothing in our law entitles him to expose the assets of any other person to the danger of loss from such other business risks in the absence of consent. Similarly, the capital of a company is subscribed by its

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members for the very purpose of participating in the business for which the company has been formed, and the company's directors and other officers are therefore authorised to expose such capital to the risks attendant on the business. However, nothing in our law entitles them to expose the assets of any other person (including the claims of creditors against the company) to such risks in the absence of consent. For a director or other officer of a company to expose the claim of a creditor to foreseeable loss through the risks attendant on the company's own business (as distinct from *vis major* etc) is conduct which is culpable because it departs from the standards of the reasonable man, and which therefore constitutes the delict of negligence, at least. It may amount to gross negligence, which is recklessness. It may also amount to a breach of contract.

Requirements to avoid liability due to

Hay v the Divisional Council of King William's Town (1880-1881) 1 EDC 97

In the latter case, which was decided in 1876, the Court of Appeal of the Supreme Court of Judicature stated the ordinary rule of law to be, that when the law creates a duty and the party is disabled from performing it without any default of his own by the act of God or the King's enemies, the law will excuse him; but where a party by his own contract creates a duty he is bound to make it good, notwithstanding any accident by inevitable necessity." I am of opinion that both upon principle and authority the plea discloses a good defence. In considering whether the plea has been proved the Court will probably be guided by what was said by Sir Wm. SCOTT in *The Generous* (2 Dods, 323): "That the defendant must shew by distinct and unsuspected testimony that he has used all reasonably practicable endeavours to surmount the difficulties, and which on fair trial he found insurmountable, for the positive injunctions of the law, if proved to be violated, can give way to nothing but the clearest proof of the necessity that compelled the violation." I wish to guard myself from being supposed to imply that a party who has imposed upon himself

a charge by his own contract is, under the Roman-Dutch Law, bound in every case to make it good, notwithstanding the contingency that has arisen was caused by *vis major*, or *actus Dei*, as it is called in the law-books. There are exceptions to this liability under the English law (see *Taylor v Caldwell*, 3 B. & S.), and a party is certainly not liable by the Roman-Dutch Law in several cases in which he is under the English law. (See *Rubidge v Hadley*, 2 Menz, 174; *Voet*, 19, 2, 24, *et seq*.) The exception must be overruled with costs.

BARRY, J. --- In answer to a claim for damages arising from the bad state of the main road last year near Greytown, the Divisional Council of King William's Town has, among other pleas, pleaded that at the time of the alleged injury war was being carried on between Government and the natives in the immediate neighbourhood of that road, which rendered it impossible for the Council to obtain labour for repairing it, although they had exercised due diligence in trying to secure such labour; and the plea adds, "that they did all that they were required by law to do." The plaintiff excepted to this plea as affording no defence. As the plea alleges that the Council 11 did all that they were required

(1880-1881) 1 EDC at Page 102

by law to do;" and this has not been specially excepted to as amounting to the general issue, or as importing a double answer into one plea, it might be said that even if *vis major* be no defence, the plea contains these other allegations which, if proved, afford a defence. But I take it that the words quoted must be construed to mean that, without any default in defendants, they were disabled from the performance of their duty to repair by the presence of the Queen's enemies. The question we are to determine, therefore, is, can the Council be heard to say that the war rendered it impossible for them to perform the duty of repairing imposed upon them by section 2, of Act 10, 1864? Mr. *Brown*, for the plaintiff, contended that the duty was an absolute one, which could not be excused by acts of the Queen's enemies, and relied upon *Norden v Shaw* (2 Menz., 150), where, apparently adopting the rule of the law laid down in *Paradine v Jane* (cited in 10 East, 533), the Supreme Court, in 1847, held that although the defendant in that case had been prevented from delivering Kafir gum according to *contract*, solely by the then Kafir war, that fact did not afford a defence against the plaintiffs claim for damages. The *Solicitor-General*, for the defendants, argued that *Norden v Shaw* was misreported, was not law, and was inconsistent with *Rubidge v Hadley*, decided by the same Court in 1848, when it held that a tenant had a right to deduct rent for loss of beneficial occupation caused by the Queen's enemies. Both sides seem to have been content to deal with the case as though the rule of law existing in case of *contract* were applicable. The rule in *Paradine v Jane* is, that "when a party by his *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." Acting upon that rule, it has been held in England that it was no defence for not carrying goods in terms of a contract, that they were confiscated by a decree of a foreign Government at one of the ports of call, or that the taking in of cargo was rendered impossible by pestilence, or by foreign embargo, or prohibition. In *Hall v Wright*, adopting the same principle (29 L.J., Q.B. 43), the Exchequer Chamber held that the defendant in a breach of promise to marry, could not justify refusal on the ground that he had become inflicted with a dangerous disease, rendering

(1880-1881) 1 EDC at Page 103

him incapable of marriage without danger of his life. These and numerous other authorities establish that if a man by lawful contract, unconditionally and absolutely undertakes to do an act not impossible at the time of contract, he cannot excuse himself by an inevitable act, or by *vis major*, not foreseen by him or within his control. (*Mayor of Berwick v Oswald*, 3 E. & B, 663; *Hadley v Clarke*, 8 TR 267; *Atkinson v Ritchie*, 10 East, 532; *Spence v Chadwick*, 10 QB 5,17; 6 TR 650, & 750.) " There can be no doubt," says Mr. Justice HANNEN, in delivering the judgment of the Court of Queen's Bench in *Baily v De Crespigny* (L.R., 4 QB 185), "that a man may by an absolute contract bind himself to perform things which subsequently become

impossible, or, to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, when the event which causes the impossibility was or might have been anticipated or guarded against in the contract. But where the event is of such a character that it, cannot reasonably be supposed to have been in the contemplation of the contracting parties when they contract, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." It is because the act of God or of the Queen's enemies might have been anticipated and provided against in the contract for Kafir gum that the Supreme Court would not, in *Norden's* case, allow the defence of *via major*, as it is- upon the principle that men roust always be considered to contract with reference to the laws existing at the time of the contract that the same Court allowed the deduction of rent arising from the act of the Queen's enemies, in *Rubidge's* case. And I may add it is in consequence of this principle and the difference between the law of England and the Roman-Dutch as to the implied liability of landlord and tenant in cases of war and accident, that I have not quoted the interpretation of English Courts upon contracts of lease as necessarily binding here. But while the fact that the Roman-Dutch Law enables the tenant to escape payment of rent where he has been deprived of his beneficial occupation by war, would cause me to construe every contract of lease here as containing this implied condition of law unless the contrary be expressed in the contract itself, I see no reason for importing such implied conditions

(1880-1881) 1 EDC at Page 104

into other contracts not affected by similar presumptions of law. Had, therefore, the obligation in the present case been one imposed by contract similar to that existing between Norden and Shaw, I should have allowed the exception. But the usual law in cases of *contract* is not applicable to this case. Where the law (as in the present case) creates the duty, it is quite clear that the party bound could not provide against the act of God or *via major*, and hence' it is that the rule of law quoted by Mr. Justice LAWRENCE in *Hadley v Clarke* is sound. It is adopted in the very recent case of *Nichols v Marshland* (L.R., 2 Ex. D, p. 4), where Lord Justice MELLISH, in delivering the judgment of the Court of Appeal, says: "The ordinary rule of law is, that when the law creates a duty and the party is disabled from performing it without any default of his own, by the act of God or the Queen's enemies, the law will excuse him; but when a party by his *own contract* creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity." In this case defendants allege a disability arising solely from the act of the Queen's enemies. The plea may be difficult to prove, but if proved, it will in law excuse the performance of a duty imposed only by law.

Hotel License

Not renewed by licensing court

License not capable of re-transfer

Frenkel v Ohlsson's Cape Breweries, Ltd. 1909 TS 957 at 974 - 975

So far there is not much contest between counsel on either side. Mr. *Stratford,* as I understood him, practically admitted that the onus was on the defendant to prove that it was excused from performance of its express undertaking. But his argument was that this onus was discharged so soon as it proved that the licensing court had refused to renew the

1909 TS at Page 974

license, and that then the onus was shifted on to the plaintiff to prove that that refusal was due to default on the part of the defendant. The basis of his argument was that the refusal by the licensing court to renew a license was equivalent to *vis major* or *casus fortuitus*. If that were so, then I should agree with him that the onus had been shifted from the defendant on to the plaintiff to prove that the refusal was due to the former's default. There is direct authority on this point. Grotius, on the question of pledge, 3, 8, 4, says: "The pledgee is liable for the destruction of or any damage to the property caused by his negligence, but not if the same is due to accident, it being well understood that fire and robbery are considered as due to negligence unless he prove the contrary." And Van der Keessel is clear upon the point. He says (*Thes.* 540): "If a creditor alleges that the pledge cannot be restored on account of accident, it is for him to prove the accident which has occurred, and also that he has used proper diligence, if it be a case in which neglect may give a cause of action; but, on the other hand, if the accident be of an extraordinary nature, and has been occasioned by extrinsic violence, he is *primâ facie* presumed to have used proper diligence;" and Schorer also, in his note on this passage, has some remarks on the same subject. He says (Maasdorp, p. 580): "It is asked on whom the burden of proof falls, supposing a creditor says that he has by accident lost the thing pledged, and the debtor on the other hand alleges *culpa* and *dolus* on the part of the creditor. In that case the more correct view is that the proof falls on the creditor, for the proof is on the party who alleges an accident, which rule obtains in all contracts in which *culpa levis* is to be made good. . . . A distinction is very usually and rightly drawn. If, for instance, the creditor says that he has lost the thing pledged to him by such an occurrence as by its very nature is hardly likely to happen, unless there has been some *culpa, e.g.* by theft, the falling in of a house, fire, &c., *culpa* on the part of the creditor is always in case of doubt presumed, but saving to him his right to prove the contrary. But if the creditor should say that he has lost the pledged property, and alleges as a cause what is very likely

1909 TS at Page 975

to give rise to it, such as a hostile incursion or a flood, *culpa* is presumed to be absent until the contrary be proved." Therefore, if it could be established that the refusal by the licensing court to renew the license was equivalent to *vis major*, I should agree with Mr. *Stratford's* argument that when once the fact of refusal had been proved the onus was shifted on to the plaintiff to prove that such refusal was due to the defendant's negligence. But in my opinion the refusal by a licensing court of the renewal of a license does not stand on the same footing as *vis major.* That is a general proposition to which it appears to me quite impossible to accede. No doubt in some cases it would be so, as, for instance, where a refusal to renew a license was based upon the ground that no licensed premises were required in the neighbourhood; for in such a case the refusal to renew the license would be the act of a superior authority over which the licensee had no control and for whose actions he would not be in any way responsible. But in the large majority of cases the refusal to renew a license is due to the default of the licensee, and in such a case it appears to me that the analogy entirely fails; it would be impossible in such a case to say that the refusal of a licensing court was equivalent to *vis major.* If that be so, it seems to me to follow as a matter of course that it is not sufficient for the defendant merely to prove that the license had been refused by the licensing court, but it must go a step further. It must prove that the refusal was not due to its default. It relies upon the defence of *vis major.* It must prove *vis major,* or something equivalent to *vis major*, and that proof is not given when the only fact proved is that the licensing court refused to renew the license.

Investment by military authorities

Rev. C. Maber v F. Spencer (1880-1881) 2 NLR 47

The COURT (CONNOR, C.J., and CADIZ, J.) HELD that the preponderance of evidence showed a contract of hiring; that the defendant's plea of agency had not been sustained; that the plaintiff was bound to accept the wagon tendered by the defendant as being of equal value with the plaintiff's own wagon which had been sold by the Imperial Government; that apparently the impressment by the military authorities amounted to *vis major*, for which the defendant could not be held responsible, and that the plaintiff could claim hire only for such time as the wagons had been employed.

Lease

Deprivation of beneficial occupation by legislation

Bayley v Harwood [1954] 3 All SA 459 (A) at 467 - 469

I shall use the words “the improvements” to include all the requirements of the Health Board, i.e. not only the structural alterations and additions but also the purification plant required for the swimming-bath. The facts may now be summed up by saying that the appellant was unable to use the leased premises as a pleasure resort unless he obtained the licences for the year 1951 and that he was unable to obtain those licences unless either he himself or the respondent made the improvements. The respondent refused to do so, and I shall assume that his refusal constituted no breach of contract. On that assumption the appellant’s case is that he was entitled to remission of rent as soon as he vacated the leased premises on the ground that he was deprived by *vis major* of the use of these premises as a pleasure resort. This defence of *vis major* was specially pleaded by the appellant in an amendment to his original plea.

I did not understand counsel for the respondent to contest the well-established legal principle that a lessee is entitled to remission of rent if he is deprived of the beneficial occupation of the leased premises by *vis major* or *casus fortuitus.* He contended however that the appellant had failed to prove *vis major* or *casus fortuitus.* The meaning of these phrases appears from the following quotations:

> “*Casus fortuitus*, which is a species of *vis major*, is a term well-understood and needing no formal definition. It includes all direct acts of nature, the

Page 468 of [1954] 3 All SA 459 (A)
violence of which could not reasonably have been foreseen or guarded against”

(per INNES, C.J., in *New Heriot Gold Mining Co. Ltd.* v. *Union Government* (*Minister of S.A.R. & H.*), 1916 A.D. 415 at p. 433).

> “Now in no case which has come before the courts has a definition of *casus fortuitus* been given; but the words themselves import something exceptional, something extraordinary, something unforeseen, and which human foresight could not be expected to anticipate. . . .”

(per SOLOMON, J., in the case of *Mountstephens and Collins* v. *Ohlssohn’s Cape Breweries*,. 1907 T.H. 56 at p. 59).

Counsel for the respondent rightly conceded that an act of legislation has the characteristic of *vis major* in that it cannot be resisted, but he argued that the act of legislation in the present case was one which ought to have been foreseen and guarded against by the appellant. Counsel relied particularly on the case

of *Mountstephens and Collins* v. *Cape Breweries, supra*, in which SOLOMON, J., after defining *casus fortuitus*, goes on to say the following:

> "Accordingly in the case of *North-Western Hotel Ltd.* v. *Rolfes Nebel & Co.*, 1902 T.S. 324, it was held that the closing of bars by order of the Government in time of war was *casus fortuitus*, inasmuch as it was an arbitrary act of the sovereign power which could not have been contemplated by the parties at the time when the lease was entered into. The present case, however, is a very different one, for here the closing of the beer-hall was not due to any arbitrary act of the sovereign power. The licence lapsed because the licensing court refused to renew it. What the grounds of refusal were is not very clear from the evidence, but I am satisfied that the application was not refused through the fault of either the defendants or the plaintiffs. But the point is this, that the act of the licensing court is one which might have been contemplated at the time of the lease. The parties must have known that the court might refuse to renew it at any time, but there is no clause in the lease providing against this contingency. The fact probably is that the defendants were so certain of getting their renewal that they did not think it necessary to put in a clause providing for the contingency which has now arisen."

In the present case, however, it is impossible to say that the act of legislation which prevented the appellant from using the leased premises as a pleasure resort was one against which he could reasonably have been expected to make provision in the lease. In the *Mountstephens* case it was pointed out that the lessees must have known, when they renewed the lease, of a warning given by the licensing court that it might refuse to renew licences in respect of buildings of the kind hired by the lessees. In the present case the appellant had no warning of any kind and did not and could not reasonably have been expected to foresee that the Peri-Urban Areas Health Board would promulgate the bye-laws which rendered his leased premises unsuitable for use as a pleasure resort. Indeed the position of the appellant appears to be the same as it would have been if the bye-laws in question had already been in existence and the improvements had already been made at the time when the parties entered into the lease and thereafter the improvements had been destroyed by lightning. In that case the respondent could not have resisted a claim for remission on the ground that the appellant could at his own expense have restored the improvements. Similarly the respondent cannot resist the claim for remission on the ground that the appellant could have obtained the licences for the year 1951 by making the improvements himself. The making of the improvements would have resulted in a new contract of lease, because the premises would no longer have been the premises specified in the original contract

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and the rent, by reason of the appellant's expenditure in making the improvements, would in effect have been higher than that stipulated for in the original contract. There is no duty on the appellant, in order to avoid the effect of *vis major*, to pay a higher rent than that stipulated for in the contract of lease in respect of premises different from those specified in that contract. In my opinion the appellant has proved that he was prevented by *vis major* from using the leased premises as a pleasure resort. He is therefore entitled to a remission of rent as from the date on which he vacated the leased premises, and it appears from the evidence that he vacated on the 12th June, 1951. In his plea the appellant admitted liability for the sum of £13 15s. 0d., being £12 10s. 0d. for rent up to the 15th June, 1951, and £1 5s. 0d. in respect of electric current up to that date. He pleaded a tender of this amount made before the issue of summons and he paid the sum of £13 15s. 0d. into court with a disavowal of liability for costs.

Zweigenhaft v Rolfes, Nebel & Co. 1903 TH 242

With regard to the arguments, I am unable to discover that the doctrine of the right of a lessee to claim remission of rent owing to his being deprived of the beneficial occupation of the premises leased by *vis major* is based upon any such principle as that suggested; the principle applicable to such cases as the present appears to me to be that a remission is claimable where the enjoyment of the property for the purposes for which it was let is hindered or prevented by some *vis major* happening without the default, actual or constructive, of either party. Any such principle as is now contended for was not present to my mind when I decided the case of *Lipinski v Bezuidenhout*, and if any expressions in my judgment in that case seem to lend support to that view they would have to be reconsidered. I still think, however, that that case was rightly decided upon the facts. I am informed by the learned reporter who reported the case of *Goldberg v Nante*, that there is an error in the report of the judgment appearing in the newspaper, the only report at present

1903 TH at Page 247

available, and that the obligation of obtaining the licence was not imposed on the lessor but upon the lessee.[1]* If this be so, that case is exactly in point, is decisive of this case, and is a direct authority for the proposition that the tenant of a bar whose licence was taken away by virtue of the Resolution of the Executive Council of the 2nd October, 1899, is entitled to a remission of rent.

With regard to the contention that the lessee had the option to use the premises as a billiard-room, and should have done so when the premises were ordered to be closed as a bar, it seems to me that, at all events after the structural alteration of the premises, it was contemplated by both parties that the premises should be used solely as a bar and not otherwise.

It was further contended that the defendants might have turned the premises into a restaurant, and had they done so they might have obtained a licence for the sale of liquor during meal hours. I fail to see that there was any obligation upon them to convert the premises to any different purpose than the one for which they were hired. Apart from this, so far as the evidence before me goes, the premises do not appear to be adapted for the purposes of a restaurant. They consist of one large room fitted up as a bar, there is no kitchen at which food could be cooked, and no place in which supplies of food could be stored or the necessary plant of a restaurant kept or washed.

For these reasons I am of opinion that the defendants are entitled to a remission of rent. On the facts proved before me I find that they were totally deprived of beneficial occupation, as I cannot regard the fact that Gillet, when he removed his stock, left behind some empty bottles, empty cigar boxes, and a few broken chairs of the value of 10s. --- which he says are only good

1903 TH at Page 248

for fire-wood --- as constituting any beneficial occupation of the premises. It seems to me that at the time he removed his stock he intended to abandon these articles as valueless to him.

Remission of rental due to

General principle stated

Mountstephens & Collins v Ohlssohn's Cape Breweries 1907 TH 56

Mr. *Leonard,* however, claims remission of rent because the defendants by *vis major* or *casus fortuitus* wore prevented from enjoying occupation of the property for the purpose for which it had been leased. In support of this contention the case of *Goldberg v Nante,* which was decided by me, has been cited. In that case I laid down no new principle, but was simply following a previous decision of the Supreme Court. Since then a number of cases on the same subject have been heard in our courts, and in the case of *Hansen, Schrader & Co. v Kopelowitz* (1903 TS 707) this question was discussed fully, and I then tried to deduce some general principle from the authorities. At p. 718 I said: "It appears to me, however, that the following general principle may fairly be deduced from the leading authorities on this subject --- a principle which has already been adopted in previous cases in this Court --- that a lessee is entitled to remission

1907 TH at Page 59

of rent wholly or in part where he has been prevented wholly or to a considerable extent in making use of the property for the purposes for which it was let, by some *via major* or *casus fortuitus,* provided always that the loss of enjoyment of the property is the direct and immediate result of the *vis major* or *casus fortuitus,* and is not merely indirectly or remotely connected therewith."

Loss of custom

Hansen, Schrader & Co. v Kopelowitz 1903 TS 707 at 716

The mere fact that a lessee has suffered loss because the country in which the leased property is situated is at war will give no right to a remission of rent. The fact also that a great

1903 TS at Page 716

number of people have left the country, so as to reduce the field from which the lessee draws his custom, is no ground for a remission of rent, because the principle upon which the Court grants the remission is that the *vis major* must be the direct and immediate cause of the lessee being deprived of the use of the property let.

Troplong. (*Louage*, sec. 226) puts it thus: "If the lessee of a house leaves that house either through fear or prudence so as to escape the accidents of war or plague, he cannot bring an action for remission of rent." 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 bedrooms 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 sub-tenants, but the fall in stock will not be the direct, immediate, and necessary cause of particular bedrooms' not being let.

In all the cases decided before this Court the operations of war or the acts of a superior power were the direct and immediate cause of the lessee's want of enjoyment of the property, and I do not think the Court ought to extend the principle of the remission of rent beyond these lines. The lessees (the appellants) will therefore be obliged to pay the lessor (the respondent) the full amount of the rent apportioned to the

bedrooms, viz., the sum of four-eighteenths of £212, 10s. per month for the period of twenty-one months, *i.e.* from the 1st October, 1899, to the 30th June, 1901, or the sum of £991, 13s. 6d. But inasmuch as the learned judge below has granted him £60 on this head, he is only entitled to an additional amount of £931, 13s. 6d.

Legislation removing rights

Impossible to perform contract

Court not compelling performance

Witwatersrand Township, Estate and Finance Corporation, Ltd., v Rand Water Board 1907 TS 231 at 240 -241

The legislature, by depriving the Water Board of the right to supply the water, has destroyed the subject-matter on which the contract of the 21st December, 1897, was based; and it seems to me that, the subject-matter of the contract having been destroyed, the contract itself falls to the ground.

There have been a number of cases in which that principle has been acted upon. The chief English case is *Taylor v Caldwell* (3 B. & S. 826); and I have the less hesitation in referring to that case because it was based on the doctrine of the Roman law with regard to *obligationes de certo corpore*. The effect of that decision, and of other cases which have followed it, was stated very clearly in *Krell v Henry* ([1903] 2 KB 748), where Lord Justice VAUGHAN WILLIAMS, in giving judgment, says: "That case" (*i.e. Taylor v Caldwell*) "at least makes it clear that 'where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.'" So that where (as in the present case) the subject-matter of a contract is destroyed by superior force, the contract itself, and all the obligations under it, fall away and cease to exist. Upon that ground, as well as on the construction of clause 4 of the agreement, it seems to me that the case of the plaintiff fails, and that the Water Board cannot be compelled to continue the payment of this 10s. a year.

Prohibition of certain conduct by Legislation

Subject to government approval

Approval granted, but then withdrawn

Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG [1997] 1 All SA 11 (A) at 25 - 28 and 28 - 30

It may be mentioned in passing that counsel for appellant advanced submissions based on the view of some writers that the failure of a common assumption, on the strength of which the parties contract, leads to substantially the same result as impossibility of performance: see De Wet en Van Wyk, *Kontraktereg en Handelsreg*, 5th ed 154 *et seq*; Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz, *Contract,*

General Principles, 202-203; and Kerr, *The Principles of the Law of Contract* 4th ed, 406 *et seq*. (*sed contra* Christie, *The Law of Contract in South Africa*, 2nd ed, 400-401). However, in the light of the finding that impossibility was established in this case it is unnecessary to consider whether his submissions were well-founded.

In referring thus far to impossibility of performance I have done so because that is the terminology used by the Court *a quo* and by counsel both on trial and appeal. More accurately, however, this is a case of supervening illegality of performance. The difference between supervening impossibility due, say, to destruction of the *merx* or failure of the intended source of supply, on the one hand, and supervening illegality, on the other, is one of substance and importance. The latter brings to the fore considerations of public policy. In this regard see Treitel, *Frustration and Force Majeure*, 364, 460. I shall revert to that work in due course. First I shall deal with the question whether, on the basis of impossibility of performance as the doctrine has developed in South Africa, appellant was relieved of its obligations under the contract.

Certain remarks in the judgment in the leading case of *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 at 435 and 437 seem to suggest that State

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action, such as the refusal of the requisite authority in this case, constitutes *vis major* and that absolute impossibility of performance due to *vis major* extinguishes the contract and thereby the parties' contractual obligations. This is referred to at 434 as the general rule, to which (as stated at 435 with reference to the Digest) there are exceptions.

What precisely the exceptions are was not discussed and the examples in the quoted text from the Digest are not helpful.

In *Hersman v Shapiro & Co* 1926 TPD 367 at 372, with reference to the judgment in *Peters, Flamman* it was said:

> "A careful perusal of the judgment leads me to think that the learned Judge never meant to say that the defence of impossibility of performance is so absolute as to override the terms of the implications of the contract in regard to which the defence is invoked. "

At 373 Stratford J (with whom Tindall J concurred) went on to say this:

> "Indeed, it seems clear that it is impossible to disregard the nature not only of the contract, but of the causes of impossibility, because those causes might be in the contemplation of the parties; or, again, they might be such as no human foresight could have foreseen. The distinction between different kinds of causes of impossibility must be a feature to be regarded before applying this doctrine of impossibility of performance without qualification.
>
> Therefore, the rule that I propose to apply in the present case is the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and that we must 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 that general rule ought, in the particular circumstances of the case, to be applied. "

That dictum has not been approved or commented on in reported judgments of this Court, as far as I am aware. However, it was followed in *Bischofberger v Van Eyk* 1981 (2) SA 607 (W) which in turn was quoted with approval in the reported judgment at 82H-83D. It is also one of the authoritative sources relied on by Ramsden, *Supervening Impossibility of Performance*, a work referred to in argument by counsel on both sides, for the proposition (at 51) that:

"(N)either *vis major* nor *casus fortuitus* can exist where the consequences of the event

(a)

were within the contemplation of the parties at the time of contracting; for example where the promisor had either expressly or impliedly guaranteed that performance was possible or had agreed to be liable in any event …"

Ramsden contends at 52 that there are other situations in which *vis major* cannot exist, namely:

(b)

… where (the consequence of the event) should have been foreseen by the exercise of reasonable foresight, and could have been avoided if reasonable care or diligence (which includes the taking of ordinary precautions) had been exercised;

(c)

(they) were brought about by the fault of one or both of the parties, which includes:–

(i)

a deliberate or negligent act; or

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(ii)

undue delay in tendering the performance in question. "

The chief authority relied on by Ramsden for proposition (b) is *Bayley v Harwood* 1954 (3) SA 498 (A) to which counsel also referred. That case concerned the question whether a lessee, who had been effectively deprived of beneficial occupation of the leased premises by the terms of a supervening amendment to legislation governing the use of the property, was entitled on the equities to remission of rent. In the course of the main judgment Greenberg JA said (at 503H-504B):

"Dealing with this question of *vis major* from another angle, I am unable to come to any conclusion adverse to the lessee, in regard to the question whether he ought to have foreseen the possibility that legislation of this kind would be passed and that it was either remiss on his part not to have done so, or that he must be deemed to have contemplated that this would happen and to have undertaken the risk. Placing myself as best as I can in the position of the *prudens paterfamilias*, it seems to me that a particularly prudent person might have foreseen the possibility of the event and provided for it, but beyond this I am not prepared to go. Speaking for myself, I can only say that I would at least be as likely to foresee the possibility on the Witwatersrand, where the leased property is situate, of damage by lightning, and this appears to be accepted as *vis major*."

From that passage it would appear that remissness on the part of the debtor or the assumption of risk by him can certainly be relevant. What is not altogether clear is whether such factors assist in determining the existence if *vis major* or, *vis major* having been established, the existence of considerations which result in the debtor being nonetheless liable. In his separate concurring judgment Schreiner JA stressed the relevance of the parties' foresight. He said (at 506G-507 *in principe*):

"It cannot be said of the parties to a contract that they ought to have foreseen, or must be taken to have foreseen, a change in the law merely because laws can always be changed by the lawgiver; and it could, in my view, make no difference if the legislation were of a type or kind that was well-known and might be expected to be introduced from time to time and in one form or another.

If it could be inferred as a fact that the parties to a lease actually foresaw the change in the law which afterwards made it impossible to use the property for the purpose for which it was leased, then it may be assumed that there could be no claim for remission, whatever the precise foundation for the

conclusion would be. But there is nothing in the present record to support an inference of fact that, at the time when the lease was entered into, the change in the law which was subsequently effected was in the contemplation of the parties. ”

Here, too, it is not certain whether foresight of the event rendering performance impossible serves to rule out *vis major* or is an important factor in determining whether, *vis major* having supervened, it must be inferred, as a fact, that the debtor assumed the risk of impossibility due to *vis major* . Either way, it is clear from the judgments in *Bayley v Harwood* that what is relevant is actual foresight, or the reasonable foreseeability, of the event which causes impossibility, not the consequences of such event, as *Ramsden, op cit*., would have it. If you foresee *vis major* you must necessarily foresee impossibility of performance. See, too, the dictum in *Wilson v Smith and Another* 1956 (1) SA 393 (W) at 396 D (cited in

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the reported judgment at 83E-F) where the stress is on foresight of the event, not foresight of the consequences.

It is unnecessary, however, to discuss the role of *vis major* any further. I shall accept that it gives rise to what has been called the general rule but that it was open to respondent to seek to avoid the legal consequences of impossibility by putting up a case in its replication aimed either at negating *vis major* or showing that, despite *vis major* , appellant should not be relieved of the obligation to deliver. I shall also assume, without deciding, that the grounds upon which such a case can successfully be based are those enumerated by Ramsden, *op. cit.,* at 51, 52.

…

Parties may expressly agree that the risk of impossibility of performance will fall on the debtor: *Oerlikon South Africa (Pty) Ltd v Johannesburg City Council* 1970 (3) SA 579 (A) at 585B. In the present case there was no express written or oral term to this effect. The question, then, is whether a tacit assumption of risk must be imported into the contract.

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In the reported judgment the learned Judge commenced his discussion on this topic (at 82G) by adopting, as correct, the following statement of the law in *Bischofberger v Van Eyk* 1981 (2) SA 607 (W) at 611B-D:

“(W)hen the Court has to decide on the effect of impossibility of performance on a contract, the Court should first have regard to the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and must then look to the nature of the contract, the relation of the parties, the circumstances of the case and the nature of the impossibility to see whether the general rule ought, in the particular circumstances of the case, to be applied. In this connection regard must be had not only to the nature of the contract, but also to the causes of the impossibility. If the causes were in the contemplation of the parties, they are generally speaking bound by the contract. If, on the contrary, they were such as no human foresight could have foreseen, the obligations under the contract are extinguished. ”

He then approved the abovementioned dictum in *Wilson v Smith*. It is to the effect that when parties enter into a contract contemplating that the event which rendered performance impossible might occur, and they make no provision in the contract against that event, the implication could be made that the party pleading impossibility should not be relieved of its obligations.

The learned Judge considered that the situation in the instant case warranted the implication referred to in *Wilson v Smith* and concluded (at 84H-I of the reported judgment):

> "The occasion of impossibility had certainly been foreseen, although for peculiar reasons the parties did not expect that impossibility would supervene. This was surely a situation where the defendant, being the debtor, should have made provision against the eventuality of an ultimate refusal of permission. The other possibility is that Sinclair-Smith was very confident and consequently took a chance and entered into an unconditional contract. If that was so, the case becomes rather like *Hersman v Shapiro*.
>
> In the light of all these considerations, I find that supervening impossibility did not relieve the defendant of its obligations. "

There is no finding in that passage or elsewhere in the reported judgment of a tacit contractual term or an assumption of risk. Indeed there is no reference to the elements of the case raised in the replication. It is also not clear to what extent, if at all, the learned Judge applied what was said in the *Bischofberger* case in the passage cited with approval.

The significance of the last-mentioned point lies in the statement at 611D of *Bischofberger*'s case, namely:

> "If the causes (of impossibility) were in the contemplation of the parties, they are generally speaking bound by the contract. If, on the contrary, they were such as no human foresight could have foreseen, the obligations under the contract are extinguished. "

With respect, that statement cannot be accepted without qualification. In the first place the contemplation that is relevant is not such as parties might at some time have had during the negotiation stage. It must, logically, be their contem-plation at the time they contract: see the judgment of Schreiner JA in *Bayley v Harwood* at 506 (last line). Secondly, the apparent requirement that the event

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causing impossibility must be beyond human foresight before the parties' obligations are extinguished, is not supported by authority. The words " human foresight" are taken from the above-quoted passage in *Hersman v Shapiro* at 373. I do not consider that dictum is authority for, or that it was intended to lay down, the proposition that the debtor is only excused where the event in question is beyond human foresight. One has no difficulty with the position where it is not as a fact foreseen because then it would be difficult if not impossible to find that the risk was assumed. But why should the debtor remain bound even where the cause is humanly foreseeable but understandably, and reasonably, not foreseen in fact? A proper analysis of the passage in question shows that the reference to human foresight appears in nothing more than an example, stated as a hypothetical extreme, of a situation where the foresight in question could not exist. The passage in *Hersman v Shapiro* was referred to in argument in *Bayley v Harwood* but not in the judgments and nothing in the judgments signifies acceptance or approval of the limit of human foresight as the criterion. The indications point in the other direction: *viz* if the cause of impossibility is not foreseen or is not such that it ought to have been foreseen then the usual consequences of *vis major* will follow even if the cause was within the bounds of human foresight.

Liquor licence revoked during wartime

No fault on part of lessee

Cancelation of lease

North Western Hotel, Ltd., v Rolfes, Nebel & Co. 1902 TS 324 at 336 - 337

Pothier's view of the civil law is also that of the Roman-Dutch lawyers. Matthaeus (*de Auctionibus,* 2, c. 5), in discussing the law of landlord and tenant, deals fully with the question of responsibility for *casus fortuitos,* and how contracts are to be interpreted where the lessee takes all risks upon himself. He comes to the conclusion that a contract of this nature must not be held to include extraordinary risks like war, earthquakes, locusts, or invasion of barbarians, unless these are specially mentioned: *"Quare non erit absurdum hanc conventionem ita interpretari ut per casum fortuitum non intelligamus etiam;* (also) *insolitum de quo omnino cogitatum non est, quive timeri non potuit tempore locationis."*

The French law took over the principle of the Roman law --- *nemo praestat casus fortuitos,* and the French Courts adopted rules of interpretation similar to those set out by Pothier and Matthaeus. Troplong (*de la Vente,* pars. 465, 466) tells us that "*De droit commun la force majeure survenne après le contrat n'entre pas dans la guarantie. . . . Mais s'il est stipulé que le vendeur sera guarant de la force majeure on du fait du prince cette charge est efficace. Elle est cependant si exorbitante qu'elle doit être expresse et speciale."* He then quotes several decisions of the French Courts to that effect.

Nor does English law differ in principle. By the common law a carrier is not liable for the act of God, in the same way as a lessee is not liable for *damnum fatale.* He can, however, take this risk upon himself, but that he had done so will not be inferred from general terms. Hutchinson (on *Carriers,* par. 172) states the rule thus: "Express language will be required to impose upon a party the responsibility of an insurer beyond his legal obligation," and he cites several American decisions to that effect.

It appears to me, therefore, that the clause of the contract whereby the lessees have agreed to make good to the lessors the value of the furniture missing or destroyed will not apply where I the furniture has been destroyed or lost by those unforeseen and extraordinary accidents which the jurists call *casus fortuitos.* Under these circumstances, therefore, the lessees will not have to make good to the lessors the furniture lost or destroyed whilst

the British were in possession; and as the evidence shows that all the loss and damage was caused during that period the plaintiffs will not be entitled to anything on this count.

Shipwreck

Cargo lost

Failure to deliver

Jamieson & Co. v Goodliffe (1880-1882) 1 SC 206 at 223

The effect of the insurance may therefore be eliminated, and we must gather the intention of the parties from the document which sets forth the contract between them. In my opinion there was a perfect bargain and sale, and so the seller became the debtor of the goods and the creditor of the price. His

obligation to deliver has been done away with by *force majeure*, but he still remains creditor for the price, and therefore the defendants are liable upon this draft, and the judgment of the Court must be for the plaintiffs with costs.

Theft

Goods stored in warehouse

Customs rebate

*Encarnaçäo NO and another v Commissioner for the South African Revenue Services [*2017] 2 All SA 153 (GP) at paras [26] - [34]

***Vis major* and how it may or may not apply to the present case**

[26]

In Wille's *Principles of South African Law*, (9ed), the following is said at page 849:

> "*Vis major*, or superior force, is some force, power or agency which cannot be resisted or controlled by the ordinary individual. The term is now used as including not only the acts of nature, *vis divina*, or 'act of God', but also the acts of man."

[27]

By way of example of the "acts of man" the learned author refers to *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 at 435 where the following is said:

> "For the authorities are clear that if a person is prevented from performing his contract by *vis major* or *casus fortuitus*, under which would be included such an act of state as we are concerned with in this appeal, he is discharged from liability."

The "act of state" referred to was the compulsory winding-up by the treasury of a contracting party's business rendering it impossible for him to perform in terms of the contract.

[28]

In heads of argument on behalf of the applicant, I was also referred to *Davis v Lockstone* 1921 AD 153. A hotel guest had his valuables stolen from his room while he was absent and he successfully claimed the loss representing the value of the stolen articles from the proprietor of the hotel.

It was common cause that the goods had been stolen but there was no evidence of a break-in or violence being used in the form of a robbery.

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At 158, the following is said:

> "'The action', he says, 'is allowed against the inn keepers, etc . . . to repair and make good all damage caused by theft, rotting, or otherwise in whatever manner, that alone excepted which is proved to have happened through *damnum fatale* or *vis major*, as for instance through shipwreck or damage done by pirates. To which is not dissimilar the case where the hotel or stable being broken into, the travellers' goods or horses have been stolen, provided that there has been no accompanying neglect or *culpa* on the part of the inn keeper or ostler."

At 159, the learned Judge of Appeal, quoted the following extract from an older authority:

"In this civil action for the property's value ship owners, inn keepers and stable keepers were supposed to have implicitly contracted that the property should be kept safely: and this was held to make them liable absolutely, unless the loss was occasioned by something in the way of inevitable fate or *vis major*, which would not include theft as distinguished from robbery with violence not to be resisted."

[29]

The learned author HC Cronje, *Customs and Excise Service* at 10–34, says the following while dealing with the subject of Rebate item 412.09:

"Regarding *casus fortuitus damnum fatale* and *vis major* see Wille's *Principles of South African Law* . . . ; *Gibson* . . . and the cases and authorities there cited (in respect of carriage of goods). Such forces or events which are inevitable, unforeseeable and quite irresistable include, so it seems, robbery but not theft. If goods were lost, destroyed or damaged by these forces or events the carrier would escape liability but not if he was negligent in exposing the goods to such risks." (Emphasis added.)

[30]

It is worth noting that already on 11 November 2013, and well before this application was launched in May 2014, the applicants' attorney wrote a letter to the respondent dealing with the contentious issues and referring the latter to some of the authorities which I already quoted. The attorney also referred respondent to the SARS: External Standard Operating Procedure Removal of Goods which contains the following guideline on page 13:

"Robbery by armed or dangerous attackers can be regarded as *force majeure*, but theft in the ordinary cause (*sic*, should be course) will seldom be regarded as *force majeure*.

Theft is *prima facie* considered the fault of the licenced remover or representative ie by observing normal care the incidence of theft can be avoided. The theft of goods is definitely not 'destruction or loss by accident'. Therefore in the case of theft the duty remains payable."

[31]

The respondent attempted to counter this reference to the External Operating Procedure by pointing out that there is also a Code of Instruction which was attached to the answering affidavit.

The relevant passages in this Code of Instruction relied upon by the respondent stipulate:

"(a)

In the event of a customs storage warehouse being burgled, duty and VAT should immediately be called for on any pilfered goods. No provision exists whereby the duty and/or VAT can be waived in these circumstances. Such goods are regarded as being removed/entered into home consumption.

(b)

In the event of goods being destroyed by fire, flood water etc and the duty amounts to R2 500,00 or more, the licensee may apply for a rebate of the duty in terms of Rebate item 412.09 of Schedule 4. No provision exists whereby any duties or VAT amounting to less than R2 500,00 can be waived."

In the first place, I am of the view that the situation of a "storage warehouse being *burgled*", is not tantamount to a "robbery by armed or dangerous attackers" which, in terms of the External Standing

Operating Procedure, is recognised as amounting to *vis major* in a proper case. It is also not the same as the "robbery with violence" recognised in *Davis v Lockstone*, (*supra*).

Although the phrase "burglary" is seldom used in our criminal law text-books, a "burglar" is described in the *Concise Oxford Dictionary*, page 122, as "one who enters building illegally . . . with intent to commit felony". In the more comprehensive *Shorter Oxford English Dictionary*, Volume 1 page 309 "burglary" is defined as "the crime of entering a building (in English law formerly by night only) with intent to commit an arrestable offence". All this is a far cry from an armed robbery which is the crime which is regarded as *vis major* by the authorities quoted, and the circumstances recognised in the Rebate item as qualifying the importer for a total rebate in a proper case.

The second portion of the passage quoted from the Code of Instruction is misleading because it is an incomplete summary of the terms of the Rebate item in the sense that the circumstances of *vis major* are not even mentioned. Indeed, the document relied upon by the respondent is in harmony with the External Standard Operating Procedure relied upon by the applicants in the sense that in the latter document ordinary theft is also recognised as not qualifying the importer for a rebate.

I add that Mr *Vorster*, in his supplementary heads of argument, reminded me that the effective date of the document relied upon by the applicants is 14 March 2012 and the effective date of the document relied upon by the respondent is 14 May 2012. The alleged robbery on which the applicants rely in support of their case took place in August 2009, some two years earlier. Counsel points out that as there is no indication that these documents were intended to have retrospective effect, it would be "unsafe to have regard thereto". Neither party raised this point in their affidavits. Indeed, it was the applicants who initiated the debate around these two documents.

Whatever the position, it seems, that at least at present, the respondent recognises that an armed robbery can be regarded as *vis major* for purposes of the Rebate item.

[32]

In conclusion, I add that the applicants, correctly in my view, find broad support for their case in the provisions of section 76(2)(d) of the Act which stipulates:

> "(2)
>
> The Commissioner shall, subject to the provisions of subsection (4), consider any application for a refund or payment from any applicant who contends that he has paid any duty or other charge for which he was not liable or that he is entitled to any payment under this Act by reason of –
>
> (a)
>
> . . .

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> (b)
>
> . . .
>
> (c)
>
> . . .
>
> (d)
>
> the goods concerned having been damaged, destroyed or irrecoverably lost by circumstances beyond his control prior to the release thereof for home consumption."

(Subsection (4) does not apply for present purposes.)

This sums up the case offered on behalf of the applicants. I have already expressed the view that "lost" in the spirit of the Rebate item, is not limited only to destruction by fire or flood, but can also be "lost" in that sense through a robbery, if the goods were never retrieved. The learned author *Cronje*, dealing with the same subject at 10–35, states that "irrecoverably lost" would require conclusive evidence that the goods cannot be recovered. My attention was not invited to any evidence to the effect that the goods lost during the robbery were ever recovered. Now, 9 years after the event, this is in any case not likely to happen.

[33]

In the result, and for the reasons mentioned, I have come to the conclusion, and I find, that an armed robbery, in a proper case, can amount to circumstances of *vis major* as intended by the provisions of the Rebate item which could qualify the importer for a rebate.

[34]

I turn to the evidence about the armed robbery relied upon.