Impossibility to perform due to COVID-19

On 23 March 2020 the President of the RSA, in response to the global pandemic COVID-19,announced a 21-day lockdown ("the Lockdown"), which commenced on 26 March 2020 at 23:59
pm.

The Lock-down entails that every person, subject to certain exceptions, is confined to his or her place of residence. The inevitable effect of the Lock-down is that, where a party's physical presence is required to allow for performance in terms of a contract, such a party will be unable to perform without contravening the Lock-down regulations.

The purpose of this opinion is, therefore, to provide legal certainty for those cases where the contract is silent on the consequences of an impossibility to perform. We have noted that a lot of questions relating to COVID-19 and the Lock-down have been answered with reference to force majeure, vis major and casus fortuitus. We, therefore, find it prudent to also start here. The purpose of this opinion is, however, not to differentiate between force majeure, vis major and casus fortuitus. Consequently, they shall, for purposes of this opinion, all be treated as one and the same thing as they all concern the impossibility of performance in one way or another.

1. Impossibility of performance

The general rule in our law is that, where impossibility of performance is brought about by vis major or casus fortuitus, a party will be excused from performing in terms of that contract. The exceptions to the rule are, in our opinion, well explained in the case of MV Snow Crystal Transnet Ltd T/ANational Ports Authority v Owner of MV Snow Crystal 2008 (4) SA 111 (SCA):

> *"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'. The rule will not avail a defendant if the impossibility is selfcreated nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant."

A third exception, not mentioned in the MV Snow Crystal-case, is the fact that the cause of the impossibility, in other words the vis major or casus fortuitus, must have been unforeseen. In the case of Nuclear Fuels Corporation of SA (Pty) Ltd v ORDA AG 1996 (4) SA 1190 (A)the court held 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."

The court later also stated that:

"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."

Put differently, parties will be excused from performing if the impossibility to perform was not –
• foreseen or foreseeable;
• self-created; or
• due to a party's own fault.

Keep in mind that, where the contract provides for the process to be followed in the case an impossibility to perform, preference will be given to the wording of the contract. If it is, for example, required that you give notice of the impossibility to perform, you will have to adhere to the terms of the contract. You will therefore, in our opinion, not be excused from performance if you were obliged to give a notice of the impossibility to perform, but failed to do so.

2. Does COVID-19 and the Lock-down constitute a supervening impossibility?

In the case of Peters Flamman and Co Appellants v Kokstad Municipality Respondents (1919) AD 427 it was held by the court that an act of State can be regarded as a vis major or casus fortuitus. The relevant facts of the case were that a business was wounded up upon the order of the Treasury. Consequently, the business was unable to perform, due to the decision of the Treasury. The court held that:

> *"If a person is prevented from performing his contract by vis major or casus fortuitus, under which would be included the compulsory winding up of his business as an act of State, he is discharged from liability. In these circumstances it is clear that by virtue of this Act of State it became impossible for the [business] to perform their obligations under the contract."*

However, in the Nuclear Fuels-case the court distinguished between cases where it is truly impossible to perform, and cases where it will be illegal to perform. The court held that the difference between supervening impossibility and supervening illegality is one of substance and importance. The latter brings to the fore considerations of public policy.

The court relied heavily on the works of Treitel in Frustration and Force Majeure and came to the conclusion that, where performance will be illegal, it does not automatically render the performance impossible. In instances of supervening illegality, one would have to turn to public policy in deciding whether or not a party should be bound to perform.

In our opinion, public policy will almost always dictate that parties will be excused from performance where such performance will be illegal. But policy considerations will not always require invalidation of a term or a contract. It can, for example, dictate that the party whose performance would be illegal, to rather pay a sum of money instead of performing.

Interestingly, the court in the Nuclear Fuels-case, did not set aside the judgement of the court in the Peters Flamman-case. It, therefore, stands to reason that where a party is unable to perform, due to such performance being illegal, it can be treated as a both supervening impossibility and a supervening illegality.

The court proceeded to mention that, in contrast to a supervening impossibility, in the event of a

supervening illegality, the foreseeability of the illegality made no difference. If it were contrary to
public policy to hold the parties to their contract, it would not matter that they foresaw, or ought to have foreseen the illegality. It will remain against public policy. However, the foreseeability element will, in our opinion, very well influence the public policy in deciding whether a party can be excused from performance, or wheter a party should perform in another way.

3. What if a party has already performed?

Where a party has only partially performed, we will have to turn to the decision of the Supreme Court of Appeal in the case of Kudu Granite Operations (Pty) Ltd v Caterna Ltd 2003 (5) SA 193
(SCA).

Here, the court held that the party who has already performed will have a claim of unjust enrichment against the other. There is, however, not yet conformity on which specific action between the condictio ob causam finitam, an offshoot of the condictio sine causa specialis, or the condictio causa data causa non secuta is the appropriate remedy.

But the court held that the identification of the cause of action is not of importance since there appears to be no difference in the requirements of proof of the two condictiones.

4. In conclusion

We are of the opinion that COVID-19, and the effects brought about by the Lock-down, were neither foreseeable, nor self-created by the members of the public, nor was it due to the fault of the general public. As such, we are convinced that the general rule relating to impossibility of performance will apply and that parties will be excused from performing.

This is, however, not a blanket excuse for failing to perform. Each case will have to be considered on its own facts. It might very well be that the exceptions, described above, finds application to your specific matter.

Janus Olivier