***Vis major* in a contractual setting: Covid 19 and the lockdown**

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Introduction:

1. In the light of the nationwide 'lockdown' in South Africa, recourse to the legal concept of *vis major* is likely to be had in a range of litigation scenarios in the near future. The aim of this short piece is to attempt to provide a practical framework to those who seek to raise *vis major* in a contractual setting, based on the legislatively imposed lockdown caused by the Novel Covid – 19 virus ("***Covid 19***").

2. The year 2020 will undoubtedly be remembered as the year that thrust the global community into a humanitarian crisis. The outbreak of Covid 19 has forced nations across the globe to take drastic steps in an attempt to deal with the crisis. In South Africa, the Minister of Cooperative Governance and Traditional Affairs declared a national state of disaster in terms of the Disaster Management Act.[1] She promulgated regulations which came into effect on 26 March 2020 to enforce

[1] Act 57 of 2002.

what is called a "national lockdown".[2] These regulations have been amended from time to time, which included creating various "alert levels".

3. The effect of these regulations has been to curtail human interaction, to limit people's movement and to shut down businesses, with the exception, broadly speaking, that only those that fall within the designated category of "essential services" are allowed to operate (at least during the more restrictive levels of the lockdown). Whilst the legislatively imposed lockdown has shut down *inter alia* business and trade, it opens the possibility of raising *vis major* in contractual relationships. We provide our views herein on a practical approach regarding such concept in a contractual setting.

4. South Africa is scheduled to move to Alert Level 3 on 1 June 2020. As we understand the draft regulations, this will allow most business activities to resume. However, it is to be expected that numerous contracts have been impacted by the lockdown.

5. This piece is aimed at being short and practical. It does not pretend to be an exhaustive discussion of the concept of *vis major*, nor to cover all possible permutations thereof.

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[2] Various subsequent regulations have been promulgated. In determining whether performance in terms of a particular contract is impossible, for purposes of evaluating *vis major,* the regulation that applies at any particular time will have to be evaluated to determine whether such regulation renders the particular performance impossible in terms of such regulation at such time.

What is the concept of '*vis major*'?

6. *Vis major* can be defined as greater force, superior force or irresistible force.[3]

7. Christie discusses *vis major* under the heading "supervening impossibility".[4] Supervening impossibility can result from *vis major* or *casus fortuitus.*[5] As Christie points out, there is no need to distinguish between these two concepts.[6]

8. The principle underlying *vis major* was stated as follows by Innes CJ:[7]

> "*Casus Fortuitus, which is a species of vis major includes all direct acts of nature, the violence of which could not reasonably have been foreseen or guarded against*."

9. We accept that "supervening impossibility of performance" is a more accurate term.[8] However, the term "*vis major*" has become entrenched through popular use and we will accordingly use it in this article.

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[3] Claasen's dictionary of legal words and phrases: RD Claasen.

[4] Christie's Law of Contract in South Africa, 7th Ed., p. 547.

[5] **Peters. Flamman and Co. v Kokstad Municipality** 1919 AD 427 at 435.

[6] Christie, *supra* at 549,

[7] **New Heriot Gold Mining v Union Government** 1916 AD 415 at 433.

[8] **Nuclear fuels Corporation of SA (Pty) Ltd v Orda AG** 1997 1 ALL SA 11 (A) at 1205 G.

10. The foundation on which *vis major* rests is 'unforeseeability'. Solomon J in **Mounstephens and Collins v Ohlssohn's Cape Breweries** explained:[9]

> *"… 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 in which human foresight could not be expected to anticipate …"*

11. It is self-evident that the superior force that constitutes *vis major* can conceivably have at least three effects on a contract. Firstly, it can make the contract impossible to perform at all. Secondly, it can make it impossible to perform some of the obligations under the contract. Thirdly, it may make it impossible to perform the obligations in terms of the contract for a limited period of time.

12. If the supervening event makes it objectively impossible to perform the contract at all, the general rule is that the supervening impossibility of performance has the effect that such party is discharged from further performance, while the counter-party's corresponding right to claim further performance is also extinguished.[10]

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[9] 1907 TH 56 at 59.

[10] **Peters. Flamman and Co. v Kokstad Municipality** 1919 AD 427 at 434-5; **Oerlikon South Africa (Pty) Ltd v Johannesburg City Council** 1970 (3) SA 579 (A) at 585A-B; **Bekker NO v Duvenhage** 1977 (3) SA 884 (E) at 889.

13. However, it is important to note that the rule is not absolute. In **Hersman v Shapiro & Co.**[11] Stratford, J., (as he then was), expressed the rule in the following terms:[12]

> *"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."* (our emphasis)

14. Accordingly, it cannot be said with absolute certainty that *vis major* that renders it objectively impossible for one party to perform will in every circumstance discharge the parties from their contractual obligations. However, in the vast majority of cases the general rule will apply.

15. However, where the supervening event only makes it impossible to perform part of the contract, then the answer depends on whether or not the part of the performance which is rendered impossible is severable from the other obligations in terms of the contract. If it is severable, then the obligations which are

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[11] 1926 T.P.D. 367.

[12] at p. 373.

impossible to perform are discharged but the remainder of the contract is enforceable.[13]

16. On the other hand, if the obligation that has become impossible to perform is not severable from the other obligations in terms of the contract, the position is less certain. In a full bench decision, Cloete J held:

> "*It is not necessary or desirable to lay down any hard and fast rule. The facts in some cases will lend themselves more readily to the application of one test, whereas other cases will more easily be disposed of by the application of another test. In every case a value judgment, based on objective criteria, will be required to establish whether it is just that the bargain should, to the extent still possible, be upheld and the obligations of the parties adjusted. On the one hand, the court should not make a new contract for the parties. On the other hand, neither party should be allowed to escape its obligations where the essence of the contract is still capable of performance.*"[14]

17. In contracts with ongoing obligations, such as lease agreements and contracts of service, the impossibility may be temporary in nature. In such circumstances, the contract is not automatically terminated. If the delay is not unreasonable in length, the obligation to perform is merely suspended. If the delay is

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[13] **Bob's Shoe Centre v Heneways Freight Services** (Pty) Ltd 1995 (2) SA 421 (A) at 429 I to J.

[14] **World Leisure Holidays (Pty) Ltd v Georges** 2002 (5) SA 531 (W) at [10].

unreasonable in length, then the party to whom performance is to be rendered is entitled to cancel the contract (it does not terminate by operation of law).[15]

Does the 'lockdown' constitute '*vis major*'?

18. The pivotal question is whether the lockdown constitutes *vis major*. In our view, depending on the circumstances relevant to the contractual relationship between the parties, it does.

19. South African law recognizes that *vis major* may include human acts in addition to acts of nature or acts of God. For instance, and with reference to human acts, in certain circumstances, an armed robbery will fall within the scope of *vis major*.[16]

20. Support for the conclusion that a state-imposed lockdown (being an act of state), in terms of which contracting parties are prohibited from performing certain acts preventing such parties from performing in terms of a contact, constitutes *vis major* is to be found in the leading case of **Peters, Flamman & Co v Kokstad Municipality** (the "***Peters, Flamman case***").[17]

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[15] **Beretta v Rhodesia Railways Ltd** 1947 (2) SA 1075 (SR) at 1080.

[16] **Commissioner for the South African Revenue Service v Encar** (543/2017) [2018] ZASCA 71 (29 May 2018) [15] – [16].

[17] 1919 AD 427.

21. In the **Peters, Flamman case**, the appellants, who were partners, were contracted by the municipality to provide lighting to the town of Kokstad for a period of years. While the contract still had several years to run, war broke out and the appellants were interned as enemy subjects. Their business was ordered by the Treasury to be wound up. The municipality brought an action for damages for breach of contract and for forfeiture by the appellants, under the contract, of certain plant which they had erected and installed. The court held that where a person is prevented from performing his contact by *vis major*, and in which would be included such an act of State, he is discharged from liability.[18]

22. The court in the **Peters, Flamman case** held as follows *inter alia*:[19]

> "*. . .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 maior or casus fortuitus* ***under which would be included an Act of State as we are concerned with in this appeal****, he is discharged from liability.*" (our emphasis)

[18] At p. 435.

[19] at p. 434 – 435.

23. Legislation subsequent to the making of the contract (which would include the lockdown regulations), making performance illegal, either absolutely or without a specified consent that has been refused, will fall within the ambit of *vis major*.[20]

24. It is highly unlikely that prior to the outbreak of Covid 19 any person to a contract in South Africa would have foreseen such outbreak and the consequential lockdown, or contemplated the situation, at the time of the conclusion of a contract.

25. In many instances, the lockdown regulations have prevented a party to a contract from performing its obligations, mostly because, save for essential services, people have been confined to their places of residence. In our view, the regulations constitute an Act of State as envisioned in the **Peters, Flamman case**.

26. We are accordingly of the view that the general rule would apply and that a party to a contract, the performance of which is prevented by Covid 19 and the lockdown regulations, may rely on *vis major*.

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[20] See: **Bayley v Harwood 1954 (3) SA 498 (A) 505**: "*… The intervention of the sovereign power, whether by legislation or by executive action, has the quality of vis major (North Western Hotel Co v Rolfes, Nebel & Co., 1902 T.S. 324 at p. 331; Goldberg v Nante, 1903 T.H. 150 at p. 155)...*"; **North-Western Hotel Ltd v Rolfes Nebel & Co., 1902 T.S. 324** - the closing of bars by order of the Government in time of war constitutes *casus fortuitus*.

The terms of the contract:

27. It is important to consider whether or not the contract itself governs the situation. Contracts may contain a *force majeure*, hardship or intervener clause, or an arbitration clause conferring on an arbitrator the power of an amiable *compositeur* (amiable composition).[21]

28. Should the relevant contract contain a clause dealing with a situation such as the national lockdown and supervening impossibility, such clause must be applied rather than the common law principles relating to *vis major*.

29. Absent such a *force majeure*, hardship or intervener clause, or an arbitration clause in the contract between the parties, the common law applies.

Limitations applicable to vis major:

30. A debtor may be prevented from timeous performance by events beyond his or her control. A debtor cannot, however, rely on supervening impossibility of performance that arose after he or she was in *mora*.[22]

31. Furthermore, a debtor bears the risk of supervening impossibility if (1) the debtor undertook that performance would be possible, (2) when entering into the

[21] As amiable compositeur, the arbitrator has the power to handle the particular circumstances by judicious departure from the strict law without creating a precedent.

[22] **Tweedie v Park Travel Agency Pty (Ltd)** 1998 (4) SA 802 (W) at 805 E to I.

contract, the debtor foresaw, or ought reasonably to have foreseen, the cause of the impossibility; (3) a rule of law places the risk on the debtor.[23] In the context of Covid-19, this limitation is not likely to apply in respect of contracts concluded before the pandemic spread to South Africa. However, every circumstance is fact dependent.

Remission of rent:

32. Due to the fact that it is likely that very many cases shall arise involving lease agreements affected by the lockdown, we set out very briefly certain authorities relevant to this particular aspect herein.

33. In **Bayley v Harwood 1954 (3) SA 498 (A) 505**, the following is stated with approval:

> *"The principle on which remission of rent is granted was very clearly stated by SMITH, J., in Zweigenhaft v Rolfes, Nebel & Co., 1903 T.H. 242 at p. 246,*
>
> *'A remission,'*
>
> *the learned Judge says,*
>
> *'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.'"*

[23] **Nuclear fuels Corporation of SA (Pty) Ltd v Orda AG** 1997 1 ALL SA 11 (A).

34. In **Hansen, Schander & Co v Kopelowitz 1903 TS 707** it was held that *"a lessee is entitled to a remission of rent either wholly or in part where he has been prevented either entirely or to a considerable extent in making use of the property for the purpose for which it was let by some vis major, provided always that the loss of enjoyment of the property is the direct and immediate result of vis major, and is not merely indirectly or remotely connected therewith".*

35. Accordingly, in our opinion, where the enjoyment of the property for the purposes for which it was let is hindered or prevented by the lockdown, subject to the terms of the lease agreement and the exceptions referred to above, the lessee will be entitled to a remission of rent.

Concluding remarks:

36. From 21 April 2020 until 1 June 2020, most South Africans were not allowed to go to work and businesses, save for those that fall within the designated category of essential services, were not allowed to operate. The promulgation of the aforementioned regulations undoubtedly qualify as legislation that rendered performance in many instances objectively impossible.

37. In our opinion, most contracting parties who found themselves unable to fulfil their contractual obligations during this time as a result of the lockdown will be able to rely on *vis major* either to contend that they are discharged from their contractual obligations or to contend for an adjustment of their contractual

obligations, such as a remittal of rental. As noted above, this is subject to the relevant facts of each situation and there are limitations to this principle.

PLEASE NOTE that this note should not be relied upon in isolation. It is always important to obtain independent legal advice relevant to a specific factual scenario.

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