COVID-19 versus Contractual Obligations: Case in point South Africa?

ASHARAF BOOLEY

The 23rd of March 2020 will forever be etched in the minds of all South Africans: President Cyril Ramaphosa declared a 21-day national lockdown effective from midnight on Thursday, 26 March to Thursday, 16 April to curb the spread of the coronavirus (referred to as COVID-19).

The novel coronavirus, which was identified in the Chinese city of Wuhan in December 2019, has spread rapidly across country borders, sea, air and has engulfed the world on a global scale. To date, over 2.6 million confirmed cases have been reported although this number may, in reality, be far higher. Globally, the rate of infections rise daily, as does the death toll.

COVID-19 has impacted businesses and communities, leaving in its wake infections, death, shortages of essential services, unpreparedness and mental and physical uncertainty. One question is, what is the impact of COVID-19 lockdown on pre-existing contractual obligations?

In order to be acknowledged as a valid and binding contract, an agreement must adhere to the following requirements:

- consensus – the minds of the parties must meet, or at least appear to meet, on all material aspects of their agreement;
- the parties must have the necessary capacity to conclude the contract;
- certain formalities – for example, where the agreement requires that it should be in writing and signed – must be adhered to;
- the agreement must be lawful;
- the agreement must be certain or definite or of determinable content when concluded and the obligations which the agreement gives rise to must be capable of being realised (Dale Hutchison (Ed) and Chris Pretorious (Ed) 'The Law of Contract in South Africa' (2017) (Oxford University Press: South Africa).

Force majeure – irresistible force

The South African law of contract has developed the concept of irresistible force (*vis major* or force majeure) as affecting the operation of a valid and binding contract. Force majeure refers to a clause that is included in contracts to remove liability for natural and unavoidable catastrophes that interrupt the expected course of events and prevent participants from fulfilling obligations. It also encompasses human actions, such as armed conflict.

French law applies three tests to determine whether a force majeure defence is applicable— the event must be unforeseeable, external and irresistible.

In *Mountstephens & Collins v Ohlssohn's Cape Breweries 1907* TH 56, the tenant claimed remission of rent because the defendants by *vis major* or *casus fortuitus* were prevented from enjoying occupation of the property for the purpose for which it had been leased. The court said: "… that a lessee is entitled to remission 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 vis 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."

Booley

Questions about what is and is not "foreseeable" in a legal sense have been raised given the increased awareness of pandemics, asteroids, supervolcanoes, cyber threats, and nuclear warfare.

The general rule: Impossiblity of performance prevents the creation of obligations

It could be argued that for a contract to be valid, the contractual obligations flowing from such a contract must be able to render performance. As a general rule, an agreement will not create obligations if performance is initially objectively impossible – *impossibilium nulla obligatio est* (impossibility is an excuse for the non-performance of an obligation). In *Peters Flamman and Co v Kokstad Municipality* 1919 AD, the court held, "A contract is void if at the time of its inception its performance is impossible: *impossibilium nulla obligatio*. 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." We seem to have departed from the English law position with this judgment. The terms *force majeure*, *vis major* and *casus fortuitus* are used interchangeably and refer to an extraordinary event or circumstance beyond the control of the parties, including a so-called "act of God".

Meaning and different types of impossibility

The general rule is that the impossibility of performance may, in certain instances, prevent the creation of obligations. It must be noted that all types of impossibility have the ability to prevent the establishment of contractual obligations. In this instance it becomes imperative to note

that for contractual obligations to become non-existent or extinguished, they must be of a certain category.

The focus of this discussion is on subjective and objective impossibility. Performance may be categorised as either being subjectively (relatively) or objectively (absolutely) impossible. Subjective impossibility suggests that someone else may be able to render performance, but that the debtor cannot do so. A typical example would be the inability to pay money on the due date, which is subjective impossibility. The mere inability to pay on due date or render performance does not entitle the debtor to escape liability. Objective impossibility refers to a situation where there is a general inability to perform; therefore, from a legal perspective, no one is able to render performance. A typical example would be for the delivery of a non-existent thing, *a res extra commercium* (a doctrine originating in Roman Law holding that certain things may not be the object of private rights and are therefore insusceptible to be traded), or a thing belonging to the purchaser.

When determining whether the performance is objectively impossible, the test applied is of a pragmatic standard. However, absolute physical impossibility may satisfy the test. On the other hand, performance that might be possible to render may be considered futile or impossible if insistence to render performance in the circumstances would be considered unreasonable.

Factors such as practical economic expediency and fairness will definitely play a role, as fairness is considered a cornerstone in the modern-day law of contract (*Barkhuizen v Napier* 2007 (5) SA (CC)). This sentiment was echoed by Ngcobo J, "Public policy, represents the legal convictions or general sense of justice of the community, the *boni mores* and the values held most dear by our society, it takes into account the necessity to do simple justice between individuals, and it is informed by the concept of *ubuntu*. Public policy imports the notion of fairness, justice and reasonableness." If the law prohibits performance, this may be assessed as an instance of objective impossibility or perhaps, in that instance, illegal. The mere difficulty in rendering performance is, at most, generally held to be subjective and not objective impossibility. In situations where the performance to be rendered may result in consequences such as economic or other burdens, it may well be viewed as objectively impossible to perform. As an example, if an object is to be delivered by ship and the ship sinks, it will normally be regarded, to all practical and reasonable purposes, impossible of performance, despite being possible to salvage, albeit at great cost, which may outweigh its commercial value.

In South Africa, if the government orders businesses to close, public transport to stop running, or any other event that would make the performance of obligations under a commercial contract impossible, this would be deemed an "Act of State" and would fall under our common law understanding of *force majeure*. This includes regulations related to the protection of property, protection of the public and for the purpose of "dealing with the destructive and other effects of the disaster", as set out in the GN313 of 2020. The phrasing here is relatively wide and companies should be alert to subsequent regulations which may affect the ordinary running of their businesses. ◆

Booley is a Senior Lecturer, Department of Private Law, University of the Western Cape.