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DISPUTE RESOLUTION **ALERT**

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Umuntu Ngumuntu Ngabantu... except in the law of contract

Judge Brand, in the case of *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) stated that "*... fairness and justice, like beauty, often lie in the eye of the beholder*". He was quoted with approval by the Supreme Court of Appeal (SCA) in *Liberty Group Limited and Others v Mall Space Management CC t/a Mall Space Management* (644/18) [2019] ZASCA 142 – a case that discussed contractual law and the values of ubuntu, a word that derives from the Zulu phrase umuntu ngumuntu ngabantu: A person is a person through other people.

Force majeure in instances of drought

Force majeure refers to circumstances beyond the control of the parties and are intended to deal with, among other things, unforeseen acts of God, of governments and regulatory authorities; chemical or radioactive contamination; failure or delays in transportation; change in law; and war. *Force majeure* provisions will usually contain a non-exhaustive list of events that the contracting parties agree to treat as *force majeure* and which render contractual performance impossible.

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Judge Brand, in the case of *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) stated that *"... fairness and justice, like beauty, often lie in the eye of the beholder"*. He was quoted with approval by the Supreme Court of Appeal (SCA) in *Liberty Group Limited and Others v Mall Space Management CC t/a Mall Space Management* (644/18) [2019] ZASCA 142 – a case that discussed contractual law and the values of ubuntu, a word that derives from the Zulu phrase umuntu ngumuntu ngabantu: A person is a person through other people.

In this case, one of the issues that the SCA had to decide was whether the first four appellants in the matter (the Liberty Group), were obliged in terms of a verbal contract of mandate concluded between them and Mall Space Management CC t/a Mall Space Management (Mall Space Management), to give Mall Space Management six months' notice before terminating its mandate to manage the promotional mall space and exhibition courts so as to market, plan and co-ordinate promotional events at the shopping centres co-owned by the first three appellants and managed by the fourth appellant.

Due to Mall Space Management's failure to properly account to the Liberty Group for the rental income it received, which had led to Mall Space Management being indebted to the Liberty Group, the Liberty Group served Mall Space Management with a notice of termination of its mandate within five days from the date of the notice, being the required notice period in terms of common law. Mall Space Management sought to interdict the termination of the mandate; contending that any termination of the agreement between the parties would require at least a six-month notice period.

Considering that the parties had a long-standing contractual relationship, the court *a quo* in applying the underlying constitutional values of Ubuntu and fairness, granted interdictory relief to Mall Space Management in terms of which the Liberty Group was directed to permit Mall Space Management access to the rental court space at the relevant shopping centres in order to carry on its mandate and further interdicting the Liberty Group from terminating the verbal agreement between Mall Space Management and themselves for a period of six months from the date of the order. It further stated that, *"in the development of the common*

Umuntu Ngumuntu Ngabantu... except in the law of contract...*continued*

The SCA, however, disagreed with the court *a quo's* approach and held that the concepts of good faith, justice, reasonableness and fairness are not self-standing rules which can justify the avoidance of performance under a contract; but are merely underlying values that are given expression through existing rules of law.

law, it is highly desirable and in fact, necessary to infuse the law of contract with constitutional values, including the values of Ubuntu which inspire much of our constitutional compact".

The SCA, however, disagreed with the court *a quo's* approach and held that the concepts of good faith, justice, reasonableness and fairness are not self-standing rules which can justify the avoidance of performance under a contract; but are merely underlying values that are given expression through existing rules of law. Therefore, these abstract values, albeit fundamental to our law of contract, do not constitute independent substantive rules that courts can employ to intervene in contractual relationships.

The court alluded to the fact that, should each judge be guided by what he or she regards as fair and equitable as opposed to applying the established principles of the law of contract, it would lead to inordinate legal and commercial uncertainty. It cannot be accepted that a judge can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity.

Despite Mall Space Management's reliance on s39(2) of the Constitution which calls for the infusion of contract law with constitutional values such as Ubuntu, the SCA held that it would be against public policy to coerce a principal to continue with an agreement they no longer wish to be party to. It was the court's contention that it was unreasonable, in a purely business transaction, to rely on Ubuntu to import a term that was not intended by the parties to deny the other party the right to rely on the terms of the contract in order to terminate it. It would, in fact, be against public policy not to apply the principle of sanctity of contract.

Therefore, in circumstances where the relative position of the parties is one of bargaining equality and Mall Space Management could have negotiated a clause in terms of which it was given notice to remedy a breach before the contract was cancelled, it is impermissible for a court to develop the common law of contract by infusing the spirit of Ubuntu and good faith so as to invalidate the term or clause in question.

Eugene Bester and Nomlayo Mabhena

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Force majeure in instances of drought

If provision is not made in a *force majeure* clause for specific circumstances that will prevent performance by a party, the parties will have to rely on the common law principle of supervening impossibility.

Force majeure refers to circumstances beyond the control of the parties and are intended to deal with, among other things, unforeseen acts of God, of governments and regulatory authorities; chemical or radioactive contamination; failure or delays in transportation; change in law; and war. _Force majeure_ provisions will usually contain a non-exhaustive list of events that the contracting parties agree to treat as _force majeure_ and which render contractual performance impossible. This is an attempt by parties to cater to instances where the breach of a contract. i.e. non-performance, is caused by circumstances beyond the control of the parties.

If provision is not made in a *force majeure* clause for specific circumstances that will prevent performance by a party, the parties will have to rely on the common law principle of supervening impossibility.

The common law position as seen in *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd 2000* (4) SA 191 (W) 198 B-E is that if performance of a contract is impossible due to unforeseen events (not caused by the parties), parties are excused from performing in terms of the contract. It was further held that, "the impossibility must be absolute or objective as opposed to relative or subjective". Furthermore, the parties must not have had reasonable foresight of the event causing impossibility at the time the contract was concluded - *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG 1996* (4) SA 1190 (A)

In determining impossibility, the court in *Hersman v Shapiro & Co* 1926 TPD 367, held:

> The contract in that case called for the delivery (at a future date) of a certain quantity and grade of corn. In the year in question there were excessive rains in the Transvaal region, however, and there was a resultant scarcity of corn of the required quality. Performance for the defendant became, as a result, far more difficult and expensive. Indeed he argued for discharge of his contractual obligation. Stratford J held that one 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 the contract should be discharged. Evidence led in the case established that the defendant had not looked to surrounding provinces and countries, nor had he offered 'fanciful' prices: the desired grade of corn was not unobtainable, but merely scarce. The court refused to discharge the defendant's obligation. (also confirmed in *MV Snow Crystal Transnet Ltd T/A National Ports Authority v Owner of MV Snow Crystal 2008* (4) SA 111 (SCA)).

Having regard to the above, it appears that a *force majeure* event must be a legal or physical restraint and not merely an economic one.

Applying the above to the recent drought in the city of Cape Town, where a company or individual relies on the

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Force majeure in instances of drought

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common law of impossibility as a result of an act by a government authority and/or an act of nature in regard to the use and supply of water, and not on the strength of a *force majeure* clause in a contract, it could be argued that:

i. there was no impossibility in performing in terms of an agreement as there was still availability of water, alternatively, water could have been accessed from alternative sources albeit in costly or limited quantities;

ii. in agreements concluded in the last few years leading up to the drought, the parties to the agreement would have been fully aware of the general lack of water in the area, alternatively, should have reasonably foreseen the effects that the drought in the area would have had on its business; and/or

iii. the effects of the drought could have been alleviated by implementing alternative methods for providing water.

Having regard to the above, the circumstances of the drought may not have met the requirements of impossibility and as a result, raising impossibility as a defence to performance could fail depending on the circumstances of each case.

In order to cater to situations of unforeseen or changed circumstances, parties to an agreement must ensure that *force majeure* is not only included as a clause in their agreements but must make certain that the clause provided is extensive. The risk of poorly drafted *force majeure* clause is that parties are bound to the agreement and thus will not be able to escape its obligations, alternatively, will be forced to rely on the common law principle of impossibility which has strict requirements. Furthermore, parties should consider inserting 'hardship' clauses into their agreements to guard against situations where a *force majeure* clause cannot be relied on.

Mongezi Mpahlwa and Denise Durand

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OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Thabile Fuhrmann
Chairperson
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Zaakir Mohamed
Director
T +27 (0)11 562 1094
E zaakir.mohamed@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Mongezi Mpahlwa
Director
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Ashley Pillay
Director
T +27 (0)21 481 6348
E ashley.pillay@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Belinda Scriba
Director
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit
Director
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse
Executive Consultant
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Willem Janse van Rensburg
Executive Consultant
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR