

*WHAT'S SO WRONG WITH WILLIAMS v
EVANS? AN EXAMINATION OF THE CONCEPT
OF THE SUPPOSITION IN FUTURO*

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INTRODUCTION

When a party enters into a contract his consent to the transaction is based on the circumstances surrounding his own personal affairs. Indeed his consent may be based on any number of motivating factors, which inform his intentions and provide the backdrop and indeed the reason for his agreement. For instance, the father of a bride may buy furniture for the home of a prospective son-in-law, believing that he is about to marry his daughter. The planned marriage provides the motivation for the father to enter into the contract of sale. What if there is an error in the motive of the contracting father: unbeknown to him the wedding has been called off, removing the reason for his purchase? Should a unilateral error in motive of this type invalidate the transaction? The answer is of course 'no': a unilateral error in motive does not affect the validity of the contract, for this would have a very negative impact on commercial certainty.¹ Even though the error may have been fundamental, in the sense that the party would not have contracted but for this error in motive, a unilateral error in motive has no effect on a contract.

The position is different, however, where the motivating factor is common to both parties. If a contract is based upon a common assumption, the contract may be void if that common assumption proves false.² For the contract to be void, however, the common assumption must also be material, in the sense that neither party would have contracted but for the assumption. This type of common assumption is referred to as a supposition. At the outset we must also state that while a material supposition about a past

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¹ See, for example, *African Realty Trust v Holmes* 1922 AD 389 at 403: 'But, as a court, we are after all not concerned with the motives which actuated the parties in entering into the contract, except in so far as they were expressly made part and parcel of the contract or are part of the contract by clear implication.'

² *Fourie v CDMO Homes* 1982 (1) SA 21 (A); *Van Reenen Steel (Pty) Ltd v Smith* NO 2002 (4) SA 264 (SCA).

or present fact renders the contract void if it proves false; if, however, the supposition relates to the future, then according to the latest SCA judgements, the supposition must also be a term of the contract.³ The various forms which suppositions can take are best illustrated with the aid of examples.

First, consider a sale of immovable property which is situated near a river.⁴ The property is to be used for agricultural purposes, so an important factor in the sale is whether the property has pump rights from this river. There is an element of uncertainty as to whether the pump rights exist and therefore the seller is not prepared to warrant their existence, but the parties enter into their agreement on the supposition that the rights exist. In other words, the existence of pump rights is the basis on which the contract rests. It would appear at first glance to be a condition, but remember that a condition relates to an uncertain future event.⁵ Since the existence of pump rights is a fact which either does or does not exist at the time of contracting, it is referred to as a supposition.

Secondly, consider a case where a son has bought two identical Plymouth motor cars from different dealers, both on hire purchase agreements.⁶ He sells one but exchanges the other for a car owned by his father. The son then defaults on his payment for the cars. One of the dealers attaches the car in the father's possession, incorrectly believing it to be the vehicle it had sold to the son. In fact, the car which the dealership should have attached was the other one which the son had sold. Neither the dealer nor the father realizes the error. The father pays the outstanding balance to the dealer to recover the attached car. Clearly there has been a common mistake here in making payment by way of settlement, since both the dealer and the father are mistaken as to the identity of the attached car. No uncertainty exists in the minds of the parties as to the identity of the car: the payment is made under the common assumption that the car is the property of the dealer. Again we have a supposition, although this time there is no uncertainty in the minds of the parties. The supposition relates to the identity of the motor vehicle, which is a fact existing at the time of conclusion of the contract. This situation would appear to be different to the first scenario, although clearly we are again dealing with a common assumption relating to a fact existing in the present. This type of scenario is usually referred to as common mistake, since the supposition which both parties labour under is commonly held and incorrect.

The effect of a fundamental supposition relating to a present fact has been settled by the Appellate Division and is more or less trite law: if the

³ *Van Reenen Steel* supra note 2 para 8; *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) para 29.

⁴ *Fourie* supra note 2.

⁵ J C de Wet & A H van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* vol 1 5 ed (1992) distinguish a supposition from a condition at 154.

⁶ *Dickinson Motors v Oberholzer* 1952 (1) SA 443 (A).

supposition fails, the contract is void.⁷ The effect on a contract of a supposition as to a future fact has had a far more controversial history in South Africa, however. It is this much maligned construction on which I wish to focus in this article.

HISTORICAL ROOTS AND COMPARATIVE LAW

For the historical roots of the concept of a supposition, one should begin with the continental European *ius commune* doctrine known as *clausula rebus sic stantibus*. This doctrine provided a limitation to the rule of *pacta sunt servanda*, with the result that an agreement would no longer be binding if an unforeseen change of circumstances upset the foundation on which the promise was based.⁸ In modern legal literature, however, the country with the most-developed concept of suppositions is Germany, and hence I will focus my investigation of suppositions on that country, beginning with the work of Bernard Windscheid (who is often quoted in South African discussions of suppositions, particularly the supposition in futuro).⁹ In 1850 Windscheid put forward his theory of presuppositions¹⁰ in a monograph entitled *Die Lehre des römischen Rechts von der Voraussetzung*.¹¹ The essence of this theory was that when a contracting party makes his contractual promise, he assumes that the intended legal consequences will occur only in certain circumstances. Therefore, an assumption exists that the circumstances will remain unchanged, although this is not elevated to a term of the contract and thereby made an express condition. If the other party to the contract had realized that this assumption had been fundamental for the promisor, then the promisor should not be bound by the agreement if his presupposition was falsified by a change in circumstances. Thus the contract was concluded under a condition that the circumstances remain unchanged, which is why Windscheid referred to the presupposition as an inchoate condition (*unentwickelte Bedingung*).

While Windscheid's presupposition had thus to be material to the contract, it was not a term of the contract, nor even necessarily a common

⁷ See for example *Dickinson Motors* supra note 6 and *Fourie* supra note 2.

⁸ For a good discussion of the *clausula rebus sic stantibus* in English, see Robert Feenstra 'Impossibilitas and *clausula rebus sic stantibus*' in Alan Watson (ed) *Daube Noster* (1974) 77.

⁹ *African Realty Trust* supra note 1 cites Windscheid's doctrine of the *Voraussetzung* in a discussion of whether '[t]here is authority for the proposition that when the basis of a contract falls away the contract falls away with it' (at 400). See also Schalk van der Merwe & L F van Huyssteen (1985) 48 *THRHR* 469, where Windscheid's *Lehrbuch des Pandektenrechts* is cited at 471. (See note 11 below.)

¹⁰ This is a translation of the German term *Voraussetzung* which is used by Windscheid. The translation is taken from Basil Markesinis *The German Law of Contract* (2006), which discusses Windscheid's doctrine at 320–3 and is the major source on which I have drawn for my own discussion.

¹¹ This theory is also discussed in Windscheid's major treatise *Lehrbuch des Pandektenrechts* 9 ed by Kipp (1906) § 97.

assumption. It was merely a unilateral motive which was known to the other party. To many in Germany this struck at the root of contractual certainty and Windscheid's theory was subjected to much criticism. Indeed the *Bürgerliches Gesetzbuch* (Civil Code), promulgated on 1 January 1900, made no mention of such a doctrine of presuppositions and there was thus no mechanism to deal with changed circumstances. History, however, vindicated Windscheid's ideas. Economic collapse followed Germany's defeat in World War I and hyper-inflation resulted. This necessitated a doctrine to deal with changed circumstances, since the enforcement of deals brokered prior to the collapse would have resulted in widespread injustice and economic ruin for contractants who had not foreseen the change in Germany's circumstances. Oertmann's theory of the so-called *Wegfall der Geschäftsgrundlage* was published in 1921 and was seized upon by the courts as the answer to the crisis they faced.¹² This theory also rested on supposition: the motivating factor in the mind of one party must become obvious to the other party and be acquiesced in by him during the course of negotiations.¹³ Should the supposition prove false due, for example, to a change in circumstances, the contract would fall away.¹⁴ Rather than a motive being privately entertained, as was possible in Windscheid's theory, it now had to be manifested during contractual negotiations. Oertmann's theory survives today in German jurisprudence, although it has been developed by the courts.¹⁵

Germany thus provides an essential case study in the field of suppositions, particularly the supposition in futuro. The interesting aspect as far as South Africa is concerned is that Germany originally also chose to reject the supposition in futuro on the grounds of contractual certainty, but was subsequently forced to adapt its law relating to supervening circumstances. In South Africa there is scant authority for a doctrine to deal with changed circumstances along the lines of the German doctrine outlined above, or indeed the comparable English doctrine of frustration. With this lacuna in mind, the decision in *Williams v Evans*¹⁶ is of particular interest. In this case a South African court decided that the supposition in futuro did exist and that 'the proposition that when the basis of a contract falls away the contract falls away with it'¹⁷ did indeed hold true in South African law.

WILLIAMS V EVANS AND THE RESULTANT DEBATE

Consider now the facts of *Williams v Evans*: Evans (the respondent) was the owner of a dairy in Plettenberg Bay. Evans entered into an agreement with

¹² Paul Oertmann *Die Geschäftsgrundlage* (1921) 37.

¹³ *Ibid* at 28ff and 38.

¹⁴ *Ibid* at 161.

¹⁵ Thus § 313 BGB (*Störung der Geschäftsgrundlage*) can be seen as based on Oertmann's theory.

¹⁶ 1978 (1) SA 1170 (C).

¹⁷ *African Realty Trust* supra note 1 at 400.

Williams (the applicant) acknowledging his debt to her. The agreement made provision for Williams to provide security to the Standard Bank at Plettenberg Bay, in order that Evans's business could obtain overdraft facilities from that bank. It was a common assumption between Williams and Evans that if Williams provided security, Evans would be able to obtain an overdraft. The bank did not oblige, however, and despite Williams's security, Evans could not obtain an overdraft. Evans then argued that since the common assumption had proved false, the agreement between himself and Williams was void.

For Broeksma J the case turned on

'whether there is authoritative support for [Evans's] contention that where a contract is entered into on the basis of a common assumption as to a future state of affairs, it may fail if the assumption or supposition fails and it is established that the parties would not have entered into the agreement had they known that their expectations would not materialize'.¹⁸

The judge went on to decide this question in the affirmative.¹⁹ What *Williams v Evans* thus established was that, in addition to a supposition relating to the present (or past) of the two types described above, the contract would also be void where the parties contract on the basis of a common assumption about the future, provided this assumption was fundamental — in the sense that neither party would have entered into the contract had he or she known the true state of affairs. The authority for this proposition, however, appears on closer inspection to be rather scant. The major support for Broeksma J's finding lay in the writing of an academic author, Wouter de Vos,²⁰ who had discussed suppositions in contract law in an article which attempted to resolve the issue of reclaiming payments made when not due. De Vos mentions in passing the different forms which a supposition may take and seems to support the future construction.²¹ As far as actual case authority goes, there was reference in *Williams v Evans* to several cases, although most of these dealt with common mistake and suppositions about a present fact.²² There was no direct case authority for the type of supposition in futuro that

¹⁸ At 1174H.

¹⁹ At 1175E–F.

²⁰ Wouter de Vos 'Solutio indebiti en eiendomsoorgang' 1976 *TSAR* 79. An extract from page 82 of this article is quoted in *Williams* at 1175A–C.

²¹ *Ibid* at 82. This article does not seem to provide strong motivation for the supposition in futuro. That De Vos was clearly in favour of this construction appears more clearly from his unpublished notes on contract law *General Principles of the Law of Contract* (1977) 99–101.

²² In particular Broeksma J referred to *Dickinson Motors* supra note 6; *Dutch Reformed Church Council v Crocker* 1953 (4) SA 53 (C); and *Fienberg v Jardine* 1915 NPD 439.

Broeksma J was dealing with, and this lack of direct authority was the source of much criticism in later cases.²³

Within the Cape Provincial Division the debate about the supposition in futuro continued. In *Osman v Standard Bank National Credit Corporation Ltd*²⁴ Friedman J stated the following:

‘If a contract is entered into on the basis of a common assumption as to a past, present or future state of affairs, and that assumption turns out to be unfounded, the contract will be void.’²⁵

Friedman J relied on *Williams v Evans* as authority for this statement. In *Hare’s Brickfields Ltd v Cape Town City Council*,²⁶ however, two judges of the Cape Provincial Division expressly overruled *Williams’s* case. In *Hare’s Brickfields* it was pleaded that there had been an assumption about a future event which had proved false and hence should void the contract. Van den Heever J distinguished conditions from common assumptions, on the basis that when dealing with a fact which exists in the present one is dealing with a common assumption, whereas if the fact exists in the future, one is dealing with a condition.²⁷ The judge stated that in so far as *Williams v Evans* had stated that a common assumption could relate to the future that case was wrong. The pleadings should rather have alleged a condition as to the future and in the result were ‘confusing’.²⁸

A case from the Natal Provincial Division also supported the distinction between suppositions and conditions. In *Sonarep (SA) (Pty) Ltd v Motorcraft (Pty) Ltd*²⁹ the court distinguished suppositions as to the future from the conventional supposition as to the present. In this case too the court held that a supposition in futuro is ‘indistinguishable from a condition’.³⁰

The case authority thus did not seem to favour the supposition in futuro. There was, however, no clear Appellate Division verdict on the matter. Academic opinion on the usefulness of this type of supposition remained divided. Van der Merwe and Van Huyssteen defended this concept in a criticism of the *Hare’s Brickfields* case.³¹ These authors argued that the supposition in futuro should be maintained and they attacked the classification of a supposition as to the future under the broad banner of conditions.

²³ See *Hare’s Brickfields Ltd v Cape Town City Council* 1985 (1) SA 769 (C) at 781 for a detailed analysis of all the authority cited in support of *Williams v Evans*. Van den Heever J distinguished all cases cited and overruled *Williams’s* case.

²⁴ 1985 (2) SA 378 (C).

²⁵ At 386B–C.

²⁶ Supra note 23.

²⁷ This distinction draws on the writing of De Wet & Van Wyk op cit note 5 at 154. The distinction drawn by these authors between a condition and a supposition was approved in *Fourie* supra note 2 at 27 and in *Hare’s Brickfields* supra note 23 at 780I–781B.

²⁸ At 781F.

²⁹ 1981 (1) SA 889 (N).

³⁰ At 902F.

³¹ Op cit note 9.

The crux of their argument was that there was a clear distinction between a supposition in futuro and a condition, since with a condition there is uncertainty in the minds of the contractants as to whether the future event will occur, whereas with this type of supposition there is no uncertainty:³² the parties simply assume the envisaged state of affairs will come about. The use of the supposition in futuro hence gives effect to the intention of the parties at the time of entering into the contract, which is not to provide for a contingency, but to confidently bring an agreement into being.

Kerr also argued in favour of *Williams v Evans*.³³ He based his position on the decision of the Appellate Division in *Sishen Hotel (Edms) Bpk v Suid Afrikaanse Yster en Staal Industriële Korporasie Bpk*.³⁴ This case concerned a change in circumstances for a hotel business operating on leased premises. During the currency of a twenty year lease of property situated on a national road, the road was diverted, with disastrous consequences for the hotel business. The landlord (a mining company) was responsible for the diversion and was held to be in breach of the contract of lease, for failure to ensure the undisturbed use (*commodus usus*) of the property. The tenant company was awarded damages. Kerr argues that this unforeseen change of circumstances meant that although the situation was not quite one of impossibility, the contract had to come to an end.³⁵ By the same token Kerr argues that *Williams v Evans* must be correct, since the contract in *Sishen Hotel* was based upon the common assumption that the hotel premises would remain adjacent to a national road: if those conditions ceased to exist, the contract ceased to exist.³⁶ This was in terms of Kerr's broader notion of frustration of purpose, conceived along English lines, a doctrine which could be given effect to by validating suppositions in futuro, as his argument above suggests.

While Kerr's position has received judicial attention,³⁷ his views have not been widely received and are based, I submit, on tenuous authority. Other textbook writers, such as Van der Merwe et al, remains more circumspect on the validity of *Williams v Evans*.³⁸ Christie, by contrast, was dead against the finding in that case: he felt that there was no 'justifiable' difference between

³² *Ibid* at 471.

³³ A J Kerr 'Impairment of profitability of premises let; implied contractual provisions; standing of Pothier' (1987) 104 *SALJ* 550.

³⁴ 1987 (2) SA 932 (A).

³⁵ Kerr *op cit* note 33 at 552.

³⁶ Kerr *op cit* note 33 at 552–3.

³⁷ See *Kok v Osborne* 1993 (4) SA 788 (SEC) at 801J–802E, where Kerr's argument that South Africa recognizes a doctrine of frustration of purpose comparable to that in English law is accepted. Kerr's position on frustration of purpose is set out in the article referred to above (note 33) as well as in his textbook *Principles of the Law of Contract* 6 ed (2002) at 545–52.

³⁸ Schalk van der Merwe et al *Contract — General Principles* 3 ed (2007) 285–6. G F Lubbe & C M Murray *Farlam and Hathaway — Contract: Cases, Materials and Commentary* 3 ed (1988) 444–6 cite the *Sonarep* case (*supra* note 29) and ask the question: 'Is the statement in *Sonarep* that the term in question [an alleged supposition] was "indistinguishable" from a condition convincing?' (at 445n1)

the supposition in futuro and a tacit term or condition, echoing the approach in, for example, *Hare's Brickfields*.³⁹

This is largely where the matter thus stood before the Supreme Court of Appeal ruled on the matter in *Van Reenen Steel*: there was the old precedent of *Williams v Evans*, which, although overruled by *Hare's Brickfields* and contradicted in *Sonarep*, lent some weight to the opinions of various academics discussed above that a supposition in futuro could exist. The *Van Reenen Steel* case provides a clear ruling against this, however, to which I must now turn.

THE NEW APPROACH: *VAN REENEN STEEL (PTY) LTD V SMITH NO*

The *Van Reenen Steel* case concerned a sale of a business. Smith was the executor in the deceased estate of the majority shareholder in this business, Mortech Industries (Pty) Ltd. Smith knew this company was in a dire financial position and wished to liquidate it or sell the estate's interest in it. One of the minority shareholders, who also happened to be the managing director, agreed to buy the estate's shares with the financial backing of Van Reenen Steel (Pty) Ltd. Van Reenen Steel undertook a 'due diligence' of the company before agreeing to the purchase. Van Reenen, the managing director of the purchasing company, undertook this 'due diligence' himself. When it subsequently transpired that Mortech Industries was in a less favourable financial position than this 'due diligence' had suggested, Van Reenen Steel tried to back out of the deal, arguing that there was a common mistake between the seller and purchaser as to the viability of the company. It also argued, in the alternative, that there had been a fundamental common assumption as to the value of the company being purchased, which had proved false.

As the court noted, Van Reenen Steel could not rely on a unilateral mistake, since Smith had not been the cause of its error.⁴⁰ Similarly there could be no common mistake; since Van Reenen Steel had undertaken the risk as to the verity of the financial statements, these statements were immaterial to Smith: he would have sold the business regardless.⁴¹ The error in question was held to have been a unilateral error in motive, with no effect on the contract.⁴²

In reaching this decision, however, Harms JA considered the argument that a common assumption existed between the parties. In his judgement he discussed the status of the supposition in futuro, quoting from the earlier

³⁹ R H Christie *The Law of Contract in South Africa* 5 ed (2006) 328. This passage, which contains Christie's opinion on the developments in *Williams v Evans*, has been updated to reflect the latest case law, but the sentiment remains unchanged from earlier editions.

⁴⁰ *Van Reenen Steel* supra note 2 para 7.

⁴¹ Paragraph 13.

⁴² Paragraph 9.

decision in the *Sonarep* case and affirmed the distinction drawn there between suppositions and conditions:

'Assumptions or suppositions can have many forms and have different effects depending upon the circumstances. An assumption relating to a future state of affairs "relates to an agreement which is in operation and its recognition would have a direct bearing upon one of the terms of the agreement. Such a supposition is indistinguishable from a condition", [Footnote: *Sonarep (SA) (Pty) Ltd v Motorcraft (Pty) Ltd* 1981 (1) SA 889 (N) at 902F, a full court decision.] usually a resolute condition, perhaps also a condition precedent or an ordinary term of the contract. [Footnote: *Williams v Evans* 1978 (1) SA 1170 (C) at 1174F–1175F is consequently wrong.] The use of the word "supposition" or "assumption" instead of "condition" in this context is not conducive to clear thinking.'⁴³

Thus finally there was a pronouncement, although obiter, from the Supreme Court of Appeal on this issue. This statement was then followed by the following finding in the recent case of *Transnet Ltd v Rubenstein*:⁴⁴

'A supposition, to have legal effect, must translate into a mistake, a misrepresentation, a term or a condition (and the term or condition may be express or tacit).'⁴⁵

In the *Transnet* case the respondent had been granted the right to operate a jewellery boutique on the Blue Train, which is a special train service run by Transnet. This right was conferred until such time as the Blue Train service would be privatized. Transnet, attempting to escape the contract, alleged that there had been a supposition in futuro that the train service would be privatized by the end of 1999. This had not happened. The respondent attempted to hold Transnet to the original terms of the contract. Cloete JA in his minority judgment (concurring in by Zulman JA alone) found for the respondent, since Transnet had failed to allege the existence of a tacit term containing the supposition for which they had argued.⁴⁶ The majority dismissed the argument as to the existence of a supposition⁴⁷ and decided the case on different grounds.

Thus, at last, in a minority judgement, we have a decisive pronouncement dealing with suppositions in futuro. Cloete JA indeed reproduced the above-quoted passages from *Van Reenen Steel*, which deal with future, as well as past and present, suppositions.⁴⁸

⁴³ Paragraph 8.

⁴⁴ Supra note 3.

⁴⁵ At 601A–B.

⁴⁶ At 601F–G.

⁴⁷ Paragraph 15.

⁴⁸ Paragraph 29.

CAN *WILLIAMS V EVANS* BE RECONCILED WITH THE NEW APPROACH?

In the *Transnet* case, counsel for the appellant attempted to argue on the authority of *Wilkins NO v Vöges*⁴⁹ that a tacit term containing the supposition which they alleged was part of the agreement could be read into the agreement in dispute. Cloete JA dismissed this contention on the basis that the existence of a tacit term is a question of fact and that the facts in that case did not support a finding that such a term existed.⁵⁰ I would like to argue that the concept of the supposition in futuro as found in *Williams v Evans* can be reconciled with the finding in *Van Reenen Steel* that a supposition about a future fact is indistinguishable from a resolutive condition. I would like to follow the argument suggested by counsel in the *Transnet* case that such a reconciliation lies in the concept of a tacit term.

Essentially in *Williams v Evans* it was held that where the parties base their consensus upon an assumption about a fact which will only occur in the future, the agreement will fall away if the assumption fails. A feature of this ruling is that the assumption must form the basis of the transaction, in the sense that neither party would have contracted had they known their assumption would not materialize. *Van Reenen Steel* holds that if such an assumption exists in the minds of the parties to an agreement, what we are actually dealing with is a resolutive condition that the contract will fall away should the future event not go as planned. Both *Van Reenen Steel* and *Transnet* acknowledge that a supposition may have legal effect if it is a term of the contract.⁵¹ Now consider the impact of a tacit term in this matrix: the existence of a tacit term is a question of fact and is read into the contract if both parties considered that term to be so obvious as not to need mentioning.⁵² Indeed even if the parties never actually contemplated the matter in question, the courts can still read in such a term.⁵³ This is referred to as an 'imputed tacit term'.⁵⁴

If the courts can read in a term which the parties never contemplated, but which both would have approved of if they had thought about it, then surely we are not far from reading into a contract a tacit resolutive condition that a contract will come to an end if a given future fact does not materialize?⁵⁵ This approach ties in with the finding of the court in *Van Reenen Steel*: is it so

⁴⁹ 1994 (3) SA 130 (A).

⁵⁰ *Transnet* supra note 3 para 30.

⁵¹ See the passages cited above.

⁵² The so-called hypothetical bystander test. See for example *Dutch Reformed Church Council* supra note 22 at 63.

⁵³ *Van den Berg v Tenner* 1975 (2) SA 268 (A) at 277.

⁵⁴ *Wilkins NO v Vöges* supra note 49 at 136–7.

⁵⁵ Consider the remarks of Nienaber (1965) 28 *THRHR* 149 at 151, where in a discussion of implied terms (albeit in the context of common mistakes based upon an incorrect common assumption), he states the following: 'Waar die partye aldus ooreenkom dat die kontrak in 'n gegee geval geen werking sal hê nie, gee die reg aan so 'n afspraak gevolg. Daar moet egter 'n beding in dier voege in die kontrak

different from the finding in *Williams v Evans*? The latest SCA rulings stress that the so-called supposition must satisfy the requirement of being a term of the contract, but *Williams v Evans* maintains that the supposition must be fundamental to the transaction. Given this feature, what if in *Williams v Evans* there was a tacit imputed resolutive condition that the contract would fall away if the bank did not grant Evans's business overdraft facilities? It appears the distinction drawn here by the courts is merely one of terminology, and does not have much consequence when applied to a given factual matrix.

Given the above argument, the next step is to address the lacuna in South African law when dealing with a fundamental change of circumstances. What if there is a change in the factual matrix upon which the contracting parties based their consensus, so that if they had contemplated this change at the time of contracting, they would not have contracted on the given terms? This question is addressed in English law by the doctrine of frustration,⁵⁶ but although this doctrine overlaps in part with our law of supervening impossibility,⁵⁷ there is clear precedent that frustration forms no part of South African law.⁵⁸ Can the supposition in futuro, whether as a common assumption, or a tacit imputed resolutive condition, be used to deal with changed circumstances in South African law, thereby giving results similar to the English doctrine of frustration? Consider the words of Lubbe and Murray:

'Whether or not a supposition of the type described in the previous notes is actually incorporated into a contract will usually depend on whether the test for the existence of a tacit term is satisfied. This means that where the parties are convinced of the existence of the state of affairs, one is concerned with an imputed rather than an actual consensus. Resort to such a fiction leaves one but a step away from holding that it is a *naturale* of contractual obligations that liability depends on the existence of the matrix of facts which motivated the contract. A further development would make the obligation depend on the continued existence of that matrix of facts.'⁵⁹

Whether or not this type of implied-term approach to suppositions is the answer to our lack of a doctrine to deal with changed circumstances, it does seem to reconcile *Williams v Evans* with the later case law. One may indeed, in response to this argument, seemingly based on terminology, be moved to ask what is so wrong with *Williams v Evans* and the much maligned supposition in futuro?

opgeneem word en die toets daarvoor is die gewone toets wat vir stilswyende bedinge gestel word.'

⁵⁶ Kerr seems to favour reading this English approach into the South African law to deal with changed circumstances. See the brief discussion of Kerr's position above for references.

⁵⁷ *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda* 1996 (4) SA 1190 (A) at 1214C.

⁵⁸ See for example *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) at 238G–H.

⁵⁹ Lubbe & Murray *supra* note 38 at 446.