

*THE DOCTRINE OF FRUSTRATION:  
A SOLUTION TO THE PROBLEM OF  
CHANGED CIRCUMSTANCES IN SOUTH  
AFRICAN CONTRACT LAW?*

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I INTRODUCTION

It is a given that circumstances change: often drastically and without any prior warning. For this reason, the prudent negotiator should include a hardship clause in his or her contract to provide for the possible eventuality that circumstances might change during that contract's currency. Not every contracting party is legally proficient, however, and no one can fully foresee the future. Unfortunately for those who have concluded their contracts in South Africa, our law is not amenable to this consideration: contractual certainty is the dominant value in the local jurisprudence and there is little scope for the party afflicted by a change in circumstances to argue for discharge on these grounds.<sup>1</sup> If performance has actually become impossible due to a change in circumstances, the contract will be void,<sup>2</sup> but should the impact on the contract fall short of this, the contract remains binding.<sup>3</sup> Consider now the situation where there has been a fundamental alteration in the equilibrium of the contract due to a change in circumstances.<sup>4</sup> This may either be because the purpose for which a contract has been concluded has been frustrated; that is where the foundation of the contract, in the sense of a motivating factor common to both parties, has fallen away subsequent to the conclusion of the contract. Alternatively, the cost of performance may have

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<sup>1</sup> The position whereby public policy is seen as valuing contractual certainty first and foremost seems to be changing, however. See *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Breedenkamp v Standard Bank of SA Ltd* 2009 (5) SA 304 (GSJ) and 2009 (6) SA 277 (GSJ).

<sup>2</sup> *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 at 434.

<sup>3</sup> See, e.g. *Hersman v Shapiro* 1926 TPD 367 at 375–7.

<sup>4</sup> This formulation is partly borrowed from the definition of hardship in the Unidroit Principles of International Commercial Contracts at art 6.2.2 (hereafter 'Unidroit PICC').

increased so drastically that the above test of fundamental alteration of the equilibrium of the contract is said to have been met. In either case in South African law the contract remains binding.<sup>5</sup>

I have argued in a separate article for a recognition of the supposition in futuro, possibly in the guise of an imputed tacit resolutive condition.<sup>6</sup> A supposition is present where there is a belief common to both parties that a certain state of affairs exists.<sup>7</sup> Should the belief prove false, the contract is void.<sup>8</sup> This is trite where the supposition relates to the past or present, but according to the Supreme Court of Appeal does not apply where the state of affairs relates to the future.<sup>9</sup> A supposition as to the future or an implied condition would address precisely the issue of the collapse of the common motivational foundation of a contract, since this would discharge the contract where a common belief that a future event would take place proved false. In the English jurisdiction (and indeed in many other legal systems based on English law) the type of role I have advocated for the supposition in futuro is already covered by the doctrine of frustration, more particularly frustration of purpose. This article will thus continue the argument for a doctrine to deal with changed circumstances, invoking comparative law in the form of the doctrine of frustration as support. Frustration, I will attempt to show, is a doctrine dealing with changed circumstances, rather than simply impossibility. This broader conception allows frustration to bring a measure of justice to the nature of business in the modern commercial world, discharging a party where a significant change of circumstances has made performance of his or her obligation something radically different from what had been undertaken at the outset.<sup>10</sup> It should be noted in addition that the English doctrine of frustration is not the most interventionist mechanism of dealing with the problem of changed circumstances. While it is more lenient than French law, which does not allow discharge for changed circumstances in private law matters, it is stricter than German law, which allows judicial adjustment of

<sup>5</sup> For frustration of purpose in South African law, see *Van Reenen Steel (Pty) Ltd v Smith NO 2002 (4) SA 264 (SCA)* para 8. For increase in cost of performance — the situation of commercial impracticability — see *MacDuff & Co Ltd (In Liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 605–6.

<sup>6</sup> Andrew Hutchison ‘What’s so wrong with *Williams v Evans*? An examination of the concept of the supposition in futuro’ (2008) 125 *SALJ* 441.

<sup>7</sup> See for example: Schalk van der Merwe, L F van Huyssteen, M F B Reinecke & G F Lubbe *Contract: General Principles* 3 ed (2007) 285.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Van Reenen Steel* supra note 5 para 8.

<sup>10</sup> This notion of a change of circumstances having rendered a contract something different from what was initially undertaken, is traditionally expressed in English law by the maxim: ‘non haec in foedera veni’ (it was not this that I promised to do). See by way of example: *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 728.

the contract.<sup>11</sup> The same is true in the international trade context under the Unidroit Principles of International Commercial Contracts.<sup>12</sup>

This article will contrast the conventional South African defence of impossibility with the doctrine of frustration. In particular, there will be focus on the notion of frustration of purpose, since this aspect of the doctrine is the functional equivalent of the South African supposition in futuro. ‘Frustration’ is the broader category in English law, whereas ‘frustration of purpose’ refers to a particular problem within the frustration context, where the purpose of the parties, or common foundation of the transaction, has fallen away. In this situation the value of performance to the disadvantaged party decreases dramatically.<sup>13</sup> There are also several reported cases in South Africa where a court has been faced with precisely the issue of what to do where the foundation of a contract has collapsed subsequent to its conclusion: in an effort to make the impossibility defence cover this type of situation, judges have resorted to the English doctrine of frustration. The use of this broader concept by our municipal courts implies an expansion of the Roman Dutch notion of impossibility. These past inferences of the doctrine of frustration will also be evaluated.

The aim of this article ultimately is to examine the status of the defence of frustration of purpose, particularly in the English law, but also with reference to other countries such as the United States and Australia, which employ a similar doctrine. South Africa’s conservative stance will thus be compared with that of several of the world’s leading economies. In sum, the article will attempt to evaluate the extent to which the refusal of our municipal courts to accommodate a defence based on changed circumstances is out of line with international trends.

## II THE ENGLISH DOCTRINE OF FRUSTRATION

Frustration is a doctrine typical of the English common law in that it has evolved incrementally over many years and, to a certain extent, in an almost ad hoc fashion. The aim of the doctrine is to ‘. . . escape from the injustice [which] would result from enforcement of a contract in its literal terms after a significant change of circumstances’.<sup>14</sup> Frustration is thus a ground for discharge of a contract struck by changed circumstances.

The frustration defence dates back to 1863 and the case of *Taylor v Caldwell*.<sup>15</sup> Prior to that contracts were regarded as absolute in English law

<sup>11</sup> See in general Hannes Rösler ‘Hardship in German codified private law — in comparative perspective to English, French and international contract law’ 2007 *European Review of Private Law* 483.

<sup>12</sup> See arts 6.2.1–3 of the Unidroit PICC.

<sup>13</sup> For a discussion of what frustration of purpose entails, and for a comparison of this concept with its opposite, impracticability, the reader is referred to Guenter Treitel *Frustration and Force Majeure* (2004) chs 6 and 7, especially at 309.

<sup>14</sup> *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd’s Rep 1 at 8.

<sup>15</sup> (1863) B&S 826.

and even impossibility was no ground for discharge. In *Paradine v Jane*, the classic authority for absolute contracts, it was held:

‘When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burned by lightning, or thrown down by enemies, yet he ought to repair it.’<sup>16</sup>

In *Paradine’s* case a tenant was held bound to pay outstanding rental despite the fact that he had been prevented from occupying the premises for two years during the currency of the lease. This was due to the occupation of the area by an invading army. Although he had derived no benefit from his contract because it had been objectively impossible to occupy the rented premises, the court refused to discharge the contract. Two centuries later, the courts relented and frustration was born in *Taylor’s* case. Here a music hall and surrounding gardens had been hired out to the defendant for the purpose of holding concerts over several specified days. When the music hall was destroyed by fire, the contract was held to have been discharged. In reaching his decision, it is worth noting that Blackburn J relied on civil law authority, particularly Pothier’s *Treatise on the Law of Obligations*, to the effect that impossibility would discharge a contract.<sup>17</sup>

Blackburn J’s exception to absolute contracts was seized upon by the English courts and entered a phase of expansion. It was extended beyond cases of absolute impossibility to a broader class of cases which had merely been affected by changed circumstances. Perhaps the most famous case example of this expansion was *Krell v Henry*,<sup>18</sup> one of the so-called ‘Coronation cases’. The facts which gave rise to these cases were that Edward VII was to be crowned King of England on 26 June 1902, and various means of honouring him were devised. One of these was a procession through the streets of London. Henry had hired a flat overlooking Pall Mall for the day of the procession: it was the common assumption of both lessor and lessee that the procession would be viewable from this flat and the rent was correspondingly high. On 24 June, however, the king-to-be fell ill with appendicitis and the procession was cancelled. Henry refused to proceed with the lease agreement and Krell sued for the rental due. The court held, however, that because the viewing of the procession had been the common foundation of the contract, its purpose was frustrated and hence it was discharged.<sup>19</sup>

This was an important development: previously the doctrine of frustration had been similar to the civil law notion of impossibility, but with the

<sup>16</sup> *Paradine v Jane* (1647) Aley 26 at 27.

<sup>17</sup> *Taylor v Caldwell* supra note 15 at 833–4. This debt to the civil law was acknowledged by Vaughan Williams LJ in *Krell v Henry* [1903] 2 KB 740 at 747–8, where he described frustration as a ‘principle of the Roman law which has been adopted and acted on in many English decisions’.

<sup>18</sup> *Krell v Henry* supra note 17.

<sup>19</sup> *Ibid* at 754.

expansion to include frustration of purpose, the doctrine became far broader. The finding in *Krell v Henry* struck at the root of contractual certainty, however, and Treitel notes that following this bold expansion the courts in England have hardly ever applied the ratio of this case.<sup>20</sup> This concept of frustration of purpose is central to the inquiry of this article, since it permits discharge of a contract following a significant change of circumstances, but which falls short of impossibility. I will thus expand on this topic briefly before continuing with the synopsis of frustration in general.

The first point to note about *Krell v Henry* is that the judgment of Vaughan Williams LJ in that case stressed that the foundation of the contract which is alleged to have fallen away must be common to both parties. His lordship distinguished the scenario where a cab driver is engaged to take a person to see a horse race in another town. The subsequent occurrence of the horse race is fundamental only to the passenger: to the cab driver he is just another passenger, even if the price has been suitably enhanced due to the derby nature of the race. Should the race be cancelled, the passenger would still have to pay.<sup>21</sup>

It should also be noted that not all the Coronation cases were decided in favour of the consumer. In *Herne Bay Steam Boat Co v Hutton*<sup>22</sup> the defendant had hired a ship to take his guests to see the Naval Review on 28 June 1902, which was to accompany the Coronation, and the following day to take the party around the fleet and the Isle of Wight. The cancellation of the Naval Review was held not to discharge the contract, since this was not the foundation of the agreement.<sup>23</sup> All three judges in this case made the point that the contract was to hire the ship for a voyage, not for a particular purpose incidental to that voyage.<sup>24</sup> Vaughan Williams LJ, who was also on the bench for this case, stated that it was analogous to his earlier example of the cab-driver.<sup>25</sup> Though these two Coronation cases may not be easy to reconcile with one another, the *Herne Bay* case does demonstrate Treitel's argument: immediately after the creation of the frustration of purpose defence by the English Courts, they were already limiting its application.

Another group of cases which dealt with frustration of purpose were the so-called 'black-out' cases. During World War One, legislation was passed in England which prevented the illumination of street lights in cities to avoid enemy detection. The local authorities then tried to escape from contracts which they had entered into with power companies to keep these street lights lit. Clearly the purpose of such a contract had been frustrated. In *Leiston Gas Co Ltd v Leiston-cum-Sizewell Urban District Council*<sup>26</sup> the plaintiff gas

<sup>20</sup> Treitel op cit note 13 at 346. See this work for a detailed account of the doctrine of frustration as a whole, and the concept of frustration of purpose in particular.

<sup>21</sup> *Krell v Henry* supra note 17 at 750–1.

<sup>22</sup> [1903] 2 KB 683.

<sup>23</sup> Ibid at 689.

<sup>24</sup> Ibid at 688–93.

<sup>25</sup> Ibid at 689.

<sup>26</sup> [1916] 2 KB 428.

company had contracted to provide and maintain street lights, powered by their gas plant for a period of five years, beginning in 1911. In 1915, government regulations prohibited the lighting of such lamps. The defendant local authority then tried to argue that the contract had been frustrated, while the plaintiff sued to recover the amounts outstanding under the remainder of the contract period. While performance of part of the contract had become illegal, remaining parts, such as maintaining the lights, remained possible. It was argued by the defendant that the purpose of these parts of the contract had been frustrated. The Court of Appeal held for the plaintiff: the performance of the maintenance functions of the gas company remained possible and it could not be said that the foundation of the contract had fallen away.<sup>27</sup>

The advent of World War Two saw the enactment of similar legislation, but this time the Japanese threat saw the extension of 'black-out' regulations to parts of the United States and Australia. The legal systems of these two countries both recognise a doctrine of frustration, with the English version providing an authoritative model. The US case was *20th Century Lites v Goodman*,<sup>28</sup> where the plaintiff company had leased neon sign installations to defendant, who operated a 'drive-in' restaurant. When the US government ordered all outside lighting on the West coast to be blacked out at night in August 1942, the purpose for which the lease had been entered into by the defendant was frustrated. The defendant offered to return the signage to the plaintiff, but this offer was refused and he then defaulted on the rent. The plaintiff's action to recover outstanding rent was denied by the Los Angeles Superior Court, which held that the contract had been frustrated. This decision was based on certain US case law, as well as the first *Restatement of the Law, Contracts*, which expressly recognised the defence of frustration of purpose in its section 288.<sup>29</sup>

A different result was reached in *Scanlan's New Neon Ltd v Tooheys Ltd*,<sup>30</sup> the leading Australian 'black-out' case. Here there was again a lease of various neon signs for a five year period against payment of a monthly rental. This contract, however, stipulated that 'rental shall be payable, except as herein otherwise provided, whether or not the sign shall be used or operated by the lessee'.<sup>31</sup> When the use of outdoor lighting was prohibited at any time, day or night, in New South Wales in January 1942, the defendants argued that their contract had been frustrated. The High Court of Australia, however, refused to discharge the defendant's obligations. Treitel suggests that the difference between the *20th Century Lites* and the *Scanlan's New Neon* case may be that the specific wording of the contract in the Australian version did not permit

<sup>27</sup> Ibid at 431–40.

<sup>28</sup> 149 P 2d 88 (1944).

<sup>29</sup> This rule is maintained in the American Law Institute *Restatement of the Law, Second: Contracts 2d* (1981) § 265.

<sup>30</sup> (1943) 67 CLR 169.

<sup>31</sup> Ibid at 183.

an argument of frustration.<sup>32</sup> The *Scanlan's New Neon* case cites largely English precedent in reaching its verdict, and *Krell v Henry* is discussed at length.<sup>33</sup> This case was, however, distinguished:

'If, however, the "basis of the contract" theory is applied in the present cases, there is no evidence which takes the court beyond the terms of the contracts. From those terms it is clear without further evidence that the parties expected that the signs would be used as illuminated signs. But they made an express provision that rent was to be paid whether the signs were used or not. The court, therefore, would not be justified in holding that the basis of the contract was that no rent should be paid if the signs were not used.'<sup>34</sup>

It should be noted, though, that there is precedent for a frustration of purpose type argument succeeding in Australia. In *Brisbane City Council v Group Projects Pty Ltd*<sup>35</sup> a developer owned certain land on which it wanted to develop a township. The land was incorrectly zoned for this purpose, so the developer entered into a contract with the city council whereby it would provide basic infrastructure, such as water and electricity to this land in exchange for the council rezoning it. After the conclusion of the contract, but before the infrastructure had been installed, the land was expropriated for the purpose of building a school. Much of the work necessary for the infrastructure to be provided was external to the land and could still be done, but this was no longer necessary, since the school would not have the same demands as a township. The developer was held to be discharged from its obligation to do the works. One of the judges, Stephen J, held that this was due to frustration.<sup>36</sup> Stephen J noted in his judgment that this case is closer to *Krell v Henry* on its facts and, while it may have failed the 'change in the obligation' test as propounded in *Davis Contractors Ltd v Fareham Urban District Council*,<sup>37</sup> it still gave rise to frustration:

'But I do not understand his Lordship [Lord Radcliffe in *Davis Contractors*] to say that without change in obligation there can be no frustration: it is "the occurrence of any unexpected event that, as it were, changes the face of things", that give [sic] rise to frustration.'<sup>38</sup>

Thus, from this brief synopsis of cases where the purpose of the contract has been frustrated we can see that a narrower approach is adopted in the English cases than the American ones. Australia seems to follow English law quite closely and also adopts a narrow approach to frustration of purpose. Outside of the US, where the doctrine is recognised by statute and by the

<sup>32</sup> Treitel op cit note 13 at 328.

<sup>33</sup> See in particular the judgment of Latham CJ at 192–4.

<sup>34</sup> *Scanlan's New Neon Ltd* supra note 30 at 194.

<sup>35</sup> (1979) 145 CLR 143.

<sup>36</sup> Ibid at 163.

<sup>37</sup> Supra note 10. This is arguably the leading UK case on frustration, which posited the test for frustration as being whether there had been a radical change in the obligation concerned (at 728). See further below.

<sup>38</sup> *Brisbane City Council* supra note 35 at 161. The inserted quote is from *Krell v Henry* supra note 17.

(second) *Restatement of the Law, Contracts*, there appears to be a reluctance to interfere with the allocation of risk in the contracts of the parties concerned. What the cases do tell us, though, is that in an appropriate case the courts do have the capacity to take account of the frustration of a common motivating factor.

The doctrine of frustration in English law is wider than simply the principle expressed in *Krell v Henry*, however. It has already been shown that frustration also covers cases of actual impossibility. Frustration in addition deals with cases of legal impossibility, where the performance of a contract becomes impossible subsequent to its conclusion due either to a change in the law (such as the introduction of a new statute)<sup>39</sup> or a change in circumstances (such as when a declaration of war upon a foreign country prevents trade with that country<sup>40</sup>). These are the major categories covered by frustration. A final category, prominent in the American law of changed circumstances, needs to be examined. This is the issue of impracticability, where performance is not strictly impossible, but has become more difficult or more expensive.<sup>41</sup> This is described by Treitel as being the ‘mirror-image’ of frustration of purpose.<sup>42</sup> With frustration of purpose it is generally the consumer of goods or services who defaults, based on the failure of a common motivating assumption. With impracticability it is the supplier who seeks to escape, based on increased expense or difficulty in performance. An important difference between these two situations is that with frustration of purpose the potential loss is limited to the contract price, whereas with impracticability the loss is (in theory) infinite.

In English law impracticability is generally speaking not a ground for discharge. Support for this statement can be found in the judgment of Lord Loreburn in *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd*:<sup>43</sup>

‘The argument that a man can be excused from performance of his contract when it becomes “commercially” impossible, . . . seems to me a dangerous

<sup>39</sup> *Denny, Mott & Dickson v James B Fraser & Co Ltd* [1944] AC 265. In this case performance under a contract for the sale of timber was frustrated when war time regulations restricting the trade in timber were promulgated.

<sup>40</sup> *Fibrosa Spolka Akcyjna v Fairbairn, Lawson Combe Barbour Ltd* [1943] AC 32. Here a contract for the sale of machinery was frustrated: the goods were to be delivered to a port in Poland, but this was occupied by German forces in 1939, subsequent to the conclusion of the contract, but prior to delivery.

<sup>41</sup> The Uniform Commercial Code (UCC) in America provides for impracticability at § 2–615: ‘[E]xcept so far as a seller may have assumed a greater obligation . . . delay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has become impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. . . .’ Impracticability is also provided for in *Restatement, Second, Contracts* at § 261.

<sup>42</sup> Treitel op cit note 13 at 309.

<sup>43</sup> [1917] AC 495.

contention, which ought not to be admitted unless the parties have plainly contracted to that effect.<sup>44</sup>

Indeed there is a dictum which states that an increase in price would have to be at least a hundredfold before discharge could be permitted on this ground.<sup>45</sup> In the leading case of *Davis Contractors*,<sup>46</sup> building contractors had undertaken to build 78 houses in eight months for a price of £94 000. Because of labour shortages, however, the project took 22 months to complete and cost £115 000. The building contractors then tried to argue that the contract had been frustrated and that they were hence entitled to renegotiate the contract price. The court disagreed, holding that this type of increase in price was foreseeable in commercial undertakings.<sup>47</sup> As Treitel points out, however, the increase in price in this case was less than 23 per cent of the contract price, which even in the US would not have brought the doctrine of impracticability into play.<sup>48</sup> Defences based on increased difficulty in shipping due to the closure of the Suez Canal<sup>49</sup> and due to inflation-based increases in price have likewise been rejected.<sup>50</sup> In the context of international trade, Brunner has suggested that for frustration of purpose the potential loss under the contract must amount to 80 to 100 per cent of the contract price to invite discharge, and under impracticability the potential loss must be in the order of 100 to 125 per cent.<sup>51</sup>

Given then that the doctrine of frustration covers a variety of scenarios and has been developed largely on an ad hoc basis, what is the theoretical foundation on which this doctrine rests? Initially the basis of frustration was seen as being an implied term between the contracting parties that a given state of affairs would continue to exist.<sup>52</sup> This construction harks back to the medieval concept of the *clausula rebus sic stantibus*, which similarly allowed for discharge of a contract based on an implied reservation to every promise

<sup>44</sup> *Ibid* at 510.

<sup>45</sup> *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] All ER 497 at 501 (per Lord Denning).

<sup>46</sup> *Supra* note 10.

<sup>47</sup> *Ibid* at 730–1.

<sup>48</sup> Treitel *op cit* note 13 at 287.

<sup>49</sup> *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93.

<sup>50</sup> *British Movietoneux Ltd v London and District Cinemas Ltd* [1952] AC 166 at 185. For a contrary decision see, however, *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387, where an 18-fold increase in the cost of supply of water was held to discharge this obligation due to frustration. This case is distinguishable, however, since it involved a long-term contract of indefinite duration. See Treitel *op cit* note 13 at 296–300.

<sup>51</sup> Christoph Brunner *Force Majeure and Hardship under General Contract Principles — Exemption for Non-Performance in International Arbitration* (2009) 432.

<sup>52</sup> *Tamplin Steamship Co Ltd v Anglo Mexican Petroleum Products Co Ltd* [1916] 2 AC 397 at 403–4.

that circumstances remain unchanged.<sup>53</sup> The implied term approach was attacked on the grounds that the change of circumstances ultimately frustrating the contract was unforeseen and hence not within the contemplation of the parties at the time of contracting.<sup>54</sup> In what has become a classic statement of the theoretical basis of frustration, Lord Radcliffe stated the following in *Davis Contractors*:

‘[F]rustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.’<sup>55</sup>

This objective standard of the ‘radical change in the obligation’ has been subsequently accepted by the House of Lords as the test for whether frustration has occurred.<sup>56</sup> This terminology reflects the fact that frustration is a fairly broad doctrine, dealing not only with impossibility, but can be read beyond that also into the realm of changed circumstances. One is left with the impression, though, that while this was intended as a theoretical basis for the doctrine of frustration to replace the implied term approach, it is arguably just a test for whether frustration occurs. A truer statement of the basis of the doctrine of frustration was made by Lord Simon in *National Carriers Ltd v Panalpina Ltd*,<sup>57</sup> where he stated that frustration occurs when ‘the law declares both parties to be discharged from further performance’ (following an unexpected and significant change in the obligation). Frustration thus operates *ex lege* to discharge obligations in appropriate circumstances.

There are, however, certain important limitations to this doctrine, and which touch on issues of the allocation of contractual risk. These must now be considered. First, the frustration pleaded must not be self-induced. In *The Eugenia*<sup>58</sup> a ship was chartered to carry a cargo from Russia to India. A clause in the contract stated that the ship was not to be ordered into a war zone without first obtaining the permission of her owners. The ship was nevertheless ordered to proceed via the Suez Canal during the 1956 crisis in the Middle East, and the ship was detained by the Egyptian authorities. The charterers then argued that the contract had been frustrated. It was held, however, that the delay was ultimately caused by the ordering of the *Eugenia* into a war-zone in breach of contract.<sup>59</sup> Hence, the frustration was self-induced.

<sup>53</sup> See Andrew Hutchison ‘Change of circumstances in contract law: The *clausula rebus sic stantibus*’ (2009) 72 *THRHR* 60 for a more detailed analysis of this doctrine by the present author.

<sup>54</sup> *Davis Contractors* supra note 10 at 728.

<sup>55</sup> *Ibid.*

<sup>56</sup> See Jack Beatson *Anson’s Law of Contract* (2002) at 544n78 for a comprehensive list of authorities.

<sup>57</sup> [1981] AC 675 at 700F–G.

<sup>58</sup> *Ocean Tramp Tankers v V/O Sovfracht* [1964] 2 QB 226.

<sup>59</sup> *Ibid* at 237.

In addition, the frustrating event should not have been foreseen or foreseeable by the parties concerned, nor should the frustration have been caused by the fault of the party pleading this defence. In a way both these further qualifications can be seen as being related to the exclusion of self-induced frustration. The issue of foreseeability relates to the allocation of contractual risk: should a contract be held to have been frustrated by a foreseeable eventuality, this would interfere in the contract to the extent that the price and other terms were based upon the foreseeable risks.<sup>60</sup> Similarly, what if the frustration was not deliberately self-induced, but resulted from a party's negligence? In *The Super Servant Two* Bingham LJ stated that negligence would preclude a plea of frustration.<sup>61</sup> This statement was, however, obiter. McKendrick notes that the issue of whether a contract may be frustrated by an event caused by the defendant's negligence has never been finally resolved.<sup>62</sup> Treitel is of the view that negligence should exclude frustration.<sup>63</sup>

Finally: what are the effects of a finding of frustration? The effect of frustration is to bring a contract to an end 'forthwith' and 'automatically'.<sup>64</sup> Discharge of the obligation occurs from the time of the frustrating event (ex nunc): any future obligations are extinguished.<sup>65</sup> This begs the question: what about performance already tendered? Initially, the position was that obligations accrued before the frustrating event remained binding, even if the reciprocal performance was discharged.<sup>66</sup> This position resulted in considerable injustice and was overruled by the House of Lords in *The Fibrosa*.<sup>67</sup> The Legislature then intervened with the Law Reform (Frustrated Contracts) Act 1943 to prevent unjustified enrichment of parties following a finding of frustration. Thus today sums paid before frustration may be reclaimed, and obligations to pay at the time of frustration are discharged.

In sum: the English doctrine of frustration deals with changes in circumstances beyond mere impossibility. The doctrine is an all-or-nothing one, however, and should frustration strike, the contract will not be renegotiated, but discharged. In addition, although the English courts were initially willing to extend the doctrine, today the emphasis is on the proper allocation of risks. This prompted Bingham LJ to assert in *The Super Servant Two* that 'the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended'.<sup>68</sup> The emerging picture from a South African perspective is that the doctrine is not so far removed from our own notion of supervening impossibility of performance, the major difference being that

<sup>60</sup> Treitel op cit note 13 at 840.

<sup>61</sup> Supra note 14 at 10.

<sup>62</sup> Ewan McKendrick *Force Majeure and Frustration of Contract* (1995) 50.

<sup>63</sup> Treitel op cit note 13 at 844.

<sup>64</sup> *The Super Servant Two* supra note 14 at 8.

<sup>65</sup> *Appleby v Myers* (1867) LR 2 CP 651; *Chandler v Webster* [1904] 1 KB 493.

<sup>66</sup> *Chandler v Webster* note 65.

<sup>67</sup> Supra note 40 at 49.

<sup>68</sup> Supra note 14 at 8.

the theoretical basis of our South African doctrine is firmly rooted in Roman Dutch principles of impossibility, whereas the English doctrine is an indigenously evolved construct, operating where there has been a 'radical change in the obligation'. While the English law may be reluctant to grant discharge where it is merely the common motivating foundation of the contract which has fallen away, other jurisdictions, particularly the United States, are more forthcoming in this regard. This provides a persuasive basis for the inclusion in South Africa of a doctrine of suppositions as to the future. For a proper comparison, however, the South African law on impossibility must also be more fully examined.

### III THE SOUTH AFRICAN DOCTRINE OF SUPERVENING IMPOSSIBILITY OF PERFORMANCE

A succinct summary of the South African doctrine of supervening impossibility was handed down by the Supreme Court of Appeal in the recent *Snow Crystal* case:

'As a general rule impossibility of performance brought about by *vis maior* 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 self-created; nor will it avail the defendant if the impossibility is due to his or her fault.'<sup>69</sup>

This extract represents a synthesis of several leading judgments, and bears further scrutiny. First, there are the terms *vis maior* and *casus fortuitus*: these concepts, derived from Roman Dutch law, refer to 'direct acts of nature, the violence of which could not reasonably have been foreseen or guarded against'.<sup>70</sup> *Casus fortuitus* (an event occurring by chance) is a species of *vis maior* (higher power). In the English jurisdiction, both types of event would be referred to as 'acts of God'. Thus supervening impossibility will discharge a contract where the impossibility results from an unforeseen (and uncontrollable) event (or change in circumstances).

While this may be trite today, it was not always the position in South African law. Prior to the seminal case of *Peters, Flamman & Co v Kokstad Municipality*,<sup>71</sup> municipal courts (including the Appellate Division) had followed the English rule of absolute contracts, as laid down in *Paradine v Jane*.<sup>72</sup> In *Peters, Flamman*, however, Solomon ACJ held:

<sup>69</sup> *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) para 28 (authorities omitted). The quoted insert is taken from *Hersman v Shapiro* 1926 TPD 367 at 373.

<sup>70</sup> *New Heriot Gold Mining Co Ltd v Union Government* 1916 AD 415 at 433.

<sup>71</sup> *Supra* note 2.

<sup>72</sup> *Supra* note 16. See *Algoa Milling Co v Arkell & Douglas* 1918 AD 145.

'By the Civil Law a contract is void if at the time of its inception its performance is impossible: *impossibilium nulla obligatio* (D. 50.17.185). 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. . . .'<sup>73</sup>

This established authoritatively that impossibility would vitiate a contract. As we have seen above, however, impossibility can be loosely defined to extend to 'commercial impossibility' or impracticability if desired.<sup>74</sup> The threshold test for impossibility in South African law must thus be examined. An essential case to deal with in this regard is *Hersman v Shapiro*.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> The court refused to discharge the defendant's obligation.<sup>78</sup>

*Hersman's* case thus seems to imply that the standard of impossibility required in South African law for discharge is a stringent one: anything short of absolute impossibility will not suffice. Then there are some further qualifications: impossibility must not be subjective (or self-created);<sup>79</sup> and must not be due to the defendant's fault.<sup>80</sup> These are well established limitations to the doctrine of supervening impossibility and (it should be noted) are in accordance with English law. This comparative similarity was pointed out by Solomon JA in *MacDuff & Co Ltd v Johannesburg Consolidated*

<sup>73</sup> *Supra* note 2 at 434.

<sup>74</sup> It should be noted that the term 'commercial impossibility' is used in two senses in South Africa: first, to connote a situation of frustration of purpose; and secondly, to indicate impracticability, as it is used here. Cf William Ramsden *Supervening Impossibility of Performance* (1985) 74.

<sup>75</sup> *Supra* note 3.

<sup>76</sup> *Ibid* at 373. This extract, it will be noticed, is reproduced in the passage from the *Snow Crystal* cited above, where the question was also whether performance was indeed absolutely impossible.

<sup>77</sup> *Ibid* at 375–7.

<sup>78</sup> *Ibid*.

<sup>79</sup> *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) paras 23–5. This is the authority cited for this proposition in the extract from the *Snow Crystal* reproduced above.

<sup>80</sup> *MacDuff & Co Ltd (In Liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 601. Again this is the authority cited in *Snow Crystal*.

*Investment Co Ltd*.<sup>81</sup> Finally, the effect of supervening impossibility is to terminate the contractual relationship *ex tunc*: the contract becomes void ab initio.<sup>82</sup> Any performance made prior to discharge must be claimed back on the basis of unjustified enrichment.<sup>83</sup>

#### IV EVIDENCE OF THE DOCTRINE OF FRUSTRATION IN SOUTH AFRICAN LAW

Despite their disparate roots, it can be seen that in certain respects the doctrines of frustration and supervening impossibility are analogous. Certainly any event that meets the test of impossibility in South African law would probably be considered a frustrating event were English law to be applied to the dispute. This similarity has been remarked upon by the Appellate Division: ‘While the English law of frustration differs from the South African law of impossibility of performance in certain respects, there is also a strong degree of similarity. . . .’<sup>84</sup>

There are certain very important differences between the two doctrines, though, which centre around the fact that frustration also covers changed circumstances, whereas supervening impossibility deals with absolute (or objective) impossibility. This difference is most visible when dealing with the English doctrine of frustration of purpose. As stated above, *Krell v Henry* is authority in English law for the proposition that when the common foundation of a contract falls away, the contract falls away with it.<sup>85</sup> While this is at odds with the notion of impossibility, it can (as pointed out in the introduction) be seen as being analogous to the supposition in futuro. There is a certain amount of case authority for a *Krell v Henry*-type proposition in South Africa, yet most of it has chosen to focus on expanding the notion of impossibility rather than on developing the concept of suppositions. Typically the decisions in these cases have then been stumped by the incompatibility of Roman Dutch impossibility and the English concept of frustration of purpose. Their solution: refer directly to English authority to resolve the incongruity. The result (by implication) is an attempted transplantation of the doctrine of frustration to South Africa. The status and merit of these cases will now be considered in an attempt to examine the extent to which frustration has been taken up into South African law.<sup>86</sup>

First and foremost is the case of *African Realty Trust Ltd v Holmes*.<sup>87</sup> In that case a contract for the purchase of agricultural land made provision for the

<sup>81</sup> Ibid.

<sup>82</sup> *Peters, Flamman & Co v Kokstad Municipality* supra note 2 at 434.

<sup>83</sup> R H Christie *The Law of Contract in South Africa* (2006) 472.

<sup>84</sup> *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (A) at 1214C.

<sup>85</sup> Supra note 17 at 754.

<sup>86</sup> It should be noted at the outset that this is directly contrary to the opinion of Professor Christie, who argues that ‘it is difficult to raise enthusiasm’ for the *clausula rebus sic stantibus* or the supposition as to a future state of affairs. See Christie op cit note 83 at 473. The opinion of the present author is less conservative (see below).

<sup>87</sup> 1922 AD 389.

construction of a rock-fill dam on the nearby river by the relevant government board. After the conclusion of the contract, the director of that board changed and a new decision was taken rather to build a concrete dam. This would cost nearly twice as much and would greatly increase the cost of water to be used on the land being purchased. The buyer sought to resile from the contract. De Villiers JA, in a separate concurring judgment, embarked upon a lengthy discussion beginning with the statement: 'There is authority for the proposition that when the basis of a contract falls away the contract falls away with it.'<sup>88</sup>

The authority to which the Judge of Appeal was referring was particularly English authority in the form of *Krell v Henry*, as well as certain civil law authorities, including the writing of the German Pandectist Windscheid.<sup>89</sup> De Villiers JA qualified this discussion, however, with the statement that the court was not concerned with the motives which caused a party to contract, except to the extent that these had been incorporated expressly or by implication into the contract.<sup>90</sup> This discussion was in any event obiter, since De Villiers JA opined that the contract made provision for a change in circumstances and was thus binding.<sup>91</sup>

In *MacDuff & Co Ltd v Johannesburg Consolidated Investment Co Ltd* there was again consideration of the doctrine of frustration by the Appellate Division.<sup>92</sup> In that case the respondent had undertaken to take over the running of the appellant company, which had been placed in liquidation. The business of MacDuff Ltd was the import and export of coal, but a subsequent slump in the coal market meant that honouring this agreement would have led to significant losses for the respondent. The respondent pleaded in its defence that performance of the agreement had become impossible: in the broad sense that a change of circumstances had rendered the venture commercially impracticable.<sup>93</sup>

The essence of this defence was that a contract becomes impossible of performance where the state of affairs on which it rests ceases to exist.<sup>94</sup> Solomon JA quoted from the *Tamplin Steamship Co* case<sup>95</sup> in support of this contention: this case, it will be remembered, is the classic statement of the implied term approach to frustration in English law.<sup>96</sup> The Judge of Appeal noted that there was no authority for this argument in South African law

<sup>88</sup> Ibid at 400.

<sup>89</sup> Ibid at 400–2. Windscheid's doctrine of *Voraussetzung* dealt with suppositions in contract and is briefly considered in an earlier article by this author: Hutchison op cit note 6 at 443–4.

<sup>90</sup> Ibid at 403.

<sup>91</sup> Ibid at 403–4.

<sup>92</sup> Supra note 80 at 602–3.

<sup>93</sup> Ibid at 600. This defence is discussed by Solomon JA at 600–7.

<sup>94</sup> Ibid at 602–3.

<sup>95</sup> Supra note 52.

<sup>96</sup> *MacDuff* supra note 80 at 603.

outside of *Schlegemann v Meyer, Bridgens & Co*,<sup>97</sup> but assumed it nevertheless to be good law. This finding in *MacDuff* was also obiter, however, since Solomon JA held that this was a case of ‘commercial’ impossibility: increased expense in performance did not discharge the obligation.<sup>98</sup> This was decided with reference to English authority.<sup>99</sup>

These two cases are the major Appellate Division pronouncements on the status of frustration in South African law. Neither was decisive of the case in question and the defence of change of circumstances does not seem to have been adopted beyond this. References to frustration continued in the provincial divisions, however. These must now be examined.

*Schlegemann’s* case is an example of a situation where a South African court relied on the doctrine of frustration to decide a case.<sup>100</sup> Here the plaintiff had been interned as an enemy subject during World War One and his continued performance in his role as a director of the defendant company had been suspended. The defendant had in the meantime replaced him and argued that the relevant change in circumstances had terminated the agreement on which the plaintiff’s directorship had been based. In reaching his decision, Gardiner J held that the English authorities had to be relied on in such an instance of changed circumstances, since these English principles were at the ‘root of any contract’.<sup>101</sup> He then cited the passage from the *Tamplin Steamship* case, which Solomon JA had later echoed in *MacDuff*: where a state of affairs on which a contract rests comes to an end, the contract becomes void due to an implied term to this effect.<sup>102</sup> The *Tamplin Steamship* case was shown to be relevant since in that case too a state of war had upset the peace time status quo, and the supervening war time state of affairs was presumed by law to be of indefinite duration.<sup>103</sup> The termination of the peace time circumstances, which meant that Schlegemann was no longer capable of serving as a managing director, likewise terminated the contract.<sup>104</sup> The ultimate reason given for this decision, however, was ‘impossibility of performance’.<sup>105</sup> The reliance by Gardiner J on frustration thus seems, with respect, to have been unnecessary since the internment of Schlegemann seems to constitute *casus fortuitus*, as did the internment of a German subject in *Peters, Flamman*. The case does, however, demonstrate a tendency of South African courts to be influenced by the English doctrine of frustration.

<sup>97</sup> 1920 CPD 494. This case is discussed further below.

<sup>98</sup> *MacDuff* supra note 80 at 605–6.

<sup>99</sup> *Tenants Ltd v CS Wilson & Co Ltd* supra note 43.

<sup>100</sup> Supra note 97.

<sup>101</sup> *Ibid* at 500–1.

<sup>102</sup> *Ibid*.

<sup>103</sup> See the discussion of this case in the *Schlegemann* judgment supra note 97 at 502.

<sup>104</sup> *Ibid* at 504.

<sup>105</sup> *Ibid*.

In the 1940s Herbstein J used the same passage from another English frustration case, *Hirji Mulji v Cheong Yue Steamship Co Ltd*,<sup>106</sup> to decide two separate cases. The passage in question was a largely unremarkable statement of the doctrine of frustration, to the effect that if an unforeseen event frustrates the common object of two contracting parties, the contract must come to an end. This was because holding a party bound under such changed circumstances would be to hold him to a contract which he had never made.<sup>107</sup> In both cases where he cites this passage, Herbstein J seems, with respect, to ignore the fact that impossibility in South African law does not equate with frustration in English law. Herbstein J directly invokes English authority in order to assert that impossibility of performance results in discharge of a contract.

In the first case, *Benjamin v Myers*,<sup>108</sup> the defendant was prevented from maintaining the petrol supply on his garage premises — something which was required in terms of the lease. Although this was beyond the defendant's control due to a refusal of the relevant authorities to supply him with petrol, this impossibility was held to have been self-created through his prior breach of petrol supply restrictions under a War Measure.<sup>109</sup> As a separate ground for this decision Herbstein J argued that since the defendant wanted only to find the obligation to maintain a supply of petrol discharged, but otherwise to keep the lease agreement intact, this was an attempt to hold the plaintiff to a new agreement following a change of circumstances.<sup>110</sup> Herbstein J rejected the defendant's argument: his judgment seems to suggest that a finding that impossibility was present would require the whole agreement to be discharged, and not merely one term thereof. Since the defendant was attempting to uphold part of the agreement, but discharge the rest, his argument was bad in law.

Herbstein J's judgment in *Rossouw v Haumann*<sup>111</sup> was another instance of reliance on the doctrine of frustration. After he had found that the agreement in question was impossible of performance, the judge went on to set out the consequences of this finding.<sup>112</sup> Instead of quoting a South African case such as *Peters, Flamman*, however, he quoted the extract from *Hirji Mulji* referred to above. Thus, instead of following established South African precedent on impossibility, he chose to invoke the doctrine of frustration. His authority for this was his own finding in *Benjamin v Myers*.<sup>113</sup>

<sup>106</sup> [1926] AC 497.

<sup>107</sup> This is a paraphrased summary of the extract which appears in *Hirji Mulji* supra note 106 at 507. Herbstein J cites this passage in *Benjamin v Myers* 1946 CPD 655 at 662–3 and then again in *Rossouw v Haumann* 1949 (4) SA 796 (C) at 799–800.

<sup>108</sup> Supra note 107.

<sup>109</sup> Ibid at 662.

<sup>110</sup> Ibid at 663.

<sup>111</sup> Supra note 107.

<sup>112</sup> Ibid at 799.

<sup>113</sup> Ibid at 800.

It is submitted that neither of the findings of Herbststein J establishes a strong precedent. In *Benjamin v Myers*, the frustration ruling was only peripheral, and in *Rossouw v Haumann* Herbststein J seems, with respect, to have looked beyond the permissible sources of South African law on supervening impossibility. In any event, neither case is a true example of the frustration of purpose-type scenario.

The next case is slightly more in point, though. *Bischofberger v Van Eyk* dealt with a dispute based on a contract for the sale of property.<sup>114</sup> Part of the purchase price was to be raised by the sale of another property that was indirectly owned by the purchaser. The sale of this second property fell through, and it became impossible for the purchaser to meet the purchase price on his first agreement. Boshoff JP held that when the source of the purchaser's funding fell away, his obligation to purchase did as well.<sup>115</sup> The basis for this finding was impossibility of performance (*Peters, Flamman* and *Hersman v Shapiv* were cited in support of this finding).<sup>116</sup> The Judge President went on to state, however, that English law did not seem to be at variance with South African law in this regard. He cited *Morgan v Manser*<sup>117</sup> to the effect that an unforeseen, fundamental change in circumstances renders a contract void.<sup>118</sup> The judge concluded that the change in circumstances regarding the availability of funds to pay the purchase price was unforeseen and made performance impossible.<sup>119</sup> As a result the agreement ceased to exist.

The problem facing Boshoff JP in *Bischofberger* seems to have been the nature of the impossibility involved. The purchaser's inability to pay did not render the agreement objectively impossible; the impossibility was as a result of his own subjective circumstances. This no doubt motivated the court to look beyond South African law for a doctrine which voided a contract for a mere change of circumstances, rather than a doctrine that required objective (or absolute) impossibility. It is submitted that this would have been a good case to have decided on the basis of a supposition: the source of the funding could (arguably) be seen as a common assumption between the parties, and the failure of the funding to materialise would then render the contract void. The problem with this construction, however, is that the supposition would relate to the future, which is not favoured in South African law.<sup>120</sup>

The final case in favour of frustration (to be examined here) is *Kok v Osborne*.<sup>121</sup> This case involved a fairly complicated set of frauds committed by a conman, Hobson-Jones. The net result of these was that Hobson-Jones's creditor, Kok, was substituted for himself as the purchaser of a property belonging to Osborne. Kok believed that she was receiving title in settlement

<sup>114</sup> 1981 (2) SA 607 (W).

<sup>115</sup> *Ibid* at 610G.

<sup>116</sup> *Ibid* at 610H–611A.

<sup>117</sup> [1947] 2 All ER 666 at 670.

<sup>118</sup> *Bischofberger* supra note 114 at 611D–F.

<sup>119</sup> *Ibid* at 611F–H.

<sup>120</sup> *Van Reenen Steel* supra note 5 para 8.

<sup>121</sup> 1993 (4) SA 788 (SEC).

of Hobson-Jones's debt to her. Osborne believed that Kok was the joint purchaser along with Hobson-Jones and would be the source of the purchase price. Hobson-Jones had no intention of paying for the property, but Kok believed that Hobson-Jones had already paid and that she would be receiving title. When Hobson-Jones's fraud emerged, it became clear that no one would be paying the purchase price. Osborne then resold the property to another buyer. Kok tried to interdict transfer, arguing that title was due to her.

Jones J found the contract to be invalid on two grounds: one was a unilateral mistake on the part of Osborne,<sup>122</sup> and the other was a failed common assumption of both parties that Hobson-Jones had paid Osborne under the contract of sale.<sup>123</sup> This reasoning on the second ground was flawed from the outset, since this was the assumption of Kok alone; Osborne did not share in the delusion.<sup>124</sup> Jones J did not follow the conventional approach to suppositions, however. Rather he stated that the problem of the false assumption could be solved by an application of 'the rule in *Peters, Flamman . . .* and *African Realty Trust . . .*'.<sup>125</sup> The judge took the wording of this 'rule' from Professor Kerr's *Principles of the Law of Contract*:

'The basic rule is that if during the currency of a contract the conditions necessary for its operation cease to exist, the change not being due to the fault of either party or to a factor for which either party bears the risk, the contract ceases to exist.'<sup>126</sup>

Jones J went on to state:

'The law recognises that the realities of the world of business demand that provision be made for a situation where unforeseen contingencies prevent the attainment of the commercial purpose which the parties had in mind when they contracted. That, too, can amount to legal impossibility.'<sup>127</sup>

The judge then cited *African Realty Trust* to the effect that when the basis of a contract falls away, the contract falls away with it.<sup>128</sup> He stated further that 'commercial impossibility' as evidenced in *Krell v Henry* had been accepted by a number of South African courts.<sup>129</sup> Examples given of such decisions were *Bischofberger v Van Eyk*, *Williams v Evans*<sup>130</sup> and *Rossouw v Haumann*.<sup>131</sup> Jones J

<sup>122</sup> *Ibid* at 801D.

<sup>123</sup> *Ibid* at 801E-H.

<sup>124</sup> This is pointed out by W A Ramsden 'Could performance have been impossible in *Kok v Osborne & another?*' (1994) 6 SA Merc LJ 340 at 341-2.

<sup>125</sup> *Kok* supra note 121 at 801J-802A.

<sup>126</sup> A J Kerr *Principles of the Law of Contract* 6 ed (2002) 545. The passage is cited in the judgment at 802B-C.

<sup>127</sup> *Kok* supra note 121 at 802D.

<sup>128</sup> *Ibid* at 802E-G. The relevant passage from *African Realty Trust* appears at 400 in that judgment and was discussed above.

<sup>129</sup> *Ibid* at 802G.

<sup>130</sup> 1978 (1) SA 1170 (C). This is the seminal case on suppositions in futuro and is discussed at length in Hutchison op cit note 6.

<sup>131</sup> *Kok* supra note 121 at 802-4.

concluded that the rule as to impossibility which he had adopted was applicable to this case, in accordance with the authority which he had cited: the basis of the agreement (payment by Hobson-Jones) had failed and therefore the contract failed.<sup>132</sup>

The judgment in this case has been criticised by several commentators, and their criticism appears to be justified.<sup>133</sup> Jones J chose to follow neither the path of a failed common assumption nor supervening impossibility as they are understood in South African law. No doubt this is because the impossibility was not absolute and the assumption was not commonly held. Rather, the judge seems to follow the English doctrine of frustration of purpose, seeking to capture the problem under the broad banner of changed circumstances.<sup>134</sup> It is doubtful whether this is even a true case of change of circumstances at all: the fraud of Hobson-Jones was present from the outset. It is submitted that the many flaws in the reasoning of this judgment make it weak authority for the doctrine of frustration of purpose in South African law.

The picture which has emerged is that there is no compelling evidence for the adoption of the doctrine of frustration, or more particularly frustration of purpose, into South African law: certainly not by precedent. The Appellate Division comments on the matter are old and in any event obiter. The provincial decisions are largely based on flawed reasoning and are in any event not supported by binding authority. It appears that any argument that frustration is already part of South African law must for this reason fail. To strengthen this conclusion there are several dicta by South African courts which unequivocally deny that frustration forms any part of South African law. The most recent (and elaborate) of these was in *Techni-Pak Sales (Pty) Ltd v Hall*.<sup>135</sup> In that case an argument based on the doctrine of frustration was raised by the plaintiff. Colman J discussed the doctrine of frustration,<sup>136</sup> but noted that if frustration could be invoked where there was no implied term that circumstances would remain unchanged, 'the granite concept of sanctity of contracts [would] be shattered'.<sup>137</sup> The judge summed up:

'In our Courts the doctrine of frustration has upon occasion been referred to by that name, but it is not clear to me that it has ever been applied to a situation which was not covered also by one or other of our more familiar rules relating to implied term [sic] or impossibility of performance. Counsel have not been able to refer me to any case in which one of our Courts has assumed the type of broad equitable jurisdiction which Courts of England are said to have in respect of frustration.'<sup>138</sup>

<sup>132</sup> *Ibid* at 804H-I.

<sup>133</sup> C-J Pretorius and T B Floyd 'Mistake and supervening impossibility of performance' (1994) 57 *THRHR* 325; Ramsden *op cit* note 124.

<sup>134</sup> This is supported by Jones J's invocation of *African Realty Trust* and *Krell v Henry*.

<sup>135</sup> 1968 (3) SA 231 (W). See also *Bayley v Harwood* 1953 (3) SA 239 (T) at 244C-D; *Grobbelaar v Bosch* 1964 (3) SA 687 (E) at 690H-691B.

<sup>136</sup> *Techni-Pak Sales* *supra* note 136 at 238C-F.

<sup>137</sup> *Ibid* at 238G.

<sup>138</sup> *Ibid* at 238H.

## V THE SUITABILITY OF THE DOCTRINE OF FRUSTRATION FOR USE IN SOUTH AFRICAN LAW

What should by now be clear is that the doctrine of frustration is not part of South African law. To an extent our law of impossibility overlaps with the English doctrine, but frustration differs fundamentally in that it deals with changes in circumstances rather than impossibility alone. The cases in South Africa which deal with frustration perhaps do not provide the best examples of changed circumstances, but these judgments do evidence the lacuna in our law in this regard. While a doctrine which addresses the problem of changed circumstances can be of assistance in times of war, hyper-inflation, change in political regime and any other unforeseen contingency which makes strict enforcement of the contract unjust, a narrowly conceived doctrine of impossibility is of limited use. The requirement of absolute impossibility means that where performance is still possible it must be enforced, no matter how dire the consequences for the afflicted party. Indeed, it could well be argued that South Africa's refusal to recognise a doctrine of changed circumstances is evidence of a lack of national catastrophes, as well as an avoidance of the demands of justice.<sup>139</sup> Such an argument could easily be based on the notion of fairness which underpins chapter two of the South African Constitution. Where there has been a fundamental alteration in the cost or value of contract performance, which is of a sufficient order of magnitude to warrant intervention, it would not be fair to place the cost of such a change in circumstances wholly on the disadvantaged party, and the spirit of the Constitution would demand intervention.

What this article does not advocate is a wholesale legal transplantation of the doctrine of frustration from English law, or any other legal system. What this article attempts to show, however, is that South Africa lags behind other major jurisdictions, as our legal system has no mechanism for ensuring that justice is done where there is a contractual dispute arising out of a change of circumstances. The recent decision of the South African Constitutional Court in *Barkhuizen v Napier*<sup>140</sup> evidenced the beginning of a shift away from public policy favouring freedom of contract alone to a broader conception — zone which recognises fairness in contracting as an important ideal. This is necessitated by s 39(2) of the Constitution, which calls for the development of the common law to reflect the values in the Bill of Rights. A strong argument can be made that fairness in contracting demands that the issue of

<sup>139</sup> It should be noted, however, that the South African Law Commission proposed legislation to deal with this issue in its 1998 Report on Project 47 *Unreasonable Stipulations in Contracts and the Rectification of Contracts*. The draft Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms included a provision at clause 4, which is similar in effect to the hardship provisions of the PICC, allowing for renegotiation or judicial adaptation of the contract should performance of a contract become 'excessively onerous because of a change in circumstances'. This Bill has never been enacted, however.

<sup>140</sup> 2007 (5) SA 323 (CC).

change of circumstances in contract law be addressed.<sup>141</sup> Fairness in contracting could then stand either as an independent ground for intervention in contracts, as *Barkhuizen* implies,<sup>142</sup> or could serve as the ‘aanknopingspunt’ for a more technical doctrine to deal with changed circumstances.

In looking for a solution to this problem our courts would be well advised to consider the doctrine of frustration in English law, as well as the separate developments which this doctrine has undergone in other countries which recognise the English system as their parent. English law does, however, seem to be quite severe when dealing with changed circumstances and, although this system recognises frustration of purpose, we have seen that courts in that country are very hesitant to invoke this rule. Similarly the converse — impracticability — is not a favoured concept. It can thus be said that the English courts also tend to favour contractual certainty over fairness, and their conservative approach to the problem of changed circumstances is not that different from the one found in South Africa. The important point, however, is that their doctrine (at least in theory) is one of changed circumstances, whereas ours is one of impossibility alone.

By contrast, the United States, despite being a commercial powerhouse, is far more liberal in permitting discharge due to changed circumstances. Legislation in that country makes provision not only for frustration of purpose, but also for impracticability.<sup>143</sup> The fact that frustration type doctrines do not spell the end for commerce is reflected in the incorporation of rules on hardship into the Unidroit Principles of International Commercial Contracts.<sup>144</sup> Indeed, the opposite is true: changed circumstances are a natural feature of international trade and the global market requires that contract law be able to take account of these. In this regard it should be noted that the Unidroit PICC rules on hardship go much further than English — or even US — law and permit renegotiation of a contract by the parties, or even the adaptation thereof by a court, following a fundamental change in circumstances.<sup>145</sup> From a commercial point of view it can hardly be doubted that this is preferable to the all-or-nothing approach of English law.

South African law on impossibility has a common ancestor with England’s frustration, namely the Roman law rules on impossibility. Although the development of these concepts have taken different paths in these two

<sup>141</sup> See for an argument along these lines: L F Van Huyssteen and Schalk van der Merwe ‘Good faith in contract: proper behaviour amidst changing circumstances’ (1990) 1 *Stellenbosch LR* 244.

<sup>142</sup> For an argument in this regard, see Graham Glover ‘Lazarus in the Constitutional Court: an exhumation of the *exceptio doli generalis*?’ (2007) 124 *SALJ* 449 and AJ Kerr ‘The defence of unfair conduct on the part of the plaintiff at the time action is brought: the *exceptio doli generalis* and the *replicatio doli* in modern law’ (2008) 125 *SALJ* 241.

<sup>143</sup> Compare generally: Joseph Perillo *Calamari and Perillo on Contracts* 6 ed (2009) ch 13.

<sup>144</sup> Unidroit PICC arts 6.2.1–3.

<sup>145</sup> Unidroit PICC art 6.2.3.

countries (and indeed in all the other countries to which impossibility or frustration have been exported), links remain between our systems. This should provide the degree of relevance necessary to take account of foreign law on change of circumstances and to develop the indigenous Roman-Dutch law of impossibility to bring it into line with modern trends.

## VI CONCLUSION

The aim of this article was to compare the English doctrine of frustration with the equivalent South African notion of impossibility. In the past, South African courts faced with problems of changed circumstances which could not be dealt with under the banner of impossibility have sought to invoke the doctrine of frustration to resolve the disputes before them. This invocation was shown to have no authoritative basis in South African law and accordingly to be invalid. This does not, however, answer the hypothetical question whether South Africa *should* broaden its impossibility defence to incorporate discharge for changed circumstances. It is submitted that this would be a beneficial move and would be in the interests of justice. Despite being controversial, under appropriate circumstances a concept such as frustration of purpose could be useful in providing a solution to difficult moral dilemmas concerning the enforcement of a contract affected by unforeseen hardship. Of course one must ensure that the prior allocation of risks under a contract is not unnecessarily disturbed, but injustice could result if courts were dogmatically to refuse to recognise that a change of circumstances could not justify discharge of performance in certain (albeit carefully circumscribed) cases.

The difficult issue then is how are we to overcome our common law and introduce such a rule. One method, of course would be legislation.<sup>146</sup> Another would be by means of equitable intervention under the doctrine of public policy or good faith. If one were to develop the common law, then perhaps the doctrine of frustration of purpose could underpin our indigenous notion of the supposition in futuro, whether in the *Williams v Evans* guise, or as an imputed tacit resolutive condition. Clearly the days of transplants from English law are over in South Africa. The time has come, however, to take account of foreign developments and develop our contract law to accommodate the problem of changed circumstances.

<sup>146</sup> Such as along the lines proposed in the 1998 South African Law Commission draft Bill. Compare also in this regard s 48 of the Consumer Protection Act 68 of 2008. This section gives courts the power to set aside unfair contract terms within the sphere of application of the Act. This is a fairly broad power, the limits of which have yet to be defined by the courts. It is the opinion of this author that this section merely codifies (for the consumer context) the headway which was made in *Barkhuizen v Napier* supra note 1. See also s 40 of the Act which prohibits 'unconscionable conduct' in (inter alia) the 'negotiation, conclusion, execution or enforcement' of a consumer agreement.