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Interpretation and impossibility: What you really mean(t to achieve)

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With the advent of the Covid-19 pandemic, phrases such as *vis major*, *force majeure*, and supervening impossibility have become the new 'legal catchphrases', much as had been the case with *dolus eventualis* during the (in)famous Oscar-trial. In a recent Supreme Court of Appeal (SCA) judgment, the SCA decided on whether the label attached to, and the terminology used in, a contract determined its nature and, if so, what the consequence would be in the context of impossibility of performance.

In foreshadowing what the SCA held, it is worth pausing to mention that it is now trite that the title subjectively ascribed to a document or the words subjectively chosen to name a contract can never be *solely* determinative of objective meaning. Although this might seem simple, on 23 April 2020, the Supreme Court of Appeal confirmed the *"well-established"* principle that [own emphasis herein]:

> *"... the label attached to an agreement is not, of itself, determinative of its character. It is the nature of the performance agreed upon by the parties that determines [a contract's] true nature."*

In this case, the parties entered into a so-called *"Rent and Rental Agreement"* in terms of which:

- A would afford B the right to (i) access and use a specified portion of immovable property and (ii) prospect, mine, or harvest peat from the specified portion.
- B would, in turn, (i) pay to A, a *"minimum rental amount"* of R15,000 per month *"for the lease of the property"* as well as R25 per m3 of peat extracted in excess of 600m3.
- The payment of R15,000, for the lease of the property *and the granting of the rights*, is a *prepayment* of the amount of peat extracted.
- Any form of *vis major* will be a valid reason for B not to perform its obligations, *if* it results in a ***permanent*** impossibility.

As fate would have it, the relevant state department issued a compliance notice (Notice) directing that the extraction of peat

be stopped. Pursuant to this Notice, B ceased paying the amount of R15,000, which led A to institute proceedings against B for payment of *"arrear rental"*. B argued that for as long as it could not legitimately carry out its peat extraction activities, it could not be required to pay the R15,000. In addition, A argued that the Notice qualifed as *vis major* resulting in permanent impossibility of performance.

The SCA was asked to decide, amongst other things, (i) what the nature of the agreement is (i.e. a lease agreement or an agreement affording the right to extract peat) and (ii) whether the Notice qualified as *vis major*, resulting in permanent impossibility.

These questions turn solely on an interpretation of the contract and the SCA restated the 'trite principles of interpretation of a contract'. In short, a Court must determine and give effect to the *intention of the parties*, i.e. what the parties *meant to achieve* with their contract. A Court is not concerned with what the parties *meant to say* or *express in their contract*, but with what the parties *meant to achieve with* their contract. The inevitable starting point to determine the intention of the parties (what they meant to achieve) is the express language, considered within the context (i.e. the factual matrix in which the contract is concluded), of the contract.

The SCA, whilst also relying on the above principles, referred to the clause entitled [own emphasis herein]

> *"[g]eneral", which provided that "[A] hereby leases the property to [B]* ***for purposes of*** *giving [B] the exclusive* ***right to solely*** *prospect, extract or mine for peat … on the property."*

The SCA held that the *nature of the performance* of the contract was an undertaking on the part of A to afford B the right to extract peat and an undertaking on the part of B to compensate A for the peat extracted. The leasing of the property was ancillary to the right to extract in that it was leased *for the purpose to* extract peat. In coming to this conclusion, the SCA relied on the principle that every contract must be given a *commercially sensible meaning* and, where more than one meaning is possible, a sensible meaning should be preferred to one that leads to *"insensible or unbusinesslike results, or one that undermines the apparent purpose"*.

Therefore, even though the contract was named *"Rent and Rental Agreement"* and contained terms such as *"leased property"* and *"rent"*, the contract was not one of lease, since it is most certainly not what the parties sought to achieve. The Court held that any interpretation in terms of which the contract is one of lease would be most *insensible or unbusinesslike* that *undermines the apparent purpose* of the contract, being *"giving [B] the exclusive right to solely prospect, extract or mine for peat"*. Accordingly, it could never have been intended that B would be expected to pay for the peat that it did not extract.

As regard impossibility of performance, B argued that it was not liable to continue with the prepayments for peat on account of *vis major* of a permanent nature, being the Notice. The SCA held that it is trite that where performance of an obligation by a party to an agreement becomes impossible after the conclusion of the agreement, that party is discharged from liability if it was prevented from performing its obligation by *vis major*, but not if the impossibility was due to its own fault.

It shall be recalled that, in terms of the contract, any form of *vis major* will be a valid reason for B not to perform its obligations, *if* it results in a ***permanent*** impossibility. Thus, B was obliged to extract peat and pay A for the extracted peat, unless B's inability to perform its operations is due to a permanent impossibility. In this regard, the SCA found that the Notice rendered the performance of B's obligations permanently impossible and that it was not due to its own fault. It is important to emphasise that, practically and reasonably considered, the Notice constituted a form of *vis major* that rendered performance objectively and permanently impossible, although the decision to issue the Notice could, notionally, have been set aside. Thus, only once it is known, based on an interpretation of the contract, what the parties meant to achieve (i.e., what the performance is), can its impossibility *to perform* be considered.

This judgment informs that (i) the intention of the parties (what they meant to achieve) is of paramount importance when interpreting a contract and, ancillary thereto, determining the nature of the performances (undertakings) of a contract and (ii) the right of use of immovable property, on the one hand, and the right to extract, on the other, must be distinctively defined and provided for *separately* in an agreement of this nature.

Judgment discussed: *Wilma Petru Kooij v. Middleground Trading 251 CC and Another (1249/18)* [2020] ZASCA 45 (23 April 2020). The facts referred to in the article are a simplified reproduction of the facts in this case.

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