# Supervening Impossibility and the Supplier's Duty to Perform in terms of Section 19 of the Consumer Protection Act, 2008

*National Consumer Commission v Crystal Tears Investment 206 CC t/a Misty River and Elizabeth Hoogenhout t/a Misty River*
NCT/261684/2023/73(2)(b)

## 1 Introduction

One of the many negative consequences of the COVID-19 pandemic, during which South Africa was subjected to restrictions imposed owing to the pandemic, was the many terminations of numerous bookings and reservations for the provision of services such as travel, accommodation, and the hosting of weddings. (For example, see for instance the facts in *KwaZulu-Natal Consumer Protector v Africa Wild Travel CC* (KZNCT03/21) [2022] ZANCT21 and *Booking.com v National Consumer Commission: In re National Consumer Commission v Abrahams t/a Sunset Villa 1 and Booking.com* NCT/262956/2023/73(2)(b) CPA – rule 34.) In *National Consumer Commission v Crystal Tears Investment 206 CC t/a Misty River and Elizabeth Hoogenhout t/a Misty River* (NCT/261684/2023/73(2)(b)), the consumer had booked a venue for her forthcoming wedding and had paid a substantial amount towards the costs of the wedding celebration. The occasion had to be cancelled owing to the imposition of lockdown restrictions imposed by the government and, unfortunately, the parties could not reach an agreement about postponing the event. The consumer demanded repayment of monies already paid, which the supplier refused. The matter was referred to the Tribunal, which held that certain provisions of section 19 of the Consumer Protection Act, (68 of 2008) (CPA) applied and that the supplier was therefore liable to refund the consumer. The Tribunal also imposed an administrative fine on the supplier.

Although it is agreed that the supplier was indeed liable to refund the monies paid by the consumer, it is respectfully argued that the Tribunal was incorrect in finding that the supplier was in breach of the provisions of section 19 of the CPA. It is argued that the provisions in question cannot be relied upon in the event that the contract between the consumer and the supplier was terminated owing to an event of supervening impossibility, as it is argued the imposition of the lockdown restrictions constituted.

The matter also allows some reflection on aspects of section 19.

## 2 Background

The start of the year 2021 saw South Africa and large parts of the world still firmly in the grip of the Covid-19 pandemic. In fact, in November of the preceding year a new variant of the coronavirus, known as 501.v2, was first identified in South Africa. The new variant of the virus caused a substantial rise in the number of infected persons because of its ability to spread more rapidly thus infecting more people in a shorter time. The increased risk led to the President of South Africa, Mr Cyril Ramaphosa, announcing on 11 January 2021 an adjusted Level 3 lockdown for the country (https://www.thepresidency.gov.za/speeches/statement-president-cyril-ramaphosa-progress-national-effort-contain-covid-19-pandemic%2C-11-january-2021 (accessed 2023-06-14)).

This announcement precipitated the publication by the then Minister of Cooperative Governance and Traditional Affairs, Dr Nkosazana Dlamini Zuma of regulations in terms of section 27(2) of the Disaster Management Act (57 of 2002) in Government Notice R11 (and published in *GG* 44066 of 2021-01-11) to give effect to the president's announcement. These regulations amended the Level 3 regulations as originally contained in GN No 480 and published on 29 April 2020 in *GG* 43258, which subsequently were amended on several occasions.

In terms of the adjusted Level 3 regulations the movement of persons was limited, and a curfew was imposed restricting people to their places of residence between the hours of 21h00 and 05h00. Failure to comply with this provision was an offence and punishable by imprisonment to a period not exceeding six months or a fine or both. Importantly also, all social gatherings were prohibited (regulation 4).

It is in this context that the events of the present case took place.

## 3 Facts

The complainant in the matter visited the premises of the respondents on 27 September 2020 to find a venue for her intended wedding. After receiving a quotation, the complainant booked the venue by paying a deposit of R7 000 to the respondents. The complainant made two further payments soon after to bring the amount of money paid to the respondents to a total value of R25 750.00 (par 15). (The dates indicated for when the payments were made are somewhat confusing, but nothing hinges on this. See par 14 and 15.)

The booking was made for the wedding to take place on 16 January 2021 and 150 guests were to be catered for (par 14).

Then on 11 January 2021, a few days before the wedding date, the president announced the adjusted Level 3 lockdown in terms of the existing state of disaster as indicated above. Of relevance is the fact that most indoor and outdoor gatherings, including all social gatherings, were prohibited (par 15). This announcement caused Ms Hoogenhout (the second respondent) to email the complainant to suggest that the wedding celebration be postponed (par 17). To this, the complainant responded by indicating that if the occasion

is to be cancelled the complainant expects to be refunded (par 18). The complainant followed this up with an email message on 8 February 2021 advising that the wedding celebration would not continue because "they could not postpone indefinitely" and she requested that the total amount already paid be refunded (par 19). The respondents did not repay the amount and upon investigation, the applicant (National Consumer Commission) was informed by the second respondent that a refund would only be made if the venue had been booked for the specific date by another client (par 20).

The complainant approached the applicant, who investigated and upon conclusion of which the matter was referred to the Tribunal in terms of section 73(2)(*b*) of the CPA (par 5).

## 4 Judgment

The Tribunal found that the first respondent had contravened sections 19(2) and (6) read with section 21(9) of the CPA and that such contravention constituted prohibited conduct (par 37.1). As a result, the Tribunal ordered the first respondent to refund the complainant the amount of R27 750, together with interest (par 37.1–37.3). An administrative fine of R15 000 was also imposed on the first respondent in respect of its prohibited conduct in refusing to refund the complainant the money paid by the latter for the wedding venue and related services (par 28 and 37.4). The Tribunal stated as follows (par 28):

> "Given the attitude adopted by the respondents and the unjustifiable refusal to refund the complainant, which resulted in the latter suffering significant financial loss, the Tribunal is of the view that an imposition of an administrative fine is appropriate. Suppliers such as the respondents should not be allowed to take money from the public and refuse to refund consumers when failing to provide the service for which the funds were paid."

## 5 Analysis and discussion

The fundamental reason for ordering the refund as indicated above is to be found in the following conclusion of the Tribunal (par 21):

> "Because the parties agreed on a date for the hiring of the wedding venue, section 19(2) of the CPA finds application. *In terms of this provision, it is an implied condition of every transaction for the supplier of goods and services that the supplier is responsible for delivering the goods or performing the services on the agreed date and at the agreed time, if any.*" [Emphasis added.]

The relevant part of section 19(2) provides as follows:

> "Unless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods or services that–
>
> (*a*) the supplier is responsible to deliver the goods or perform the services–
>
> (i) on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement;
>
> (ii) at the agreed place of delivery or performance; and

(iii) at the cost of the supplier, in the case of delivery of goods".

In terms of section 19(2)(*a*) the supplier is responsible for delivering the goods or performing the services on the agreed date, time, and place, and at the cost of the supplier, unless agreed otherwise. Some observations about the wording of the provision may be opportune. It would appear as if the provision were formulated rather awkwardly, especially in sub-paragraphs (*a*)(i) and (ii). The first part of sub-paragraph (*a*)(i) provides that the supplier is under an implied contractual obligation to perform on a date and at a time as agreed between the parties unless they have agreed otherwise. This does not seem to add anything or help the consumer in any way. It does not assist in providing a clear date and time for performance in the absence of an agreement on these aspects. Does it add value to state that, in the absence of an agreement to the contrary, it is an implied term of the agreement that the parties agree to perform on the date on which they have agreed to perform? The second part of sub-paragraph (*a*)(i) provides that unless agreed otherwise performance must take place within a reasonable time after the conclusion of the agreement. This at least assists in providing some certainty as to when performance must take place in the absence of an agreement as to when performance is to take place. Similarly, and in addition to what is mentioned above about the first part of sub-paragraph (*a*)(i), sub-paragraph (*a*)(ii) provides that performance of the service must take place at the agreed place, unless agreed otherwise. This again adds no value as to where that place is in the absence of an agreement on that aspect unless one reads that with paragraph (*b*), which provides that "the agreed place of delivery of goods or performance of a service is the supplier's place of business, if the supplier has one, and if not, the supplier's residence". Paragraph (*b*) is clear and provides certainty and is not assisted in any way by sub-paragraph (*a*)(ii). The need for the first part of sub-paragraph (*a*)(i), as well as sub-paragraph (*a*)(ii) appears unclear, and it is submitted that these provisions serve no purpose and can be removed.

Section 19(2) provides implied terms that will be the default position in respect of the relevant aspects in the absence of an agreement to the contrary (De Stadler "Section 19" in Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* Revision Service 1 (2016) 19–5). In the current matter, the date and place of when and where the service had to be performed were agreed upon expressly. Although not specifically mentioned it is safe to assume that the time for the performance was agreed expressly as well especially considering that the function was a wedding reception which by its nature starts at an appointed time. (In the absence of any specific mention of this aspect it is assumed that there was agreement on this as well, if not expressly then at least anticipated as provided by section 19(2). However, it would seem as if this aspect was not germane to the case, and nothing turns on it.) It would also appear that the cost was agreed upon expressly since a quotation was provided by the respondents and accepted by the complainant. Although not relevant to the present matter it appears that sub-paragraph 19(2)(*a*)(iii), paragraph 19(2)(*b*), and subsection 19(2)(*c*) do make sense in that in the absence of an agreement to the contrary these provisions read into the contract will provide much-needed certainty and serves to protect the consumer. For instance, section 19(2)(*c*) deals with the important aspect of the passing of risk. The provision states

that in the absence of an agreement to the contrary, the supplier bears the risk of goods being delivered until the consumer has accepted delivery.

It is submitted that all the relevant aspects, for which default rules are provided by section 19(2), have been expressly agreed upon between the parties. It is in any event clear that the real bone of contention is the date for the performance of the service. This has been expressly agreed with the result that in the ordinary course of events, section 19(2) would not find application to the matter at hand, contrary to what was held by the Tribunal (par 21). It is submitted therefore that the Tribunal's finding of prohibited conduct under section 19(2) on the part of the first respondent is incorrect as there was no need for implied terms to be incorporated into the contract as the parties had expressly agreed on the relevant aspects.

Assuming for the sake of argument that there was no agreement on the aspects in respect of which section 19(2) provides implied terms, especially the date of the performance, what would be the effect? Another question also arises and that is what the effect would be of the announcement of a general lockdown and the imposition of a curfew and prohibition of all social gatherings, including wedding celebrations as happened in this case, especially where there has been an expressly agreed date.

On the first question, and as indicated, it must be said that it is very difficult to see how section 19(2)(*a*)(i) can provide any assistance to clarify the matter in the absence of an agreed date, except in so far as the second part of the provision provides that the service is to be provided within a reasonable time after the conclusion of the transaction. Clearly, *in casu* the service could not be provided while prohibited from being provided. At best this must then mean that the service is to be provided within a reasonable time after it again has become possible to do so. It is clear from the facts that the respondents were not afforded that opportunity with the complainant indicating that they could not continue with the wedding celebrations (par 19). (It should be noted that the Lockdown restrictions were announced on 11 January 2021 and already on 8 February 2021 the complainant advised that they are not proceeding with the wedding as they cannot wait "indefinitely" (par 19).) It is submitted that the complainant (consumer) cannot rely on this provision and that the respondent cannot be held in breach of the provision in these circumstances. In any event, the facts are that there was indeed an express agreement as to the date for the performance of the service, which meant that the first respondent was under an obligation to perform on 16 January 2021 – a time at which providing the service was prohibited by law.

When performance in terms of a contract becomes objectively impossible due to no fault of one of the parties because of an unavoidable and unforeseen event, the obligations to perform in terms of the contract, as a rule, are extinguished (Naudé "Termination of Obligations" in Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 4ed (2022) 391. See also Van Huyssteen, Lubbe, Reinecke, and Du Plessis *Contract General Principles* 6ed (2020) 591–592). This is referred to as supervening impossibility of performance. There are two basic requirements to establish supervening impossibility, which is firstly that the performance must be objectively impossible (Naudé in Hutchison and Pretorius *The Law of*

*Contract in SA* 389). Objective impossibility does not necessarily mean absolute factual impossibility. So, for instance, will performance be considered objectively impossible where it is factually possible for the debtor to perform, but performance has become illegal because new legislation prohibits the performance (Naudé in Hutchison and Pretorius *The Law of Contract in SA* 390). Secondly, supervening impossibility requires that the impossibility must be unavoidable by a reasonable person. This means that the impossibility to perform must not be due to the fault of one of the parties but must be caused by an event that is beyond the control of the debtor, often referred to as *vis major* or *casus fortuitus*. Even if the happening of the event was foreseeable, it will still be *vis major* if it is unavoidable by a reasonable person (Naudé in Hutchison and Pretorius *The Law of Contract in SA* 390–391 and Van Huyssteen *et al Contract General Principles* 592–593). See also *Glencore Grain Africa (Pty) v Du Plessis NO* ([2007] JOL 21043 (O)) concerning the requirements for establishing supervening impossibility.

The effect of supervening impossibility is that it "discharges the contract" (Van Huyssteen *et al Contract General Principles* 592–593. See also Naudé in Hutchison and Pretorius *The Law of Contract in SA* 391 and Kerr *The Principles of the Law of Contract* 6ed (2002) 545). See further *KwaZulu-Natal Consumer Protector v Africa Wild Travel CC* (*supra* par 22) where the KwaZulu-Natal Consumer Tribunal states the following:

> "Our law makes provision for such circumstance where a *force majeur* causes a contract to become impossible to perform. In the case of *Peters, Flamman & Co v Kokstad Municipality* [1919 AD 427] the Court held that: 'if a person is prevented from performing his contract by *vis major* or *casus fortuitus* … he is discharged from liability.' The terms *force majeure*, *vis major* and *casus fortuitus* are used interchangeably and refer to an extraordinary event or circumstances beyond the control of the parties, a so-called 'act of God'."

Supervening impossibility then has the effect of extinguishing the contractual obligation and therefore also the duty to perform and the corresponding right to claim performance (Van Huyssteen *et al Contract General Principles* 592–593). The authors also observe that the reason for extinguishing the contractual obligations in the event of supervening impossibility is not so much that the event was caused by an unforeseen or unforeseeable event but rather that the event was not avoidable (Van Huyssteen *et al Contract General Principles* 593). As is the case with legislation prohibiting certain conduct it may be foreseeable but certainly not avoidable.

Back to the matter under discussion. Section 19(2) imposes certain obligations on the supplier when contracting with a consumer for the provision of services. These obligations are implied terms that will form part of the contract in the absence of an agreement between the parties to the contrary. Where a contract containing these implied terms is subjected to an event that constitutes supervening impossibility, such as legislation prohibiting performance, then the contract and the obligations imposed by it are extinguished.

The imposition of regulations in terms of the state of disaster which prohibited social gatherings after the conclusion of the contract but before the date of performance constitutes an event of supervening impossibility.

The KwaZulu-Natal Consumer Tribunal in *KwaZulu-Natal Consumer Protector v Africa Wild Travel CC* (*supra* par 24) summarises the position, albeit in the context of international travel, as follows:

> "The Covid-19 pandemic has been declared a global pandemic by the World Health Organisation and the effect of the prohibition on international travel would make the performance of the obligations under the contract impossible and would fall under the common law doctrine of *force majeur*. The general effect of a *force majeur* is that it extinguishes the obligations owed between the parties and no action for damages for a breach of contract is available to a party to a contract where the other party is unable to perform as a result of the *force majeur*."

It must follow that any obligations imposed by section 19(2) if it did in fact apply to the contract between the parties, were extinguished by the supervening event and therefore the respondent should not have been found to have been in breach of the provisions of the section.

As the respondent was found by the Tribunal to have also breached section 19(6) it stands to consider whether this provision is applicable. Section 19(6) reads as follows:

> "If the supplier tenders the delivery of goods or the performance of any services at a location, on a date or at a time other than as agreed with the consumer, the consumer may either-
> (a) accept the delivery or performance at that location, date and time; or
> (b) require the delivery or performance at the agreed location, date and time, if that date and time have not yet passed; or
> (c) cancel the agreement without penalty, treating any delivered goods or performed services as unsolicited goods or services in accordance with section 21."

De Stadler in Naudé and Eiselen (*Commentary on the Consumer Protection Act* 19–12), points out that the subsection specifically refers to a breach of the agreed terms regarding delivery or performance. This is an important observation as it was argued above that the parties had in fact expressly agreed on all relevant terms, particularly the date of performance. However, as also argued, the contract and the obligations agreed to therein, had terminated on the coming into effect of the regulations prohibiting social gatherings – the supervening *vis major* event. As there was no contract it must follow that there could not possibly have been a breach of the terms thereof. One may also argue that there could not be a tender to offer the performance "on a date or at a time other than as agreed with the consumer". The reason is simply that there was no agreement. De Stadler in Naudé and Eiselen (*Commentary on the Consumer Protection Act* 19–12) states that "[t]he use of the term "tendered" means that the subsection applies both to situations where delivery [performance] is made after the agreed upon date or where the delivery [performance] date has not yet passed, but where the seller has indicated that he will deliver [perform] at a different date." From this and the wording of section 19(6), it seems clear that the purpose of section 19(6) is to provide protection to a consumer in circumstances where a supplier attempts to force the consumer to accept the performance of a service or delivery of goods on a date or time or at a place other than as originally agreed. In other words, it is a remedy aimed at giving effect to the contract as agreed between the parties. The provision is

not aimed at enforcing a contract extinguished by operation of law. The offer (or tender) by the respondents to host the wedding celebration on another occasion, could not have constituted unsolicited services when it became objectively impossible to do so on the original date. To hold otherwise implies that the respondents were objectively able to comply with the obligations imposed by the contract, which they were not as performance had been rendered objectively impossible and the contract had been terminated.

Even if one accepts that there still was an agreement despite the supervening impossibility of performance, considering that the term "agreement" is defined quite widely in section 1 of the CPA, it is submitted that it is not possible to get around the fact that performance was no longer objectively possible. To attempt to find another mutually convenient date for performance can therefore not be interpreted to mean that it is an attempt to change the original date as performance on the original date is not objectively possible. (See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 par 18 where the Supreme Court of Appeal states that when interpreting a document "[a] sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.")

The Tribunal stated (par 24) "that the complainant's wedding celebrations had to be *cancelled* three days before it was to take place owing to a ban on social gatherings" (emphasis added). If that meant that there was a contract that was now cancelled by one of the parties, it is submitted that that is not correct. The contract terminated or was discharged because performance became objectively impossible. If there was a contract that was cancelled by the complainant (see par 25) then it may well mean that the respondents would be entitled to a reasonable cancellation fee as provided by section 17(3)(*b*) of the CPA. The matter should then in any event have been dealt with in terms of section 17 and not section 19. (Whether section 17 could have been used in this context is an open question.)

If the argument is accepted that the tender by the respondents to host the wedding celebrations on another date, is not unsolicited service then it follows that section 21(9) does not find application. This provision states:

> "If a consumer has made any payments to a supplier or deliverer in respect of any charge relating to unsolicited goods or services, or the delivery of any such goods, the consumer is entitled to recover that amount, with interest from the date on which it was paid to the supplier, in accordance with the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975)."

This does not mean that the consumer is without any recourse. In the event where supervening impossibility of performance results in the one obligation being extinguished in a situation of reciprocal obligations, then the counter-obligation is also extinguished (Van Huyssteen *et al Contract General Principles* 593). The extinction of the obligations creates a duty on the parties to return whatever performance has already been received in terms of the contract, and this duty can be enforced by way of an enrichment action (Naudé in Hutchison and Pretorius *The Law of Contract in SA* 391).

## 6 Conclusion

The facts in *National Consumer Commission v Crystal Tears Investment 206 CC t/a Misty River and Elizabeth Hoogenhout t/a Misty River* (*supra*) provide the opportunity to engage with aspects of section 19 of the CPA and the supplier's duty to perform in the context of a situation where there is supervening impossibility of performance.

It is argued that *in casu*, and contrary to what the Tribunal found, section 19(2) does not apply. The basic reason is that section 19(2) will find application in the absence of an agreement to regulate the aspects mentioned in the subsection, i.e., date, time, place, and cost of performance or delivery. These aspects were indeed expressly agreed between the parties, negating the need for the default rules of section 19(2). The note then considers the impact of supervening impossibility on the obligations created by section 19(2) in the event the provisions do find application. The effect of supervening impossibility generally is to discharge a contract resulting in the obligations created in terms of the contract being extinguished. This will apply with respect to both expressly agreed terms but also implied terms. Implied obligations imposed on parties in terms of section 19(2) will therefore be extinguished by the occurrence of a *vis major* event resulting in the objective impossibility of performing these obligations. When obligations are extinguished owing to the occurrence of an event which is not the fault of any of the parties then it is not correct to state, as the Tribunal did (see par 28), that there is a failure on the part of the debtor to perform. A party cannot fail to perform that which is objectively impossible to do.

The first respondent was found also to have breached section 19(6) of the CPA. The section provides that where a supplier tenders to perform the agreed services at a date, time, or place other than agreed with the consumer, the latter can "cancel the agreement without penalty, treating any delivered goods or performed services as unsolicited goods or services in accordance with section 21." It is argued that the purpose of section 19(6) is to uphold a contract and to protect the consumer by holding the supplier to what was originally agreed. A supplier cannot be held to perform that which has become objectively impossible to perform through no fault of the contracting parties. The section cannot be applied in the situation of supervening impossibility of performance and the Tribunal was incorrect in finding so.

*In casu*, it is suggested that section 19 does not find application. The matter is one where the happening of a *vis major* event caused performance to become impossible through no fault of the parties involved. The contract was terminated and the obligations in terms thereof extinguished. This gave rise to a duty on the part of the first respondent to return the money already received, and which return was enforceable by way of an enrichment action. Section 19 is not appropriate for addressing a situation of supervening impossibility. Considering that there was no breach of sections 19(2) and (6), there was no prohibited conduct, and the imposition of an administrative fine therefore was not proper.

Lastly, it is a pity that the supplier apparently did not avail itself of legal advice as this may have contributed to the legal issues being aired more thoroughly – and may well have saved the supplier from an administrative fine.

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