THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 250/07

Name of ship: *MV 'SNOW CRYSTAL'*

In the matter between:

TRANSNET LIMITED t/a NATIONAL PORTS AUTHORITY **Appellant**

and

THE OWNER OF THE *MV* '*SNOW CRYSTAL*' **Respondent**

Coram: **SCOTT, FARLAM, CLOETE, COMBRINCK JJA et HURT AJA**

Date of hearing: **3 MARCH 2008**

Date of delivery: **27 MARCH 2008**

Summary: Use of dry dock – does dock master contract or perform administrative function? – *mora ex re* – supervening impossibility – damages – general or special.

Neutral citation: *Transnet Ltd v The MV Snow Crystal* (250/07) [2008] ZASCA 27 (27 March 2008)

SCOTT JA/…

SCOTT JA:

[1] The respondent is Snow Crystal Ltd, a company registered in the Cayman Islands. It is the owner of the *MV Snow Crystal*, a fruit carrying reefer vessel which is managed by Holy House Shipping AB of Stockholm, Sweden. It instituted an action *in personam* against the appellant in the High Court, Cape Town, (exercising its admiralty jurisdiction) for the payment of damages arising from the failure on the part of the latter to make the Sturrock dry dock in Cape Town harbour available for the docking of the vessel during the period 1 to 14 December 2001. The matter came before Davis J who upheld the respondent's claim for damages under certain heads but rejected its claim under others. The appeal is with the leave of the court *a quo*. There is no cross-appeal.

[2] It was common cause both in this court and in the court below that the respondent's claim was a maritime claim within the meaning of s 1 of the Admiralty Jurisdiction Regulation Act 105 of 1983. It was also common cause that in terms of s 6(1)(b) of that Act the law to be applied was 'the Roman-Dutch law applicable in the Republic'. In its plea the appellant denied the existence of the contract relied upon by the respondent. The issues on appeal were the existence or otherwise of a contract between the parties, and if there was a contract, its nature and scope, its terms, whether the appellant was precluded from performing by reason of a supervening impossibility, and the respondent's entitlement to damages. Before dealing with these issues it is necessary to set out the facts upon which the respondent based its claims. Much is common cause.

[3] In 2002 the *Snow Crystal* was on time charter to Universal Reefers. In terms of the charterparty, which made provision for a 'long term' charter, the charterers were given the option of trading with the vessel for either eight months of the year or for the full year. The charterers chose the eight-month option for 2002. It was the practice of Holy House Shipping to operate the vessel on the spot market during the off-hire period. In that year, however, it was decided to use part of the four-month period to have the vessel repaired

and surveyed for classification purposes. The charter period had been negotiated to recommence in Cape Town on 14 December 2002. Mr Thure Gellerbrant, a technical superintendent in the employ of Holy House Shipping, accordingly made arrangements for the vessel to be laid-up and dry docked in Cape Town. The first step in the process was to contact Mr Ivan Separovic. He was both the sole member of I Separovic CC, which traded in Cape Town as Ivan Engineering, and the proprietor of Quay Maritime Services. Ivan Engineering was duly engaged to carry out the steel and pipe repairs on the vessel and Separovic in his capacity as proprietor of Quay Maritime Services, was instructed by Gellerbrant to make a dry dock booking.

[4] Separovic spoke to Mr Etienne Gouws, the dock master, as early as March 2002. The latter advised Separovic that the Sturrock dry dock was available for the period 1 December to 14 December 2002 and a booking was made for that period. On 15 March 2002 Separovic wrote to Captain Lock, the acting port captain, recording that the dry dock had been booked for that period, describing the work to be done on the *Snow Crystal* and seeking information regarding the availability of berth 700, being the repair berth, from October to December 2002.

[5] Early in June 2002 Gouws requested Separovic to put in what he described as an 'official booking' for the vessel. Separovic duly completed a printed form prepared by the appellant. It is necessary to describe this form in some detail. It is headed 'Portnet: Port of Cape Town' with a subheading 'Application for the use of drydock, or syncrolift' (Portnet is a division of the appellant). The form, as filled in, commences 'I/we Quay Maritime Services request that the vessel: *Snow Crystal* be dry docked . . . from 1.12.2002 (date) to 14.12.2002 (date)'. What follows is a record of the vessel's particulars such as gross tonnage, overall length and 'extreme' breadth. Spaces for other particulars such as the vessel's draft were left uncompleted. The document was signed by Separovic and dated 5 June 2002 as agent for the vessel. It is not disputed that he had authority to do so. A space left for the signature of the dock master was left blank. The words 'See reverse side for conditions' are printed at the foot of the page. The reverse side of the form

contained three printed paragraphs. The first was headed 'Declaration'. Its grammatical construction is less than perfect and it contains a number of printing errors. It is necessary to quote it in full.

DECLARATION

'I

(1) Declare regulations 60(1) of the Regulations for the Harbours of the Republic of South Africa and that I understand and concur with the Provisions of that regulations.

(2) That all shore-side connections required by the vessel, especially fire-fighting water connections, is my responsibility and are operating to my satisfaction and that the ongoing integrity of these connections shall be my responsibility for the duration of the period which my vessel occupies the Drydock.

(3) I take note that the salt water is free of charge and fresh water is payable as per Harbour Tariff book and agree to monitor the consuming thereof in order to accept the Applicable charges.

(4) That the sides of my vessel will be kept clear by removing all over board smoking buoys, EPIRB buoys, lights etc which might be in the way of the crane wires.

(5) Only accredited shiprepair firms to be used.

(6) The gangway on board to be kept in a sole and serviceable condition and not misused.'

It is common cause that in subparagraph (1) the reference to 'Regulations 60(1)' should be to 'Regulation 61' and that the words 'to be applicable' should be inserted after the words 'South Africa'. Paragraph 2 of the reverse side of the form deals with spray painting in the Robinson dry dock and when the syncrolift is used. Paragraph 3 contains various conditions relating to pollution control in the dry dock facilities.[1]

[6] Regulation 61(1) is of particular importance. It reads:

'(1) Before a ship is admitted to a drydock in a harbour the name and full particulars of the ship shall be entered in a book to be kept for that purpose at the port office of the harbour, and the owner, master or agent of the ship shall sign an agreement acknowledging himself to

[1] The Regulations for the Harbours of the Republic of South Africa were promulgated in terms of s 73(1) of the South African Transport Services Act 65 of 1981. In terms of s 21(2) of the Legal Succession to the South African Transport Services Act 9 of 1989 the regulations continue to be in force and are deemed to have been promulgated in terms of s 21(1) of the latter Act.

be bound by the following conditions and undertaking to pay the applicable charges specified in the Official Harbour Tariff Book.'

I interpose that Gouws explained in his evidence that the form completed and signed by Separovic was called 'an application form' but it was 'basically' the agreement envisaged in regulation 61(1). As stated in that regulation, the 'conditions' by which the owner, master or agent agrees to be bound are set out in regulations 61(2) to (19). Not all of these have a bearing on the issues in the appeal and I quote below those that have some relevance to a greater or lesser degree.

'(2) When ship may lose her turn.

Should a ship not be placed in a drydock on a day duly appointed for that purpose owing to the default of the master, such ship shall, if the drydock be required for other ships, lose her turn in the order shown in the entry book, and the master, owner or agent of such ship shall pay to the Transport Services the expenses, if any, which may have been incurred in preparing the drydock for the reception of such ship.

(3) When preference may be given.

Notwithstanding any previous arrangements to the contrary, the port captain may give priority to any ship in a damaged or leaky condition or to a ship that requires a drydock for a period not exceeding seventy two hours.

(4) No ship to have absolute right to use drydock.

No ship shall have an absolute right to the use of a drydock either in turn or at any other time. The decision of the port captain in all cases of dispute as to turn, shall be final.

(5) . . .

(6) Ships to be drydocked under supervision of dockmaster.

Every ship shall be drydocked under the direction and supervision of the dockmaster and in the presence of the master, whose duty it shall be to be present at the time appointed for drydocking, and to remain there until such drydocking is completed.

(7) When ship to be considered as properly placed on blocks or cradle.

When the dockmaster has declared a ship to have been properly and safely placed upon the blocks of a drydock or cradle of a slip, the master shall forthwith satisfy himself that his ship has been so properly and safely placed, whereupon the ship shall be deemed to have been properly and safely drydocked or slipped.

(8) How two or more ships in one drydock to be dealt with.

(a) When two or more ships are in joint occupation of a drydock such ships shall remain in the drydock until such time as all are capable of being floated; but no ship shall be charged for the use of the drydock beyond the time she

actually requires it; provided that the master of such ship has given to the port captain twenty four hours notice in writing of the readiness of his ship to leave the drydock and the port captain is satisfied that the notice is correctly given.

(b) The port captain may, however, after having given twenty four hours written notice, forthwith order the undocking of any or all of such ships as may be ready to leave the drydock, and may also admit any other ship to the occupation of the drydock, jointly with a ship already in occupation thereof.

(9) Limit of time for occupation of a drydock.

(a) No ship shall remain in occupation of a drydock for a longer period than four days, except by the authority of the port captain.

(b) The master of a ship shall arrange for such overtime to be worked in carrying out repairs as the port captain may consider necessary.

(10) Ships failing to leave drydock.

A ship which fails to leave a drydock on the expiration of the period agreed upon may, if the drydock be required by another ship, be removed at the expense of the owner of such ship after twenty four hours written notice has been given. If the ship should not then be capable of being floated, the port captain may cause such ship to be made capable of being floated at the expense of its owner.'

[7] I return to the narrative. On 20 August 2002 Separovic wrote to the port captain, Captain Peter Stowe, confirming the berthing of the *Snow Crystal* and recording that the vessel was booked to be dry docked for two weeks from 1 December 2002. The letter further sets out the nature of some of the major work to be done on the vessel.

[8] The *Snow Crystal* arrived in Cape Town on 16 October 2002. The internal work was commenced immediately according to the schedule prepared by Gellerbrant who at that stage spent about a week in Cape Town. Gellerbrant returned on 26 November 2002 to oversee the dry docking of the vessel.

[9] One of the two vessels then in the Sturrock dry dock was the *MV Gulf Fleet 29.* It had been booked for the period 7 to 30 November but had entered the dry dock six days late on 13 November. The owner had, however, assured Gouws that the work would be completed in 14 days. On 26 November Mr John Marques of Globe Engineering (Pty) Ltd, the manager in charge of the

repairs to the *Gulf Fleet 29*, advised Gouws that he was running one to two days late. Gouws informed Separovic and they discussed putting the Globe Engineering on notice as provided for in regulation 61(10). Gouws said that he telephoned Marques who adopted a hostile attitude and told Gouws the notice would mean nothing because the hull of the *Gulf Fleet 29* was 'open'. But on that same day, 26 November 2002, the dry dock had been flooded and the *Gulf Fleet 29* 'floated on her tank tops' so as to enable the other vessel to leave the dock. The *Gulf Fleet 29* was settled back on her blocks the following day, 27 November. The expression 'floating on the tank tops' means in effect floating the vessel with certain sections flooded, in this case by reason of openings of about a square metre on both the port and starboard sides of the hull which permitted the ingress of water. It should be mentioned at this stage that Mr Paul Coxin, a marine engineer and surveyor who gave evidence on behalf of the appellant, conceded in cross-examination that the owners would not have permitted the *Gulf Fleet 29* to be floated if the vessel was not structurally sound.

[10] On 28 November Gellerbrant visited the workshop of Globe Engineering which was situated in close proximity to the Sturrock dry dock. He said he spoke to Marques who was uncooperative and took up the attitude that the *Gulf Fleet 29* would remain in the dry dock until the work was finished, however long it took. According to Gellerbrant, the openings in the hull where the plating had been cropped out could be closed in a matter of hours.

[11] On the same day, 28 November, Gouws met with Mr Tom Larkin, the commercial manager of Globe Engineering, and offered him the use of the Robinson dry dock. That dry dock, built in the 19th century, was too small for the *Snow Crystal* but was large enough to accommodate the *Gulf Fleet 29.* Gouws said that his proposal was not well received by Larkin. The Robinson dry dock was at the other side of the harbour and Larkin was not prepared to have the vessel taken there floating on her 'tank tops'. He said that in any event the vessel would be leaving the Sturrock dock on 4 December. Gouws testified that by 28 November he was in 'big trouble' and 'getting desperate' because the 'whole world was aware of the seriousness [of the situation]'. It

was for this reason, he said, that he was even prepared to consider floating the *Gulf Fleet 29* to the Robinson dock on her tank tops.

[12] On Friday 29 November 2002 Gouws sent Gellerbrant an e-mail which read:

'This serves to confirm your drydock booking by Thure Gellerbrant for Mv Snow Cristal on 05/06/02 for Sturrock drydock on or about 01/12/02. However the drydock is running behind schedule at present and therefore we can only drydock you on or about 06/12/02. We regret any inconvenience caused.'

He explained that he had said 6 December 2002 because he anticipated it could take time to set up the blocks for the *Snow Crystal.*

[13] Both Gellerbrant and Separovic were of the view that the openings in the hull of the *Gulf Fleet* 29 could easily be closed and on receipt of the email Gellerbrant spoke to Gouws and indicated to him that the respondent was prepared to pay the expenses involved in moving the vessel to the Robinson dock. It is necessary to record that the experts who testified on behalf of both parties were in agreement that it would have been a simple matter to close up the openings in the hull to enable the vessel to be taken to the Robinson dry dock. Coxin stressed, however, that for this to have been done the vessel would have to have had the necessary structural integrity. As previously indicated, Coxin acknowledged that the vessel must have had the necessary structural integrity for it to be floated on the top tanks on 26 to 27 November.

[14] On Wednesday, 3 December, Marques advised Gouws that the surveyors had condemned the keel coolers of the *Gulf Fleet 29.* These are situated at the bottom of the vessel and their function is to cool the water in the engine cooling system. Their condemnation at such a late stage was advanced by Marques as a reason for further delay. He advised Gouws that the vessel would accordingly leave the dry dock only on 6 December 2002. It transpired, however, that the coolers were internal and not external so that if it were necessary to re-float the vessel, it would have been a simple matter to weld up the pit or fit a steel plate over whatever hole that was there.

[15] On Thursday 4 December Marques advised Gouws that because it had been raining the *Gulf Fleet 29* would not be leaving the dry dock over the weekend and that he planned to undock the vessel on Monday 9 December. On 5 December Gellerbrant and Separovic met with Stowe (the port captain) and Gouws, to discuss the situation. Gellerbrant explained that he would probably have to change his plans completely and that somebody would have to pay. Gouws's attitude was that what had happened was not his fault. He also told Gellerbrant that they could expect the *Snow Crystal* to enter the dry dock on 10 December at the earliest. The following day Gellerbrant wrote to the director of the port authority advising him of what had happened and that he would have to cancel the dry docking of the vessel in Cape Town. On 10 December 2002 and on the instructions of Gellerbrant, Separovic cancelled the dry docking. On the same day the *Gulf Fleet 29* finally left the dock.

[16] Gellerbrant immediately took steps to engage a diving company to scrape the bottom of the vessel and polish the propeller. He explained that this was a temporary measure but that it was necessary to remove the growth which would otherwise have retarded the movement of the vessel through the water and increased the fuel consumption. This, he said, was all the more necessary as the vessel had been alongside in port since 16 October 2002 and the absence of movement resulted in a rapid increase in the growth on the hull and propeller. He also arranged to have the top-side and boot top of the vessel painted so that she would be in a condition to be presented to the charterers when loading was to commence on 14 December 2002. The vessel was subsequently dry docked from 15 November to 1 December 2003 in Varna, Bulgaria, where the work that would have been done in the Sturrock dock was done with some minor additional work.

[17] When the matter first came before Davis J the learned judge was asked to decide a single issue on the basis of an agreed statement of facts. That issue, separated by prior agreement, was whether regulation 61(4) (quoted in para 6 above), in any event, had the effect of absolving the appellant from liability for any damages which may have been caused to the appellant as a result of a failure on the part of the appellant to comply with its

contractual obligations. In a separate judgment the judge found that regulation 61(4) did not have that effect. The appellant lodged an application for leave to appeal but did not persist in the application.

[18] I turn now to the first issue raised on appeal; was there a contract? On behalf of the appellant it was contended that the relationship between the parties was governed by the regulations, that the booking was not made *animo contrahendi* and hence there was no contract. Counsel argued that the port captain and those under him, such as the dock master, were constrained to act in terms of the regulations and there was no need for ship owners wishing to make use of the harbour and its facilities to enter into a contract for that purpose. Those facilities, so it was argued, were available to be used on the basis set out in the regulations and against payment of the charges set out in the Official Harbour Tariff Book; all that was necessary for those wishing to use a particular facility was for them to make appropriate arrangements with the officials of the appellant. In short, the submission was that they book the facilities, they do not enter into contracts for that purpose.

[19] The appellant was established in pursuance of s 2(1) of the Legal Succession to the South African Transport Services Act 9 of 1989. Although it is 'competition- and profit-orientated',[2] the State owns all its shares and it remains an organ of state exercising a public power and performing a public function which includes the provision of transport services in the public interest.[3] The regulations, in turn, provide for a regulatory scheme for the conduct of operations in harbours. Many are indubitably public law provisions regulating public law relationships. To mention just a few, regulations 2 and 11 provide that permission of the port captain is required before a ship may enter a harbour or, within a harbour, shift from the berth assigned to her; regulation 4 provides that no ship may enter a harbour until the proper signal has been displayed at the port control; regulation 38 prohibits the deposit of foreign matter in a harbour; regulation 161 provides that any person who contravenes or fails to comply with any of the regulations shall be liable on

[2] *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001(1) SA 853 (SCA) at 870G.
[3] *Transnet Ltd v SA Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para 8 at 290C-D.

conviction to a fine not exceeding eight hundred rand or imprisonment for a period not exceeding two years.

[20] There are other regulations, however, which are couched in the language of contract. Regulations 34 and 35, for example, make provision for the 'hire' of cranes and floating cranes and detail the terms and conditions that are to apply. These include when the 'hire charges' are to commence, limitations as to the use to which cranes may be put 'while under hire' and the non-liability of the appellant 'for any loss or delay suffered by the hirer'. Regulation 61 is even more specific. In terms of regulation 61(1) the ship owner or agent is to 'sign an agreement' (in practice the application form referred to in para 5 above) in terms of which he acknowledges himself to be bound by the 'conditions' in regulation 61 and undertakes to pay the applicable charges specified in the Official Harbour Tariff Book.

[21] An organ of state which is empowered by statute to contract is obliged to exercise its contractual rights with due regard to public duties of fairness.[4] It could not, for example, refuse without good reason to contract with a particular person. Its decision in such an event would constitute administrative action and would be reviewable.[5] Even when it is clear that an organ of state has in fact entered into a contract, it may still be difficult, depending on the circumstances, to determine where the line is to be drawn between, on the one hand, its public duties of fairness and on the other its contractual obligations, or indeed the extent to which the two may overlap, if at all. However in the present case, as I have indicated, the appellant's initial stance was that there was no contract at all. On this basis it contended that any remedies that the respondent may have had were confined to those at public law and that the respondent had accordingly misconceived its remedy.

[22] I do not think that this can be correct. It is not disputed that the appellant was empowered to enter into contracts. It is also clear that the

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[4] *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) para 11 at 467H.
[5] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 28 at 325E.

respondent in effect gave an undertaking to be bound by the conditions referred to in regulations 61(2) to 61(19) and to pay the applicable charges. That undertaking, which was accepted by the appellant, was an ordinary commercial undertaking given in this instance by a peregrine. In these circumstances, counsel for the appellant found themselves obliged to concede that had the *Snow Crystal* been dry docked, the respondent would have been liable to the appellant for such charges. Indeed, any suggestion that in that event the only remedy available to the appellant would have been to institute a prosecution would be untenable. But the only basis upon which that liability could arise would be in contract. If there was no contract, there could be no liability.

[23] In response to this difficulty, counsel shifted their ground somewhat and advanced a further argument which, as I understood it, was that the contract entered into between the respondent and the dock master on behalf of the appellant was not a contract with reciprocal obligations. The argument was that the undertaking given by the respondent to pay the charges and abide by the conditions, although giving rise to contractual obligations, was not given in return for an undertaking to make the dry dock available but was given merely in anticipation of the dock master exercising his statutory power derived from the regulations to make the dock available. Consequently, so the argument proceeded, the dock master had no obligation in contract to make the dock available and his failure to do so could not give rise to liability in contract.

[24] I must confess that this construction of the contractual relationship between the parties strikes me as contrived. An undertaking to pay is not one normally given without a reciprocal obligation, save for donations. Indeed, I would imagine that the suggestion that the undertaking was given other than in return for a reciprocal obligation would come somewhat as a surprise for the respondent. But this aside, there is, I think, a sound basis for rejecting the contention. The agreement contemplated in regulation 61(1) is not one that is limited simply to the ship owner acknowledging himself to be bound by the conditions and undertaking to pay the specified charges. The agreement

contemplated is one which includes a term - and a most important term from the ship owner's point of view – as to when the ship is to enter the dry dock and the duration of her stay. This much is clear from the provisions of regulation 61(10) which makes provision for the removal of a ship which fails to leave the dry dock 'on the expiration of *the period agreed upon*' (my emphasis). In the present case, it is clear that it was a term of the agreement, subject to a degree of flexibility to which I shall refer later, that the *Snow Crystal* would enter the dry dock on 1 December 2002 and leave on 14 December 2002. The term was of importance to the respondent; the schedule of the vessel had been arranged to fit in with the period she would be in dry dock. But the regulations do not determine the period; it is determined by agreement between the parties. To suggest in these circumstances that the obligation to pay was assumed other than in return for a reciprocal obligation on the part of the appellant to make the dry dock available for the period agreed upon is simply to ignore the commercial nature of the transaction and in my view cannot be upheld.

[25] The obligation in contract to make the dock available was, however, subject both to certain limitations and to a degree of flexibility. As to the limitations, the respondent pleaded that it was a tacit term that the appellant would be relieved of its obligation in the circumstances referred to in regulation 61(3) or in the event of a dispute as to turn referred to in regulation 61(4). Neither of these occurred and they need not be considered. The respondent also pleaded that it was a tacit term of the agreement that the appellant would be relieved of its obligation if for some reason beyond its control it was not possible to make the dry dock available. This was not a tacit term in the true sense. It is always possible, as a matter of law, for a party to raise the defence of impossibility of performance. The onus of establishing that defence is upon the party raising it and I do not think that the fact it was pleaded by the respondent (as plaintiff) can alter the onus of proof.

[26] As far as the question of flexibility is concerned, Gouws stressed that in his letter of 29 November 2002 he had referred to the period for which the *Snow Crystal* had been booked as 'about' 1 December 2002 to 14 December

2002. He pointed out that by the very nature of the operation of a dry dock there had to be a degree of flexibility. This was not disputed by the respondent. Gellerbrant testified that he had made some allowance for a possible delay and, as I understood his evidence, the work on the *Snow Crystal* could have been completed by 14 December 2002 even if the vessel had entered the dry-dock as late as 4 December 2002. He acknowledged that delays of two to three days in a dry dock being made available do occur from time to time but this, he said, was not normal. In the present case, as I have said, the *Gulf Fleet 29* left the dock on 10 December so that it would only have become available for the *Snow Crystal* on 11 or possibly 12 December.

[27] It is trite law that when a contract fixes the time for performance, *mora* will arise from the contract itself and hence the *mora* is said to be *ex re*. In such a case there is no need for the creditor to make a demand to place the debtor in *mora*. Where the contract fixes the time for performance as 'about' a certain date, or, I should add, it is contemplated by the parties that some latitude will be allowed, the same principle is said to apply, it being in such a case a matter of interpretation how much latitude was intended.[6] In the present case, time was clearly of the essence. Ships operate on tight schedules and Gouws was at all times aware of this. Even as early as 28 November 2002 Gouws regarded himself as being in 'big trouble' in the face of the respondent's need to have its vessel dry docked. Regulation 61(10) makes provision for 24 hours notice being given to a ship that fails to leave the dry dock on the expiration of the period agreed upon. That notice can only be given once the period expires. The latitude contemplated must accordingly have been longer than the notice period but not by much. In my view, the appellant must be regarded as having being in *mora* from at least 4 December 2002.

[28] This brings me to the appellant's defence of supervening impossibility of performance. As a general rule impossibility of performance brought about by *vis major* or *casus fortuitus* will excuse performance of a contract.

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[6] *Bergl & Co v Trott Bros* (1903) 24 NLR 503; Christie *The Law of Contract in South Africa* 5 ed 498.

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'.[7] The rule will not avail a defendant if the impossibility is self-created;[8] nor will it avail the defendant if the impossibility is due to his or her fault.[9] Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant.[10]

[29] In the present case the 'impossibility' on which the appellant relied was the physical presence of the *Gulf Fleet 29* in the Sturrock dry dock and the apparent refusal of Globe Engineering to countenance a move to the Robinson dry dock which was available. The proposal to move the *Gulf Fleet 29* was put to Globe Engineering as early as 28 November 2002. On that same day the vessel was floated on her tank tops and must have been structurally sound. It was ultimately common cause between the experts that had the vessel been ordered to move it would have been a relatively simple matter to close up the openings in the hull and move the vessel to the Robinson dry dock. In terms of regulation 61(10), which was a term of the appellant's contract with the owner of the vessel, the dock master had the power, on 24 hours written notice, to take action to remove the vessel from the dry dock. Nonetheless, the dock master failed to give such notice for fear of upsetting the contractors who had adopted an uncooperative attitude and in the belief that the notice would not be heeded. His approach to the problem, he explained, was to try to keep everyone 'quiet and calm and get the job done'. But it was obviously convenient for Globe Engineering to complete the work while the vessel was in the Sturrock dock. Their workshop was close to the Sturrock dock and the move would have caused a disruption in the

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[7] Per Stratford J in *Herman v Shapiro & Co* 1926 TPD 367 at 373 quoted with approval in *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (SCA) at 1206D-E.
[8] *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) paras 23-25).
[9] *MacDuff & Co Ltd (In Liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 601.
[10] *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982(1) SA 398 (A) at 442B-443F.

progress of the work. It is no doubt for this reason that Marques adopted the hostile and uncooperative attitude that he did.

[30] It was a term of the contract between the parties that the dock master would have the power afforded to him in terms of regulation 61(!0). The respondent was accordingly entitled to expect the dock master to exercise that power when the *Gulf Fleet 29* failed to vacate the dry dock. In these circumstances, I do not think it was open to the dock master simply to take up the attitude that notice to the *Gulf Fleet 29* would have served no purpose. As I have said, the Robinson dry dock was available and with a minimum of work the vessel could have been made capable of being moved to that dock. Had notice been given it is probable that Globe Engineering's bluff would have been called. I am unpersuaded that the appellant discharged the burden of establishing that performance of its obligation in terms of the contract was rendered impossible.

[31] I turn finally to the question of damages. The court *a quo* awarded damages under three heads. The first was in respect of the costs of cleaning the bottom of the vessel and the propeller while the vessel was afloat in Cape Town harbour. The evidence was that this was a temporary measure necessary to remove the accumulated underwater growth so as to enable the vessel to operate efficiently until such time as the work could be done properly in a dry dock. The appellant contended that it had not been shown that the work was necessary. The court *a quo* found that it had been shown to be necessary and I can see no reason for interfering with that finding. It was not in dispute that the charges of the contractor who did the work were reasonable.

[32] The second head related to certain of the costs associated with the painting of the vessel. Before the vessel left Cape Town harbour and while afloat, her boot topping and top sides were painted. The condition of the paintwork was such that these had to be painted before the vessel could be presented to the charterers. Had the work been carried out in the dry dock the paint would have lasted until the next dry docking three years later. But

because it was done with the vessel in the water it was necessary for certain of the work to be redone when the vessel was painted in dry dock at Varna. Again, the reasonableness of the amount claimed for this work was not in dispute.

[33] The damages awarded under the third head were in respect of loss of charter hire during the period 15 November 2003 to 1 December 2003 while the vessel was dry docked in Varna. Mr Andrew Hamill, the head of the operations and chartering department of Holy House, testified that when Universal Reefers, the charterers of the *Snow Crystal*, exercised the eight-month option, the vessel was chartered on the spot market during the remaining four months of the year. He said that Universal Reefers had chosen the eight-month option in 2003 as they had done in 2002. He explained that it was part of his function to keep abreast of the rates at which vessels were chartered on the spot market. Relying on the rate at which a similar vessel was chartered for the period November to December 2003 he expressed the view that had the *Snow Crystal* been available to be chartered on the spot market during the period she was in dry dock at Varna, Holy House would have been able to obtain hire in an amount of US$0,46 per cubic foot net per day. On this basis he calculated the loss suffered during the period in question to be US$156 424,63. He explained, too, that because the commencement of the eight-month or 12-month period was not predetermined it would have been possible to negotiate the commencement date to fit in with the expiry of the spot charter. Hamil's evidence was not disputed and was accepted by the trial judge.

[34] The principal attack on the award of damages under all three heads was founded on the submission that none of these flowed naturally and generally from the breach relied upon by the respondent and that they were to be regarded as special damages. Accordingly, so it was argued, it was incumbent on the respondent to show not only that it was contemplated at the time of contracting that such damages would flow from the breach but also, in

the light of *Lavery & Co v Jungheinrich*[11], that the contract was entered into on the basis of the parties' knowledge of special circumstances so that in substance they formed part of the contract itself.

[35] The distinction between 'general damages' and 'special damages' (being no more than convenient labels) formulated by Trollip JA in *Schatz Investments (Pty) Ltd v Kalovyrnas* 'broadly and without any pretence at precision'[12] was refined by Corbett JA in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*[13] as being between:

'(a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach.'

In *Thoroughbred Breeders' Association v Price Waterhouse*[14] Nienaber JA doubted whether by the use of the word 'probable' in (a) in the passage quoted above, Corbett JA intended to introduce 'high probability' as a further limiting factor under the first subrule. After referring to authorities both in South Africa and in England, Nienaber JA concluded that the harm that had to be contemplated was no more than harm 'as a realistic possibility'. Whether such harm would be contemplated or not, ie in the case of the first subrule, may be inferred from 'the subject-matter and terms of the contract itself'.[15] On that premise the inquiry is essentially whether the harm as a realistic possibility was reasonably foreseeable. As observed by Vieyra AJ (with whom Marais J and Jansen J concurred) in *Bruce NO v Berman*.[16]

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[11] 1931 AD 156. See also *Schatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) where at 551B it was suggested that the approach adopted in *Lavery* be reconsidered.
[12] 1976 (2) SA 545 (A) at 550C-E.
[13] 1977 (3) SA 670 (A) at 687D-F.
[14] 2001 (4) SA 551 (SCA) para 49.
[15] *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 552B.
[16] 1963 (3) SA 21 (T) at 24A-B.

'. . . one inevitably is concerned with the question of foreseeability because unless one can say that the defaulting party should have foreseen the consequences of his breach one can hardly be heard to contend that the loss can be reasonably said to flow naturally.'

To sum up therefore, to answer the question whether damages flow naturally and generally from the breach one must inquire whether, having regard to the subject-matter and terms of the contract, the harm that was suffered can be said to have been reasonably foreseeable as a realistic possibility. In the case of 'special damages', on the other hand, the foreseeability of the harm suffered will be dependent on the existence of special circumstances known to the parties at the time of contracting. For the reasons that follow it is unnecessary for the purpose of this judgment to revisit the decision in *Lavery & Co v Jungheinrich* and to consider the further question whether the contract must be entered into 'on the basis' of the parties' knowledge of those circumstances.

[36] It is common knowledge in shipping circles that ships operate on tight schedules and to delay a ship or disrupt its schedule can and usually does have far-reaching commercial consequences. This was emphasized by Didcott J in *Katagum Wholesale Commodities Co Ltd v The MV Paz*[17] who observed, albeit in the context of attachments:

'To stop or delay [a ship's] departure from one of our ports, to interrupt its voyage for longer than the period it was due to remain, can have and usually has consequences which are damaging to its owner or charterer, not to mention those who are relying upon its arrival at other ports to load or discharge cargo.'[18]

In the present case the *Snow Crystal* was to be dry docked for the relatively lengthy period of 14 days for general repairs and surveying for classification purposes. It goes without saying that the managers of the vessel would have planned a schedule around the period the vessel would be dry docked and during which the vessel would necessarily be off hire or otherwise out of

[17] 1984 (3) SA 261 (N) at 269H
[18] Quoted with approval by Corbett CJ in *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 581G-H.

commission. Indeed, the period 1 to 14 December 2002 had been agreed upon at least six months in advance. In these circumstances, the last minute failure of the appellant to make the dry dock available for the period agreed upon would inevitably mean that the vessel would again have to go off hire or be out of commission when dry docked at some time in the future. The loss of hire sustained while the vessel was dry docked in Varna was therefore, in my view, clearly foreseeable as a natural consequence of the breach and its foreseeability was not dependent on the existence of special circumstances. By the same token an experienced dock master, such as Gouws, would have known or at the least would have regarded it as highly probable that as soon as the repair work was completed and the vessel left the dry dock she would go back on hire or into service in accordance with a pre-planned schedule. Once the planned dry docking did not come about, the need for some temporary work to enable the vessel to go back into service or, for that matter, the possibility of work that had to be done while the vessel was afloat having to be redone when the vessel was subsequently dry docked, would be foreseeable as a realistic possibility. It is true that the precise nature of such work may not have been foreseen, but that would not mean that the loss did not flow naturally from the breach.

[37] It follows that in my view the court *a quo* was correct in awarding the damages it did and the appeal must fail.

[38] The appeal is dismissed with costs, such costs to include those occasioned by the employment of two counsel.

D G SCOTT
JUDGE OF APPEAL

CONCUR:

FARLAM JA
CLOETE JA
COMBRINCK JA
HURT AJA