THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no. 1134/2020

Reportable

In the matter between:

POST OFFICE RETIREMENT FUND	**Appellant**
and	
SOUTH AFRICAN POST OFFICE SOC LTD	**First Respondent**
MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES	**Second Respondent**
SOUTH AFRICAN POSTAL WORKERS UNION	**Third Respondent**
COMMUNICATION WORKERS UNION	**Fourth Respondent**
DEMOCRATIC POSTAL AND COMMUNICATIONS UNION	**Fifth Respondent**

Neutral citation: *Post Office Retirement Fund v South African Post Office SOC Ltd and Others* (Case no. 1134/2020) [2021] ZASCA 186 (30 December 2021)

Coram: Petse AP, Makgoka and Plasket JJA and Molefe and Unterhalter AJJA

Heard: 11 November 2021

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Summary: Posts and Telecommunications-Related Matters Act 44 of 1958 – rules of Post Office Retirement Fund (the Fund) – rule 3 requires the South African Post Office (SAPO) to pay to the Fund pension contributions, including employees' contributions, on a monthly basis – SAPO stopped paying contributions – rule 3 places an obligation on SAPO to pay contributions – the obligation to pay has not been

extinguished or deferred by intervening impossibility of performance – the obligation to pay may not be avoided by SAPO deciding not to pay the Fund, but to pay other creditors instead.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kubushi J sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following order:

'1 It is declared that the South African Post Office:

1.1 is obliged and required, in terms of rule 3 of the Post Office Retirement Fund's rules, to pay contributions, as defined therein, to the Post Office Retirement Fund on a monthly basis, in arrear, by not later than the first working day of each month; and

1.2 is in breach of this obligation in that it has not made the required payments since May 2020.

2 It is declared that the South African Post Office's obligations in terms of rule 3 of the rules have not been extinguished or deferred by intervening impossibility of performance.

3 The South African Post Office is directed to pay the costs of the Post Office Retirement Fund, including the costs of two counsel.'

JUDGMENT

Plasket JA (Petse AP, Makgoka JA and Molefe and Unterhalter AJJA concurring)

[1] The South African Post Office SOC Ltd (SAPO) – the first respondent in this appeal – is an organ of state that has provided postal services to the South African

public for many years. Its juristic form has varied over the years[1] but it now takes the form of a state-owned company, its continued existence in this form having been provided for by s 3 of the South African Post Office SOC Ltd Act 22 of 2011 (the SAPO Act). In terms of s 3(3), the 'powers and duties of the State as a member and shareholder of the Post Office must be exercised and performed' by the Minister of Communications and Digital Technologies, the second respondent in this appeal.

[2] Section 4(1) of the SAPO Act spells out SAPO's duties. It provides:

'Subject to the Postal Services Act and the licence issued to the Post Office in terms of the said Act, the Post Office must take reasonable measures, within its available resources, to achieve the progressive realisation of the following duties:

(a) Ensure the universal and affordable provision of postal services;

(b) ensure the provision of a wide range of affordable postal services in the interest of the economic growth and development of the Republic;

(c) be innovative in the provision of postal services;

(d) develop postal services that are responsive to the needs of users and consumers;

(e) ensure the achievement of universal access to postal services by providing an acceptable level of effective, reliable and regular postal services to all areas, including rural areas and small towns where post offices are not sustainable;

(f) ensure greater equity in respect of the distribution of services, particularly within the areas of the historically disadvantaged communities, including rural areas;

(g) ensure that the needs of disabled persons are taken into account in the provision of postal services;

(h) ensure the development of human resources and capacity-building within the postal industry, especially amongst historically disadvantaged groups;

(i) act in the best interest of postal users and other clients;

(j) maintain an effective and efficient system of collecting, sorting and delivering mail nationwide in a manner responsive to the needs of all categories of mail users;

(k) actively provide and develop a citizens' post office that contributes to community and rural development and education, thereby serving as an interface between government and the community; and

[1] Lawrence Baxter *Administrative Law* (1984) at 115; E Van Eeden 'Postal Services' *LAWSA* (3 ed) Vol 33 para 72.

(l) ensure compliance with international commitments relevant to the postal industry.'

[3] In terms of s 5, SAPO may, without derogating from its powers in terms of the Companies Act 71 of 2008 and subject to the Public Finance Management Act 1 of 1999, engage in a wide range of activities, such as purchasing immovable property,[2] erecting buildings, installations and plants,[3] acquiring and holding movable property[4] and letting its services or otherwise making them available.[5] One such service is the paying of social grants. It is paid to do so by the South African Social Security Agency (SASSA) and acts as its agent in so doing.

[4] The Post Office Retirement Fund (the Fund) – the appellant in this matter – was established, along with the Telecommunications Pension Fund, by s 9 of the Posts and Telecommunications-Related Matters Act 44 of 1958 (formerly known as the Post Office Act). Section 10 makes provision for rules, which it calls statutes, for both funds. Section 10(1) states that the control and management of these funds, the conditions for admission to them and termination of membership, the amount and nature of contributions and other payments to them by members and employers, the benefits due to members and beneficiaries and the manner in which they may be amended are governed by the statutes of each fund. Section 10(4) states that the statutes of the funds 'shall be binding on each fund as well as the postal employer and the telecommunications employer, as the case may be, and on the members and beneficiaries of each fund'.

[5] By notice of motion dated 31 July 2020, the Fund applied on an urgent basis to the Gauteng Division of the High Court, Pretoria for the following substantive relief:

'2. That the South African Post Office SOC Ltd ("SAPO") be declared to be in breach of Rule 3.3 of the South African Post Office Retirement Fund Rules (the "Rules").

3. That SAPO be directed to remit to the Fund, within five (5) days of this order, all outstanding arrear contributions (i.e. employer and employee contributions) in respect of the periods May 2020 and June 2020, inclusive of interest at 9.75% per annum.

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[2] Section 5*(a)*.
[3] Section 5*(b)*.
[4] Section 5*(d)*.
[5] Section 5*(e)*.

4. That going forward, SAPO be directed to continue to timeously pay contributions to the Fund as they fall due, in accordance with the Rules.'

None of the respondents other than SAPO took part in the proceedings in the high court or on appeal. The application was dismissed with costs by Kubushi J. She subsequently granted the Fund leave to appeal to this court.

[6] The material facts upon which the Fund's case is founded are not complicated and are largely common cause. Rule 3.3 of the rules of the Post Office Retirement Fund (the rules) provides that contributions paid by SAPO, which include members' contributions, are payable to the Fund monthly. SAPO failed to pay any contributions to the Fund for the months of May and June 2020.

[7] SAPO raised three defences. The first was that the Fund's rules did not oblige it to pay contributions to the Fund. The second was that, if it was obliged by the rules to pay contributions, it had a power to decide not to pay the Fund in the prioritization of payments to creditors. The third was that its parlous financial state rendered it impossible to pay the Fund with the effect that its obligation was either extinguished or deferred.

The facts

[8] The contributions paid by SAPO to the Fund prior to May 2020 comprised of members' contributions of 7.5 percent of each employee's pensionable monthly salary, employer contributions of 13.55 percent of each employee's pensionable monthly salary and an additional voluntary contribution. It is not in dispute that SAPO did not pay these contributions to the Fund at the end of May and June 2020. It ought to have paid a total contribution of R40 million in respect of each month. It would appear that SAPO has not paid any further contributions to the Fund since.

[9] When SAPO had not paid the May 2020 contribution by the due date of the first working day of June 2020, Mr Michael Faasen, the Fund's principal officer, wrote to Mr Ivumile Nongogo, SAPO's acting group chief executive officer. He pointed out that the payment of contributions is a statutory obligation and that a failure on the part of SAPO to pay placed the Fund in a difficult position. He understood that SAPO's cash

flow would improve within a few days and said that 'it will be much appreciated if this payment will receive your favourable consideration'.

[10] Nongogo responded two days later. He said:

'Indeed SAPO's financial situation is dire and each month we are having to make a call on payments. Last month we paid the pension fund but did not pay Medipos, this month we will commence payments with Medipos and then the fund. We are cognizant that both parties have statutory requirements in this regard but we are trying not to be unfair to any one party.' (Medipos is SAPO's in-house medical aid scheme.)

[11] Faasen wrote back to Nongogo to ask for clarity. He wanted to know whether his understanding was correct that SAPO would pay contributions a month after the due date for payment, with the effect that 'SAPO's arrears will grow exponentially until the financial position of SAPO normalises'. In his response, Nongogo said:

'Ideally this should not be the case, we are hopeful that as we open for business and start to receive normal revenues we can cover all statutory payments and not create a backlog, otherwise as you point out we will have an exponential growth in that backlog that will become unmanageable. We are prioritizing these payments and as the cash comes in we will attempt to bring any arrears to zero.'

[12] The Fund's board of trustees decided that a formal letter, copied to the Minister, should be sent to SAPO to spell out the Fund's position. Prior to that letter being sent, however, Faasen wrote to Nongogo to inform him of the board's decision. He also raised a further concern – that SAPO had also not paid premiums in respect of a temporary disability policy for employees and that death and permanent disability benefits of SAPO employees were at risk as well. Nongogo replied to say that he appreciated the 'serious impact that is [being] caused by SAPO's non-payment'. He assured Faasen that 'everything is being done to resolve the financial issues' but he was unable to indicate when a solution to the problem would be found.

[13] The board's formal letter followed. It is dated 11 June 2020 and was written by Mr Ashwin Trikamjee, the chairperson of the Fund's board. After stating that one of the board's responsibilities was to ensure that both employer and employee

contributions were paid timeously to the Fund and that SAPO's contributions for May 2020 had not been paid, he said:

'We are therefore concerned that members will suffer prejudice due to the non-payment and/or delay by the Company in paying the required contributions. This specifically relates to death and disability benefits not being funded as well as exit benefits being underfunded. Of special concern is the deduction of member contributions from salaries but not being paid to the Fund, which could have further legal implications for the Company.'

[14] Trikamjee requested that SAPO investigate the failure to pay the Fund and furnish the board with 'detailed feedback'. He demanded an undertaking from SAPO that the outstanding contributions, plus interest, would be paid within 21 days of the date of his letter. He asked for an 'unequivocal commitment' from SAPO that, in future, contributions would be paid in accordance with the rules. He expressed the board's willingness to discuss 'any challenges that the Company might be experiencing during these times of upheaval caused by the Covid-19 outbreak that might negatively impact the Company's legal obligations towards the Fund as well as possible relief measures within the ambit of the law'.

[15] Nongogo replied about two weeks later. He apologized for SAPO having been 'unable to remit the pension contributions as required on a monthly basis'. He said that SAPO's financial position had deteriorated dramatically and that this had accelerated as a result of 'the Covid-19 induced lockdowns', with a negative impact for all of its creditors including the Fund.

[16] Nongogo informed the board that SAPO had approached the Department of Communications and Digital Technologies for financial assistance but the earliest any assistance could be expected was October 2020. In the meantime, he said, 'the situation remains extremely dire'. He expressed his appreciation that the board was willing to discuss temporary relief measures. He identified two possible options for discussion. They were a 'contributions holiday' of six months, and a 'once-off capped withdrawal by pension fund members who are still employees to cushion them from decisions that SAPO will need to make that may impact on their earnings'. Finally, he said that SAPO was 'fully cognizant of the legal implications that arise from non-remittance and the financial consequences that will impact on employees', but it

looked forward to ‘an engagement with the Fund as to ways that could be pursued to mitigate the situation’.

[17] Trikamjee responded on 6 July 2020, by which time SAPO’s June 2020 payment to the Fund was overdue. He informed Nongogo that the Fund’s board had discussed the two proposals that he had made. Both were impractical for various reasons and could not be pursued without a change to the rules, in the case of the first proposal, and the amendment of an Act, in the case of the second. He said that the board had resolved to request SAPO ‘to pay the contributions in respect of risk benefits and fund expenses for May and June 2020 as a matter of extreme urgency to ensure that members of the Fund are covered in respect of death and disability benefits’ and that ‘Additional Voluntary Contributions which have already been deducted from employees’ salaries at the end of May 2020 and June 2020 also need to be paid over to the Fund’. The board, he said, would appreciate the opportunity to meet Nongogo and his senior staff in order to discuss payment of the outstanding contributions after the board had ‘considered all the legal options available to them to accommodate SAPO in its present dire financial position’.

[18] On 21 July 2020, however, Faasen sent an email to Nongogo in which he informed him that when the board had sought legal advice, it had been told that the type of engagements it had thus far had with SAPO fell short of compliance with its fiduciary duties to the Fund and its members. He informed Nongogo that the Fund would shortly be launching an urgent application against SAPO ‘with a view to receiving payment of outstanding contributions and ensuring that the Post Office pays such future contributions as may arise’. He then said that the Fund would ‘at the same time, consider a Rule Amendment in order to provide possible relief for all the parties, and this would likely require further engagements with the employer’.

[19] On the following day, Nongogo replied as follows:

‘This is well noted and the stance is well understood. We remain cognizant of the outstanding contributions to the fund and we are doing all things necessary to bring SAPO to a position where it can honour these payments. In the meantime your consideration of possible actions to offer relief [is] greatly appreciated.’

[20] The Fund's attorneys then drafted the founding papers in the urgent application. The notice of motion was dated 31 July 2020, as payment of the July contributions was about to fall due. The papers were issued on the same day.

[21] In SAPO's answering affidavit, deposed to by Ms Nondumiso Ngonyama, a non-executive member of its board, the application was categorized as not being 'a simple claim by a creditor against a debtor', but rather a matter that raises 'a multitude of contractual, statutory, constitutional and public policy issues'. She stated that it was unclear what the Fund was trying to achieve:

'It seeks payment of over R80 million and an order that SAPO must continue timeously to pay R40 million a month. However, it does so while readily conceding that SAPO's financial position is dire and that each month SAPO has to prioritise its most critical financial obligations. In fact, the Fund purports to found its claim for urgent payment on the basis that SAPO cannot pay the amount in question. This is a non-sequitur.

[22] She explained that as a result of the 'current economic environment and the impact of COVID-19', SAPO chose to pay medical aid contributions rather than pension fund contributions. It had reasoned that it was 'more important to pay its employees' salaries (rather than any fringe benefits) so that those employees may continue to provide for themselves and their families whilst the COVID-19 pandemic ravages South Africa's health and wealth'.

[23] Ngonyama made the claim that the Fund had not made out a case as to why it required payment of R40 million a month, as its operational expenses were only R1.4 million and it had reserves that would enable it to operate for four or five months without SAPO's contributions. She described the Fund's insistence on being paid what was owed to it as bewildering. Nonetheless, she claimed that SAPO was trying 'to make as many payments as it can, in order to ensure the fulfilment of its various duties under section 4 of the South African Post Office SOC Act, 2011'. It would, she undertook, pay the Fund as soon as it was able to, but said that it was not possible to predict with certainty when that would be. At the time of deposing to her affidavit, however, 'paying R40 million a month to the Fund is not only financially impossible and fiscally irresponsible, but payment of any material amount to the Fund would likely cause SAPO's demise'.

[24] Ngonyama claimed that the Covid-19 pandemic and the lockdowns put in place to control it had a severe, adverse effect on SAPO's business. Without any historical context and without any detail, she stated that, as at 31 July 2020, only 55 of SAPO's 1 416 post offices were operating profitably. In July 2020, SAPO incurred a net loss of R97 million. This was nearly triple the net loss of R 34 million at the corresponding time in 2019. It year to date loss at 31 July 2020 was R1.066 billion.

[25] As a result of SAPO's dismal financial performance, it was only able to pay some of its creditors but not others. It therefore decided to prioritise which would be paid and which not. So, for instance, it prioritised the payment of transport costs, national linehaul expenses, property costs including rental expenses, information technology expenses and the cost of security. It chose to prioritise these expenses, Ngonyama said, 'in order to continue to meet its primary statutory duties'.

[26] Ngonyama stated that as a result of SAPO's failure to pay creditors, critical services, including the payment of social grants, had been interrupted and continued 'negatively to impact on SAPO's ability to recover lost revenue and to move to financial sustainability'. She continued to say:

'As a result of the economic downturn and constraints on its business, SAPO's YTD loss as at 31 July 2020, was R1.066 billion. YTD (as at 31 July 2020) staff costs are R1.2 billion . . . Staff costs constitute 61% of total expenses . . . Despite the risks in not paying trade creditors, SAPO has done everything it can to continue to pay employees' basic salaries, even if it cannot afford to cover all fringe benefits, especially medium to long term ones such as pension fund contributions. Not all creditors are being paid, and once critical payments have been made, SAPO has no cash left. For instance, once the August 2020 salaries have been paid, SAPO will need to accumulate cash during the course of September to pay the September salaries. The COVID-19 pandemic has had a fundamental impact on SAPO's business.'

From this, it was clear that 'at this stage SAPO does not have the R 40 million per month, or any other amount, to pay the Fund'.

[27] Paying the Fund was described by Ngonyama as not being 'one of SAPO's primary statutory duties'. She said that the Fund was 'in no worse a position than any of SAPO's other statutory creditors'. As at 31 July 2020, SAPO owed its 'statutory

creditors' R 454 million. This included R 162 million to the medical aid scheme, R 125 million to the South African Revenue Service and R 18 million to the Unemployment Insurance Fund.

[28] SAPO claimed that it was simply not possible for it to pay 'tens of millions of Rand to the Fund on a monthly basis simply because the Fund has brought this application'. It averred that it would be 'contrary to public policy and the Constitution, and a forced breach of the Board's fiduciary duties for the Court to compel SAPO to make payment to the Fund to the detriment of the public and in unlawful preference *vis-a-vis* all the other creditors of SAPO'.

[29] Finally, Ngonyama dealt with the fact that employees' contributions, along with employer's contributions and voluntary contributions were not being paid. She said that the Fund was confused when it alleged that SAPO was deducting employees' contributions from their salaries and then failing to pay those amounts to the Fund. Her explanation was this:

'SAPO is intended to pay both the member and employer contributions, out of its own funds. The member does not actually place SAPO in funds to pay any of the contributions. The member portion of pension fund contributions would show up as a notional "deduction", simply as a matter of payroll accounting or book entry, on the employees' payslips. No funds are being diverted from the employees, because no such funds exist.'

[30] In the Fund's replying affidavit, Faasen made the points that SAPO did not deny its indebtedness to the Fund or that it failed to pay contributions to the Fund. Instead, he said, it had redirected contributions meant for the Fund 'to its operational expenditure for an indeterminate period of time'. He accused the SAPO board of acting with impunity, resorting to self-help and attempting to avoid judicial scrutiny.

[31] Faasen also made the point that SAPO's financial difficulties pre-dated the Covid-19 pandemic and that its governance failures were not temporary in nature. SAPO's version amounted to it simply being unable to pay its debts as they fell due which, Faasen said, 'begs the question whether SAPO's Board is not continuing to trade the company under reckless circumstances, bordering on delinquency'. Its explanation for not paying what it owed, when all was said and done, was that it was

insolvent. He described SAPO's utilization of employees' pensions and risk cover for the payment of operational expenses as being fiscally and morally irresponsible. What is more, SAPO's continued trading under these circumstances constituted, in Faasen's view, a potentially serious dereliction of duty in terms of the Companies Act 71 of 2008.

[32] In respect of the deduction of employees' contributions that were not paid to the Fund, Faasen categorised SAPO's explanation, quoted above, as troubling particularly because the recording of deductions of pensionable emoluments on employee payslips was, on SAPO's version, fraudulent. Furthermore, once the deductions were made from employees' gross salaries, the obligation to pay them to the Fund was triggered.

The high court's judgment

[33] The high court found that as a result of the lockdown induced by the Covid-19 pandemic, SAPO shut down completely and that the pandemic had a profound impact on its business. The first statement of fact is nowhere to be found in the papers, and the second, as I will show, is only partially correct. It then recorded information concerning SAPO's financial difficulties, some of which has been mentioned above, and stated that it was against this background that the Fund had brought its application.

[34] The approach of the high court to the issues that arise for decision were encapsulated thus in the judgment:[6]

'For the reasons that follow hereunder, I have to agree with SAPO that this application cannot just be categorized as a simple monetary claim of a creditor against a debtor. It is a constitutional matter which implicates constitutional and statutory duties of organs of state and indeed the protection of fundamental rights. The claim takes place against the background sketched in the opening passages of this judgment. Ordinarily, SAPO would be expected to comply with the provisions of Rule 3.3 without much ado. These, however, are not ordinary times. The imperatives of the time require a fresh look at the provisions and requirements of the Rule.'

[6] Para 40.

[35] This was so for two primary reasons. First, in terms of s 4 of the SAPO Act, SAPO was placed under an obligation to provide services such a ensuring a universal and affordable postal service. Secondly, SAPO is the agent that pays social grants on behalf of SASSA. These functions, according to SAPO, were critical in fulfilling socio-economic rights like the rights to social security and children's rights, and also in supporting and strengthening 'almost every other right in the Bill of Rights'. The high court found that to jeopardise SAPO's ability to fulfil these functions would endanger 'key constitutional rights and values'.[7]

[36] The high court accepted that SAPO had not paid its contributions to the Fund and that it was unlikely to be able to do so in the immediate future. The crux of the matter, it held, was whether SAPO should be ordered to pay the contributions that it accepted were owing.[8] It then turned to rule 3.3 of the rules. While disavowing the need to interpret rule 3.3, as the parties had done, it accepted that the rule required SAPO to make monthly payments to the Fund. It held, however, that 'the Rules cannot be read and/or interpreted to require payment where this is impossible, which is the case here'.[9]

[37] An interpretation of rule 3.3 that meant that SAPO would be ordered to pay what it owed would 'fundamentally jeopardise the ability of SAPO to fulfil its core functions and imperil key constitutional rights, if not the total collapse of SAPO'.[10] Its limited resources had to be applied 'to achieving a government developmental mandate and to maintain the infrastructure for the payment of social grants'. Reliance was placed on the Constitutional Court judgment of *Soobramoney v Minister of Health, KwaZulu-Natal*[11] in support of the proposition that 'there is a hierarchy of rights – favouring the good of the many above the good of the few'; and that this 'principle' applied to the instant case in which the 'rights of the many should trump the few'.[12]

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[7] Para 47.
[8] Para 49.
[9] Para 52.
[10] Para 54.
[11] *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).
[12] Para 56.

[38] Having dealt thus with the meaning and effect of rule 3.3, the high court turned to the second leg of SAPO's defence, namely that of supervening impossibility of performance. It observed that 'any unqualified obligation to pay this court may make, is at present not capable of being fulfilled'; that a court 'cannot make an order the implementation of which would not come to fruition'; and that SAPO had made it clear that 'even if it can be compelled to pay the amounts claimed by the Fund by a court order, it will be impossible for it to pay'.[13] Having concluded that it was impossible for SAPO to pay what it owed to the Fund, the high court held that SAPO was 'excused from paying over its employees' retirement contributions, at least for the duration of the impossibility'.[14] On this basis, the Fund's application was dismissed.

[39] Finally, the high court ordered the Fund to pay SAPO's costs on an attorney and client scale. Its reasoning appears to have been that both parties had asked for a punitive costs order against the other and that, as SAPO was the successful party, these spoils too went in its favour.

The interpretation of rule 3.3

[40] The high court made a number of far-reaching findings as to the meaning of rule 3.3 without attempting even the most perfunctory engagement with its terms or the most basic of interpretive exercises. It is by now well-known that the interpretation of written documents, including legislative instruments, involves a consideration of the language used, the context in which it is used and the purpose of the document that is the subject of interpretation. This was explained by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[15] as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to

[13] Para 58.
[14] Para 61.
[15] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18. See too *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) paras 10-12; *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA) para 25.

which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[41] Section 9 of the Post and Telecommunication-Related Matters Act established the Fund. Its principal purpose was to provide pensions for employees of SAPO in order to ensure their security and dignified living in their latter, post-retirement lives. Section 10(1) provided that the Fund's control and management, the conditions for admission to membership and the termination thereof, and the amount and nature of contributions by members and the contributions by SAPO are governed by the Fund's rules. In terms of s 10(2), those rules, in common with subordinate legislation generally, were required to be published in the *Government Gazette*. In terms of s 10(4), the rules 'shall be binding on' the Fund, SAPO and members and beneficiaries of the Fund. Section 10 thus sets out the purpose of the rules and their context as the mechanism for running and funding a vehicle for the eventual payment of benefits to employees of SAPO who retire or leave its employ, and to the beneficiaries of those who died while in SAPO's service.

[42] In order to interpret rule 3.3, it is necessary to consider it in its broader context. I shall first detail some of the more important provisions of the rules in order to sketch that context and the purpose of the rules. I will then turn to rule 3.

[43] Rule 1.4 states that the object of the Fund is 'to provide retirement and ancillary benefits for the BENEFICIARIES as described in the RULES'. A beneficiary is rather unhelpfully defined in rule 1.1 as 'any person who is entitled to benefits in terms of

these RULES'. It becomes evident from the rules, however, that the beneficiaries of the Fund are SAPO employees, both pre- and post-retirement, and their dependents.

[44] Rule 2 concerns the financial structure of the Fund. Rule 2.1 provides that the Fund's assets are to be held in three separate accounts. They are the share account, the pensions account and the reserve account. For present purposes, the share account is the most important of the three accounts. In terms of rule 2.1(1), it is comprised of 'all the MEMBERS'SHARES plus the additional voluntary contribution account'. In respect of each member, it is made up of a member's opening balance; each member's subsequent monthly contributions in terms of rule 3.1; SAPO's monthly contribution on behalf of each member in terms of rule 3.2(1)*(a)*; transfers of a member's pension value from another Fund in terms of rule 9.8(1); investment earnings; surplus bonuses; special transfers from the stabilization reserve in terms of rule 3.2(4); and transfers from the data reserve. Additional contributions made by a member in terms of rule 3.1(3) are also reflected in the share account, but separately in an additional voluntary contribution account.

[45] Rule 4 defines who is eligible for membership of the Fund. Rule 4.1 provides that 'eligible employees' shall become members of the Fund. An eligible employee is defined in rule 1.1 as a permanent employee of SAPO, including a permanent part-time employee, who has not attained the age of 65 years. Rule 4.1(5) stipulates that membership of the Fund is a condition of service of every eligible employee.

[46] Rule 5 is headed 'RETIREMENT'. It provides for the payment of pensions to SAPO employees in the event of 'normal retirement', in rule 5.1, and 'early retirement', in rule 5.2. It also makes provision, in rule 5.3, for lump sum benefits to be paid. To illustrate the working of this rule, rule 5.1(1) provides that on retirement, a member 'shall receive a PENSION vesting on the following day secured by the balance of the MEMBER'S SHARE at that date after the amount of any lump sum benefit paid in terms of RULE 5.3 has been deducted'. Rule 5.3(1) provides that a member, on retirement, may choose to be paid a lump sum, but it may not be more than a third of that member's share.

[47] Rule 6 deals with the payment of benefits to the spouse of an employee who has died while in the service of SAPO or after retirement. Rule 7 concerns itself with benefits for employees who are disabled by accidents, diseases or illness to the extent that they are no longer able to work.

[48] Rule 10 deals with the management of the Fund. In terms of rule 10.2(1), the 'management, control and administration' of the Fund is vested in the board. Rule 10.5 provides for the appointment of a principal officer and rule 10.6 requires the board to appoint an auditor. Rule 10.8 requires the board to appoint an actuary for the Fund.

[49] From the above truncated and incomplete precis of the rules, it is apparent that they create a sophisticated vehicle to provide for the social security of SAPO employees when they retire, of dependents of SAPO employees who die either while in service or after retirement and of SAPO employees who, prior to retirement, are disabled. The funding model for this social security model is employee and employer contributions, plus the fruits of the investment of these contributions. As SAPO employs a large number of people, the Fund, of necessity, manages large sums of money.

[50] With this context in mind, as well as the purpose of the rules to provide social security for SAPO employees and their dependents, I now turn to rule 3. This rule is headed 'CONTRIBUTIONS'. It consists of three inter-locking parts.

[51] Rule 3.1 concerns itself with members' contributions to the Fund. Rules 3.1(1), 3.1(2) and 3.1(3) provide:

'(1) Each MEMBER other than a DEFINED BENEFIT MEMBER shall contribute monthly an amount equal to 7,5% of one-twelfth of his PENSIONABLE EMOLUMENTS to the FUND.

(2) Contributions are deducted monthly by the EMPLOYER from the MEMBER'S remuneration.

(3) A MEMBER may make additional contributions to the FUND in order to secure greater benefits or in respect of a period of past service. The conditions relating to the additional contributions and the benefits payable shall be as provided for in RULES 5.4, 6.3 and 7.3(4).'

[52] Rule 3.2 deals with the employer's contributions and the quantification of those contributions. Rule 3.2(1) reads as follows:

'The EMPLOYER shall contribute monthly the following amounts to the FUND:

(a) 9% of one-twelfth of each MEMBER'S PENSIONABLE EMOLUMENTS in respect of MEMBERS other than DEFINED BENEFIT MEMBERS towards the provision of retirement benefits only;

(b) 4.75% of one-twelfth of each MEMBER'S PENSIONABLE EMOLUMENTS in respect of MEMBERS other than DEFINED BENEFIT MEMBERS to procure the death and disability benefits described in Rules 6.1(1) and 7 and to cover the cost of expenses referred to in Rule 10.14 and rule 10.15; relating to members other than defined benefit members as decided by the TRUSTEES in consultation with the ACTUARY;

(c) such amounts as mutually agreed between the EMPLOYER and the TRUSTEES acting on the advice of the ACTUARY, as may be necessary to eliminate a shortfall in the Stabilisation Reserve;

(d) such amounts as determined from time to time by the TRUSTEES after consultation with the ACTUARY as may be necessary to eliminate any actuarial shortfall in the Pensions Account or the Defined Benefit Reserve in the Reserve Account . . .

(e) a percentage of the DEFINED BENEFIT MEMBERS' PENSIONABLE EMOLUMENTS as determined from time to time by the TRUSTEES after consultation with the ACTUARY to fund the benefits of DEFINED BENEFIT MEMBERS in the defined benefit reserve in the Reserve Account and to fund the cost of expenses referred to in Rules 10.14 and 10.15 relating to DEFINED BENEFIT MEMBERS.'

[53] Rule 3.2(2) allows for the increase or reduction of SAPO's contributions in defined circumstances. In terms of rule 3.2(3), SAPO may, in consultation with the Fund's actuary, 'from time to time make additional contributions to the FUND in order to increase the balance in the Reserve Account'. In terms of rule 3.2(4), the board may on the request of SAPO , and after consultation with the Fund's actuary, 'make special transfers of all or part of any balance in the stabilization reserve in the Reserve Account as contemplated in RULE 2.2(3) to the MEMBERS' SHARES or the defined benefit reserve in the Reserve Account, pro rata to the contributions due by the EMPLOYER in terms of [rule 3.2](1)(a) or (e) above, in which case the EMPLOYER'S contributions will be reduced by the amount of such transfer'.

[54] Rule 3.3 is headed 'PAYMENT OF CONTRIBUTIONS'. It states:

'Contributions are payable to the FUND monthly, in arrears, not later than the first working day after the end of the calendar month to which such contributions relate.'

[55] Rule 3 follows a series of logical steps. The first is that SAPO's employees contribute a defined proportion of their salaries to the Fund on a monthly basis. Their contributions are deducted from their salaries by SAPO and are then paid to the Fund by SAPO. The second step is that SAPO is required to contribute to the Fund, also on a monthly basis, in respect of each of its permanent employees. The amounts that SAPO is required to pay, and their purpose, are set out in rule 3.2(1)*(a)* to *(e)*. The third step determines when SAPO is required to pay the contributions contemplated by rules 3.1 and 3.2. Rule 3.3 requires payment to be made monthly in arrears and immediately after the end of a month to which they relate.

[56] Understood in this way, within the wider context of the rules as a whole and their purpose of providing social security to SAPO's employees, it is clear that SAPO has no choice: it is placed under an obligation by the rules – a statutory obligation – to pay the Fund the contributions provided for in rules 3.1 and 3.2 and, in terms of rule 3.3, to do so by 'not later than the first working day after the end of the calendar month to which such contributions relate'. SAPO, being a public body, may only do what it is empowered by law to do. It is not free to do what it pleases.[16] No provision is made in the rules for an exemption from the obligation to pay contributions on a monthly basis and SAPO is not authorized, in its discretion, to decide to withhold payment. In unqualified terms, rule 3 requires SAPO to pay contributions to the Fund. It had no power, in terms of the rules, to decide to withhold payments and to prioritise other creditors over the Fund. The purpose of the Fund would be undermined if SAPO was free to contribute if it wanted to, and to withhold contributions at will.

[57] It is necessary now to comment on the approach taken by the high court to the interpretation of rule 3. First, the high court committed an irregularity by holding that while ordinarily rule 3.3 imposed an obligation on SAPO to pay contributions monthly to the Fund, the extraordinary times required a different result. In so doing it took the

[16] *Compcare Wellness Medical Scheme v Registrar of Medical Schemes and Others* [2021] ZASCA 91; 2021 (1) SA 15 (SCA) paras 21-23 and 30-32. See too Cora Hoexter and Glenn Penfold *Administrative Law in South Africa* (3 ed) (2021) at 357-358.

view that rule 3.3 could mean one thing on a particular day and another on the following day – that circumstances dictated its meaning. That is not correct. The interpretation of a written document is an objective exercise and the starting point is the words of the document to be interpreted.[17] Those words remain constant and cannot be made to mean different things in order to suit the perceived needs of the moment. As Lord Aitken said in *Liversidge v Anderson*,[18] the laws 'speak the same language in war as in peace'.

[58] Secondly, the high court confused the interpretation of rule 3.3 with the separate doctrine of impossibility of performance when it held that the rule should not be interpreted to include an obligation on the part of SAPO to pay contributions when this was impossible. In order to make such a finding as to the meaning of the rule, the high court had to ignore the words of the rule, its context and purpose, and read other, unspecified, words into it. A dictum of Kentridge AJ on constitutional interpretation, in *S v Zuma and Another*,[19] is apposite:

'We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination.'

[59] Thirdly, in holding that an interpretation that rule 3.3 required SAPO to pay contributions would not promote constitutional values, the high court simply ignored both the plain meaning of the rule and the fundamental rights of SAPO's employees to social security and to fair labour practices. It also ignored the founding constitutional value of the rule of law. The purpose of the obligation was to enable SAPO to fulfil its employees' fundamental rights to social security in terms of s 27(1)*(c)* of the Constitution. By misappropriating a portion of its employees' salaries required to be paid on their behalf to the Fund, and using that money for other unauthorized purposes, SAPO perpetrated an obvious unfair labour, in contravention of s 23(1) of the Constitution, and did so on a grand and persistent scale. And the endorsement of an arbitrary, open-ended and undefined power in the hands of SAPO to prefer its

[17] *Natal Joint Municipal Pension Fund v Endumeni Municipality* (note 15) para 18.
[18] *Liversidge v Anderson* 1942 AC 206 (HL) at 244. See too *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* [2021] ZASCA 9; 2021 (3) SA 593 (SCA) para 4.
[19] *S v Zuma and Another* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (6) BCLR 665 (CC) para 18.

creditors of choice over other creditors undermines the rule of law enshrined as a founding value of the Constitution in s 1*(c)*. It is far from clear to me how this promotes constitutional values. At best, if it does, it does so while simultaneously undermining other fundamental rights and constitutional values. This interpretation of the rule turns a blind eye to SAPO routinely giving undue preferences to some creditors at the expense of others.[20]

[60] Perhaps because the high court eschewed the need to interpret rule 3, it is not at all clear how it arrived at its conclusion that the rule included a power in the hands of SAPO to choose which of its creditors to pay and which to ignore. The high court's most profound misdirection, it seems to me, is its complete lack of any principled basis for its decision: it has failed to explain how the power it recognized can, as a matter of interpretation, to be said to be included in rule 3. I find, however, that rule 3's meaning is clear: it requires employees and SAPO to pay contributions to the Fund and those contributions are required to be paid monthly, on the first working day of a month for the preceding month. The argument that rule 3 does not impose an obligation on SAPO to pay contributions to the Fund is consequently without merit.

Could SAPO decide not to pay the Fund despite the terms of rule 3?

[61] I turn now to two related arguments advanced by SAPO that are said to be based on the Constitution and its values. They are to the effect that even if rule 3 imposes an obligation on SAPO to pay the Fund, it enjoys an unrestricted power to decline to pay creditors of its choosing.

[62] As I understand the first of these arguments, it has the following contours: SAPO's contractual obligation to pay social grants implicates the fundamental rights of access to social security, including social assistance[21] and, in some cases, the fundamental right of the paramountcy of a child's best interests;[22] the obligations imposed on SAPO in terms of s 4 of the SAPO Act also impose constitutional obligations because, by requiring SAPO to take reasonable measures within its available resources to progressively realise, for instance, 'the universal and affordable

[20] Insolvency Act 24 of 1936, s 30.
[21] Constitution, s 27(1)*(c)*.
[22] Constitution, s 28(2).

provision of postal serves'[23] or the development of postal services that 'are responsive to the needs of users and consumers',[24] SAPO fulfils the fundamental rights of its customers to dignity, equality and, it claims, virtually every other fundamental right; the fact that it is fulfilling fundamental rights in this way vests in it a power, derived from the Constitution or its values, to prioritise the payment of social grants and the provision of the services it offers at the expense of some of its creditors.

[63] I have my doubts as to the correctness of the assertion that, by fulfilling its mandate to provide a postal service, SAPO is fulfilling fundamental rights. That assertion seems to me to be a bridge too far. Section 4 of the SAPO Act does no more than place on SAPO an obligation to progressively realise, within its available resources, a number of postal services. I shall, however, despite my doubts, accept SAPO's premise to be the case for purposes of the argument advanced by it.

[64] In my view, there is no merit in the argument for the reasons that follow. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[25] Chaskalson P, Goldstone J and O'Regan J held that it was 'central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. As a public body, SAPO labours under the same constraint, imposed by the rule of law and its principle of legality.

[65] We have not been directed to any provision in the Constitution that empowers SAPO and, presumably every other organ of state, to decide which of its creditors it wishes to pay, and which not, in order to prioritise its spending. If such an extraordinary power existed, its effect would be to undermine the rule of law by placing organs of state above the law in respect of the payment of their contractual and statutory obligations. This attempt by SAPO to dress its failure to meet its obligations to the Fund in the finery of the Constitution must therefore fail.

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[23] Section 4*(a)*.
[24] Section 4*(d)*.
[25] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) para 58.

[66] The second argument is a variation on the same theme. SAPO places reliance on *Soobramoney v Minister of Health, KwaZulu-Natal*[26] to justify its failure to pay its debts. It was argued that *Soobramoney* recognizes that an organ of state may prioritise its activities in the context of shortage of resources. It is necessary to consider *Soobramoney* in detail in order to determine whether it assists SAPO in this case.

[67] Soobramoney was terminally ill and required kidney dialysis in order to prolong his life, it being common cause that his illness could not be reversed. He sought kidney dialysis from a state hospital but was refused treatment. Because of a shortage of resources, the hospital was not able to provide the treatment to all who required it. It had developed guidelines to determine who would receive treatment and who would not. Soobramoney was not eligible for treatment because his renal failure was irreversible and he was not, for various reasons, eligible for a kidney transplant. He applied for an order directing the hospital to treat him. His application was dismissed but he appealed to the Constitutional Court.

[68] Chaskalson P found that the fundamental right in issue in the case was the right of access to health care in s 27(1)*(a)* of the Constitution. That right was subject to s 27(2) which provided that the state was required to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of this and other socio-economic rights mentioned in s 27(1). Chaskalson P held that the obligations imposed on the state by s 27 were dependent on the availability of resources 'for such purposes' and that 'the corresponding rights themselves are limited by reason of the lack of resources'.[27] Because the hospital could not treat everyone who required treatment, the hospital administration had to develop guidelines concerning access to dialysis treatment. Those guidelines were reasonable and had been applied fairly and rationally in relation to Soobramoney.

[69] *Soobramoney's* case is not authority for the proposition that an organ of state may ignore its legal obligations in order to pursue what it considers to be more important goals. It is, instead, authority for a different proposition, namely that when

[26] Note 11.
[27] Para 11.

access to a right such as health care is made dependent on the availability of resources, an organ state may put in place a program in which it prioritises how that right will be made available, as long as that program is reasonable.[28] In this case, by analogy, that means that when SAPO was faced with its financial crisis, it could and should have formulated a plan of action to prioritise its s 4 duties, as they are dependent on the availability of resources. It was not entitled to take the law into its own hands and simply ignore its statutory obligation to pay contributions to the Fund. The high court also misinterpreted *Soobramoney*. It is not authority for the proposition that there is 'a hierarchy of rights' that favours 'the good of the many over the good of the few' and that the 'rights of the many should trump the few'.[29]

[70] Much was made in SAPO's answering affidavit of its obligation to pay social grants. It sought to create the impression that this was a cost that it bore. That is not so for two reasons. In the first place, social grants are paid from the budget of SASSA to SAPO, its agent, which pays beneficiaries. Secondly, SAPO is paid by SASSA for providing this service. Its obligations in relation to beneficiaries cannot therefore have a bearing on its failure to pay its contributions to the Fund.

Impossibility of performance

[71] The final defence raised by SAPO is that its obligation to pay the Fund was extinguished by supervening impossibility of performance. The event that, according to SAPO, rendered performance impossible was the onset of the Covid-19 pandemic and its attendant lockdowns. In order to determine whether this defence may avail SAPO, it is necessary first to consider the facts relevant to this defence and then to consider the nature of the impossibility relied upon.

[72] In the communications between Faasen and Trikamjee, on the one hand, and Nongogo, on the other, very little was said by the latter about the Covid-19 pandemic being the cause of SAPO's failure to pay contributions to the Fund. And this despite Trikamjee asking for 'detailed feedback' on the causes of that failure. At one stage,

[28] See too *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).
[29] Para 56.

however, Nongogo said that SAPO's financial position had deteriorated dramatically and that this trend had accelerated as a result of the lockdown.

[73] The evidence as to the cause of SAPO's failure to honour its obligations to the Fund are, at best, ambiguous. For instance, Ngonyama spoke of SAPO's parlous financial position being the result of the 'current economic environment and the impact of COVID-19'. While she asserted that the Covid-19 pandemic had had a severe impact on SAPO, she provided little historical evidence as to SAPO's financial position prior to the lockdown. Even so, on the limited evidence available, there is merit in the Fund's assertion that SAPO's financial woes pre-dated the Covid-19 pandemic and were caused by managerial failures.

[74] For instance, SAPO's net loss in July 2020, a few months after the imposition of the lockdown and at a time when the worst of it had been ameliorated, was R97 million. In July 2019, however, well before the start of the Covid-19 pandemic, SAPO's loss was R34 million. In other words, SAPO was a loss-making enterprise before the lockdown, even though, as Nongogo said, the lockdown accelerated its decline. The year-to-date loss, as at 31 July 2020, of R1.066 billion must be seen in that light. Strangely, for a party seeking to establish a defence to its failure to meet its obligations, SAPO has not taken the court into its confidence as to how many of the 1 361 loss-making post offices were profitable before the lockdown started. The statement in the answering affidavit that only 55 out of 1 416 post offices in the country were profitable as at 31 July 2020 is a largely meaningless statistic.

[75] A second factual strand concerning impossibility of performance is apparent. Nongogo, in his exchanges with Faasen, explained that SAPO was paying its creditors in turns: one month it planned to pay medical aid contributions but not pension fund contributions, and the following month it planned to do the reverse. This plan does not, however, appear to have been put into effect.

[76] In the answering affidavit, Ngonyama explained that SAPO had decided to pay medical aid contributions rather than pension fund contributions. She said that SAPO was trying to pay as many of its creditors as it could, and she undertook to pay the

Fund as soon as it could. At the time she deposed to her affidavit, it was not possible, she said, to pay the Fund what was due to it.

[77] Although the legal principles relating to impossibility of performance are most closely associated with the law of contract,[30] they have a wider application and are based on the notion that the law does not require people to do the impossible – *lex non cogit ad impossibilia*.[31] These principles also apply in respect of the non-performance of statutory obligations. For example, in *Montsisi v Minister van Polisie*,[32] a special plea of prescription was dismissed on appeal because it had been impossible for Montsisi to give the required statutory notice timeously of his intention to institute proceedings against the Minister for damages arising from an assault on him by policemen. It had been impossible for him to have complied while he was being detained without trial, with no access to the outside world, in terms of s 6 of the Terrorism Act 83 of 1967.

[78] The operation of the principles, in a contractual setting, was explained thus by Scott JA in *MV Snow Crystal*:[33]

'As a general rule impossibility of performance brought about by *vis major* 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.'

[79] It is evident from the dictum cited above that it is not every instance of impossibility that would allow a defendant to escape the consequences of their bargain. In *Peters, Flamman and Co*,[34] Solomon ACJ held that it was only if 'a person

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[30] See for example *Peters, Flamman and Co v Kokstad Municipality* 1919 AD 427 at 434-435; *MacDuff & Co Ltd (In Liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 600-601; *MV Snow Crystal: Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* [2008] ZASCA 27; 2008 (4) SA 111 (SCA) para 28.
[31] *R v Hargovan and Another* 1948 (1) SA 764 (A) at 769-770; *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A) at 634H-636H; *Gassner NO v Minister of Law and Order and Others* 1995 (1) SA 322 (C) at 325H-327H.
[32] Note 31.
[33] Note 30 para 28. See too *Bischofberger v Vaneyk* 1981 (2) SA 607 (W) at 611B.
[34] Note 30 at 435.

is prevented from performing his contract by *vis major* or *casus fortuitus*' that 'he is discharged from liability'. These terms, taken together, mean 'any happening, whether due to natural causes or human agency, that is unforeseeable with reasonable foresight and unavoidable with reasonable care'.[35]

[80] In order to establish impossibility of performance, whether initial or supervening,[36] four requirements must be met by the party relying on this defence. They have been set out by Bradfield as follows:[37]

'First, the impossibility must be absolute as opposed to probable. The mere likelihood that performance will prove impossible is not sufficient to destroy the contract. Second, the impossibility must be absolute as opposed to relative. If I promise to do something which, in general, can be done, but which I cannot do, I am liable on the contract. Third, the impossibility must not be the fault of either party. A party who has caused the impossibility cannot take advantage of it and so will be liable on the contract. Fourth, the principle must give way to the contrary common intention of the parties. This intention may be expressed, as when, for example, a seller expressly represents or guarantees that the goods sold exist.'

[81] There are three fundamental problems that arise in relation to SAPO's invocation of supervening impossibility of performance. The first is that the evidence, such as it is, does not establish that the impossibility of performance that is alleged arose as a result of *vis major* or *casus fortuitus*. At best for SAPO, its financial misfortunes preceded the Covid-19 pandemic and were only made worse by it. In July 2019, for instance, more than six months before the onset of the Covid-19 pandemic, it incurred a loss of R34 million. To this extent, its financial difficulties were foreseeable and avoidable, with the fault lying squarely with the management of SAPO. As Meer J said in *Quinella Trading (Pty) Ltd v Minister of Rural Development and Land Reform*,[38] '[s]elf-created impossibility does not discharge the obligations' of a party to a contract.

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[35] G B Bradfield *Christie's Law of Contract in South Africa* (7 ed) (2016) at 549.

[36] In *Peters, Flamman and Co v Kokstad Municipality* (note 30) at 434, Solomon ACJ held that 'a contract is void if at the time of its inception its performance is impossible' and that 'where a contract has become impossible of performance after it has been entered into the general rule was that the position is then the same as if it had been impossible from the beginning'.

[37] Bradfield (note 35) at 109-110.

[38] *Quinella Trading (Pty) Ltd v Minister of Rural Development and Land Reform* 2010 (4) SA 308 (LC) para 28.

[82] The second problem is that impossibility of performance was not established. The evidence, boiled down to its basics, establishes that SAPO chose to pay certain of its creditors and not others because it did not have sufficient funds to pay all of its debts when they fell due. It decided that it would not pay the Fund. It could have decided not to pay another creditor and, instead, to pay the Fund. Performance was thus not objectively impossible.

[83] The third problem concerns whether the impossibility relied on by SAPO is absolute or relative. In *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd*,[39] the court held that '[i]mpossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable' because '[d]eteriorations of that nature are foreseeable in the business world at the time when the contract is concluded'. Bradfield says of the requirement of absolute impossibility that if a person promises to do something which, generally speaking, can be done, but which the person concerned is unable to do, they are liable on the contract.[40] In *Scoin Trading (Pty) Ltd v Bernstein NO*[41] it was held by this court that the law 'does not regard mere personal incapacity to perform as constituting impossibility'.

[84] The position, when a debtor is unable to pay a debt, was set out by Meyer J in *Unlocked Properties 4 (Pty) Ltd v A Commercial Properties CC*.[42] He held that when the impossibility on which a seller relied was 'peculiar to itself because of its personal financial situation and incapability of securing payment of the full debt owed to the bank', it was not absolute and so the seller's 'incapability does not render the contract void' on account of impossibility of performance.

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[39] *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd* 2000 (4) SA 191 (W) para 9.3.1.
[40] Note 35 at 110.
[41] *Scoin Trading (Pty) Ltd v Bernstein NO* [2010] ZASCA 160; 2011 (4) SA 118 (SCA) para 22.
[42] *Unlocked Properties 4 (Pty) Ltd v A Commercial Properties CC* [2016] ZAGPJHC 373 para 13. See too *Matshazi v Mezepoli Melrose Arch (Pty) Ltd and Another; Nyoni v Mezepoli Nicolway (Pty) Ltd and Another; Moto v Plaka Eastgate Restaurant and Another; Mohsen and Another v Brand Kitchen Hospitality (Pty) Ltd and Another* [2020] ZAGPJHC 136 para 39; *Pillay v Personify Investments (Pty) Ltd and Others; Pillay and Another v Huntrex 302 (Pty) Ltd and Others; Pillay v Misty Blue Investments (Pty) Ltd and Others; Investec Bank Ltd v Personify Investments (Pty) Ltd; Investec Bank Ltd v Misty Blue Investments (Pty) Ltd; Investec Bank Ltd v Huntrex 302 (Pty) Ltd; Huntrex 302 (Pty) Ltd and Others v Investec Bank Ltd and Others* [2021] ZAKZDHC 41 paras 40-43; *Nedbank Limited v Groenewald Familie Trust and Others* [2021] ZAFSHC 150 paras 16-17; *Mahomed NO v VGZ and Others* [2020] ZAECPEHC 20 paras 28-29.

[85] The authorities I have cited apply foursquare to SAPO's position. It chose not to pay the Fund when it could have done so; its financial distress pre-dated the Covid-19 pandemic, was foreseeable and avoidable, and so was not the result of *vis major* or *casus fortuitus*; and the impossibility it relied upon was, in any event, relative as opposed to absolute. The result is that SAPO's defence of impossibility of performance fails, and it is bound to perform its obligations in terms of rule 3 of the Fund's rules.

Conclusion

[86] Each of the three defences raised by SAPO lacks merit. Its conduct in this case is worthy of censure. Instead of facing up to its financial challenges, as it initially did, and dealing with the Fund openly and honestly, it changed tack and sought to vilify the Fund for seeking to protect the rights of its members, as its board was duty-bound to do. Not only was SAPO's approach to this matter opportunistic, but it was also cynical: while claiming to be concerned about the fundamental rights of social grant beneficiaries and its customers, it infringed the rights of its employees and sought, through transparent legal sophistry, to place itself above the law. An organ of state ought not to act in this way. SAPO, like any other debtor, cannot choose which debts to pay. If it is trading in insolvent circumstances, its board's obligation is to place it in liquidation, not to pick and choose which of its debts to honour.

[87] SAPO's approach was cynical in another respect as well. It attempted to use the scare tactic of predicting its collapse if the relief sought by the Fund was granted. And that it did without a tenable legal defence. Its apparent purpose was to divert the court from applying the law – that when a statutory instrument places an obligation on a party to pay contributions to another, it must do so. Courts of law exist to determine disputes through the application of legal principles, not to attempt to find expedient, non-legal, ad hoc solutions for one of the parties at the expense of the other. If the consequence of the law taking its course is the demise of SAPO, that is a factor that cannot influence us when the law is clear: SAPO is under a statutory obligation to pay its employees' contributions and its own contributions to the Fund every month, and it is in breach of that obligation.

[88] On appeal, the Fund, perhaps influenced by its symbiotic relationship with SAPO, informed us that it only sought declarators to the effect that SAPO was in breach of its obligations in terms of rule 3 and that supervening impossibility of performance has not extinguished or deferred its obligations. While it also sought a remittal of the matter to the high court, with a view to seeking further remedial relief, I do not believe that that is appropriate. If, despite the declaratory relief, SAPO continues to breach its obligations the Fund can in that event take whatever steps it considers to be appropriate.

[89] Before making the order, it is necessary to comment on the high court's costs order. It decided that costs should follow the result and that the Fund should pay SAPO's costs on an attorney and client scale because both parties asked for such a costs order against the other. In this it misdirected itself. Even if the judgment was otherwise correct, I can see no possible justifiable basis for an attorney and client costs order being made against the Fund. As the appeal will succeed and the high court's order, including the costs order, will be set aside, the costs of the proceedings in the high court and on appeal will have to be paid by SAPO. Given my comments on its conduct in this matter, it can consider itself fortunate that those costs will only be on a party and party scale.

[90] I make the following order.

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following order.

'1 It is declared that the South African Post Office:

1.1 is obliged and required, in terms of rule 3 of the Post Office Retirement Fund's rules, to pay contributions, as defined therein, to the Post Office Retirement Fund on a monthly basis, in arrear, by not later than the first working day of each month; and

1.2 is in breach of this obligation in that it has not made the required payments since May 2020.

2 It is declared that the South African Post Office's obligations in terms of rule 3 of the rules have not been extinguished or deferred by intervening impossibility of performance.

3 The South African Post Office is directed to pay the costs of the Post Office Retirement Fund, including the costs of two counsel.'

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C Plasket

Judge of Appeal

APPEARANCES

For the appellant:	T Motau SC (with him R Tshetlo)
Instructed by:	Norton Rose Fulbright SA Inc, Johannesburg Webbers Attorneys, Bloemfontein
For the first respondent:	J P V McNally SC
Instructed by:	Webber Wentzel, Johannesburg Symington & De Kok, Bloemfontein