SANTA CLAUS

LAW, FOURTH INDUSTRIAL REVOLUTION,
DECOLONISATION AND COVID-19

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St Nicholas, a Performance Guarantee and Covid-19

Charl Hugo

I

*Santa said, "It cannot be,
It seems I'm now old,
No doubt far too bold,
For, in order to lure,
One back to the fold,
I went to procure,
This demand guarantee,
(to secure my performance you see)."*

II

4 September 2020: The invitation

The Director of the Centre for Banking Law of the University of Johannesburg looked in astonished incredulity at his computer screen displaying the following message in the Christmassy colours of green, red and white:

St. Nicholas is inviting you to a scheduled Zoom meeting.

Join Zoom Meeting

<https://lap4web.zoom.us/j/78954299413?pwd=a1lpbWFkbkVrT2t6S0E2WXcvakVEDz09>

Meeting ID: 788 5429 9413

Password: 123Nare1

The meeting was scheduled for 23h10-23h50 on 24 September 2020 – exactly 3 months from Christmas Eve.

Of course, the mixture of COVID19 and the Fourth Industrial Revolution had changed the way meetings were conducted and had broken down national and continental borders, but an invitation from St. Nicholas! – did this not break down a far more distant border – that is between fantasy and reality?¹

Grossly intrigued he knew that he would be clicking on the hyperlink at the appointed time.

III

24 September 2020: 23h09: Explanations and instructions

‘Click’.

The familiar zoom screen opened up in front of the Director, followed by the usual assurance that the host would let him in shortly. Seconds later the screen blinked and he was staring with skeptical interest at the red-cloaked and white-bearded figure displayed. The face was ageless yet lined; every line told a story – most were happy stories but there were sad ones too. The eyes shone with wisdom and kindness. The Director’s skeptical interest made way for overwhelming peace,

¹ Saint Nicholas of Myra, also known as Nicholas of Bari, was an early Christian bishop of Greek descent from the maritime city of Myra in Asia Minor during the time of the Roman Empire. Because of the many miracles attributed to his intercession, he is also known as Nicholas the Wonderworker. Born: 15 March 270 AD, Patara. Died: 6 December 343 AD, Myra [but he lives on prominently]. (Wikipedia).

serenity and joy. Somehow *this* Director of *this* Centre for ('black-letter') Banking Law, suddenly knew with complete certainty, that he had become part of something very special.

He engaged the computer audio: "St Nicholas", he said with joyful reverence, "how very good to meet you". The kind eyes smiled at him shortly, but then, strangely and incongruently, clouded over with anxiousness.

"I have a problem and need expert advice as to what I must do. It concerns a performance guarantee, and I have been advised by my banker that your Centre commands significant knowledge in this field."

And so the Director, who knew little other law, but something about guarantees received the most memorable brief of his career. ...

IV

26 September 2020 (quick service you see!): The opinion

OPINION PROVIDED TO ST NICHOLAS RE PERFORMANCE GUARANTEE

Background facts

- 1 Tshepo Mahlako, the proud son of a Pedi banker living in a village in the Waterberg, yearned for a pair of new football boots, which he had hoped he would find at the foot of his bed, by courtesy of St Nicholas, on Christmas morning 2019.²
- 2 This did not happen.

² Although St Nicholas day is 6 December, Tshepo and his family, as respected protestants, expected the patron saint of children to visit on Christmas Eve. See <https://www.whychristmas.com/customs/fatherchristmas.shtml> (accessed 4 September 2020).

- 3 There was a good reason for this unfortunate non-event. It appears that:
 - 3.1 On Christmas eve 2019, when the sleigh bearing Tshepo's boots entered South African territory, it was hijacked, as so many other vehicles in South Africa, by a group of violent thugs.
 - 3.2 The reindeer managed to escape, shaken but unscathed, and fled back north, north and further north.
 - 3.3 St Nicholas, who had suffered a bad blow to the head, was only rescued two days later by a less timid team of reindeer who brought him home.³
- 4 Conscious-stricken, St Nicholas returned to the Waterberg one month later, by way of a very special 'dream visit',⁴ in which he promised Tshepo that the football-boots issue was a temporary setback and that he would receive his boots next Christmas.
- 5 To the dismay of St Nicholas, however, Tshepo confided in him that he had lost faith in the patron saint of children. He further shared with St Nicholas that the only promises he believed to be trustworthy, were the promises of bankers – an important truth drilled into him from an early age by his father.

³ "Some people say that Santa lives at the North Pole. In Finland, they say that he lives in the north part of their country called Lapland." (See <https://www.whychristmas.com/customs/fatherchristmas.shtml> - accessed 4 September 2020.) This matter seems to be somewhat of a mystery – but is not of importance for the purposes of this opinion.

⁴ It is a bit unclear exactly what a "dream visit" is. When pressed on this point St Nicholas responded, somewhat exasperated, that we would not be able to comprehend this type of visit but assured us that it was no less real than a zoom meeting. He hinted at a journey between different dimensions which may perhaps become possible by the time of the 13th Industrial Revolution.

- 6 There being no suitable bank at the North Pole or in Lapland, St Nicholas visited the town of his original roots, now known as Demre, in Turkey.⁵
- 7 He arranged an appointment with a personal banker at the Denizbank-demre Şubesi,⁶ describing his dilemma.
- 8 His banker, who had attended a summer school at the University of Augsburg in July 2020,⁷ where he was lectured competently on guarantees by the Director as visiting scholar, explained to St Nicholas that the perfect answer would be for the Denizbank, on application of St Nicholas, to issue a performance guarantee in favour of Tshepo.

⁵ Demre, also known as Kale, is the current name of the ancient town of Myra, metropolis of Lycia in the early Christian times. It has the most beautiful Greco-Roman and Lycian ruins of the region. Myra was one of the six most important cities of ancient Lycia, along with Xanthos, Patara, Olympos, Pinara, and Tlos. ... In the 4th century AD, Myra was the capital of the Roman province of Lycia. ... Saint Nicholas, born during the 3rd century in nearby Patara, was the bishop of Myra in the 4th century. He became famous for his charitable nature and for miraculously curing diseases ... He died December 6, 343 in Myra and was buried in his cathedral church [yet somehow lived on and, to the glory of God, continues to do so]." See <http://www.turkishculture.org/archaeology/myra-1075.htm> (accessed 4 September 2020).

⁶ SWIFT code: **DENITRIS296**; Bank code: **DENI**, Country Code: **TR**, Location Code: **IS**, Branch Code: **296**.
http://www.thebankcodes.com/swift_code/r.php?bs=y&bv=DENIZBANK+A.S.&p age=6 (accessed on 4 September 2020).

⁷ The Augsburg summer school is very popular with Turkish students, a fact that the Director of the Centre for Banking Law discovered when teaching there in June 2019. The high praises given by the saint's banker for his teacher at the summer school was the main reason why the Centre was approached by St Nicholas for legal advice.

The guarantee

- 9 On 24 March 2020 Tshepo received by special courier (a sleigh drawn by reindeer), an imposing document. It provided as follows:

“Performance Guarantee in favour of Tshepo Mahlako, in the Waterberg

As security for delivery by St Nicholas on 24/25 December 2020 to Tshepo Mahlako of 1 pair of Adidas football boots, the Denizbank-demre Şubesi hereby promises to pay to Tshepo Mahlako the amount of R3000 on first written demand delivered to our correspondent bankers, Capitec Bank, Vaalwater, on or after 26 December 2020. The demand shall allege that no football boots were delivered by St Nicholas on 24/25 December 2020, and that for this reason the guarantee is being called up. This guarantee, which is independent of the underlying promise by St Nicholas to deliver the football boots referred to above, and should not be interpreted as being accessory to this promise, is issued subject to the Uniform Rules on Demand Guarantees (URDG) 758 of the International Chamber of Promise. The guarantee expires on 24 January 2021.”

The problem

- 10 The concern of St Nicholas is that due to travel restrictions in South Africa imposed by the Government in the wake of the COVID19 pandemic, he may be precluded from delivering the football boots to Tshepo on Christmas Eve 2020.
- 11 Against this background he seeks legal advice regarding the consequences should Tshepo call up the guarantee.

Legal position

- 12 The legal question can be simply stated thus: does (legal) impossibility of performance of the underlying contract (in this

case the promised donation) excuse the guarantor (Denizbank-demre Şubesi) from its obligation to honour its guarantee?

- 13 Despite the unusual and disastrous factual situation (the pandemic and concomitant restrictions on the community) the law regarding this issue is simple. The guarantor must pay. It has no defence. In this respect the Centre points out the following:

- 13.1 The guarantee is subject to the URDG 758. Article 5(a) provides as follows:

"A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary."

- 13.2 This foundational principal⁸ of the law of guarantees is well-established in case law throughout the world.⁹ The inability of the contractor in the underlying contract (in this case St Nicholas) to perform his obligations arising from the contract underlying the guarantee is the very risk that gave rise to the issuing of the guarantee. The

⁸ See Hugo "Bank guarantees" in Sharrock (ed) *The Law of Banking and Payment in South Africa* (2016) 438.

⁹ See, for example *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd* 2010 2 SA 86 (SCA) par 20; *Dormell Properties 282 CC v Renasa Insurance Co Ltd* 2011 1 SA 70 (SCA) par 38; *Eskom Holdings Soc Ltd v Hitachi Power Africa (Pty) Ltd* 2013 ZASCA 101 (12 September 2013) par 14; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* 1978 QB 159 (CA) 171A-C; *RD Harbottle (Mercantile) v National Westminster Bank Ltd* 1977 2 All ER862 (CA) 870; and *Intraco Ltd v Notis Shipping Corporation (The 'Bhoja Trader')* 1981 2 Lloyd's Rep 256 CA 257.

reason why this contract has not been performed (irrespective of how good it may be) is simply irrelevant.

- 14 So, if Tshepo were to call up the guarantee by means of a demand in compliance with the requirements of the guarantee, the bank must and will pay. Once the bank has paid, moreover, it will be entitled to recover the money paid from its mandator (St Nicholas).
- 15 The position would be different if it were to be impossible for the bank to pay. However, in this technological age of the Fourth Industrial Revolution, physical travel in order to pay a debtor is not necessary. Electronic funds transfers, despite all the concomitant problems relating to fraud and phishing,¹⁰ are well-established and functional.

Advice

- 16 The hard approach of a skeptic, against this background, would be simply to point out that if the guarantee is called up, St Nicholas would have to live with the consequences as set out above; it will accordingly have to find R3000 to reimburse the bank that properly paid the guarantee in accordance with the mandate it received from Tshepo. Put differently in the words of a common Afrikanerism: the Wet van Transvaal will apply: "k*** en betaal".¹¹

¹⁰ On which, see *inter alia*, Malan & Nagel "Reflections on cheques, payment instruments, phishing and codification" in Hugo & Kelly-Kelly Louw (eds) *Jopie Jurist Mentor Supervisor Friend* (2017) 55; Booysen "Tackling payment scams: A comparative review" in Du Toit & Hugo (eds) *Annual Banking Law Update (ABLU)* (2019) 1; Plato-Shinar "Regulating liability for unauthorised digital payments: Insights for South Africa" in Hugo (ed) *Annual Banking Law Update (ABLU)* (2020) (forthcoming) 1.

¹¹ It is not for the authors of this opinion to seek reasons as to the Saints concern – if it was monetary, for by all accounts he is a very wealthy man. See

- 17 This memorable interaction between the Centre and the patron saint of children, however, has closed the door to cynical skepticism firmly. The Centre accordingly points out respectfully, that St Nicholas should take into account (as pointed out above) that, not without reason, he is widely known as "the wonderworker" and "for miraculously curing diseases".¹² The solution, therefore, seems:

"St Nicholas, it would seem
You would best serve your cause
No longer to pause
But worthwhile it deem
To rid us this year
of COVID19".

Dated this 26th day of September 2020.

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<https://www.whychristmas.com/customs/fatherchristmas.shtml> (accessed on 6 September 2020).

¹² See <http://www.turkishculture.org/archaeology/myra-1075.htm> (accessed 4 September 2020).

V

26 September 2020: Invoice:

It is truly no jest
That for this strange request
No money's required.
But take note my friend
What this Centre needs
and is widely desired
Is a buffalo of beads
(For the Centre – of course – only the best!)