

CONTRACTUAL PERFORMANCE UNDER COVID-19 LOCKDOWN AND OTHER RECOURSE UNDER SOUTH AFRICAN LAW

Overview

During this unprecedented time, this note is intended to create awareness of the legal remedies or relief and contractual defences that may be available in response to the extensive repercussions of the COVID-19 lockdown facing businesses in the weeks and perhaps months to come.

There are various mechanisms available to provide short term relief to companies in financial difficulty, especially if negotiations with counterparties have broken down. Two of these are (1) suspension or termination of contracts on the basis of *vis major/force majeure* without the usual liability for damages, and (2) business rescue.

We set out below a brief summary of the main principles of each of *vis major/force majeure* and business rescue proceedings.

Please note that what follows are the general legal principles only and as circumstances may vary greatly every set of facts will require closer scrutiny for the correct application of the law.

Suspension or Termination

If the contract is silent

Under the South African common law (which applies to the extent that the relevant contract is silent as to what happens in such a scenario), in the event that parties contracted for certain reciprocal performances and the performance of one or both obligations subsequently becomes impossible beyond the control or fault of the parties, the parties might be able to avoid their respective obligations to perform without penalty or suspend same without penalty.

In certain circumstances, such supervening impossibility of performance will extinguish the duty of a contracting party to perform with the corresponding right of the other contracting party to claim performance simultaneously ceasing and may result in the contract being terminated. This will generally be the case if the impossibility is the result of an event constituting *vis major* being an event beyond the control of the parties, not foreseen or reasonably foreseeable by them at the time of contracting, emanating from nature or man and which cannot be resisted or avoided for example natural disasters, acts of war, riotous assemblies and statutory interventions.

Impossibility of performance is determined objectively and mere difficulties in performance will not suffice.

This doctrine provides an indemnity to contractual parties who are thereby pardoned from complying with their intended contractual obligations and from the contractual liabilities which will normally flow from breach for instance damages claims. Some writers argue the justification for the doctrine to be that it would simply not be fair if the disadvantages of *vis major* events were to be borne by only one party as opposed to both.

Where the contract is of an on-going nature and the impossibility only temporary the contracting parties may agree to suspend the performance of the contract for the duration of the circumstances which prevent performance rather than terminating the contract.

Contractual force majeure

Often parties will have negotiated and agreed on tailor-made consequences to follow defined events that constitute impossibility of performance. Such express contractual provisions commonly known as *force majeure (vis major)* clauses have their origin in the principles discussed above and their application depend on the interpretation of the provisions of the relevant clauses.

In the event that your business is not impacted by the lockdown in its performance of obligations in the manner discussed above, your business is advised to honour its contractual obligations to avoid legal action for breach of contract.

Business Rescue

Should your company be in financial distress, and suspending its contracts as contemplated above will not provide the necessary and/or desired relief or might not be possible, Chapter 6 of the Companies Act 71 of 2008 provides formal relief for financially distressed companies by providing for:-

- temporary supervision of the company, the management of its affairs, business and property by a business rescue practitioner;
- a temporary moratorium (with certain exceptions) on the rights of claimants against the company or in respect of property in its possession; and
- the development and implementation (if approved) of a plan to rescue or rehabilitate the company by restructuring its affairs, business, property, debt, liabilities and equity in a manner to maximise the likelihood of the company continuing in existence on a solvent basis or result in a better return for the company's creditors or shareholders as would be the case with liquidation.

Business rescue is available as a last resort to avoid liquidation.

Business rescue proceedings begin when either the board of a company files a resolution with the Companies and Intellectual Property Commission (CIPC) to place itself under supervision, an affected person applies to the court for an order placing the company under supervision, or a court makes an order placing the company under supervision during the course of liquidation proceedings.

It is important to note that the board of a company cannot validly resolve to place the company under business rescue if liquidation proceedings have already been initiated by or against it.

If business rescue is the appropriate procedure for your company it could prevent its liquidation and allow the company time to find its feet post COVID-19.

Other

Beyond the scope of this note is the relief available under business interruption or similar insurance. It is advised that you ensure that you understand the obligations that may rest on you as insured business for a valid claim. These may include submission of claims in accordance with time bar limitations or having to take certain steps to mitigate harm.

In all these matters you are advised to seek timeous legal advice on your exact circumstances to best protect your interests.

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