

30 MARCH 2020

# CORPORATE & COMMERCIAL AND DISPUTE RESOLUTION ALERT

## IN THIS ISSUE

### *An "Act of God" that is now an "Act of State"*

In a [previous alert](#), we recognised that the COVID-19 virus might already have triggered some contractual clauses relating to *force majeure*, but we were still speculating about whether it would do so under our common law. Then came the unprecedented announcement by President Cyril Ramaphosa – that the country would go into lockdown at 23:59h on Thursday, 26 March and it will not be business as usual.

## An “Act of God” that is now an “Act of State”

In the days leading up to the lockdown, the Government had steadily been releasing notices setting out exactly what the lockdown will entail.

In a [previous alert](#), we recognised that the COVID-19 virus might already have triggered some contractual clauses relating to *force majeure*, but we were still speculating about whether it would do so under our common law. Then came the unprecedented announcement by President Cyril Ramaphosa – that the country would go into lockdown at 23:59h on Thursday, 26 March and it will not be business as usual.

In the days leading up to the lockdown, the Government had steadily been releasing notices setting out exactly what the lockdown will entail. Given the enormous effort required to logistically enforce this lockdown, it is not surprising that a list of all anticipated regulations is not yet readily available. We do know that most businesses have closed their doors, unless services can be provided remotely, with the exception of supermarkets, pharmacies and certain essential services. The likely consequence of the lockdown is that a large majority of South Africans will not be able to perform certain contractual obligations, the most applicable example being paying monthly rental or keeping businesses open during business hours, previously agreed to.

### Impossibility regulated by the common law

Parties should ideally regulate the consequences of a *force majeure* with a specific clause in a contract, since the South African common law is quite rigid in enforcing long-term contracts

in the absence of such a *force majeure* clause. However, in the well renowned case of *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427, the Supreme Court of Appeal held that legislation making performance illegal will constitute a *force majeure*. This means that if, as a result of the lockdown, it is illegal for a party to perform an obligation, they cannot be held liable for non-performance. The obligations under the contract are consequently discharged and neither party will be required to perform. The converse is true for the innocent party. A bondholder would during this period not be able, for instance, to foreclose on a bond if the debtor, due to impossibility of performance, caused by the *force majeure*, is unable to perform, i.e. pay its bond repayments.

### Impossibility regulated in the contract itself

If parties had made provision for the consequences of a *force majeure* contractually, the consequences stipulated in the contract will take precedence over those in the common law. This means that if the contract sets out rules regarding notices, timelines and events constituting a *force majeure*, then the parties must abide by that and cannot rely on the common law. It is, thus, vital that parties make sure that they follow the steps laid out in the contract and seek legal guidance in the instance where there is uncertainty relating to a specific clause. The court in *Contracts and Design Ltd v Victor Green Publications Ltd* 1980 (B) No. 80 (CA) also pointed out that every effort must be made to perform the contract, before any party can rely on the *force majeure* clause therein.

## An “Act of God” that is now an “Act of State”...continued

It will be prudent to seek legal advice if it seems as though a substantial portion of a contract is still performable, even if the contract as a whole is not.

### One foot in, one foot out – the effect of partial impossibility

It may well be that there are contracts in which certain obligations can still be performed. If these obligations are divisible from the rest of the contract, then those will remain whilst the rest of the contract is discharged. A practical example of this would be where a book distributor is required to deliver an electronic copy, as well as a physical copy of a book, on a certain date falling within the lockdown period. In this case, it would still be possible to deliver an electronic copy of the book, although delivery of a physical copy will not be possible due to the *force majeure*. If the one obligation is divisible from the other, performance may still be due.

The court in *Bob’s Shoe Centre v Heneways Freight Services (Pty) Ltd* [1995] 1 All SA 693 (A) conceded that determining whether an obligation in a contract is divisible from the rest is not an easy task and that “*There are no hard and fast rules to determine whether a performance is divisible or indivisible*”. The court considered the following factors:

- a) the intention of the parties;
- b) the nature of the performance;
- c) whether the contract made provision for separate performances; and
- d) whether the contract would’ve been entered into if only the divisible part could be performed.

It will be prudent to seek legal advice if it seems as though a substantial portion of a contract is still performable, even if the contract as a whole is not.

### Conclusion

In light of the present uncertain circumstances, it is strongly recommended that parties do not use *force majeure* as a way to benefit themselves at the expense of their counterparty. Renegotiate contracts where possible, perform as far as possible and grant the necessary indulgences where the alternative of cancellation will have adverse effects on small businesses or struggling industries. We have also seen the Government putting certain regulations in place to assist parties in re-negotiating contracts or placing certain contractual provisions on hold in an effort to avoid businesses closing permanently as a result of the lockdown.

One such regulation is the COVID-19 Block Exemption for the Retail Property Sector, 2020 (published in the Government Gazette No 43134), which exempts certain agreements from provisions relating to restrictive horizontal and vertical practices in the Competition Act. In essence, this means information that could ordinarily not be shared between retailers, may now be shared for the purpose of alleviating the economic effects of the lockdown. More such regulations are expected to be published in due course.

---

*Lucinde Rhoodie, Justine Krige,  
Pauline Manaka and Kara Meiring*

## OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:



**Willem Jacobs**  
National Practice Head  
Director  
Corporate & Commercial  
T +27 (0)11 562 1555  
M +27 (0)83 326 8971  
E willem.jacobs@cdhlegal.com



**David Thompson**  
Regional Practice Head  
Director  
Corporate & Commercial  
T +27 (0)21 481 6335  
M +27 (0)82 882 5655  
E david.thompson@cdhlegal.com

**Mmatiki Aphiri**  
Director  
T +27 (0)11 562 1087  
M +27 (0)83 497 3718  
E mmatiki.aphiri@cdhlegal.com

**Roelof Bonnet**  
Director  
T +27 (0)11 562 1226  
M +27 (0)83 325 2185  
E roelof.bonnet@cdhlegal.com

**Tessa Brewis**  
Director  
T +27 (0)21 481 6324  
M +27 (0)83 717 9360  
E tessa.brewis@cdhlegal.com

**Etta Chang**  
Director  
T +27 (0)11 562 1432  
M +27 (0)72 879 1281  
E etta.chang@cdhlegal.com

**Clem Daniel**  
Director  
T +27 (0)11 562 1073  
M +27 (0)82 418 5924  
E clem.daniel@cdhlegal.com

**Jenni Darling**  
Director  
T +27 (0)11 562 1878  
M +27 (0)82 826 9055  
E jenni.darling@cdhlegal.com

**André de Lange**  
Director  
T +27 (0)21 405 6165  
M +27 (0)82 781 5858  
E andre.delange@cdhlegal.com

**Werner de Waal**  
Director  
T +27 (0)21 481 6435  
M +27 (0)82 466 4443  
E werner.dewaal@cdhlegal.com

**Emma Dempster**  
Projects & Energy  
Director  
T +27 (0)11 562 1194  
M +27 (0)79 491 7683  
E emma.dempster@cdhlegal.com

**Lilia Franca**  
Director  
T +27 (0)11 562 1148  
M +27 (0)82 564 1407  
E lilia.franca@cdhlegal.com

**John Gillmer**  
Director  
T +27 (0)21 405 6004  
M +27 (0)82 330 4902  
E john.gillmer@cdhlegal.com

**Jay Govender**  
Projects & Energy Sector Head  
Director  
T +27 (0)11 562 1387  
M +27 (0)82 467 7981  
E jay.govender@cdhlegal.com

**Johan Green**  
Director  
T +27 (0)21 405 6200  
M +27 (0)73 304 6663  
E johan.green@cdhlegal.com

**Allan Hannie**  
Director  
T +27 (0)21 405 6010  
M +27 (0)82 373 2895  
E allan.hannie@cdhlegal.com

**Peter Hesseling**  
Director  
T +27 (0)21 405 6009  
M +27 (0)82 883 3131  
E peter.hesseling@cdhlegal.com

**Quintin Honey**  
Director  
T +27 (0)11 562 1166  
M +27 (0)83 652 0151  
E quintin.honey@cdhlegal.com

**Roelf Horn**  
Director  
T +27 (0)21 405 6036  
M +27 (0)82 458 3293  
E roelf.horn@cdhlegal.com

**Kendall Keanly**  
Director  
T +27 (0)21 481 6411  
M +27 (0)83 645 5044  
E kendall.keanly@cdhlegal.com

**Yaniv Kleitman**  
Director  
T +27 (0)11 562 1219  
M +27 (0)72 279 1260  
E yaniv.kleitman@cdhlegal.com

**Justine Krige**  
Director  
T +27 (0)21 481 6379  
M +27 (0)82 479 8552  
E justine.krige@cdhlegal.com

**Johan Latsky**  
Executive Consultant  
T +27 (0)11 562 1149  
M +27 (0)82 554 1003  
E johan.latsky@cdhlegal.com

**Giada Masina**  
Director  
T +27 (0)11 562 1221  
M +27 (0)72 573 1909  
E giada.masina@cdhlegal.com

**Nkcubeko Mbambisa**  
Director  
T +27 (0)21 481 6352  
M +27 (0)82 058 4268  
E nkcubeko.mbambisa@cdhlegal.com

**Nonhla Mchunu**  
Director  
T +27 (0)11 562 1228  
M +27 (0)82 314 4297  
E nonhla.mchunu@cdhlegal.com

**Ayanda Mhlongo**  
Director  
T +27 (0)21 481 6436  
M +27 (0)82 787 9543  
E ayanda.mhlongo@cdhlegal.com

**William Midgley**  
Director  
T +27 (0)11 562 1390  
M +27 (0)82 904 1772  
E william.midgley@cdhlegal.com

**Tessmerica Moodley**  
Director  
T +27 (0)21 481 6397  
M +27 (0)73 401 2488  
E tessmerica.moodley@cdhlegal.com

**Anita Moolman**  
Director  
T +27 (0)11 562 1376  
M +27 (0)72 252 1079  
E anita.moolman@cdhlegal.com

**Jo Neser**  
Director  
T +27 (0)21 481 6329  
M +27 (0)82 577 3199  
E jo.neser@cdhlegal.com

**Francis Newham**  
Director  
T +27 (0)21 481 6326  
M +27 (0)82 458 7728  
E francis.newham@cdhlegal.com

**Gasant Orrie**  
Cape Managing Partner  
Director  
T +27 (0)21 405 6044  
M +27 (0)83 282 4550  
E gasant.orrie@cdhlegal.com

**Verushca Pillay**  
Director  
T +27 (0)11 562 1800  
M +27 (0)82 579 5678  
E verushca.pillay@cdhlegal.com

**David Pinnock**  
Director  
T +27 (0)11 562 1400  
M +27 (0)83 675 2110  
E david.pinnock@cdhlegal.com

**Allan Reid**  
Director  
T +27 (0)11 562 1222  
M +27 (0)82 854 9687  
E allan.reid@cdhlegal.com

**Megan Rodgers**  
Oil & Gas Sector Head  
Director  
T +27 (0)21 481 6429  
M +27 (0) 79 877 8870  
E megan.rodgers@cdhlegal.com

**Ludwig Smith**  
Director  
T +27 (0)11 562 1500  
M +27 (0)79 877 2891  
E ludwig.smith@cdhlegal.com

**Ben Strauss**  
Director  
T +27 (0)21 405 6063  
M +27 (0)72 190 9071  
E ben.strauss@cdhlegal.com

**Tamarin Tosen**  
Director  
T +27 (0)11 562 1310  
M +27 (0)72 026 3806  
E tamarin.tosen@cdhlegal.com

**Roxanna Valayathum**  
Director  
T +27 (0)11 562 1122  
M +27 (0)72 464 0515  
E roxanna.valayathum@cdhlegal.com

**Roux van der Merwe**  
Director  
T +27 (0)11 562 1199  
M +27 (0)82 559 6406  
E roux.vandermerwe@cdhlegal.com

**Charl Williams**  
Director  
T +27 (0)21 405 6037  
M +27 (0)82 829 4175  
E charl.williams@cdhlegal.com



CLIFFE DEKKER HOFMEYR

## OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



**Tim Fletcher**  
National Practice Head  
Director  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com



**Thabile Fuhrmann**  
Chairperson  
Director  
T +27 (0)11 562 1331  
E thabile.fuhrmann@cdhlegal.com

**Timothy Baker**  
Director  
T +27 (0)21 481 6308  
E timothy.baker@cdhlegal.com

**Eugene Bester**  
Director  
T +27 (0)11 562 1173  
E eugene.bester@cdhlegal.com

**Jackwell Feris**  
Director  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com

**Anja Hofmeyr**  
Director  
T +27 (0)11 562 1129  
E anja.hofmeyr@cdhlegal.com

**Julian Jones**  
Director  
T +27 (0)11 562 1189  
E julian.jones@cdhlegal.com

**Tobie Jordaan**  
Director  
T +27 (0)11 562 1356  
E tobie.jordaan@cdhlegal.com

**Corné Lewis**  
Director  
T +27 (0)11 562 1042  
E corne.lewis@cdhlegal.com

**Richard Marcus**  
Director  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com

**Burton Meyer**  
Director  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com

**Rishaban Moodley**  
Director  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com

**Mongezi Mpahlwa**  
Director  
T +27 (0)11 562 1476  
E mongezi.mpahlwa@cdhlegal.com

**Kgosi Nkaiseng**  
Director  
T +27 (0)11 562 1864  
E kgosi.nkaiseng@cdhlegal.com

**Byron O'Connor**  
Director  
T +27 (0)11 562 1140  
E byron.oconnor@cdhlegal.com

**Lucinde Rhoodie**  
Director  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com

**Belinda Scriba**  
Director  
T +27 (0)21 405 6139  
E belinda.scriba@cdhlegal.com

**Tim Smit**  
Director  
T +27 (0)11 562 1085  
E tim.smit@cdhlegal.com

**Willie van Wyk**  
Director  
T +27 (0)11 562 1057  
E willie.vanwyk@cdhlegal.com

**Joe Whittle**  
Director  
T +27 (0)11 562 1138  
E joe.whittle@cdhlegal.com

**Roy Barendse**  
Executive Consultant  
T +27 (0)21 405 6177  
E roy.barendse@cdhlegal.com

**Pieter Conradie**  
Executive Consultant  
T +27 (0)11 562 1071  
E pieter.conradie@cdhlegal.com

**Willem Janse van Rensburg**  
Executive Consultant  
T +27 (0)11 562 1110  
E willem.jansevanrensburg@cdhlegal.com

**Nick Muller**  
Executive Consultant  
T +27 (0)21 481 6385  
E nick.muller@cdhlegal.com

**Jonathan Witts-Hewinson**  
Executive Consultant  
T +27 (0)11 562 1146  
E witts@cdhlegal.com

### BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2020 8788/MAR



CLIFFE DEKKER HOFMEYR