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CORPORATE & COMMERCIAL AND DISPUTE RESOLUTION **ALERT**

IN THIS ISSUE >

The media may be calling it an *"act of God"*, but what does the law say about *force majeure* and COVID-19?

When disaster strikes it is easy for the world to fall into disarray. The impact of natural disasters, famine, war and now a pandemic, can have long lasting effects on the systems that keep our economies running. The COVID-19 virus has impacted over 140 countries globally, with schools, churches and businesses being closed down – inevitably affecting contractual obligations nationally and internationally.

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The media may be calling it an *"act of God"*, but what does the law say about *force majeure* and COVID-19?

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When disaster strikes it is easy for the world to fall into disarray. The impact of natural disasters, famine, war and now a pandemic, can have long lasting effects on the systems that keep our economies running. The COVID-19 virus has impacted over 140 countries globally, with schools, churches and businesses being closed down – inevitably affecting contractual obligations nationally and internationally. As impossible as it may sound, the law attempts to make provision for such circumstances, where a *force majeure* causes a contract to become impossible to perform. This article will look at whether COVID-19 triggers a *force majeure* clause in a contract in the South African context, or potentially in terms of the common law in circumstances where no such clause exists in a contract.

Law relating to *force majeure* generally

South African law on impossibility of performance departed from English law more than a century ago, when the court in *Peters, Flamman & Co v Kokstad Muncipality* 1919 AD 427 held that *"if a person is prevented from performing his contract by vis major or casus fortuitus... he is discharged from liability"*. The terms *force majeure*, *vis major* and *casus fortuitus* are used interchangeably and refer to an extraordinary event or circumstance beyond the control of the parties, including a so-called *"act of God"*. Our law is, however, quite strict in the sense that it does not excuse the performance of a contract in all cases of *force majeure*, as was held by the court in *Glencore Grain Africa (Pty) Ltd v Du Plessis NO & others* [2007] JOL 21043 (O). There are certain conditions that must be fulfilled in order for a *force majeure* to trigger the type of impossibility that extinguishes a party's contractual obligations. These are:

1. The impossibility must be objectively impossible
    a. It must be absolute as opposed to probable
    b. It must be absolute as opposed to relative, in other words if it relates to something that can in general be done, but the one party seeking to escape liability cannot personally perform, such party remains liable in contract)
2. The impossibility must be unavoidable by a reasonable person
    a. It must not be the fault of either party
    b. The mere fact that a disaster or event was foreseeable, does not necessarily mean that it ought to have been foreseeable or that it is avoidable by a reasonable person.

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It is generally accepted that natural calamities, acts of State and strikes are examples of a *force majeure*.

Circumstances falling within ambit

Generally, an event falling within the ambit of *force majeure* satisfies the above requirements. The list of events under our common law falling within this category has not been closed and is constantly being developed by courts. It is generally accepted that natural calamities, acts of State and strikes are examples of a *force majeure*. The courts have also held that legislation enacted or an order of court being granted subsequent to a contract being concluded, fall within this ambit. In each case the law will take certain considerations into account. The court in *MV Snow Crystal, Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* [2008] 3 All SA 255 (SCA) set out these considerations to be *"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"*.

In order to avoid the potential ambiguity of the common law in these circumstances, most well advised contracts contain a *force majeure* clause, which deals with the consequences of an event causing performance to become impossible. The court in *Airports Company of SA Limited v BP Southern Africa (Pty) Limited and others* [2015] JOL 34127 (GJ) confirmed that in the case that the parties made provision for this contractually, the consequences stipulated in the contract will take precedence over those in the common law. A contract can thus specify a list of excluded events, or contain a closed list of events that would trigger the *force majeure* clause and extinguish the parties' obligations under the contract. Well drafted clauses also generally contain time limits during which a party unable to perform pursuant to *force majeure* can be excused from performance, stipulating that after the impossibility has prevailed for a certain period of time, the remaining contracting parties would, notwithstanding the presence of *force majeure* be entitled to cancel the contract.

Application to present circumstances

The COVID-19 virus has been declared a global pandemic by the World Health Organisation and several countries now have quarantines in effect to slow the spread of the virus. In South Africa, if the government orders businesses to close, public transport to stop running, or any other event that would make the performance of obligations under a commercial contract impossible, this would be deemed an *"Act of State"* and would fall under our common law understanding of *force majeure*. The South African government declared a state of national disaster on 15 March 2020, giving the national executive certain powers to implement regulations in an effort to curtail the spread of the virus. This includes regulations related to the protection of property, protection of the public and for the purpose of *"dealing*

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...continued

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with the destructive and other effects of the disaster", as set out in the GN313 of 2020. The phrasing here is relatively wide and companies should be alert to any subsequent regulations which may affect the ordinary running of their businesses.

In the instance where companies had the foresight to include a *force majeure* clause with general terms such as *"disease or illness"* or more specific terms such are *"epidemic or pandemic"*, it is possible that COVID-19 has already triggered this clause. Subsequent to the previous outbreak of the SARS and MERS viruses, more and more companies have been advised to include specific reference to pandemics in their *force majeure* clauses. It is especially relevant when dealing with long-term or relational contracts, since these types of contract are particularly vulnerable to unforeseen changes in circumstance.

It is also important to ensure that the *force majeure* clause has indeed been triggered, before making such a declaration to the other contracting party. This is because the unevidenced declaration of a *force majeure* could lead to a breach of contract, or in the case where it appears that the party no longer intends to perform its duties under the contract, it could lead to repudiation of the contract. Especially in the case of lease agreements, in the absence of a *force majeure* clause specifically allowing for termination, a lessee cannot invoke COVID-19 to escape their obligation to pay rent. In the event that a company fears that it may struggle to make rental payments in upcoming months, a renegotiation of the lease agreement should rather be considered – especially if the alternative is not being able to pay rent at all. Consulting a legal practitioner prior to the declaration that a *force majeure* clause has been triggered, is essential.

Remedies available to parties in the event of a *force majeure*

The general effect of a *force majeure* is that it extinguishes the obligations owed between parties. No action for damages for a breach of contract is available to a party to a contract where the other party is unable to perform resulting from *force majeure*, but an *"innocent"* party may have a claim for unjustified enrichment if such party continued to perform in the case of reciprocal obligations. This means that a party who validly fails to perform as a result of a *force majeure* cannot be sued any damages suffered by the other party as a result of the non-performance of the other. However, if a party can prove that the other had be unjustifiably enriched, they may be compensated for their performance.

It is possible to contractually allocate risk in the event of a *force majeure* and the party on whom the risk falls may be liable for damages. In the absence of a contract, risk in contracts of sale are allocated

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by operation of law. In this instance, a purchaser will remain liable for the purchase price in a completed transaction, regardless of whether the goods had been delivered. Thus, even if the goods became undeliverable due to a *force majeure* – for example if a State imposed ban on imports or exports - the purchaser will still be liable payment of the purchase price even if the goods purchased are not delivered. Ensuring adequate protection against risk in such instances is thus essential when drawing up commercial contracts.

Steps to take to mitigate risks

We have already seen the economic and business impact of COVID-19 in China, Italy and Japan and it is almost inevitable that this will spread to the rest of the world. It is thus important for companies to take proactive steps to ensure that they can fulfil their contractual obligations in the upcoming months and that the parties they are contracting with are doing the same in order to prevent the need for invoking a *force majeure* clause.

Especially since companies now have the ability to *"see into the future"*, by looking at the impact of COVID-19 on commercial business internationally, it is particularly important to take steps to mitigate the impact of the further spread of the virus. The steps that companies are advised to take include mitigating the impact of restricted travel, seeking alternative streams of supply, implementing effective remote working for employees and determining whether certain operational functions can be moved to different locations. In the case that a dispute arises where a defaulting party wishes to rely on *force majeure*, whether contractually or in terms of common law, the court will generally look at whether reasonable steps were taken by either party to mitigate the risks in advance.

It is also recommended that companies review their insurance policies potentially covering an event such as COVID-19. In the same way that our government and healthcare systems are being proactive in mitigating the spread of the virus, businesses can be proactive in mitigating the economic and legal consequences arising from the spread of the virus.

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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.

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