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DISPUTE RESOLUTION ALERT

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The FIDIC Contracts: COVID-19, Acts of God and other Exceptional Events

The COVID-19 pandemic has had a profound impact on the construction industry in South Africa. Construction projects were only permitted to resume operations once the country reached Alert Level 3, on 1 June 2020. Parties to construction contracts, including contractors and employers, are now required to face the contractual music to address claims for losses upon resumption of construction works after lockdown.

Application of Section 133 of the Companies Act to transactions during business rescue

Section 133 of the Companies Act 71 of 2008 (Act) places a general moratorium on the institutions of legal proceedings against a company in business rescue. In *Cloete Murray v FirstRand Bank* 2015 (3) SA 438 (SCA), the Supreme Court of Appeal (SCA) recognised that section 133 is imperative to the business rescue process, as it *"provides the crucial breathing space ... to enable a company to restructure its affairs"*.

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The FIDIC Contracts: COVID-19, Acts of God and other Exceptional Events

In terms of Clause 19, it appears that the COVID-19 pandemic may meet the definition of Force Majeure and thus entitle a party to invoke the provisions thereof to be excused from performance of certain obligations under the contract.

The COVID-19 pandemic has had a profound impact on the construction industry in South Africa. Construction projects were only permitted to resume operations once the country reached Alert Level 3, on 1 June 2020. Parties to construction contracts, including contractors and employers, are now required to face the contractual music to address claims for losses upon resumption of construction works after lockdown.

With regard to the consequences of COVID-19 on construction projects, certain categories of potential losses can typically be identified. These include:

- Execution of additional or varied works giving rise to claims for a variation of the contract.
- Critical delays to the completion of the works beyond the agreed completion date, giving rise to claims for an extension of time in relation to the agreed completion date.
- Increased time-related site costs – if the Contractor suffers critical delay, its time-related site costs, which include its general requirements such as site establishment and the salaries of on-site management, will increase due to its presence on site being extended giving rise to an entitlement to claim for those extension costs to be fully compensated.

The Fédération Internationale Des Ingénieurs – Conseils (FIDIC) suite of contracts are among the most commonly used standard forms of construction contracts, in particular in relation to higher value international construction projects. FIDIC contracts are endorsed by many multilateral development banks including the African Development Bank.

The FIDIC Red Book is the standard and most used construction contract form in projects where the design is provided by the Employer, pursuant to a procurement process.

Force Majeure

When considering the FIDIC (1999) standard form contracts (Red, Yellow and Silver Books), certain contractual mechanisms are available to the parties to address claims for COVID-19 related losses, in particular clause 19 relating to Force Majeure and clause 13.7 relating to Changes in Legislation.

In terms of Clause 19, it appears that the COVID-19 pandemic may meet the definition of Force Majeure and thus entitle a party to invoke the provisions thereof to be excused from performance of certain obligations under the contract.

To rely on Force Majeure relief on account of COVID-19, a party has to prove that its obligations are being prevented by the relevant event or circumstance, and that the event or circumstance constitutes a Force Majeure event.

The FIDIC Contracts: COVID-19, Acts of God and other Exceptional Events...continued

The two areas of possible contention in terms of meeting the standard of Force Majeure would be whether construction activities were prohibited which would depend on the severity of restrictions being imposed in terms of lockdown legislation and/or whether COVID-19 is determined to fall within the category of a natural catastrophe.

Clause 19.1 sets out the conditions that must be satisfied for an event or circumstance to be considered Force Majeure and states:

"In this Clause, 'Force Majeure' means an exceptional event or circumstance:

- (a) which is beyond a Party's control,*
- (b) which such Party could not reasonably have provided against before entering into the Contract,*
- (c) which, having arisen, such Party could not reasonably have avoided or overcome, and*
- (d) which is not substantially attributable to the other Party."*

Clause 19.1 lists events which may constitute a Force Majeure provided that conditions (a) to (d) above are satisfied. Although a pandemic such as COVID-19 is not expressly included in the list of example events and circumstances, the list is non-exhaustive and COVID-19 related claims may find application under the category cited in clause 19.1(v): *"natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity"*.

Clause 19.2 provides that if a party is or will be prevented from performing any of its obligations under the contract by Force Majeure, then it shall give notice to the other party of the event or circumstances constituting Force Majeure and shall specify the obligations, the performance of which is or will be prevented.

To assert Force Majeure, the party must actually be prevented from performing at least some of its obligations. It is not enough that the performance might simply have become more difficult or expensive to fulfil.

Therefore, depending on the particular circumstances, COVID-19 may qualify as a Force Majeure if the above conditions are met. The two areas of possible contention in terms of meeting the standard of Force Majeure would be whether construction activities were prohibited which would depend on the severity of restrictions being imposed in terms of lockdown legislation and/or whether COVID-19 is determined to fall within the category of a natural catastrophe.

The consequence of Force Majeure is that the party who is relying on the Force Majeure event will be entitled to claim an Extension of Time in terms of clause 19.4 (a) should the prevention of the relevant obligations result in a critical delay. However, in terms of clause 19.4 (b), compensation for the relevant costs incurred by reason of such event would not be available to the party claiming relief for COVID-19 related claims in that such claims would fall within the events described in sub-paragraph (v) of sub-clause 19.1 and not sub-paragraphs (i) to (iv) as required.

In FIDIC (2017), the term *"Force Majeure"* was replaced with *"Exceptional Event"* in clause 18. The definition and the non-exhaustive list of events, however, is largely unchanged.

The FIDIC Contracts: COVID-19, Acts of God and other Exceptional Events...*continued*

If the party claiming relief in terms of clause 13.7 can provide supporting evidence in terms of clause 20.1 that it suffered delays and/or incurred additional cost as a result of a change in laws as a consequence of COVID-19, it would be in a position to claim for both an extension of time and the time related costs suffered.

Changes in Legislation

Parties may argue that it was not necessarily COVID-19 itself that prevented construction activities on site, but rather that the statutory imposed lockdown caused the suspension of the works.

Clause 13.7 of the FIDIC Red Book (1999) (Adjustments for Changes in Legislation) states that the Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from a change in the Laws of the Country (including the introduction of new Laws and the repeal or modification of existing Laws) or in the judicial or official governmental interpretation of such Laws, made after the Base Date, which affect the Contractor in the performance of obligations under the Contract. If the Contractor suffers (or will suffer) delay and/or incurs (or will incur) additional Cost as a result of changes in Laws, made after the Base Date, the Contractor shall give notice to the Engineer for an extension of time and/or costs. The provision entitles the Contractor to an extension of time for any such delay, if completion is or will be delayed, under clause 8.4 relating to Extension of Time for Completion, and payment of any such Cost, which shall be included in the Contract Price.

The definition of Laws in the FIDIC standard form Contracts is quite broad and covers a wide range of legislation as well as regulatory actions from "any legally constituted public authority". In South Africa, the COVID-related regulations imposed by the Minister

of Cooperative Governance and Traditional Affairs in terms of the Disaster Management Act No 57 of 2002 would constitute a change in legislation as per clause 13.7.

Therefore, if the party claiming relief in terms of clause 13.7 can provide supporting evidence in terms of clause 20.1 that it suffered delays and/or incurred additional cost as a result of a change in laws as a consequence of COVID-19, it would be in a position to claim for both an extension of time and the time related costs suffered.

Parties would be entitled to similar relief in terms of the Adjustments for Changes in Laws provisions of the FIDIC Red Book (2017) at paragraph 13.6.

Force Majeure versus Changes in Legislation

There is no provision in the FIDIC standard form Contracts which precludes a party from seeking relief in terms of either Force Majeure (FIDIC Red Book 1999) or Exceptional Events (FIDIC Red Book 2017) clauses, or the Changes in Legislation clauses in seeking relief for claims relating to COVID-19. The party seeking relief would need to determine the strength of their position and prospects of success under the contract based on the facts and circumstances of the matter and the particulars that can be provided to substantiate such claims.

Joe Whittle, Krevania Pillay and Stefan Zimmermann

Application of Section 133 of the Companies Act to transactions during business rescue

The SCA found that section 133 of the Act applies to the assets and liabilities of a company when that company enters business rescue. It questioned, however, whether section 133 also applies to transactions concluded subsequent to business rescue.

Section 133 of the Companies Act 71 of 2008 (Act) places a general moratorium on the institutions of legal proceedings against a company in business rescue. In *Cloete Murray v FirstRand Bank 2015 (3) SA 438 (SCA)*, the Supreme Court of Appeal (SCA) recognised that section 133 is imperative to the business rescue process, as it “provides the crucial breathing space ... to enable a company to restructure its affairs”.

The section 133 moratorium requires the permission of either the business rescue practitioner or the court before a party can institute legal proceedings against a company in business rescue. However, as held by the SCA in the recent case of *Timasani (Pty) Ltd (in business rescue) v Afrimat Iron Ore (Pty) Ltd [2021] ZASCA 43*, this moratorium is not without its limits.

In *Timasani* the extent of the breathing space referred to in *Cloete Murry* was called into question. In this case, the business rescue practitioner (BRP) for Timasani (Pty) Limited (Timasani) entered into a sale agreement with Afrimat Iron One (Pty) Limited (Afrimat) for the sale of certain of Timasani’s assets. The agreement was subject to certain suspensive conditions and required Afrimat to pay a 10% deposit amounting to R1,7 million. For various reasons the sale fell through and the suspensive conditions were never fulfilled. Afrimat consequently demanded, amongst other things, its deposit back.

When the BRP failed to pay back the deposit, Afrimat launched a court application claiming repayment. Opposing this, the BRP argued, *inter alia*, that Afrimat had not complied with the provisions of section 133 of the Act because it had not secured the consent of the BRP or a court to launch legal proceedings against Timasani.

The High Court found that the consent was not necessary. On appeal, the SCA had to determine whether section 133 of the Act applied to the facts.

The SCA found that section 133 of the Act applies to the assets and liabilities of a company when that company enters business rescue. It questioned, however, whether section 133 also applies to transactions concluded subsequent to business rescue. While acknowledging that this is a pivotal question to business rescue, the court found that it was not necessary in this instance and for reasons set out below to make a finding on this point.

Section 133(1) of the Act specifically provides that no legal proceedings may be brought against a company in business rescue in relation to property it owns, or property lawfully in its possession.

In this case, the SCA found that where a contract is subject to a suspensive condition, which is not ultimately fulfilled, the contract falls away, as if it never existed. The parties then need to be

Application of Section 133 of the Companies Act to transactions during business rescue...*continued*

A business rescue practitioner is required to contract with third parties during the restructuring of a company, and if section 133 were to apply to the assets and liabilities arising from these contracts, third parties may, as suggested by the SCA, be dissuaded from entering these contracts. Therefore, the business rescue process would be hindered.

restored to the position they would have been in had the contract never existed. Therefore, when the contract between Timasani and Afrimat fell away, the SCA held that there remained no lawful basis for Timasani's continued possession of the deposit. As such, section 133 of the Act did not apply, and Afrimat was entitled to the repayment of the deposit.

The question therefore remained open as to whether section 133 of the Act applies to transactions or property, whether lawfully in a company's possession or not, which were concluded or came into that company's possession *after* the company entered business rescue. Although giving no conclusive answer, the SCA opined that section 133's application to these transactions or property would not serve the purpose of business rescue. A business rescue practitioner is required to contract

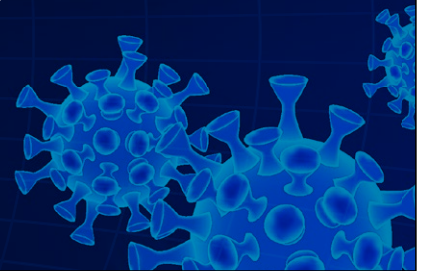
with third parties during the restructuring of a company, and if section 133 were to apply to the assets and liabilities arising from these contracts, third parties may, as suggested by the SCA, be dissuaded from entering these contracts. Therefore, the business rescue process would be hindered.

The *Timasani* judgment illustrates the internal limitation on section 133 to claims concerning property in the lawful possession of a company. Looking forward, however, the SCA's opinion gives strong support to the argument that section 133's application is limited to those assets, liabilities and transactions of a company that pre-exist it entering business rescue.

Belinda Scriba and Nicholas Carroll

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

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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