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KIETI LAW LLP, KENYA

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COVID-19 and the doctrine of supervening impossibility of performance

There have been numerous learnings that have come out of COVID-19, one lesson in particular is, like any other rarely occurring global catastrophe, pandemics have happened in the past and will continue to happen in the future. Whilst we cannot control and prevent dangerous situations from emerging, we should at least educate ourselves as to the defenses available.

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COVID-19 and the doctrine of supervening impossibility of performance

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In the instance of contractual obligations, if the performance of duties become impossible, it is advisable to prepare to mitigate its effects and the consequences thereof by making simple, yet useful changes, to the agreements.

It is a well-established principle that if performance of a contract has become impossible through no fault of the party concerned, the obligations under the contract are generally extinguished (or suspended, if the impossibility is only temporary) under the doctrine of supervening impossibility of performance.

In the context of COVID-19, it is important to remember that this doctrine is not absolute and will not always be available to parties as a defense. This was highlighted in the case between Freestone Property Proprietary Limited (Freestone Property) and Remake Consultants CC (Remake Consultants) where the court clarified some of the general principles on invoking COVID-19 as a defense (*Freestone Property Investment (Pty) Ltd vs Remake Consultants CC* and another 2021 (6) SA 470 (GJ)).

Freestone Property, as lessor, and Remake Consultants, as lessee, concluded two written lease agreements for a commercial premises. On 15 March 2020 a National State of Disaster was declared to combat the COVID-19 pandemic. Although the "*hard lockdown*" ended on 30 April 2020, Remake Consultants only recommenced trading in June or August 2020. In November 2020, Freestone Property terminated the lease agreements because of non-payment of rental and other charges. *Remake Consultants'* primary defense was that the obligations of Freestone Property and Remake Consultants were suspended for the period March to June 2020 and the parties' respective obligations became incapable of performance because of supervening impossibility of performance as the declaration of the state of disaster made it unlawful for both the lessor and the lessee to perform their obligations.

COVID-19 and the doctrine of supervening impossibility of performance

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The court had to consider the effect of the declaration of the state of disaster and its associated regulations on the lease agreements as an issue to be determined in the context of the doctrine of supervening impossibility of performance. In this regard, the court held that *"A consideration of a defence of supervening impossibility of performance in the context of the regulations passed pursuant to the state of disaster should be approached from the perspective of its effects on the performance by the plaintiff of its obligations as lessor and on the performance by the first defendant's obligations as lessee, rather than approached solely from the perspective of whether the first defendant was able to perform its side of the bargain, particularly to pay rentals"*.

Applying this approach in determining whether Remake Consultants was entitled to rely on the doctrine of supervening impossibility of performance, the court found as follows:

- An assessment of whether there is impossibility of performance should not be approached from the narrow perspective. Instead, a more nuanced approach must be implemented;
- supervening impossibility can only be invoked if it was totally and objectively impossible to perform, as it typically was during the "*hard lockdown*". Remember, this the *"general"* position because one must always assess the particular facts, the nature of the performance sought, and the party's line of business. Some contractual performances may have remained legally impossible even during softer lockdowns, and conversely some performances were perfectly possible during the hard lockdown. Lease cases are the most prominent in the case law, and in this context it was generally impossible during hard lockdown for most lessors to comply with their obligation to give vacant possession of the premises, as most businesses had to be shut down. Under the principle of reciprocity, lessees are given a corresponding remission in rental when the lessor is unable to give vacant possession;

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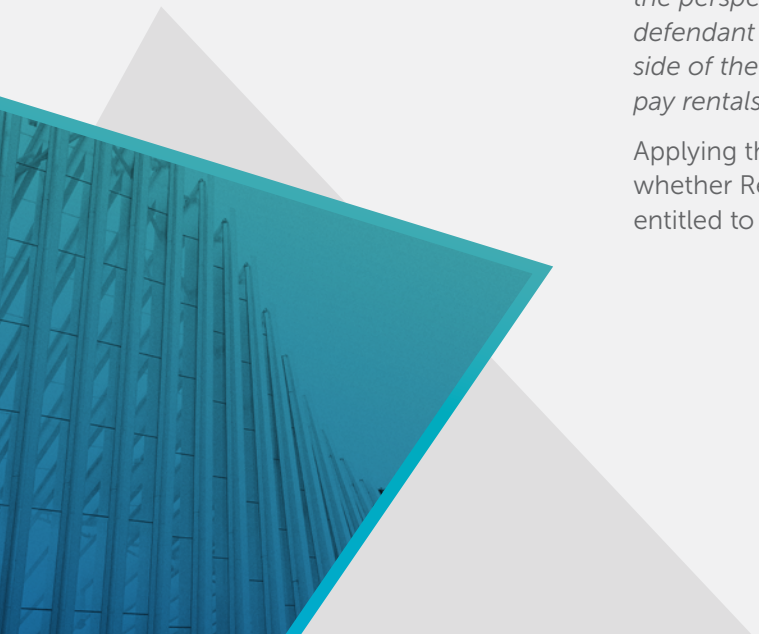

COVID-19 and the doctrine of supervening impossibility of performance

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- the *"vis major"* must be the direct and immediate cause of a lessee being deprived of the use of the lease premises;
- a *"vis major"* or *"casus fortuitus"* that makes it only uneconomical or no longer commercially attractive for a party to carry out its payment obligations cannot constitute a basis to be excused from performance – this is not *"impossibility"*; and
- our law allows for parties to contractually regulate the position should there be supervening impossibility of performance, and the doctrine of supervening impossibility of performance will not apply if the contract provides otherwise.

Persons wishing to keep a party liable despite impossibility brought about by COVID-19 and the lockdowns arising pursuant thereto, must preferably be very clear and identify COVID as a specific *force majeure* event. In the Freestone case (a summary judgment case) this point came to the lessee's rescue. Because such a clause is very onerous (some may even argue that in certain contexts it is against public policy – but that is a debate for another day), it will likely be restrictively interpreted. If the clause lists a number of disasters like floods, fires, earthquakes and the like there is a decent chance that a court will read the catch-all that typically appears at the end (*"or as a result of any other cause whatsoever"*) in light of, or in line with, those listed events and exclude impossibility of performance arising out of COVID. That is, it will apply the eiusdem generis principle of interpretation and may be inclined to hold that a virus pandemic was not one of the events in contemplation of the parties.

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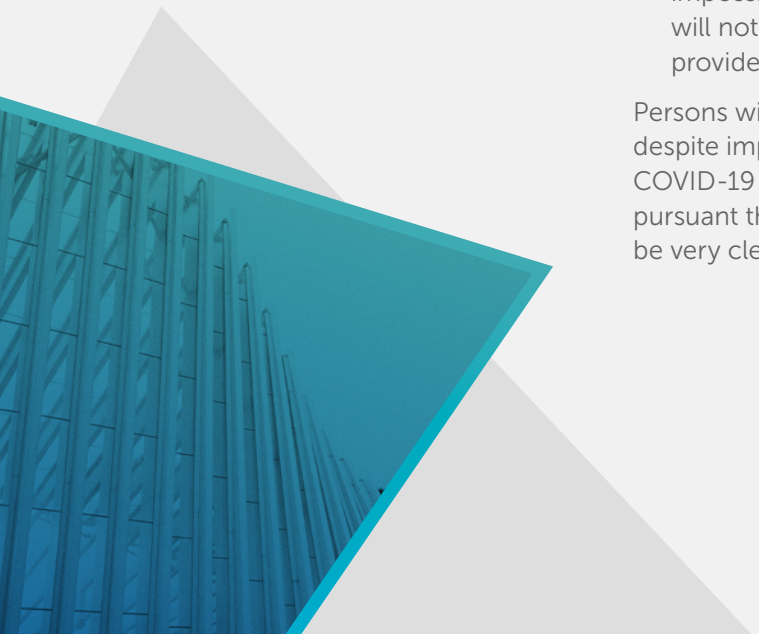

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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