

THE COVID-19 PANDEMIC AND ITS EFFECT ON CONTRACTUAL LIABILITY

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The COVID-19 virus has been declared a global pandemic by the World Health Organisation and several countries have quarantines in effect to combat the spread of the virus. The South African government implemented a nation-wide 21-day lockdown on the 27th March 2020. Most businesses have been ordered to close, public transport has been ordered to stop running, and many other restrictions on the movement of people have been ordered.

During the lockdown, parties to a contract may be prevented from rendering their respective contractual obligations. As such parties may seek to raise the defence of impossibility of performance ‘vis majeure’ or ‘force majeure’ to escape their respective contractual obligations. The terms ‘vis majeure’ and ‘force majeure’ are used interchangeably and refer to an extra-ordinary event or circumstance beyond the control of the parties to a contract – which is commonly referred to as an “act of God”. The lockdown caused by the COVID-19 pandemic is more accurately referred to as an “act of State” which falls under the common law understanding of ‘force majeure’.

Where parties to a contract made provision for ‘force majeure’ in a clause in the contract, the consequences stipulated in the contract will take precedence over the common law. Where the contract does not make provision for ‘force majeure’ the South African common law of impossibility of performance applies. Where a person is prevented from performing a contractual obligation by ‘force majeure’ this will result in a discharged from liability.

There are however conditions that must be fulfilled in order for a defence of ‘force majeure’ to extinguish a party’s liability. These are:

1. The impossibility must be objectively impossible.
2. It must be absolute as opposed to probable.
3. 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.
4. The impossibility must be unavoidable by a reasonable person.
5. It must not be the fault of either party.
6. 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.

The effect of the defence of impossibility as a result of ‘force majeure’ is that it extinguishes the obligations owed between parties. A party who validly fails to perform as a result of the lockdown cannot be sued for damages suffered by the other party for non-performance. However, if a party can prove that the other party has been unjustifiably enriched by their performance under a contract they may be compensated for the performance they have rendered.



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Contact one of our corporate and commercial law experts at J Leslie Smith & Company Incorporated on 033 845 9700 for assistance with any legal aspect relating to the effects of COVID-19 and the nation-wide lockdown on contractual arrangements.

SOME ADDITIONAL INFORMATION WHICH MAY BE RELEVANT FOR OUR PURPOSES:

A purchaser under a contract of sale will remain liable for the purchase price in a completed transaction, regardless of whether the goods became undeliverable due to 'force majeure'. A defence of impossibility will not succeed if, when the impossibility intervened, the performance was overdue. In this case the rule of lateness perpetuates the obligation, and the debtor bears the risk of impossibility unless they can show that the impossibility would have come about even if they had rendered performance timeously.

A party whose performance was already due at the time the lockdown took effect, may be liable for damages for breach of contract. A debtor is late in performance if they fail to render the contractual performance within the agreed time. If no time for performance is agreed upon, the debtor is not automatically late if they fail to perform. In this case it is only once the creditor has demanded performance within a specified time, reasonable in the circumstances, and the debtor has failed to perform within that time, that they are regarded as being late. (see *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W)).



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