

Force majeure and Covid-19

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While our country takes a 21 day time-out to flatten the curve, a more frequently asked question is to what extent does Covid-19 and, more particularly, the national shutdown legally affect commercial contracts?



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Surprisingly, these circumstances are not new and our law has attempted to make provision for such by force majeure clauses. Do they apply to the coronavirus though?

What is a force majeure?

This is the term which is commonly known by lawyers and non-lawyers alike as an 'act of God'.

From a legal perspective, a force majeure is an act of nature (*vis divina*) or an act of man which is unforeseen or reasonably unforeseeable and beyond the reasonable control of either or both of the parties to the contract, and which makes it objectively impossible for one or both of the parties to perform their respective obligations under the contract.

Some of the more common examples of force majeure include events such as a war, strike, riot, crime, plague, hurricane, flood, earthquake, volcanic eruption, and other similar events.

Is Covid-19 a force majeure event?

Our common law has not created an exhaustive list of events which are considered to constitute a force majeure and these events are constantly being reviewed by our courts. It is however widely accepted that events such as international pandemics, plagues as well as acts of state are examples of force majeure. So in short, yes, the coronavirus outbreak and the concomitant national shutdown do constitute force majeure events.

What is a force majeure clause?

These are clauses in contracts which specifically address and modify the parties' obligations and/or liabilities under a contract when an extraordinary event or circumstance beyond their control prevents one or all of them from fulfilling those obligations.

These clauses are usually drafted broadly and encompass an array of circumstances and events which trigger the provisions of the clause. Depending on the drafting and language used, such clauses may have a variety of consequences, which include excusing the affected party from performing its obligations under the contract either partially or in full; excusing that party from the consequences of delay in performance, entitling that party to suspend (or claim an extension of time for) performance; or giving that party a right to terminate the contract in its entirety.

Parties often include set time periods during which certain provisions of the contract will be suspended if a force majeure event occurs. This provision is normally accompanied by the right to terminate the agreement unilaterally by way of notice to the other party should the force majeure event continue for longer than the set period. This period will depend on the type of agreement between the parties, the nature of the obligations concerned, the contractual performance required and the practicality of allowing for such a suspension.

Importantly, the party seeking to rely on a force majeure clause will bear the onus of proving that a particular event or

circumstance triggers its application in order to avail itself of the relief it provides.

What if there is no force majeure clause in the contract?

If the existing contract does not contain a force majeure clause or if such clause in a contract does not cover the unforeseen event that a party wishes to rely on, this does not necessarily mean that such party is without a valid legal remedy but rather that the common law principle of 'supervening impossibility of performance' will need to be relied on in order to suspend performance of its obligations. This is discussed in more detail below.

The common law approach to force majeure

In terms of general principles of the law of contract, a contract is only valid where performance is possible. Therefore, an occurrence of a force majeure event may, in some circumstances, suspend and/or terminate a party's obligations under a contract provided such party can prove 'supervening impossibility of performance'.

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. Our courts have pronounced that there are some key elements which must exist in order for a party to successfully prove that an event or circumstance does in fact give rise to a 'supervening impossibility of performance'. These elements are:

- the event must have an effect of causing the performance of one or both of the party's obligations to be objectively impossible;
- the impossibility must be absolute as opposed to probable or relative;
- the event must have been unavoidable by a reasonable person and must not be the fault of either party;
- the event must have been unforeseen or reasonably unforeseeable in the circumstances; and
- the event giving rise to the impossibility must occur after the conclusion of the contract.

The mere fact that performance has become more difficult or more costly does not absolve a party from performing its obligations. A change in commercial circumstances which renders performance expensive or unaffordable is similarly insufficient.

Does a force majeure clause override the common law?

Yes, the court in *Airports Company of SA Limited v BP Southern Africa (Pty) Limited and others* [2015] JOL 34127 (GJ) confirmed that the provisions of the contract between the parties relating to force majeure events and the agreed consequences thereof as stipulated in the contract will take precedence over the provisions of the common law.

Can you contractually agree that an event will not be considered a force majeure?

A contract can indeed specify a list of events that will not, for the purposes of the contract, constitute force majeure events, or conversely contain a closed list of events which are the only events recognised as force majeure events that would trigger the force majeure clause and extinguish the parties' obligations under the contract.

How is the force majeure clause triggered?

A force majeure clause is not automatically triggered. Well drafted force majeure clauses generally prescribe the required formalities to be carried out before the provisions of the force majeure clauses can be invoked, together with the 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 ongoing presence of force majeure be entitled to cancel the contract.

It is imperative that prior to seeking to enforce a force majeure clause, you receive advice from a legal practitioner to

confirm that the provisions of the 'force majeure clause' are indeed capable of being invoked, before dispatching a notification to the other contracting party. This is because an unjustified declaration of a force majeure could give rise to the inference that the party seeking to invoke it no longer intends to perform its duties under the contract, which in turn could give rise to grounds for repudiation or breach of the contract.

Remedies available to parties in the event of a force majeure

The general effect of force majeure is that for so long as it persists, it extinguishes the obligations owed between parties. In the seminal case of *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427, the court held that: "if a person is prevented from performing his contract by vis major or casus fortuitus...he is discharged from liability".

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.

Conclusion

The ongoing coronavirus (Covid-19) contagion is having an unprecedented impact on trade and commerce. Some businesses may seek to rely on (or conversely oppose attempts to rely on) force majeure clauses or other contractual rights for relief from the performance of certain obligations due to the impact of the coronavirus outbreak.

It is imperative that before doing so, you consult a legal practitioner to review any commercial contracts you have to advise you on the existence and applicability of a force majeure clauses contained therein as well as how to validly trigger such clause or oppose an unjustified reliance on such clause. In the event that there is no 'force majeure clause' in the commercial contract, the legal practitioner can advise you as to whether or not you have any common law remedies available.

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