THE IMPACT OF UNFORESEEN EVENTS ON CONTRACTUAL IMPLICATIONS FORCE MAJEURE / IMPOSSIBILITY OF PERFORMANCE

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INTRODUCTION

The purpose of this article is to explore the impact of COVID-19 and the resultant lockdown on contractual implications in South Africa. There are two primary issues to be considered in this regard:

1. Does the contract have a Force Majeure (FM) clause?
2. If there is no FM clause or if there is but it does not apply – does the Common Law concept of “supervening impossibility of performance” apply?

Relying on the common law of “impossibility of performance” is difficult as the South African Courts stringently apply these requirements.

*Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd 2000 (4) SA 191 (W) 198 B-E,* described the common law position: if performance of a contract is impossible due to unforeseen events (not caused by the parties), parties are excused from performing in terms of the contract. The impossibility must be absolute or objective as opposed to relative or subjective.

It is important that the parties must not have had reasonable foresight of the event causing impossibility at the time the contract was concluded.

FORCE MAJEURE

What is Force Majeure

Force majeure (known in Roman law as *vis maior* or *casus fortuitus*) is the term used to describe an event or occurrence which is unexpected and beyond a party’s reasonable control that makes contractual performance impossible.

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As a general rule and to the extent there is a FM clause that is applicable, FM will relieve any party from liability arising from non-performance of a contractual obligation.

The requirements for FM are as follows:

1. The performance must be objectively impossible;
2. The impossibility must be unavoidable by a reasonable person.

The obligation to comply with a contractual obligation due to FM will however not be terminated (or suspended if applicable) where:

1. The party was in mora (breach) at the time performance became impossible
2. Where impossibility of performance was the fault (whether intentionally or negligently) of the defaulting party;

As a general rule, where a contractual obligation cannot be performed due to FM, counter obligations of the other party are also not due. As can be seen there are various factors at play and each contract and case must be examined on its own merits.

Force Majeure Clauses

It must be noted that there are various forms of FM clauses and to be enforceable, the clause needs to be sufficiently specific. General standard FM clauses for the most part lack specificity and will afford the affected parties with limited manoeuvrability.

Is Force Majeure Permanent?

The effect of an FM clause is to suspend contractual obligations for an unknown period. Essentially an FM clause results in the effects of breach of contract being suspended for the length of the force majeure event. Therefore, once the force majeure event terminates and performance is possible once more, the contract will continue. It is vital
to analyse an FM clause on a case-by-case basis, having consideration of the contract and the particular surrounding circumstances.

**COMMON LAW POSITION - SUPERVENERNING IMPOSSIBILITY OF PERFORMANCE**

To the extent that FM is not applicable, parties need to look to the common law for assistance. In South African law, any event beyond the control of contractual parties (such as COVID-19 and the resultant lockdown) that makes performance impossible after the conclusion of the contract is addressed under the common law principle of “supervening impossibility of performance”.

The common law position is that both parties are excused from performing:

1. If performance of an obligation becomes impossible after conclusion of the contract;
2. The inability to perform is not due to the fault of any of the contractual parties.

Relying on the common law of “impossibility of performance” is difficult as the South African Courts stringently apply these requirements.

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It is important that the parties must not have had reasonable foresight of the event causing impossibility at the time the contract was concluded.

**THE EFFECT OF FORCE MAJEURE ON PROPERTY RELATED CONTRACTS**
FM clauses are generally not included in most sale / lease of residential property agreements and will thus not be applicable to the extent that these clauses are not in the agreement.

If there is an FM clause, it must be examined to see if it is enforceable having regard to the specific wording of the clause and the circumstances of the parties (i.e. is performance objectively impossible).

If there is no FM clause, the question is whether the common law applies. Each matter needs to be assessed on a case by case basis.

**CONCLUSION**

Parties need to carefully consider whether their current contracts make provision for FM and if so where the FM clause is applicable and to what extent. If there is no FM clause it must be determined whether the common law applies and to what extent. Legal advice must be sought before taking action.

**COMMON QUERIES**

In order to address some common queries regarding the law during the COVID-19 lockdown, we have included the summary on the following page below.

Please e mail us conveyancers@schindlers.co.za with any queries you may have.

**COMMON QUERIES**

Lease Agreements

The answers may vary depending on the terms of the contract and any FM clauses.
Query: a tenant was due to move in on 1 April and could not. Is rent payable?

Answer: no. Since the tenant could not move in due to lock down he/she will not be required to pay rent to the new landlord until he/she can take occupation as the circumstances are beyond their control. The landlord will not be able to rent the property to someone else during lockdown, even if it is empty.

Query: must a residential tenant pay rent:

Answer: As a general rule, provided the tenant has beneficial occupation of the property, Yes.

Query: must a commercial tenant pay rent

Answer: this depends on the circumstances and on whether there is an applicable FM clause in the agreement and whether the tenant has beneficial occupation and the extent to which there is beneficial occupation.

Sale of Immovable Property

The answers may vary depending on the terms of the contract and any FM clauses

Query: are suspensive conditions related to bond finance automatically extended?

Answer: This is arguable and we will need to await case law.

One argument is no, the period is not automatically extended – Arguably the purchaser is excused from performance to the extent impossible. i.e. if the purchaser cannot apply for the bond due to lock down, the time period will run down and the agreement will lapse.
A second argument is yes, the period is automatically extended - the argument here is that the period during which the purchaser cannot perform is suspended i.e. the period is automatically extended.

Due to uncertainty, it is best to extend by means of an addendum. The provisions of the ETCA apply and parties can agree on the terms of the Addendum / sign same digitally.

Query: what happens to time periods such as the due date for a guarantee?

Answer: the same arguments for and against with regard to a bond, apply here.

Whilst the time period for a guarantee is not a suspensive condition and thus not alike a bond condition in that not meeting the date won’t cause the agreement to lapse, it is best to do an addendum to create certainty.