■ CORONAVIRUS

CAN COVID-19 BE USED TO JUSTIFY NON-PERFORMANCE IN TERMS OF A CONTRACT?

COVID-19 or what is better known as the coronavirus, which started in Wuhan, China in December 2019, hit our South African shores in March 2020, with the first confirmed case in KwaZulu-Natal.

Since then, the number of people who have tested positive for this virus across South Africa has dramatically increased to 402 people as at 23 March 2020 – which demonstrates a dramatic increase from the first positive test.

The President's state of the nation address on 15 March 2020 labelled the virus a national pandemic and introduced various restrictions to control the outbreak of the virus.

The virus is not only having a devastating impact on the health of the population but is also having a devastating impact on the global economy and commercial transactions.

Countries are now imposing quarantines and travel bans which are impacting businesses and commerce. Companies can be negatively affected by this virus in various ways which include the following: the temporary closure of companies; the companies not performing at capacity due to a number of its employees being positive and are under quarantine; employees who are sick and taking the precaution of self-isolation or the companies performances being affected due to the travel bans. As a result, companies must be proactive and consider the effect that this will have on existing contracts in place and whether there are any defences that they can rely on to protect itself during these trying times.

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Many contracts include a clause which is termed 'force majeure' ("an act of god") which provides that if an event occurs which is out of the control of a party which prevents it from performing its obligations in terms of the contract, that party is entitled to delay, not perform or repudiate the contract. In South African Law, our law of contract has a principle termed 'a supervening impossibility of performance'. The key elements are that the event must have occurred after the conclusion of the contract in question, the event must be beyond the control of the party and performance of the obligations in terms of the contract must be objectively impossible. This causes the obligations of the party who relies on this principle and the other party's right to receive that performance to terminate.

A supervening impossibility of performance or a force majeure usually refers to a natural catastrophe or disaster.

The question which has now arisen is whether the virus falls within that ambit and can be used by a party to a contract to justify its non-performance in terms of that contract and to be released from it.

The nature of the virus does fall within the ambit of a natural disaster as it was unforeseen at the time of the conclusion of a contract, it could not have been avoided and provided that it objectively renders the party's performance in terms thereof impossible, that party could very well be released from the contract.

A key question which will be relevant to the public, is whether individuals will be able to successfully rely on this contractual principle to justify its non-performance, i.e. failure to make payment/s, in respect of any of the various agreements which they may have concluded, such as loan agreements, mortgage agreements and vehicle instalment sale agreements. From our case law, is it evident that each situation is viewed on its own facts and what is important to consider is whether objectively it was impossible for a party to perform in terms of that agreement as a result of the impact of the virus on them.

It is thus highly unlikely that individuals who do not have the virus and who can work, even if just from home, or; who has the virus but is still getting paid, will be able to successfully rely on this principle to escape its payment obligations – as payment is not objectively impossible.

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