

COVID-19 and school's contractual obligations



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Introduction

School Governing Bodies enter into contracts in order to carry out the functions that have been granted either in terms of section 21 of the Schools Act or which are necessary for the governing body to carry out other functions in terms of the Schools Act. In the midst of the Covid-19 pandemic, the question arises as to what effect the COVID-19 lockdown may have on contractual obligations of parties, especially schools. Are schools still obliged to pay for goods or services that cannot be provided during the lock state and may these agreements be terminated?

Although events like this pandemic are absolutely unique and exceptionally rare, our country's law provides for these types of events. Contractual provisions on *force majeure* are contained in numerous written agreements. Furthermore, our common law also provides for impossibility of performance.

What is impossibility of performance?

Where the performance of a contract, following the conclusion thereof, as a result of an inevitable and unforeseeable event, has become objectively impossible, without the fault

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of either party, reference is made to 'impossibility of performance'.¹ This principle is part of the common law.² Because this principle is part of South Africa's common law, it is not included in any legislation. The principle developed from the Roman times and over time we adopted, applied and developed it.

Superior Force (*Force Majeure*) and the Common Law

Superior force (*Force majeure*) are events that substantially relieve both contracting parties of their contractual obligations when any extraordinary event or circumstance that exceeds the parties' control occurs, such as a war, strike, riot, crime, plague, or event described as *force majeure* (hurricane, flood, earthquake, volcanic eruption, etc.) prevent one or both parties from fulfilling their obligations under the contract and making performance in terms of a contract impossible.³

If an agreement does not contain a *force majeure* clause, or if a *force majeure* clause in a contract does not explicitly mention the unforeseen event, the parties may rely on the common law principle of impossibility of performance to suspend their obligations under the contract provided it has become objectively impossible for them to perform under the contract due to an unpredictable and inevitable event.⁴

The following important points must be considered for a successful defense based on impossibility of performance⁵:

- i. Performance must be objectively impossible.

¹ Hutchison et al. 2012. *Suid-Afrikaanse Kontrakereg*. Oxford University Publishing. Page 318.

² *World Leisure Holidays (Pty) Ltd v Georges* [2002] JOL 10112 (W). Page 3.

³ Hutchison et al. 2012. *Suid-Afrikaanse Kontrakereg*. Oxford University Publishing. Page 318-320, 527; Du Bois et al. 2007. *Wille's Principles of South African Law*. 9th Edition. Juta. Page 348-452.

⁴ Hutchison et al. 2012. *Suid-Afrikaanse Kontrakereg*. Oxford University Publishing. Page 318-320.

⁵ *Glencore Grain Africa (Pty) Ltd v Du Plessis NO & others* [2007] JOL 21043 (O). Page 10-11.

- ii. The impossibility must be unavoidable to the reasonable person.
- iii. The impossibility must not be the fault of any of the parties.
- iv. The impossibility must be absolute and not probable.
- v. The mere fact that a disaster or event was foreseeable does not mean that it could have been avoided by a reasonable person.
- vi. The impossibility of performance must be related to the unforeseen and inevitable event.

The principle does not apply in cases where the contract was entered into after the unforeseen and unavoidable event occurred.⁶ For example, if a school already owed money, or was *in mora* during the event, this defence is not available.⁷

Is it a breach of contract when a school doesn't perform as a result of impossibility of performance?

Breach of contract is committed when a party, through an act or omission and without a legitimate excuse, fails in any way to fulfil his or her contractual obligations.⁸ The party who suffered damage as a result of breach of contract then has remedies to his or her disposal to claim specific performance, damages or cancellation of the contract.⁹

Due to the unavoidable event, such as an earthquake, it may happen that a party to the contract cannot perform, for example a building has been destroyed and can no longer be rented out. The tenant may consider a claim for damages, but would the landlord raise the impossibility of performance as a defense that would curtail the claim. Thus, it is still

⁶ Du Bois et al. 2007. *Wille's Principles of South African Law*. 9th Edition. Juta. Page 849.

⁷ *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* [1982] 1 All SA 191 (A). Page 197.

⁸ Hutchison et al. 2012. *Suid-Afrikaanse Kontraktereg*. Oxford University Publishing. Page 318-320.

⁹ *Basson and others v Hanna* [2016] JOL 37015 (SCA). Page 9.

breach of contract, but due to the defense of *force majeure*, the breach of contract remedies as referred to above will not succeed.¹⁰

The *force majeure* clause

Parties to a contract may include a *force majeure* clause which stipulates that, in the event of performance impossibility, the contract is suspended rather than terminating the contract.¹¹ However, the common law definition of *force majeure* applies to any and all agreements, including employment contracts, commercial agreements and lease agreements.

The term *force majeure* includes any event, including the actions of a third party, which is unavoidable and beyond the control or fault of contracting parties. A *force majeure* clause often includes a list of possible events, although this is not necessary. It is suggested that the clause should rather focus on the consequences of the events rather than mention specific examples.¹²

A *force majeure* clause may stipulate that the *force majeure* event does not suspend any payment obligations.¹³ Furthermore, the clause may also stipulate that the contract is suspended only for the period of the *force majeure* event. All *force majeure* clauses are therefore not identical and depends on the specific contract, parties and industry.

Therefore, it is important, in the case of a *force majeure* clause, to look at the specific contract and clause. Governing bodies must review all existing contracts in order to

¹⁰ Peters Flamman and Co v Kokstad Municipality 1919 AD 427. Page 437.

¹¹ Hutchison et al. 2012. *Suid-Afrikaanse Kontraktereg*. Oxford University Publishing. Page 433, 523.

¹² Bund, J. M. Force majeure Clauses: Drafting Advice for the CISG Practitioner' (1998). *Journal of Law and Commerce*, 17, 381-413. Paragraph C: Interpretation.

¹³ Glencore Grain Africa (Pty) Ltd v Du Plessis NO & others [2007] JOL 21043 (O). Page 9.

determine whether such a *force majeure* clause appears therein and whether there is specific reference to pandemics and diseases.

What happens in cases where a contract does not have a *force majeure* clause?

Parties can rely on the common law principle of impossibility of performance as discussed above.¹⁴ In the case where a *force majeure* clause does exist but is not sufficient, the common law is also followed.¹⁵

However, our law is very strict when it comes to the application of impossibility of performance, as there are certain conditions / requirements to be applied and schools should rather arrange this contractually.

Which party is relieved from their contractual obligations?

The principle of impossibility of performance has the effect that both parties are relieved from their obligation to perform. In the case of a *force majeure* clause, it depends on the specific clause.

The party that wants to escape liability has to prove that it is a *force majeure* event.¹⁶

Are the consequences of the nationwide lockdown always a *force majeure*?

Each case must be judged on its own unique circumstances and facts. Courts look at the nature of the contract, the relationship between the parties, the specific circumstances of

¹⁴ Le Roux. 2020. <https://www.lexisnexis.co.za/news-and-insights/covid-19-resource-centre/practice-areas/contract-law/force-majeure-an-analysis-of-what-force-majeure-is>

¹⁵ *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC). Page 707.

¹⁶ *Moffat v Rawstorne* 1927 TPD 435. Bladsy 437; *Spolander v Ward* 1940 CPD 24. Page 27.

the case and the nature of the impossibility on which the debtor relies to determine whether it is a *force majeure* event.¹⁷

The mere fact that performance is difficult does not release the debtor from performance.¹⁸ In South Africa, our government has responded to the Covid-19 pandemic by enacting laws and regulations. This is an act of state and normally falls under force majeure. President Cyril Ramaphosa in his speech, during which the restriction period was extended, made a request to companies not to rely on force majeure and to try to fulfil obligations as long as possible. Force majeure has a domino effect on the economy.¹⁹

The principle of impossibility of performance is complex and depends on the facts of each case and, in the case of a *force majeure* clause, on the specific contract.

It is therefore important to consult a legal practitioner before relying on a *force majeure* clause or the common law principle of impossibility of performance. As soon as it is relied on impossibility of performance and consequently a contract is not fulfilled, there is the danger that a breach of contract may occur.

Please contact FEDSAS to discuss your possible legal remedies at this uncertain time.

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¹⁷ Glencore Grain Africa (Pty) Ltd v Du Plessis NO & others [2007] JOL 21043 (O). Page 10.

¹⁸ Du Bois et al. 2007. Wille's Principles of South African Law. 9th Edition. Juta. Page 849.

¹⁹ <https://www.moneyweb.co.za/news/south-africa/lockdown-corporates-asked-not-to-draw-on-force-majeure/>