

COVID-19 and the impact of time delays on a contract

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The delays and disruptions caused by the global outbreak of COVID-19 and government measures undertaken in response thereto may have a significant impact on the ability of a party to meet a deadline specified in a contract. While each case will be dependent on its own facts and, in particular, the terms of the relevant agreement, we set out below some considerations which may be relevant in these circumstances.

Extending deadlines

Specified deadlines are a very important feature of most commercial agreements. An agreement may, for example, specify a date by which suspensive conditions must be fulfilled or stipulate a date for the performance of an obligation such as the delivery of a product.

If, due to circumstances resulting from the COVID-19 outbreak, a deadline is unlikely to be met, then it will first need to be considered whether the agreement itself makes provision for an extension of the deadline. Such a provision will typically give one of the parties the right to extend the relevant deadline by giving written notice to the other party. An agreement may, for instance, allow one of the parties to extend the date for the fulfilment of a suspensive condition. A party may also effectively extend the deadline for the performance of an obligation by invoking a force majeure clause (if the agreement contains such a clause and the requirements set out in that clause are met).

If the agreement does not itself provide any mechanism for the extension of a deadline, such an extension is generally only possible by way of an amendment of the agreement, which requires the consent of all of the parties to that agreement. Such an amendment will usually take the form of a written addendum signed by the parties.

The parties should be aware that, under South African law, notice may be given and agreements may be concluded by e-mail and other electronic means. However, agreements often contain specific provisions regulating how notice must be given or amendments must be made and the parties should carefully comply with these provisions to ensure that their notice or addendum is effective.

Failure to fulfil suspensive conditions

Generally, if the suspensive conditions to an agreement have not been fulfilled timeously, then the agreement terminates automatically. It is therefore not possible to extend the date for fulfilment of a suspensive condition after that date has passed. If the parties wish to "revive" the lapsed agreement, they will have to enter into a reinstatement and amendment agreement.

Failure to perform obligations

A party's failure to perform a contractual obligation timeously will generally constitute a breach of contract, entitling the other party to the normal contractual remedies such as specific performance, damages and, possibly, cancellation.

However, it must be kept in mind that whether a party has a claim for breach and which remedies are available to a party may be impacted by the terms of an agreement. For instance, a party may be excused in terms of a force majeure clause from performing some or all of its obligations under the contract. An agreement may also expressly provide one party with a cancellation right for any breach or, alternatively, exclude cancellation altogether.

Furthermore, in the absence of a force majeure clause, contractual obligations may be extinguished in terms of the common law doctrine of supervening impossibility, if those obligations have become objectively impossible to perform due to an event which was unavoidable by a reasonable person. Whether the requirements of this doctrine have been met will, of course, have to be considered in light of the facts of each case.

The reasonableness standard

Contracts often use "reasonableness" as a standard to measure conduct for certain purposes. For instance, a party may have to perform a certain action within a reasonable time or use reasonable endeavours to procure the fulfilment of a condition. Naturally, what is considered to be reasonable in the circumstances may be affected by delays or disruptions caused by COVID-19 and which are outside a party's control.

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