

## Insight into the *Force majeure* legal principle

Written by: Saiuri Seetal

Mooney Ford Attorneys

Pursuant to the civil unrest experienced in parts of South Africa, contracting parties are considering the implications of the *force majeure* principles.

*Force majeure* is a principle whereby a party may be freed from not performing its legal obligations in terms of a contract due to unpredicted circumstances beyond its reasonable control. These circumstances typically comprise “acts of God” varying from riots, civil unrest, fires and severe weather, among several others.

*Force majeure* clauses are intended to safeguard parties to a contract from an event beyond their control which consequently thwarts positive performance in terms of their contractual obligations, as such events render performance impossible, unrealistic or financially inadvisable.

In practice, most *force majeure* clauses do not vindicate a party's non-performance completely, but only suspend it for the period of the *force majeure*.

Contracts often define what events amount to *force majeure*. Legal responsibility arising therefrom is then set out in the contract itself and not by statute or principles of the general law of application.

In the event of a contract being silent on a specific *force majeure* clause, the common law doctrine recognised as “supervening impossibility of performance” may apply. This principle protects the contracting parties in a manner that parallels *force majeure* and includes any event that is unforeseeable with reasonable foresight and inescapable with reasonable care.

It is imperative for the contracting parties to consider the contract itself along with the supplementary facts in order to determine whether the event, such as the recent riots and civil unrest in South Africa, are catered for in the contract itself as it not uncommon for contracts not to include a *force majeure* clause regulating the consequences of such a defined event, perhaps because of the (un)reasonable likelihood of the event taking place, or because it is not always realistic or practical in the circumstances to attempt to regulate in detail a future event which by its very nature can be particularly unpredictable.

If we assume that the riots and civil unrest fall within the defined event of a *force majeure* within the ambit of the contractual provision, the onus on the alleging party is two-fold:

- (1) that the riots have made the performance of their obligations impossible; and
- (2) that the civil unrest and its consequences were beyond the reasonable foresight of the parties at the time they entered into the contract.

In other words, the party seeking relief must show that they cannot perform their contractual obligations due to unforeseeable, extraordinary circumstance which is beyond their control. It is a well-established principle that a party cannot rely on its own action or inaction, which led to a certain consequence, as an event of *force majeure* - the circumstance must be unforeseeable and completely outside the control of the parties.

Contracting parties are advised to consider the following if they have been implicated due to the recent riots and civil unrest. Has it inhibited or prevented their ability to execute contractual duties:

- consider the phrasing of the *force majeure* clause contained in the contract in order to establish whether it accommodates the occurrence at hand;
- ascertain the specifics –*force majeure* is applicable if the prescribed event is going to place either contracting party in default of their duties. It is not enough for obligations to be “difficult to fulfil”- they should be impossible to fulfil;
- a party seeking to rely on a *force majeure* clause will probably be required to give timeous notice to the other party as these clauses typically require that notice that a *force majeure* event has occurred be given in writing to the other contracting party within a fixed number of days of the occurrence. Close consideration should accordingly be given to such possible time constraints as a party’s right to rely on the *force majeure* clause may be denied if proper notice is not given; and
- be mindful of any exclusions listed in your contract which could result in the event not constituting *force majeure* in terms of the contract;
- a party relying on *force majeure* is required to take reasonable measures to mitigate the consequence of the event.

Where a party’s supply or service obligations are prevented by *force majeure* that the unaffected party is given the right to procure the goods or services elsewhere for the duration of the *force majeure* event.

Given the extent of the civil unrest in parts of the country, it is likely that our courts will find that the unrest was as an unforeseeable event beyond the control of either contracting party. Seek the advice of your attorneys if your business finds itself in a situation that it is impossible to perform its contractual obligations as a direct result of the recent civil unrest.