COVID-19: IMPACT ON BUSINESSES AND INVESTMENTS IN SOUTH AFRICA

BY CATHY TRUTER WEDNESDAY, APRIL 08, 2020

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The World Health Organisation (**WHO**) categorised the severe acute respiratory syndrome novel **Coronavirus** 2 (**COVID-19**) as a **pandemic**. Pursuant to this, on 15 March 2020, President Cyril Ramaphosa declared a **national state of disaster** in South Africa in terms of the Disaster Management Act, 2002, as amended (**DMA**) and on 18 March, Regulations in terms of section 27(2) of the DMA were published with immediate effect, with subsequent amendments published on 25 March, again on 26 March and most recently on 2 April (the **Regulations**). A twenty one day **national lockdown**, restricting freedom of movement and other rights, was announced by the President, effective from midnight on Thursday 26 March 2020 to 16 April 2020, which period may be extended if required. Government has announced bold measures to contain the spread of the virus in South Africa.

We live in increasingly turbulent and unpredictable times and whilst it is early, the impact on our economy and businesses will be significant.

To assist our clients, we have highlighted below certain areas and issues to be considered by businesses, investors and transaction teams during this period.

For more information regarding the legal effect of a National State of Disaster, what regulations may and have been issued pursuant to the National State of Disaster and a summary of the regulations, directions, ministerial statements and key regulatory statements and publications pertaining to COVID-19, please see our COVID-19 – Key Regulatory Changes in South Africa Guide and for more detailed sector specific newsflashes, please see our **COVID-19 client facing portal**.

ABSTRACT

In this note, we discuss the following potential legal issues that may arise as a result of the COVID-19 crisis on businesses operating in South Africa. We have reflected next to each topic where it is new or updated since our last publication dated 19 March 2020.

- Business continuity - **new (the concept of essential service providers, ongoing corporate actions and good practice)*
- Contractual considerations - **updated (for electronic signatures)*
- M&A and capital markets considerations - **updated (for MOI amendment considerations and dividend requirements for JSE listed entities)*
- Corporate action considerations
- Disclosure requirements for JSE listed companies - **updated (for financial reporting and auditing time concessions, further price sensitive information and trading statement clarification and REIT information)*
- Banking and finance considerations
- Commercial property considerations
- Employment considerations – **updated (a full overhaul to cater for numerous changes)*
- Remuneration considerations
- Employee benefit considerations - **new (retirement fund and medical scheme considerations)*
- Access to courts - **updated (a full overhaul to cater for numerous changes)*
- Data protection considerations
- Consumer law considerations
- Competition/ Antitrust considerations - **updated (for prioritisation of matters before the Commission, restrictions on excessive pricing and exemptions from restrictive horizontal and vertical practices)*
- Insolvency and restructuring - **new (financial distress, operational restructuring, financial restructuring, director duties, business rescue and liquidation)*
- Procurement - **updated (a full overhaul to cater for numerous changes)*
- Tax considerations - **updated (full overhaul to outline considerations arising out of the Draft Disaster Management Tax Relief Bill and Draft Disaster Management Tax Relief Administration Bill)*
- Insurance considerations - **updated (for new regulatory guidance)*
- Cyber-crime - **new (cautioning against cyber-attacks)*
- Intellectual property - **new (transaction and business considerations due to shut down of the registration office)*
- Financial Services Regulatory Sector considerations - **new (regulatory guidance)*
- Telecommunication considerations - **updated (for new regulations and directives)*
- Shipping, aviation and logistics considerations - **updated (a full overhaul to cater for numerous changes)*

We will continue to track these and **other developments** through our specific newsflashes on the topics and intermittently updating this note.

SUMMARY OF KEY LEGAL CONSIDERATIONS FOR BUSINESSES IMPACTED BY COVID-19

In this briefing, we discuss the following potential legal considerations that may be relevant as a result of the COVID-19 crisis on businesses operating in South Africa:

Business Continuity

Essential service providers

As mentioned above, pursuant to the Regulations issued under the DMA, South Africa has been placed under national lockdown, restricting freedom of movement and other rights, effective from midnight on 26 March 2020 to 16 April 2020, which period may be extended if required. Among other things, these Regulations provide that during the lockdown, all businesses and other entities must cease operations, except for any business or entity involved in the manufacturing, supply, or provision of an essential good or service, save where operations are provided from outside of South Africa or can be provided remotely by a person from their normal place of residence.

As to what constitutes an essential good or service has been the subject of much debate and is an evolving area of law. There is a specific list of these goods and services which is attached to the Regulations, supplemented by numerous Ministerial directives. There are also specific exclusions stipulated in the body of the Regulations, such as those limiting the sale, dispensing or transportation of liquor and the closure of retail shops, etc. It is advisable that you contact your attorney if there is any question of whether or not your business falls within this exemption to the Regulations.

Although whether or not you fall within the exceptions set out in the Regulations is the determining factor as to whether or not your business may operate within the category of exempted businesses, the Minister of Trade and Industry has announced that all businesses that consider themselves exempted (i.e. involved in the manufacturing, supply, or provision of an essential good or service) are required to seek approval from the Department of Trade, Industry and Competition in order for them to trade during the period of the lockdown. Such businesses are required to apply to the Companies and Intellectual Property Commission (**CIPC**) Bizportal website at **www.bizportal.gov.za** and obtain a certificate from the Commission confirming that they do in fact fall within the exemption. The certificate can then be used as evidence to authorities. Certain sectors also have industry specific requirements in this regard (i.e. the mining sector is required to apply to the DMRE instead of the CIPC).

It is important to note that false applications to the CIPC will be taken as a fraudulent application and will render a business, as applicant, liable to criminal prosecution and sanction. Further, the office of the Minster has subsequently released further communications which clarify that no companies will be prejudiced by any delay in the system and that it is not a requirement that companies complete registration before lockdown.

The Regulations also provide that the head of an institution providing essential services must determine essential staff to provide those services and authorise them in writing. For certain sectors, this requires additional approvals from the relevant regulatory body (i.e. persons performing essential services in the agricultural sector will also need approval from the nearest agricultural centre, etc.). This is dealt with in more detail below in the chapter dealing with employees.

Other corporate actions

Extensions have been given for many corporate actions (i.e. the filing of certain annual returns, audit requirements for listed entities, etc). Our recommendation is to make every effort to comply with all ordinary regulatory requirements and corporate actions. If you are faced with obstacles in doing so, reach out to your attorney to understand whether or not a dispensation has been provided for that corporate action and the recommended course of action. We have dealt with some of the corporate actions that are most materially impacted by the COVID-19 lockdown in more detail in the body of

this note (i.e. the calling of meetings, - under the Corporate Proceedings heading, the declaration of dividends - under the M&A Considerations heading, and audit requirements for listed entities - under the Disclosure heading below).

Good practice

Several sectors have released codes of good practice (i.e. for agro processing, etc.), directives (i.e. for hygiene related matters) and regulations (i.e. the telecommunications sector), some of which are discussed in more detail in the body of this note. It is critical that each business is aware of its corporate responsibilities and regulations in its particular sector. If you require guidance in this regard, please reach out to your attorneys for assistance.

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Contractual Considerations

COVID-19 threatens the ability of contracting parties to meet their obligations or perform as required under the relevant agreement regulating their relationship. Faced with a public health crisis largely beyond their control, contracting parties may find it impossible to fulfil those obligations on time or at all. At the same time, those parties may themselves face non-performance or delayed performance by counterparties. The impact on businesses in these uncertain times may be significant.

Parties should review their agreements to assess their risks and seek to limit the risk of their non-performance or non-performance by a counterparty and, in doing so, should consider the following:

- **Breach of agreement:** Businesses should assess which of their obligations are potentially affected/disrupted, which might result in a potential breach of an agreement. The consequences of such breach must be considered and a plan implemented to ameliorate such consequences. For instance, a party might be liable for damages suffered by the other party. The type of damages must be assessed as they may be too "remote" to claim as such loss was never, at the time of entering the agreement, considered by the parties. There is also a responsibility for a party to take reasonable steps to mitigate its losses. Another result of breaching a term of an agreement might be that a party may have the right to terminate the agreement as an event of default may be triggered. Businesses must be aware of clauses with unforgiving time constraints for certain actions, where any delay will be significant and may entitle the other party to terminate the agreement. A breach of contract may be countered with several defences, such as limitations of liability or *force majeure* clauses contained in the agreement or supervening impossibility, discussed in more detail below.
- **Suspension, variation or termination of contractual obligations:** Parties seeking to be excused for non-performance can rely on either the general common law defence of supervening impossibility of performance or on a *force majeure* clause included in their contract.
    - **Force majeure:** A *force majeure* clause in an agreement typically excuses non-performance of contractual obligations when an extraordinary event or circumstances beyond the control of the parties (i.e. a *force majeure*) prevents performance by one or both of the parties. Being excused from performance while the event continues should avoid being placed in breach and limits the exposure to damages being claimed for non-performance. Determining whether COVID-19 constitutes a *force majeure* will require careful consideration of the *force*

majeure clause relied upon, the contractual obligation in question and the reasons for non-performance. Should a party wish to invoke a *force majeure* clause, it should confirm whether the clause requires it to give notice of *force majeure* and, if so, when notice must be given. One should be careful to meet the requirements for such notices as precisely as possible including the address to which it must be sent and what level of detail or information the notice should contain.

- **Supervening impossibility of performance** is a common law defence that suspends or in some cases terminates a party's obligations where an irresistible force (*vis major*) or unforeseeable accident (*casus fortuitous*) has made fulfilment of its contractual obligations impossible. The defence applies generally to all contracts and may be relied upon in the absence of a *force majeure* In general, our courts have restricted the scope of this defence so that it applies in very limited circumstances. However, if the alleged impossibility of performance is a consequence of COVID-19 and compliance with government directives and norms such as social distancing, a court might find that public policy dictates that parties should be relieved of their obligations so that they can comply with these directives. In the event of a supervening impossibility of performance, the risk of being placed in breach and facing a possible damages claim (whilst the event continues) is mitigated.
- **Variation and waiver of obligations:** As a consequence of COVID-19, parties that are unable to fulfil their contractual obligations in strict conformity with the contract may ask their counterparty to accept defective performance or to waive the obligation completely. A party facing such requests should be careful to ensure that in granting an indulgence that it is not inadvertently varying the contract or waiving its contractual rights. By contrast, a party seeking an indulgence should ensure that any variation or waiver is effective and binding on the counter-party. In both instances, the parties must carefully consider whether the contract in question contains a non-variation clause requiring any variation to be reduced to writing and proceed accordingly.
- **Mitigation of loss:** A party suffering damages as a consequence of breach not excused by a *force majeure* clause or the common law defence of supervening impossibility is under an obligation to mitigate its losses. For example, should a customer breach its obligations to purchase from a supplier, the supplier must attempt to sell its product elsewhere. If no attempt is made to do so, the supplier may be precluded from claiming damages.

- **"Material Adverse Change" provisions:** When reviewing their agreements, business should be alert as to whether any "material adverse change" (**MAC**) or "material adverse effect" (**MAE**) provisions are triggered as a result of the outbreak. Such clauses ensue as a result of specific negotiations between the parties and might permit a party to avoid, or otherwise alter, the terms of an agreement should the outbreak or its effects be categorised as a MAC or cause a MAE.

  The MAC clause usually also covers MAE and vice versa. MAE are usually defined as any material adverse effects on the business, assets, properties, results of operations or financial conditions of a particular company. MAC or MAE provisions are mainly found as a condition precedent to an agreement or to qualify the seller's representation and warranties in an agreement. Such clauses may trigger a price review and thus fundamentally impact the value of a deal.

  A significant challenge will be negotiating MAC or MAE provisions in new transactions.

- **Electronic signatures:** In terms of the Electronic Communications and Transactions Act, 2002 (**ECTA**), an electronic signature is legally binding whether or not the parties have expressly agreed to the use of an electronic signature and provided they have not specifically excluded the application of the principles in the ECTA. It is also possible for contracting

parties specifically to agree to use electronic signatures. Where the parties agree to use electronic signatures, then an ordinary electronic signature may be used unless the parties have stipulated that only an advanced electronic signature can be used. An electronic signature can be any type of digital marking that is used by a person to be bound by a document or to authenticate a record, and can be any sound, symbol or process attached to or associated with an electronic record by the person intending to sign the record. Where signature is required or prescribed by law (i.e. where legislation requires that a document be "signed"), but the law does not indicate the type of signature to be used, then only an advanced electronic signature may be used in order to comply with the signature requirement. An advanced electronic signature can only be obtained from a provider accredited by the Department of Communications. At this stage, only LawTrust and the South African Post Office are accredited providers of advanced electronic signatures.

Guidance for Contractual Parties

- ***New Contracts***: Depending on your contractual position (for example, as a supplier or a customer), make sure to include a *force majeure* clause if you intend to suspend either parties' obligation to perform should COVID-19 prevent such performance. Consider including in the definition of "*force majeure*" epidemics, pandemics or other events that may result from an epidemic or pandemic, including mandatory quarantines or any restrictions on the importation of goods into the country. Ensure that the clause provides for a notification requirement and deals with the issues that may arise if a *force majeure* event (such as COVID-19) occurs e.g. care of the project pending completion works. Negotiate clear MAC or MAE provisions carefully considering whether or not the outbreak, its possible duration and its forecasted effects for the business should fall within the provisions.
- ***Existing Contracts***: Parties should review their existing contracts to identify whether their "*force majeure*" clause and/or MAC or MAE provisions cover pandemics such as COVID-19 and the procedure that must be followed by a party seeking to invoke those provisions. Bowmans has trained artificial intelligence that can help with this process from a time and reduction of risk perspective. Parties should also confirm whether, for an alteration to be made (even if a temporary change due to COVID-19), an exchange of e-mails or an oral variation of the contract is sufficient or will be precluded by a non-variation clause that requires any change to be agreed in writing and signed by the parties. It is also advisable for parties to review potential exposure to loss or damages – check whether there is a damages limitation clause or an exclusion of damages clause. A decision should then be made regarding the approach, whether to initiate the provisions in the agreement or to commence mitigation measures, etc.
- ***Commercial Mitigation***: Parties should take pro-active steps to mitigate their commercial risks as a result of the COVID-19 event and prepare for the interruption of their operations or those of their commercial counterparties arising from impossibility to perform existing contracts or the eventuating of a material adverse change/effect.

Note:

- *Cancellation of consumer contracts and associated insurance considerations are dealt with below.*
- *A proper assessment of the impact of COVID-19 on the contractual obligations of parties requires a case-by-case/contract-by-contract analysis and companies should conduct a full review of their contracts to assess their risk. Bowmans have an artificial intelligence (**AI**) tool, Kira, which we have trained to identify force majeure clauses in agreements. If you would like the assistance of our AI in the review of your agreements, please reach out to your attorney.*

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Other M&A / Capital Markets considerations

COVID-19 may have legal impact on the timing, logistics and practicalities of **M&A deals, international offerings, public offerings, private placements and capital/debt markets transactions**. Issuers and underwriters would need to consider the following in respect of pending deals:

- **Boards** will need to actively evaluate opportunities for transactions not previously available, be prepared to respond to potential activist attacks or other offers or actions by those capitalising on the current situation, actively engage with regulators, each other, shareholders and other stakeholders and act quickly to implement changes within the organisation necessary to mitigate risks, manage liquidity and align corporate strategies.
- **Due diligences** may need to be reworked logistically, particularly where physical data room restrictions apply or on-site visits are required for accuracy and verification. In addition, the focus of ongoing due diligences is likely to shift towards the ability of the target to conduct business optimally, in relation to the ability of employees, service providers and suppliers performing at the expected efficacy rate, and the appetite of customers in changing times.
- **Regulatory or third party approvals** which have been granted in respect of specific time periods may no longer be sufficient to conduct all activities which need to be completed within the available timeframes. In this case, discussions should be arranged with such parties in order to decide whether or not amendments are required to the applicable approvals and related agreements. In addition, it would be useful to bear in mind that regulatory bodies may undergo closure, at which stage the implementation of many transactions, which are often dependent on successfully making regulatory filings, may be delayed. Some of these regulatory closures are dealt with in more detail in the body of this note (i.e. as it pertains to amending the constitutive documents of the company, filing merger filings and intellectual property registrations).
- **Memorandum of Incorporation (MOI) amendments** cannot be filed during the lockdown period. This is because the CIPC is closed for the filing of documents that cannot be processed automatically. This may impact the timing and implementation of transactions that are dependent on the acceptance by the CIPC of an amended MOI. Parties to an agreement of this kind should contact their attorneys to discuss alternative options.
- **Warranties and indemnities** in transaction agreements will need to be carefully considered and negotiated, with detailed disclosures and a considered approach to the concept of "knowledge" and exclusions associated with that concept.
- **Access to funding** either as conditions to the agreement or otherwise will need to be considered understanding the entity's lines of credit its ability to satisfy obligations.
- **Roadshows** which are usually held in person will need to be reconsidered. It should be possible to hold the roadshows electronically as virtual meetings, depending on any applicable underlying documentation which may direct the content to be shared and the manner of presenting it to investors.
- Where **Solvency and liquidity resolutions** are triggered as part of a transaction, the anticipated impact of COVID-19 will need to be taken into consideration in the directors' assessment of the forecasted financial position of the relevant company.
- **Plans to declare dividends and dividend policies** may need to be reconsidered by boards if the liquidity available to the company is constrained. The Johannesburg Stock Exchange Limited (**JSE**) has pronounced on the topic of cancelling payment, postponing or changing to the value of declared dividends, confirming that dividend announcements in respect of JSE listed companies must comply with the corporate actions timetable. After the finalisation announcement has been made and the last day to trade has passed, a dividend variation will not be permissible. Changes to pertinent details between the finalisation date and the last day to trade (which do not include cancelling dividends) will result in starting the corporate action timetable afresh. Issuers may only cancel a dividend and the resultant payment prior

to the finalisation date. A process has been set out for certain dividend variations to be made for JSE listed companies. Please reach out to your attorney for more detail.

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Corporate proceedings/ holding meetings

One of the measures introduced to combat the spread of COVID-19 is the prohibition of gatherings. This prohibition should be taken to include shareholder meetings. In terms of the Companies Act of 2008 (**Companies Act**), a shareholders' meeting conducted entirely by electronic communication (i.e. virtual meeting) is permissible, unless prohibited by the company's MOI, but key parameters apply. In particular, the electronic communication must allow shareholders to communicate concurrently and to participate effectively in the meeting, and the notice of the relevant meeting must inform shareholders of the availability of that form of participation, including necessary information.

Annual general meetings (**AGMs**) of public companies are generally held in person, where only shareholders physically present in person or by proxy may vote, although shareholders may otherwise participate electronically. Where notices convening a physical meeting have already been issued, companies might wish to consider converting that meeting to a virtual meeting, and may need to issue an announcement or fresh notice to shareholders postponing the meeting to a later date and providing details on how shareholders may access the meeting (at that later date) electronically.

The question of whether a general meeting or an AGM may be held electronically or not will have to be determined depending on the constitutional documents of the company as well as the circumstances around the company in question, with particular regard to, *inter alia,* the jurisdiction of any relevant regulators, including the Companies Tribunal (in respect of potential Companies Act breaches), the JSE (for listed companies) and the Takeover Regulation Panel (where an affected transaction is involved).

There are a number of service providers who provide virtual meeting platforms which enable a meeting to be conducted entirely through electronic means, including over the internet. Companies would do well to start the process of selecting the appropriate service provider and testing the suitability of that service provider's technology for the company's needs. In choosing a suitable virtual meeting platform, a board will have to consider the nature of its shareholder base and whether its shareholders are likely to have the resources to meaningfully participate through the chosen platform. For instance, if a company wishes to employ a virtual meeting platform that requires high speed internet access, it is important to consider whether the majority of the company's shareholders are likely to have access to the internet at the optimal speed required by the platform in question.

Ultimately, companies will need to balance their obligations to conduct shareholder meetings in a manner that complies with their duties under the law, on the one hand, and, on the other hand, to protect the health and safety of their shareholders and other members of the community in the context of the COVID-19 outbreak.

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Disclosure requirements

The effect of COVID-19 may trigger several disclosure obligations for JSE Listed entities under the JSE Listings Requirements and the JSE Debt Listings Requirements. The JSE has released a number of clarification communications in this regard. Certain of these requirements and clarifications are listed below:

- **Financial reporting obligations: IFRS measurement and disclosure** in relation to equity and debt listed companies may be impacted by COVID-19 with regard to fair values, impairment assessments and accounting estimates.

  The JSE has, through several communications, acknowledged the challenges regarding timeous publication of financial results during this time, encouraging engagement with the JSE through sponsors in this regard. It has undertaken to consider, among other things, extensions; variations of the content of financial information relating to minimum content; variation on the timing and nature of the assurance report; and/or other unusual reporting variations on a case by case basis.

  On 3 April 2020, in consultation with the JSE, the Financial Sector Conduct Authority (**FSCA**) granted several blanket dispensations, subject to conditions**.** Please reach out to your attorney if you require any guidance in this regard.

- **Price sensitive information and trading statements:** Companies listed on the JSE are required to make an immediate announcement to the extent that any **unpublished specific or precise sensitive information exists**, which, if made public, would have a material effect on the price of that company's securities, amounting to price sensitive information. The impact of COVID-19 on specific circumstances of the JSE listed company may amount to price sensitive information and would necessitate an announcement. Similarly, the JSE Debt Requirements also require disclosure of price sensitive information, including consideration of the ability of the debt issuer to service the debt.

  Trading statements must be published by JSE listed companies as soon as such companies are satisfied that (a) a reasonable degree of certainty exists that for the period to be reported on next, the financial results will differ by at least 20% (or 15% for property companies under specified circumstances) from recent financial results or a recent profit **forecast** provided in relation to such period; or (b) the aforementioned difference is less than the percentages set out herein, but are viewed by the company to be important enough to warrant release of a trading statement. COVID-19 may well have an impact on the anticipated financial results of a JSE listed company and may need to be disclosed as such.

  On 25 March 2020, the JSE stated that **price sensitive information and trading statements** are key at this time, requesting additional information. Trading statements should be considered where the relevant differences are less than 20% but sufficiently important. Prescribed minimum information must be provided to the JSE via the sponsor for a reporting variation. The reporting variation should be followed up by a SENS announcement.

- **Annual report: Material risks must be disclosed in the annual report** pursuant to paragraph 8.63(s) and 7.F.7 of the JSE Listings Requirements. All material risks which are specific to the issuer, its industry and/or its securities must be specifically disclosed and grouped together in a coherent manner. On 25 March 2020, the JSE provided **transitional**

provisions with regard to Section 8 disclosures in the annual report, based on the preparation involved in the publication and distribution of annual reports.

- **REITS:** The JSE has expressed concern for REITS who may lose REIT status due to temporary inability to fully comply with the JSE Listings Requirements, but has not proposed a solid solution at this stage. Issuers are encouraged to engage with their sponsors to assess the impact of COVID-19 on its business and its ability to comply with Section 13 of the JSE Listings Requirements, and engage with the JSE if they will not have the continued ability to comply with such requirements.
- **Risk factor Disclosures** in pre-listing statements and circulars should be ramped up holistically in order to cover the impact of international COVID-19 resultant restrictions. Panic buying, shortage of goods usually imported from China or the EU, inefficiencies and the like may have severe global economic impact. Risk factors have always been disclosed as a matter of practice, but are even more important after amendments to the JSE Listings Requirements in recent times, making them mandatory. Amplified risk factor disclosures works will be beneficial towards providing investors with adequate background in coming to settling on informed investment decisions.
- **Audit procedures and internal controls** will require coordination, as audit personnel may face restrictions from access to on-site facilities required in the auditing process. It would be prudent for audit committees to meet more frequently under the current circumstances.

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Banking and Finance considerations

COVID-19 may have a significant impact upon the ability of borrowers to meet their obligations under their existing funding arrangements. This may particularly be the case for borrowers whose earnings derive from industries which have been most impacted by measures imposed by the Government or otherwise by changing public behaviour in light of COVID-19, for instance the leisure and hotel industry and the logistics industry (including airlines). Borrowers whose funding is secured by securities, the value of which may continue to be impacted by market volatility, will likely also have cause for concern.

Faced with the default or potential default of borrowers as a result of non-performance or delayed performance, parties should consider the following:

- **Financial covenants** may be adversely impacted by COVID-19, particularly should they be based on underlying earnings and/or liquidity of the borrower or borrower group. Lenders may seek to exercise any rights relating to more regular or *ad hoc* reporting and certification of financial covenants, in order to monitor financial performance and borrowers may seek a temporary loosening of such covenants in order to alleviate pressure during this period of uncertainty, particularly if long term projections of underlying company performance remain strong.
- Transactions which are backed by securities, the value of which may be adversely impacted by the volatility of markets, may also see **share cover** ratios slip towards default, with lenders potentially seeking additional or alternative qualifying security.
- Funding arrangements do not typically include ***force majeure*** provisions that contracting parties may otherwise seek to rely upon to excuse non-performance due to events outside of their control. In addition, it would be extremely difficult to rely upon any common law protection that a concept such **supervening impossibility** may otherwise provide as, in the absence of a collapse of underlying financial systems, the repayment of money could not be said to be impossible.
- Most facility agreements should contain a MAE concept and whether lenders seek to rely upon such clauses in order to limit utilisations of facilities on the basis that an MAE is a

draw-stop event or call events of default (or trigger thresholds for representations or undertakings) will depend upon the breadth of the concept as negotiated by the parties. Care should be taken to consider whether the MAE concept applies to individual members of the Group or the Group taken as a whole and which underlying metrics are being tested in asserting this clause. Which party falls to make any determination of the occurrence of a MAE will also vary on a case by case basis (or clause by clause). Even if the ramifications of COVID-19 could be interpreted to result in an MAE, whether such clauses would be relied upon to call a default is uncertain as lenders have historically been cautious of relying upon the concept.

- With the exception of those discussed above, other **events of default** typically contained in standard finance documents and which may also be relevant, include:
    - **cross default** to other financial indebtedness and/or underlying material contracts of the borrower;
    - **insolvency** and **financial distress** (as financial distress is forward looking, over the next 6 months, this may be a particularly sensitive trigger);
    - actions or steps taken with regard to any **compromise** with creditors;
    - **cessation** of (all or a substantial part of) a borrower's business.
- Borrowers should also be conscious of their **information undertakings** and any positive obligations they may have to inform lenders of circumstances which may result (or might reasonably be expected to result) in a default or MAE or of any other information material to the funding and any security. Pro-active engagement with lenders on potential issues that may arise may be advisable in the circumstances.
- To the extent that financial covenants may be breached or other defaults continuing, borrowers may be unable to satisfy **drawdown conditions** under their revolving facilities and may therefore seek to draw down before such circumstances exist.
- Some agreements may include **market flex** provisions which may be called upon by lenders if the conditions required to exercise the rights under the such provisions have been met.

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Commercial property

The effects of COVID-19 will undoubtedly be felt in the Commercial Property sector. Principally, we envisage that issues may arise with regard to:

- The **functioning of the Deeds Registries**: Like many other businesses, the effective functioning of our Deeds Registries is dependent upon the staff and officials of the Deeds Registries. Deeds Registries being closed or operating on skeleton staff or physical access to Deeds Registries being restricted will undoubtedly impair the ability of the Deeds Registries to register transactions. Registration is critical to Commercial Property transactions closing and this will delay the implementation of transactions.
- The **functioning of Municipalities**: The comments made in relation to the Deeds Registries apply equally with regard to Municipalities and other Governmental Departments (including the office of the Surveyor General). The ability of such Municipalities to issue rates clearance figures and certificates, approve building plans, subdivisions, consolidations and other town planning procedures will be impaired. Similarly the ability of the office of the Surveyor General to approve subdivision, consolidation and leasehold diagrams and sectional plans will be impaired. This will have a knock effect on the implementation and timing of transactions.
- The **contractual relationships between landlords and tenants**: Undoubtedly, retail trade will be adversely effected – simply put, consumers will be reluctant to visit retail centres and retail trade will suffer. Similarly, the downturn in the economy resulting from COVID-19 will impact the turnover of commercial tenants. All of this will constrain the ability of tenants to service their rental obligations and, in turn, effect the ability of landlords to meet their

corresponding debt obligations. There is a lot of law in this space and it is recommended that you reach out to your attorneys for contextual advice.
- The **implementation of developments**: The ability of developers and contractors to deliver developments on time will be hampered by the effects which COVID-19 will have on their workforces and the availability and delivery of goods and materials to sites.

Guidance of Business

- Transactions which are already in the process of being implemented will need to be reviewed to assess any delays in implementation which may arise from any of the considerations referred to above. Where applicable, the parties to such transactions should endeavour to agree realistic extensions to cater for any delays which may be experienced which are outside of the control of either party. Guidance should be sought from our Commercial Property team in this regard.
- Landlords should have regard to their existing leasing arrangements and should begin engaging with tenants who are most at risk. Leasing arrangements should also be reviewed to assess the extent to which reliance can be placed on force majeure provisions. In the same vein, tenants should also begin assessing their positions. Ultimately, landlords and tenants will need to engage constructively with one another to find commercial solutions to the challenges which may be experienced – strict reliance on contractual provisions in the context of COVID-19 will undoubtedly result in reputational harm. Where applicable alternative arrangements will need to be reduced to writing and the guidance of our Commercial Property team can be sought.
- Developers and contractors should similarly consider projects which are underway and/or which are being planned and allowance should be made for any delays likely to be experienced. Discussions with counter-parties to projects should begin sooner rather than later.

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Employment considerations

Considerations outside of the lockdown period

Specific provisions apply during the lockdown period. These are dealt with below. We first consider the position outside of the lockdown period.

Ensuring a safe and healthy work environment

The Occupational Health and Safety Act, 1993 (**OHSA**) imposes a duty on employers to ensure, as far as reasonably practicable, a **safe and healthy working environment** for their employees. This duty includes, for example: a) taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment; b) the provision and maintenance of systems of work, plant and machinery that is as far as reasonably practicable, safe and without risk to health; c) providing such information, instructions, training and supervision as may be necessary to ensure, as far as reasonably practicable, the health and safety at work of its employees; and d) enforcing such measures as may be necessary in the interests of health and safety.

If faced with an allegation that an employer has failed to provide and maintain a working environment that is safe and without risk to the health of its employees, the employer would need to be able to demonstrate that it has done everything that is "reasonably practicable" in the circumstances.

- **Restricting access to the workplace***:* The ***General Safety Regulations*** published under OHSA prohibit an employer from permitting a person to enter a workplace where the health and safety of such person is at risk. An employer is entitled to post up a notice to its premises, if necessary in the interests of health and safety, prohibiting the entry of unauthorised persons, and no person may enter or remain at the premises without the permission of the employer. Employers may impose rules on their employees in order to ensure a safe working environment and, in addition, it may place conditions on entry to its premises. Employers may exclude persons from their premises if they do not abide by those rules. The employer should then take appropriate steps, such as requiring all entrants to the premises to sanitize their hands and feet, requesting that they complete an information register (see below), requiring persons to submit to a temperature test (see below) and, on the basis of the aforegoing, and if deemed necessary, require the person concerned to leave the premises.
- **Logging and recording all access to the workplace***:* Any third parties who enter the workplace including, but not limited to, clients, service providers, and/or contractors, should be required to complete an information register detailing, among others, their names, telephone numbers, address, e-mail address, and identity number, as well as disclosure/s on recent international travel as well as any other reasonable apprehension of having been exposed to COVID-19. If there exists a reasonable apprehension that the individual has been exposed to COVID-19, or that s/he has tested positive for COVID-19, then the employer may exclude the person from entering the premises or require the taking of a temperature test, but would need to obtain the person's informed consent in doing so (see below).
- **Temperature checks***:* If there exists a reasonable apprehension that the individual may have been exposed to COVID-19, temperature checks may be conducted. The privacy of the individual should be respected in conducting the test, and the test must be done with the individual's informed consent. Such consent does not need to be given in writing, but it is advisable to obtain written consent for purposes of proof. The manner in which the test is conducted must be as non-invasive as possible, and the use of temperature scanners, as opposed to thermometers placed in a person's ear or mouth, is recommended. If the individual objects to the test, the employer may legitimately rely on other relevant information at its disposal (e.g. an observation test for excessive sneezing, coughing, and/or whether or not the person has disclosed recent travel to a location where COVID-19 incidents have been reported or there exists a reasonable apprehension of exposure etc.) to determine whether or not to allow the person concerned into the premises.
- **Sanitisation facilities***:* In terms of the **Facilities Regulations** issued in terms of OHSA, employers must provide sanitary facilities in accordance with the National Building Regulations and, importantly: a)provide soap or a similar cleansing agent free of charge to its employees. While this must be provided in the sanitary facilities, it is advisable to make tissues and hand sanitizers available in boardrooms and other public spaces at the workplace; b) provide disposable wipes so that commonly used surfaces (for example, doorknobs, keyboards, remote controls, desks) can be wiped down by employees before use; c)provide running hot and cold water (or pre-mixed hot and cold water) for wash basins; d)maintain all rooms and facilities in a clean, hygienic, safe, whole and leak-free condition; and e) routinely clean all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs/handles.
- **Ventilation***:* The **Environmental Regulations** issued in terms of OHSA provide, *inter alia*, that the employer must ensure that the premises are ventilated in such a way that the air breathed by the employees does not endanger their safety. Where there is a danger of unsafe air, the employer must provide the employees (and must ensure that they correctly use) respiratory protective equipment of a type that reduces their exposure to a safe level.

Businesses are therefore required to ensure that the air-conditioning systems at their premises do not expose the employees to the risk of infection.

Must the employer notify the authorities?

While COVID-19 amounts to a Notifiable Medical Condition (**NMC**), this obligation falls on health care providers and not employers. Every doctor or nurse, laboratory, and medical scheme in both the public and private health sector who diagnoses a patient with any one of the NMC must report the case. Failure to report a NMC is a criminal offence.

What are an employer's legal obligations towards people who are not employees in the context of COVID-19?

Section 9 of OHSA provides that every employer shall conduct its undertaking in such a manner as to ensure, as far as reasonably practicable, that persons other than those in its employment that may be directly affected by its activities are not exposed to hazards to their health or safety. In addition, every self-employed person must conduct her/his undertaking in such a manner as to ensure that s/he and other persons affected by her/his activities, are not exposed to hazards to their health and safety.

In so far as there exist service level agreements between employers and clients, and/or service providers, the employer should be cognisant of the terms contained in these agreements and how the presence of COVID-19 in the workplace may impact these agreements e.g. *force majeure* and breach clauses etc.

What are an employee's legal obligations in the context of COVID-19?

OHSA imposes a duty on employees to take reasonable care for her/his own health and safety and that of other persons who may be affected by her/his actions or omissions; and to co-operate with the employer to enable a duty imposed by the employer to be complied with.

Employees must accordingly obey the health and safety rules and procedures laid down by the employer and carry out any lawful instructions given in this regard.

In terms of **section 14(d)** of OHSA, if an employee becomes aware of a situation that is unsafe or unhealthy, s/he must report the situation to the employer as soon as practicable. This may include a suspicion that a fellow-employee or customer/client exhibits flu-like symptoms or is running a fever, or any other information which would give rise to a reasonable apprehension that the fellow-employee or customer/client may have been exposed to and/or infected by COVID-19. (A reasonable apprehension may exist where an individual has recently travelled internationally, has been in contact with someone who had tested positive for COVID-19, or who displays flu-like symptoms.)

What if an employee disobeys the employer's rules on health and safety?

Employees who act in violation of an employer's health and safety rules or who disobey reasonable and lawful instructions in relation to health and safety rules may be subjected to appropriate disciplinary action. Blatant disregard for such rules or instructions could potentially be a ground for a dismissal on the basis of misconduct.

Can the employer be legally liable if an employee contracts COVID-19 at the workplace?

It is important to remember that "reasonably practicable" measures must be taken by an employer to provide and maintain a working environment that is safe and without risk to the health of its employees. A proper assessment of what would be reasonably practicable must accordingly be made in the circumstances of each case. If taken too far, such measures could be challenged on the basis of being unreasonable but, if not taken when necessary to safeguard the health and safety of the workplace, an employer may be found to have been negligent and liable for the consequences.

The Compensation for Occupational Injuries and Diseases Act, 1993 (**COIDA**) protects the employer from delictual liability in respect of an employee who contracts an illness during the course and scope of her/his employment. An employee who contracts an occupational disease can claim compensation from the Compensation Fund without having to prove the employer's negligence. However, if the employer was in fact negligent, the employee may receive increased compensation and the cost of such increased compensation may be passed on to the employer in the form of increased assessment rates. COIDA only protects employers against claims arising out of injuries or diseases contracted by their employees in the course and scope of employment.

Can the employer be liable if a third party contracts COVID-19 through contact with the employer's premises or employees?

As stated above, COIDA only protects employers against claims arising out of injuries or diseases contracted by their employees in the course and scope of employment. Customers or clients who contract a disease due to their contact with an employer's workplace and/or interaction with the employer's employees would have to institute a civil claim, and the normal delictual principles will apply.

Employee-absence

If an employee is able to work remotely, s/he would not require leave. S/he would continue to work and would continue to be paid.

The Basic Conditions of Employment Act (the **BCEA**) recoginses certain forms of leave, which may, depending on the circumstances, be applicable to the employee's absence as a result of COVID-19.

- **Sick leave***:* In the event that an employee displays flu-like symptoms or runs a fever, the employee may be required to take sick leave. BCEA entitles employees to 30 (thirty) days' paid sick leave in every sick leave cycle. Where an employee has exhausted her/his sick leave entitlement, the employee may be required to take annual leave. If no annual leave is available, then absence due to illness may need to be unpaid.
- **Annual leave***:* Employees are entitled to 15 (fifteen) working days' statutory annual leave per annum on full pay. This entitlement may be increased by agreement between the employer and the employee. In terms of section 20(10)(b) of the BCEA in the absence of agreement between the employer and employee, the employer may require that annual leave be taken at a time determined by the employer.
- **Family responsibility leave***:* Employees are entitled to 3 (three) days' family responsibility leave per annum, which may be taken to care for a sick child, or that may be taken in the event of the death of a close family member. Family responsibility leave is not applicable where the employee needs to care for a child who is not sick, but who, as a result of school closures, must be looked after. In such circumstances, the employee may need to take annual

leave. This is subject to the employee having annual leave available, and is subject to the business needs of the employer.

- **Special leave***:* While an employer may not grant employees less favourable leave than what is contained in the BCEA, they may provide more favourable entitlements. In instances where a reasonable apprehension exists and an employee is self-quarantined, the employer may decide to regard the absence as a form of "special leave" in respect of which the employee would be entitled to be paid. Special leave is not a legislated form of absence and an employer is not legally required to offer such leave. This is because the absence would not be as a result of any of the recognised reasons for employee-absence, such as those listed above. Rather, the reason for the absence is the employer's obligation to establish and maintain a safe and healthy work environment.
- ***Unpaid leave*****:** Where an employee has exhausted her/his entitlement to statutory paid annual leave, sick leave, and/or family responsibility leave, then any further leave taken (in the absence of being able to work remotely and/or special paid leave granted by an employer) would need to be unpaid.

Business closures

If alternative preventative measures are inappropriate or prove insufficient to ensure the safety of employees or visitors at the workplace, employers may need to consider a temporary closure of the workplace. This should only be a measure of last resort, after the employer has considered all other options. Where it is possible for employees to work remotely, the employer may require that employees do so for the duration of the closure. This could potentially be the case if, with the help of technology, employees are able to work from home. In these circumstances, the employer would continue to pay the employees who are working remotely in the ordinary course.

Where remote working is not possible or feasible (e.g. in the case of teachers, pilots, or public-facing staff etc.) the employer will need to consider whether the employee's absence will be paid or not. This is because the absence would not be as a result of any of the recognised reasons for employee-absence, such as annual leave, sick leave, family responsibility leave, parental leave, or maternity leave. Rather, the reason for the absence is the employer's obligation to establish and maintain a safe and healthy work environment.

If the temporary closure is for a short period only, the employer may decide to regard the absence as a form of special leave in respect of which the employees would be entitled to be paid.

In certain instances, the employer may wish to consider unpaid absence, or temporary lay-offs. In these circumstances, the employment relationship remains in place, but the employee is not required or permitted to attend at work and is not entitled to be paid. The first thing to consider here is whether or not there are any applicable collective or industry arrangements regulating the issue. In particular, parties to some bargaining councils (like the Metal and Engineering Industry Bargaining Council) have concluded collective agreements that permit employers to lay-off staff or initiate short-time measures where unforeseen circumstances halt production. It may also be that the individual employment contracts of the employees contain appropriate provisions that would entitle the employer to suspend the contract due to unforeseen circumstances and not to pay the employee.

Outside of these arrangements, the general rule is that an employer may not unilaterally suspend and/or vary an employment contract and stop payment and/or change the terms and conditions of employment. There is, however, an argument that unforeseen circumstances that expose the employer and the employees to significant and severe risk to health and safety, may entitle the employer to temporarily close operations and stop payment on the basis of "supervening

impossibility" of performance. These are unchartered waters in the employment context and, ideally, the employer should try and attempt to reach agreement with the employees on how such absence would be treated.

Section 189 / 189A Process

If alternative measures (such as remote working) are not reasonably practicable or if preventative measures to safeguard the workplace prove insufficient to ensure the safety of employees or visitors at the workplace, then as a measure of last resort, the employer may consider closing operations and imposing temporary lay-offs or short-time/part-time work. This could potentially be done under the umbrella of a retrenchment consultation process in terms of section 189/189A of the Labour Relations Act. This is a complex area of law and legal advice must be obtained.

Demanding changes to terms and conditions of employment

Another option is for the employer to make a demand regarding changed working times and a reduction in pay. Employees who do not agree to the employer's proposals, may face being locked out in accordance with the provisions of the Labour Relations Act. In essence the parties would be required to negotiate to deadlock. If agreement is not reached, the employer may refer a dispute to the CCMA. After a certificate of non-resolution is issued, or a period of 30 days has lapsed, the employer may give notice of a lock-out. The employees would then be denied access to the premises and the employer's IT systems, without pay, until they agree. In these circumstances, the employer may not utilise replacement labour.

Unilateral changes

The general rule is that changes to terms and conditions of employment may not be effected unilaterally and employees' consent is required. The risk in the case of unilateral implementation is that the employees may continue to tender their services on their agreed terms and sue the employer for specific performance. Alternatively, employees may require restoration of the status quo in terms of s64(4) of the Labour Relations Act; or they may embark on strike action. In some cases, these risks may be more apparent than real and employers willing to take these risks, may potentially implement certain changes to working hours and/or pay unilaterally. Again, this is a complex area of law and advice should be obtained.

Considerations during the lockdown period

How do employers' OHSA duties work during the Lockdown?

The duties that an employer has under the OHSA would extend to circumstances where such an employee renders services to the Company remotely from home.

For purposes of the OHSA, the employee's 'workplace' would be her/his home. Ordinarily, how the employer will ensure a healthy and safe working environment would depend on the sort of work that is being carried out from home and what equipment and assistance may need to be provided to employees by their employer. In addition to the OHSA, the BCEA requires an employer to regulate the working time of its employees with due regard to their health and safety and to their family responsibilities. Employers are required to, as far as is reasonably practicable, provide a workplace

that is free of risk to the health and safety of its employees and that this requirement would persist during the COVID-19 pandemic and the Lockdown subject, of course, to an employee actually working remotely from home.

In the normal course, employer may require their employees to sign an indemnity form in which they warrant, among other things, that their home office is safe. While the present circumstances are extraordinary, it would probably be appropriate for an employer to ask its employees to sign and return a warranty and indemnity form in relation to working remotely from home.

However, it would probably also be prudent to take further steps under section 8 of the OHSA to, *inter alia*, meet the requirement of "*providing such information, instructions, training and supervision as may be necessary to ensure, as far as is reasonably practicable, the health and safety at work of … employees*", through appropriate information and instructions being given to employees working from home on how to avoid or limit the risks to their health and safety in the home working environment.

On 23 March 2020, the Compensation Commissioner published a notice confirming that the Compensation Fund will treat instances of COVID-19 contracted by employees in the workplace during the course and scope of their employment as a compensatable illness, and which sets out the steps, among others, that must be followed by employers and medical personnel when submitting claims and supporting medical reports for COVID-19 (the **Notice**).

There is no specific guidance on or view expressed in the Notice in relation to COVID-19 compensation claims arising from remote working situations. What the Notice does require for a claim to succeed is an "occupationally-acquired COVID-19 diagnosis" which is reliant upon the following:

a. *"Occupational exposure to a known source of COVID-19;*
b. *A reliable diagnosis of COVID-19 as per the WHO guidelines;*
c. *An approved official trip and travel history to countries and/or areas of high risk for COVID-10 on work assignment;*
d. *A presumed high-risk work environment where transmission of COVID-19 is inherently prevalent; and*
e. *A chronological sequence between the work exposure and the development of symptoms".*

While there would not be an automatic presumption that an employee contracted COVID-19 in the home "workplace" during the course and scope of employment, if the employee is able to satisfy the Compensation Commissioner of the requirements set out in the Notice, a claim in this regard may succeed.

In so far as the issue of employer negligence is concerned, signature by an employee of a warranty and indemnity form would go some way towards mitigating any alleged negligence, as would taking other reasonably practicable measures as contemplated in section 8 of the OHSA regarding the working from home practices and risks.

Must employees be paid during the Lockdown?

The effect of the Lockdown is that many businesses will need to close and employees will not be able to go to work. Advice should be sought from your lawyers regarding whether or not they are

required to continue to pay their employees in these circumstances. In our assessment, during the Lockdown there will be 3 categories of employees:

- **employees designated as 'essential staff' in essential businesses, who would continue to work and should continue to be paid;**
- employees who are **not in essential businesses** but who **can work remotely**, and who would accordingly **continue to be paid**; and
- employees who are **not in essential businesses**and who **cannot work remotely**.

The issue in relation to payment is slightly different for each.

What is the COVID-19 Temporary Employer/Employee Relief Scheme (C-19 TERS)?

One of the measures that is designed to provide relief to employers and employees is the C-19 TERS benefit. On 8 April 2020, the Minister of Employment and Labour issued a revised directive under the Disaster Management Regulations that will regulate these benefits (the **Directive**). In addition, the benefits are subject to the terms of the memorandum of understanding or standard terms, which have also been published.

Who can claim?

- Contributors, i.e. employers and employees who contribute to the UIF.
- The employer must have closed its operations, or part of its operations, as a direct result of the COVID-19 pandemic, for a period of three (3) months or less.
- The size of the employer's workforce does not matter. Special provisions of the memorandum of agreement apply to employers with fewer than 10 employees.
- The employee must have been in the employer's employ on 27 March 2020, and must have suffered, or will suffer, a loss of income as a result of the closure.
- The benefit may only cover the cost of salaries during the closure; it may not be used for other purposes.

What is the value of the benefit?

- The benefit is determined with reference to a sliding scale.
- Employees may get a percentage of their salary (between 38% and 60%).
- For purposes of this calculation, the relevant salary amount is the maximum of R17,712 per month, per employee. Therefore:
    - If an employee's salary is more than the maximum threshold amount of R17,712 - for example, R20,000 - the employee would not receive a percentage of R20,000, but would receive 38% of the threshold amount of R17,712. The maximum amount of the C-19 TERS monthly payment will therefore be the amount of R6,730.
    - If an employee's salary is less than the threshold amount, e.g. R15,000, the employee would receive a percentage of her/his salary of R15,000. The exact percentage that s/he would receive, will be determined in accordance with the UIF calculator. The calculator is soon to be found on the UIF website, and we will update this note when it is.
    - The minimum amount of the benefit is R3,500 regardless of the minimum wage as prescribed by the applicable sectoral determination / collective agreement.
    - Employers may supplement these benefits, but employees may not get their full salary PLUS the benefit. The maximum that an employee may accordingly receive (from the UIF and their employer) is 100% of their salary.

What if the employer paid the employee? Can the employer still claim the benefit?

- The employer may claim the benefit and may retain the value of the benefit already paid to the employee.
- In order to avoid disputes, it is recommended that the employee's payslip reflects "TERS Benefit" (in the event that the employee is paid the value of the benefit) or "Includes TERS Benefit" (if the employee is paid an amount higher than the TERS benefit).

Who will pay the benefit?

- If the employer has concluded a Memorandum of Agreement with the UIF, or if the employer has accepted the UIF's standard terms and conditions, the value of the benefit in respect of the employer's employees will be paid to the employer. The employer must then pay over the benefit to the employees concerned (except where they have already been paid) within 2 days (see below).
- If the employer is a member of a bargaining council that has concluded a Memorandum of Agreement with the UIF, the UIF will pay the amount to the bargaining council, and the bargaining council will administer the payments to the employees.
- Employees will therefore not be paid by the UIF directly, but by their employer or the applicable bargaining council. The only exception to this is where an employer employs fewer than 10 employees.
- The UIF will first verify the supporting documents submitted by the employer and, within 10 business days of the employer's submitting all of the required documents and information, will deposit the funds into the employer's business account.
- Employers must pay their employees the benefit within 2 days of receiving payment from the UIF. If the employer has already paid their employees part or all of the benefit amount, the employer can recover those amounts from the funds deposited by the UIF and pay the balance – if applicable - to the employees within 2 days. Employers must submit proof of payment to the UIF within 5 days of the payment by the UIF and return any funds not used (including interest) to the UIF within 10 days of its business operations recommencing.

What must the employer do to claim?

- The employer must apply by reporting the total or partial closure to covid19ters@labour.gov.za.
- The employer will receive an automatic response outlining the application process and the documents and information that is required.
- These documents would include:
    - a letter of authority from the employer;
    - the signed memorandum of agreement, or electronic acceptance of the standard terms;
    - the UIF's template which includes details of the employer, the period of closure, the list of employees and their dates of employment and ID numbers, the remuneration received by the employees;
    - proof of remuneration to employees for the previous 3 months;
    - confirmation of employer bank account.

Will the benefit be paid in one lump sum?

- The UIF will pay benefit funds in relation to three separate time periods:
    - first, for the period of temporary closure for 30 days from the date of Lockdown;
    - second, for any period of temporary closure during the following 30 days; and

    - third, for any period of temporary closure during the balance of the Memorandum of Agreement.
- The Agreement is in force for 3 months from the date of confirmation by the UIF that it accepts the employer's COVID-19 TERS application.

What about employer who employ fewer than 10 employees?

Employers with FEWER than 10 employees must submit the individual bank account details of each of the employees to the UIF. The UIF will pay these employees directly.

What are the employer's accounting obligations?

- Employers must keep all their accounting records relating to the Memorandum of Agreement and the COVID-19 benefit for 5 years, and keep them separate from accounting records relating to its business. This will enable them to be identified on a standalone basis from the business-related accounting records.
- Employers must keep a proper audit trail of the UIF funds received and benefits paid to employees.
- Employers may not withdraw the funds paid by the UIF, or draw any cheques from the funds.
- The UIF may appoint an auditor or investigator to audit the employer's implementation of the Memorandum of Agreement.

Is the information submitted to the UIF confidential?

Yes, the information submitted by the employer and employees must be kept confidential, unless it needs to be disclosed to a third party in order for the Memorandum of Agreement to be implemented.

What happens if there is a dispute?

- The first step is for senior officials of the UIF and the employer to meet to attempt to resolve the dispute amicably.
- If that doesn't resolve the dispute, either of the parties may refer the dispute to the Arbitration Foundation of South Africa, which arbitration will include the right of appeal.

Is there a right to strike during the Lockdown?

The LRA makes provision for the designation of certain businesses as "essential services". These include the South African Police Services, Parliamentary Services, and those services designated as essential services by the Essential Services Committee. Employees in essential services may not embark on strike action, and their disputes regarding matters of mutual interests must be resolved by arbitration.

The Lockdown Regulations include a list of "essential goods" and "essential services" that would remain operational during the lockdown.

The list of essential services in the Lockdown Regulations extends beyond those entities and businesses that have been designated as essential by the Essential Services Committee. In the normal course, the employees of these entities would be entitled to strike. The question is whether, by reason of their designation as an 'essential service' for purposes of the DMA, employees in these entities are also now precluded from striking. Advice should be sought from your attorney in this regard.

Employee benefits in the COVID-19 context

Retirement fund contributions (private retirement funds registered under the Pension Funds Act, 1956)

The Pension Funds Act, 1956 (**PFA**) places an obligation on an employer to pay any contributions which, in terms of the rules of the retirement fund, must be deducted from the employee's remuneration, and any contribution for which the employer is liable in terms of the fund's rules. Fund contributions must be paid by no later than 7 days after the end of the month for which such contributions are due. Non-compliance is a criminal offence and every director of a company 'who is regularly involved in the management of the company's overall financial affairs' will be personally liable for the company's payment of contributions and related compliance. 'Any person' (including the employer company and individual directors) who fails to comply with or contravenes the requirement is guilty of an offence. On conviction, such a person is liable to a fine of up to ZAR 10 million, or imprisonment for a period not exceeding 10 years, or both.

The FSCA has however acknowledged the financial impact of the COVID-19 global pandemic on employers and employees and that certain employers may not be in a financial position to pay their full contributions to the retirement funds in which they participate. It has therefore made provision for the suspension of fund contributions for financially distressed employers that meet the conditions.

What do employers and funds need to do?

Employers and funds should respond immediately to the FSCA's guidance. The FSCA has urged funds that do not have relevant rules in place (i.e. to make provision for temporary absence from work (with or without full pay), or a break in services, and/ or postponement of contributions payments ,and/ or reduction of pensionable service) to urgently submit relevant rule amendments to the FSCA after engagements with the employer.

The FSCA has also advised that funds must attempt to ensure that full risk benefit premiums (to the extent applicable) continue to be paid in full by participating employers in order to ensure that risk benefits (death, ill-health) will be provided.

It is important to note that funds will be required to inform affected members of their employer's request to reduce or suspend fund contributions, as well as the proposed rule amendment to that effect (if necessary) within 30 days of receipt of the employer's request.

Other employee benefits

In addition to retirement fund benefits, employers should consider whether any other employee benefits may be impacted in the event of a reduction of salaries or temporary suspension of salaries during the COVID-19 pandemic. Employers should also give consideration to the employment law implications of any reduction in contributions, as this may impact on employment contracts and fair practices regarding benefits.

Medical scheme contributions

The Council for Medical Schemes (**CMS**) in concurrence with the Minister of Health published a circular to advise the industry of interventions aimed at protecting the interests of members during the COVID-19 pandemic and the current national lockdown until 16 April 2020. Some of the interventions include requesting that medical schemes, in the spirit of social solidarity, investigate all disruptions to member contributions on a case by case basis and determine the merits thereof, prior to termination.

Like the FSCA, the CMS has also acknowledged that employers and employees in financial distress as a result of the COVID-19 pandemic may not be able to pay full contributions to medical schemes. It appears that the schemes are encouraged to give some temporary reprieve before terminating membership in instances where, for example, the employer or employee is financially distressed and member contributions are not forthcoming.

Members and employers are to carefully consider the rules of their applicable medical schemes to determine what they provide in the event of non-payment or partial payment of medical schemes contributions, alternatively to contact the relevant medical's call centre for information in relation to contributions.

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Remuneration models in the COVID-19 context

The economic reverberations of COVID-19 have only just begun. The challenge for businesses is to keep the lights on and remain intact so they can bounce back after the pandemic. Remuneration models are therefore coming under scrutiny like never before, forcing a relook at conventions such as cash-based executive bonuses and variable pay. One remuneration alternative worth considering is the US-style restricted stock model, which is simple and compelling, conserves cash yet offers opportunities for significant reward to those who keep their companies intact and thrive after the crisis.

2020 is unlikely to be a year for cash bonuses for executives. The bigger business imperative is to keep the economy going and find ways to keep a basic income flowing to as many people as possible. But although cash bonuses for executives might be unrealistic, awards of US style "restricted stock" awards provide a means of preserving companies' cash flow streams while still rewarding key talent and top-performing executives. In South Africa these types of awards are usually called "forfeitable shares" and many listed companies have such Plans in place. Urgent dialogue will need to held with institutional investors who have not yet accepted the US tech approach and still require forward looking performance conditions for executive awards. In such turbulent times setting normal targets may be impossible.

In the race to survive the immediate financial impact of the COVID-19 crisis, companies may be tempted to let go of their best talent. However, these are extraordinary times calling for extraordinary solutions and innovation. Now more than ever, business needs smart, creative people who can help keep their companies and even thriving. The big question is, what remuneration models can companies use to keep their doors open and retain their talent for when the pandemic is over?

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Access to Courts

The Minister of Justice has published amended directions in terms of Regulation 10 under the DMA. The directions published on 26 March 2020 have been withdrawn (**Amended Directions**). The Amended Directions came into operation on 31 March 2020 and remain in force for the duration of the national state of disaster.

The most notable amendments include (i) the deletion of the previously applicable directive 5(c) which provided that all time limits imposed by any rule of court shall be suspended and shall recommence after the termination or lapsing of the period of the national state of disaster; and (ii) the deletion of the previously applicable directive 10 and replacement thereof with directive 9 which requires legal practitioners to obtain a permit authorising them to (presumably) travel/commute to court in connection with litigation processes in which they are engaged during the lockdown from the Provincial Director of the relevant Provincial Legal Council. In addition, provision is made for instances where a legal practitioner is unable to obtain the permit referred to above, the practitioner must be allowed to commute between his/her place of residence and the court upon presentation of (i) an original or certified copy of his/her admission certificate; (ii) proof of identification; and (iii) confirmation from the registrar of the court that the matter is enrolled for that particular day and that the matter is urgent or essential.

Access to courts is limited to persons with a material interest in a case. Only those cases identified as urgent and essential, including bail applications in the case of first appearance of an accused, or a matter which, if not enrolled during the state of disaster, will lead to substantial injustice will be placed on the court roll for hearing. However, Heads of courts retain the discretion to authorise the hearing of matters through teleconference, videoconference or any other electronic mode.

The Judge Presidents of the Gauteng Division of the High Court (Johannesburg and Pretoria), Western Cape High Court and KwaZulu-Natal Division have issued practice directives. In respect of issuing new processes (excluding matters that may prescribe and urgent court matters) access to these specific courts has been limited and alternative methods for issuing and filing of documents at court have been prescribed. As at today's date (2 April 2020), time periods prescribed in the rules governing proceedings in the High Courts (save and except for the KwaZulu-Natal Division) for the delivery of pleadings, affidavits and notices are not suspended by the declaration of a national state of disaster.

The situation is fluid and litigating parties are advised to remain in contact with their attorneys who will advise them of developments in this regard as and when they occur.

Be vigilant of claims that may prescribe during the lockdown. Adequate provision has been made in the practice directives in the Gauteng Division of the High Court read with the Amended Directions

for the issue and service of process (which is required to interrupt prescription) in respect of claims that may prescribe.

All private mediations or arbitrations in South Africa will proceed as normal, unless advised otherwise.

Should you require any additional information on this notification or on any other legal issue arising from COVID-19 please do not hesitate to contact us and we will refer you to the appropriate attorney to address your queries.

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Data protection

Please see our separate newsflash in respect of contact tracing of COVID-19 infections in terms of the Disaster Management Regulations.

Aside from information that is collected by government agencies from telecommunications service providers to combat the spread of COVID-19, other organisations may need to collect COVID-19 information to comply with their own legal obligations and to keep staff and others safe. This may include, for example, travel information and information about the health status of an individual (data subject) including whether they tested positive or negative, information about individuals who have self-isolated, and in certain instances, information about family members who have self-isolated or who have shown symptoms. This type of information will be personal information under the South African Protection of Personal Information Act 4 of 2013 (**POPIA**). Health data, in particular, is considered as a category of sensitive personal information under POPIA. Until the full commencement of POPIA (expected later this year), the personal information (including health information) of data subjects in South Africa is protected under the common law and the constitutional right to privacy. It is generally considered good practice to comply with POPIA pending its full implementation, particularly given that the position under POPIA mirrors the current legal requirements.

The collection and processing of personal information, and sensitive personal information in particular, is subject to various restrictions. Under POPIA, businesses should only process personal information if they have in place appropriate safeguards and the processing is done for legitimate purposes or as provided for under applicable legislation. Sensitive personal information can only be collected in limited circumstances, including where it is necessary to exercise a legal obligation.

In this regard, in terms of OHSA employers with more than 20 full-time employees must designate health and safety representatives whose functions include identifying potential (health) hazards at the workplace, inspecting the workplace, with a view to the health and safety of employees, and making representations to the employer on general matters affecting the health or safety of the employees at the workplace. This will generally provide a basis on which employers can request health information from employees, customers and visitors.

The Information Regulator (**IR**), who is the data protection authority appointed to monitor and enforce compliance with POPIA once it becomes effective, has issued a guidance note weighing in on the data protection implications of personal information that is collected for COVID-19 management purposes. The Information Regulator's view is that an employer is able to request health information

on the health status of an employee to maintain a safe and hazard-free working environment, provided the information should not be used to unfairly discriminate against the employee. The Regulator's view is that an employee could even be compelled to undergo testing for COVID-19 in order to maintain a safe working environment.

The transfer of any sensitive personal information (such as health information) out of South Africa should generally only be done with the consent of a data subject. Ordinary personal information (such as travel information) may be transferred out of South Africa provided that the data exporter is justified in doing so, such as where it is in the legitimate interests of the exporter or another third party to transfer the information. In addition, the recipient of the personal information either has to comply with the laws of the country where it is located, and those laws must provide for an adequate level of protection for personal information similar to what is contained in POPIA, or the South African data exporter and the recipient must have entered into an agreement that provides for similar protections.

Guidance for Businesses

- Businesses should only collect personal information of their employees if it is necessary for its operations and compliance with the obligation to ensure a safe and healthy work environment. Information that is not strictly for these purposes should not be collected.
- Where businesses collect the personal information of their employees or other individuals, they should ensure that they have in place appropriate data security measures such as encryption to protect the personal information collected.
- Where businesses wish to transfer personal information out of South Africa, they should ensure that they have appropriate data security measures for the transfer and that the recipient is subject to a law, binding corporate rules or binding agreement which provide an adequate level of protection. Health information should only be transferred with specific consent from data subjects.
- Businesses should check their privacy notices and employment contracts to ensure that the proposed collection and processing activities are covered. Privacy notices should be amended if necessary.
- In appropriate circumstances, employers may need to disclose the fact that an employee has tested positive for COVID-19, or may be at risk of having contracted COVID-19, to fellow employees. We think that employers are justified in doing so on the basis of their duty of care. Such disclosures should meet the proportionality principle, both in respect of the information being disclosed (such as the name of the employee concerned and the fact that s/he had tested positive) and the audience to which the information is disclosed (e.g. immediate team members and such other individuals, including clients, with whom the employee has been in contact).

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Consumer protection

With the ban on international travel and the recommendation against any non-essential domestic travel, there are likely to be cancellations across the board in the context of, amongst others, flight and hotel bookings. The Consumer Protection Act, 68 of 2008 gives consumers the right to cancel advance reservations, bookings or orders. Suppliers are able to impose a reasonable charge for cancellation of the order or reservation. A supplier cannot impose any cancellation fee for a cancelled booking, reservation or order if the consumer is unable to honour it because of death or hospitalisation. Cancellation charges must be determined on the basis of what is fair in the circumstances, having regard to the nature of the goods or services, the notice given, the reasonable

potential for the service provider to find an alternative consumer, and the general practice of the relevant industry.

Consumers are able to cancel fixed term contracts (such as gym membership contracts or contracts for mobile telecommunications services) at any time by giving the supplier 20 business days' notice in writing. The consumer is responsible for any amounts owed to the supplier in terms of that agreement up to the date of cancellation, and the supplier must credit the consumer with any amount that remains the property of the consumer as of the date of cancellation. The supplier can impose a reasonable cancellation penalty with respect to any goods supplied, services provided, or discounts granted, to the consumer in contemplation of the agreement enduring for its intended fixed term. Suppliers also have the right to cancel fixed term agreements where there has been a material failure by the consumer to comply. Twenty (20) business days' notice must be given.

Guidance for Businesses

- Conduct a proper review and assessment of your business to understand the risk and potential impact of COVID-19 on your operations and financials in light of the above consumer protection regime.
- Consider and develop policies on reasonable cancellation fees, and appropriate early cancellation penalties under fixed term contracts in light of COVID-19.

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Competition/ Antitrust considerations and the pricing of goods

The following competition/ Antitrust matters are pertinent as a result of COVID-19:

- **Prioritisation of COVID-19 complaints:** The Competition Commission is prioritising complainants relating to excessive pricing and exploitative practices by businesses in response to COVID-19. The Commission has significantly scaled-down all of its other operations, discouraging the filing of complaints, unrelated to COVID-19, as well as the filing of all merger transactions except those involving failing firms or firms in distress. Similarly, the Competition Tribunal has prioritised hearings relating to COVID-19 complaints and has postponed *sine die* all referrals already enrolled, pre-hearings and interlocutory hearings. Consent orders and all other new matters, unrelated to COVID-19, will not be set down for hearing. In relation to merger transactions, the Tribunal has categorised mergers into three phases, depending on the complexity of the merger and the level of engagement required from the merger parties.
- **Restrictions on pricing of consumer goods and services:** Regulations have been passed precluding dominant firms from charging excessive prices in respect of critical medical and hygiene supplies, a wide range of basic consumer goods and services , emergency products and services, as well as any other goods or services identified by the Minister of Trade, Industry and Competition. Any material price increase by a dominant supplier which does not correspond or is not equivalent to an increase in the cost of providing the product or service, or which increases the net margin or mark-up on the product or service above the average margin or mark-up in the three month period prior to 1 March 2020, will be a relevant and critical factor in determining whether the price is 'excessive'. Pricing of this nature is also deemed by the Regulations to be unconscionable, unfair, unreasonable or unjust in terms of the Consumer Protection Act, 2008. Pricing orders can be levied against contravening firms, in addition to other possible remedies.

- **Block exemptions**: Categories of agreements or practices by competitors, customers and suppliers have been exempted from the ordinary application of horizontal and vertical restrictive practice provisions in the Competition Act. The exemptions are only applicable if undertaken in coordination with the relevant Minister and for the sole purpose of responding to the COVID-19 crises. Exemptions have been granted in the healthcare industry and banking sector, and to South African retail tenants in designated trading lines, which currently comprise clothing, footwear, home textile retailers, personal care services and restaurants, as well as businesses involved in the supply of rentable space in the retail property sector. Communication in respect of prices is specifically prohibited, unless otherwise authorised.

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Insolvency and restructuring

The following Insolvency and restructuring considerations are pertinent as a result of COVID-19.

- **Financial distress – insolvency and restructuring:** Many businesses will be facing some form of financial distress as a result of the economic and social consequences of COVID-19.

  In many instances some form of restructuring will be required, be it operational restructuring or financial restructuring.

- **Operational restructuring:** In this regard various sections of this note have reference. See in particular Employment considerations (section 7) regarding the section 189 / 189A process and Remuneration models in the COVID-19 context (section 8), the suspension, variation or termination of contractual obligations under the Contractual considerations (section 1) and the reference to contractual relationships between landlords and tenants in the Commercial Property section (section 6).
- **Financial restructuring:** In this regard access to funding and the ability of borrowers to meet their obligations under their existing funding arrangements becomes critical. We refer you to the section on Banking and Finance considerations in this regard (section 5). It is likely to be critical for businesses to engage with their bankers and other funders at an early stage to negotiate any possible covenant holidays, forbearances and waivers and possibly standstills and amendments and extensions to existing facilities. Tax considerations may also be relevant, particularly if SARS grants any extensions or lenience due to the pandemic – see Tax considerations (section 15). Any insurance cover the business may have should be assessed to determine whether it may assist – in this regard see the Insurance section (section 13)
- **Directors' duties:** Under circumstances of financial distress directors need to be mindful of their duties, including their general statutory and common law duties and potential personal liability for reckless trading. There is no general obligation on a board of directors either to place a company in liquidation or to take steps to commence business rescue proceedings if a company is financially distressed. The board's obligations must therefore be assessed in relation to (i) reckless trading in terms of section 424 of the 1973 Companies Act, (ii) reckless trading in terms of section 22(1) of the Companies Act: and (iii) the obligation to provide notice of "financial distress" in section 129(7) of the Companies Act.

  Our Restructuring and Insolvency attorneys will be able to guide you in regard to the above. The primary consideration is that although "recklessly" does not mean mere negligence but at least gross negligence, the Courts have stated that if a company continues to carry on business and to incur debts when, in the opinion of the reasonable business person, standing

in the shoes of the directors, there would be no reasonable prospect of creditors receiving payment when due, it will generally be a proper inference that the business is being carried on recklessly.

Section 129(7) of the Companies Act is dealt with under "Business rescue" below.

Insolvency or lack of liquidity – options available

In instances where restructuring as described above will not suffice or fails to provide the liquidity required, a formal process may be appropriate. Our Restructuring and Insolvency attorneys are able to assist you in evaluation your options. A brief summary of the main options follows.

- **Business rescue:** Chapter 6 of the Companies Act introduces the concept of business rescue, which involves proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for (i) the temporary supervision of the company, and of the management of its affairs, business and property; (ii) a temporary moratorium on the rights of claimants (creditors) against the company or in respect of property in its possession; and (iii) the development and implementation (if approved) of a plan to rescue the company by restructuring its business, property, affairs, debt and other liabilities and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis, or, if this is not possible, in a manner that results in a better return for creditors or shareholders than would result from the immediate liquidation of the company.

  The term 'financially distressed' means that "it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months", or "it appears to be reasonably likely that the company will become insolvent (i.e. liabilities will exceed assets) within the immediately ensuing six months".

  Business rescue proceedings can be initiated on a voluntary basis by way of a resolution of the board of directors of the company, or by way of an application to court by an 'affected person', this being a shareholder, creditor, a registered trade union representing employees or any employee of the company.

  The requirements that must be satisfied for a company to commence business rescue proceedings are (i) that the company is financially distressed; and (ii) that there appears to be a reasonable prospect of rescuing the company.

  Section 129(7) of the Companies Act requires that if the board of a company has reasonable grounds to believe that a company is financially distressed, but it has not adopted a resolution to place the company in business rescue, the board must deliver a written notice to each "affected person" explaining why it has not adopted such a resolution. The section does not contain a sanction if the board fails to comply, and there is currently no case law on the section. However, it is possible that a failure to comply with the obligation could have adverse consequences for directors (such as personal liability) if the company is subsequently placed in liquidation and creditors suffer a loss, to the extent that it can be shown that the failure to comply caused the loss. Clearly notice to affected persons of this nature could prompt them to bring a business rescue application. Creditors may also be unwilling to continue to supply goods and services on favourable credit terms and banks

may withdraw facilities. It is therefore important to avoid the need to give such a notice. In this regard it is critical for the board to consider the restructuring options available and whether the implementation of them would result in the company not being financially distressed, and therefore avoiding the need to issue a section 129(7) notice.

- **Liquidation:** In the very worst of circumstances, a board may need to consider liquidation. Companies may also face liquidation proceedings initiated by creditors.

  The threshold for liquidating a company is essentially that it is unable to pay its debts as they fall due. Factual insolvency (i.e. liabilities exceeding assets) is not a ground for liquidating a company (although may be a factor considered by the Court in adjudicating an application).

  Liquidation should only be considered if consensual restructuring and business rescue options have been exhausted. In that event our Insolvency attorneys can guide and assist you. We are also available to assist a company in defending any such application, if appropriate. In some instances it is possible to convince the Court not to grant a liquidation application but instead to order the company to commence business rescue proceedings. If there is a viable business to be saved, business rescue is a suitable alternative.

Guidance to Business

- Businesses and boards of directors must act proactively in engaging with creditors and financiers at the early stages of financial distress. The economic consequences of the COVID-19 pandemic are likely to be far reaching and unprecedented. Good faith engagement at an early stage may be vital in ensuring the support of all relevant stakeholders as we weather this storm.

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Procurement

Clients in the business of providing goods or services to institutions to which the Public Finance Management Act, 1999 (**PFMA**) and the Local Government: Municipal Finance Management Act, 2003 (**MFMA**) apply (respectively, government departments, public entities, municipalities and municipal entities) should be aware that, in terms of the Regulations, the ability of these institutions to engage in emergency procurement is governed by standard procurement regulations, subject to certain qualifications. The Treasury Regulations promulgated under the PFMA remain applicable to emergency procurement by government departments and public entities. In particular, Regulation 16A.6.4 of the Treasury Regulations provides as follows: "If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority." National Treasury (**NT**) Instruction No. 3 of 2016/17 provides that such deviations are permitted in an "emergency" situation but then only with NT's prior written approval. NT Instruction No. 8 of 2019/2020 dispenses with the requirement of prior NT approval in respect of emergency procurement to deal with the COVID-19 pandemic. Annexure A to this NT Instruction specifies a list of items to be procured centrally by NT according to Department of Health specifications. These items should be procured from the listed suppliers (unless the relevant institution already has an existing contract in place). Existing contracts may be expanded beyond the normal threshold without NT approval. In the case of items not listed in Annexure A but which are "deemed a specific

requirement" of the institution, the institution's accounting officer may deviate from standard competitive bidding processes without prior NT approval. However, emergency procurement related to COVID-19 must be reported to NT within 30 days.

Similarly, emergency procurement by municipalities and municipal entities must comply with the relevant provisions of their own supply chain management (**SCM**) policies, which in turn must comply with the existing SCM regulations governing emergency procurement. In much the same way as NT has dealt with emergency procurement by PFMA entities, it has issued MFMA Circular 100 to speed up procurement of goods required by municipalities and municipal entities to reduce and control the spread of COVID-19.

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Tax considerations

Taxpayers could be impacted directly and indirectly by the virus. For example:

- **Physical visits to SARS:** The South African Revenue Services (**SARS**) has requested recognised professional and controlling bodies to encourage members and their clients to make use of electronic channels wherever possible. Taxpayers can access e-filing as normally. The SARS MobiApp is also available for those who want to access SARS services via their mobile devices. In exceptional circumstances, where a taxpayer is required to physically visit SARS, an appointment will be need to be requested, either via email or via the SARS online form. The request will be assessed and only if it cannot be resolved without a visit to a branch will SARS grant approval for a visit.
- **Travellers through ports:** SARS has initially advised that all international and domestic flights as well as all cross-border road passenger movements are prohibited for the duration of the lockdown. There is also a ban in place on cruise ships calling at any of South Africa's sea ports, which will be strictly enforced. Since then, some flights have been allowed to leave, in order to repatriate foreign visitors to their home countries.
- **Tax dispute resolution:** Taxpayers who are involved in disputes with SARS should note the proposed amendments outlined in the Draft Disaster Management Tax Relief Administration Bill regarding the extension of time periods, detailed below. Judge Presidents of various divisions have issued urgent directives restricting access to courts and dealing with the filing of pleadings, notices or heads of argument. It is important to consider the restrictions applicable in the different divisions to determine the impact on pending disputes. In certain instances, the objections and appeals cannot be submitted via e-filing and taxpayers should ensure that they are filed timeously via the correct channels and that proof of such filing is obtained. Taxpayers who are due to attend meetings such as Alternative Dispute Resolution proceedings over the next few weeks, are encouraged to contact the relevant SARS officials to explore either conducting proceedings via virtual meeting applications, or alternatively, to arrange postponement of the proceedings to an agreed date.
- **Compliance deadlines:** The absence of employees may make it difficult to ensure that all tax deadlines such as the submission of pay as you earn (**PAYE**) and VAT returns are met and that all taxes are being paid timeously. In addition, the slow-down of the economy could impact on the ability of taxpayers to pay their taxes on time. Please see below for various tax relief measures proposed by the government.

SARS has, however, emphasised that the COVID-19 pandemic should not be used by taxpayers as an excuse for noncompliance with the law. Taxpayers should thus, as far as possible, ensure that they comply with their obligations to timeously submit returns and pay taxes.

Proposed tax relief measures

The Draft Disaster Management Tax Relief Bill (Draft DMTR Bill) and the Draft Disaster Management Tax Relief Administration Bill (Draft DMTRAB) were released on 1 April 2020. The preamble to the Draft DMTRAB describes its purpose as providing for tax measures to assist with alleviating cash flow burdens on tax compliant small to medium sized businesses arising as a result of the COVID-19 pandemic and lockdown.

The two Bills contain further details of the COVID-19 tax relief measures announced towards the end of March. A number of these relief measures will apply only during the period from 1 April to 31 July 2020 (the **four-month period**).

- **PAYE deferral: Tax compliant businesses with a turnover of less than ZAR 50 million**

  Qualifying taxpayers will be allowed to defer 20% of their pay-as-you-earn (PAYE) liabilities in respect of the four-month period (remuneration paid in respect of April to July 2020) without incurring penalties or interest.

  A 'qualifying taxpayer' is a company, trust, partnership or individual who conducts a trade and who has a gross income of ZAR 50 million or less during the year of assessment ending on or after 1 April 2020 but before 1 April 2021. Not more than 10% of its gross income may be derived from interest, dividends, rental from letting fixed property or remuneration.

  The deferred PAYE liability must be paid to the South African Revenue Service (SARS) in equal instalments over the six-month period commencing on 1 August 2020 (i.e. the first payment must be made by no later than 7 September 2020).

  It is very important that employers who wish to defer their PAYE liabilities in terms hereof, do not understate their PAYE liability for any of the four months, as this will result in the imposition of penalties and interest. Instead, the full PAYE liability must be reflected, together with the payment of not less than 80% thereof.

  Non-compliant taxpayers who have failed to submit returns or who have an outstanding tax debt of ZAR 100 or more (except if payment has been suspended, or it it is being dealt with in terms of an instalment payment agreement or compromise arrangement) will not qualify for the deferral of PAYE.

- **Deferral of provisional tax payments**

  One of the measures announced by President Ramaphosa in March was in relation to the payment of provisional tax. The Draft DMTRAB now provides the detail of the proposed measure.

  The deferral of provisional tax payments is available only to qualifying taxpayers. A qualifying taxpayer that is a provisional taxpayer can pay:

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- 15% instead of 50% of its estimated liability as its first provisional tax payment; and
- 65% instead of 100% of its estimated tax liability as its second provisional tax payment.

No interest or penalties will be imposed in respect of the deferred amount. The provisional tax that is deferred must be paid after the end of the year of assessment, as an additional (third) provisional tax payment in order to avoid interest running.

Qualifying micro businesses qualify for similar relief in respect of their interim payments as required in terms of the Income Tax Act (the ITA).

Taxpayers who submit provisional tax estimates must remember that they may be called upon by SARS to justify their estimates. Should SARS be dissatisfied with the estimate, SARS could increase the amount to what it considers to be reasonable. It is to be anticipated that many businesses will have to adjust their estimates downward in light of the current crisis. It will now be more important than ever to have a calculation that supports the provisional tax payments.

- **Employment Tax Incentive (ETI) relief**

  All businesses, irrespective of whether or not they currently qualify to claim an ETI, can derive a tax subsidy of up to ZAR 500 per month during the four-month period for those private sector employees between 18 and 65, earning below ZAR 6 500 per month.

  In terms of the normal ETI rules, an employer can claim ETI relief only in respect of eligible employees, such as employees between the ages of 18 and 29. The ETI claims are available only for a period of 24 months per eligible employee. Accordingly, an employer normally cannot claim ETI relief in respect of employees who have already been included in the employer's ETI claim for a period of 24 months.

  However, during the four-month period and subject to the detailed provisions of the ETI Act:

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    - an employer will be entitled to increase the ETI claimed in respect of eligible employees by ZAR 500 per month (e.g. from ZAR 1 000 to ZAR 1 500 in the first qualifying 12 months, and from e.g. ZAR 500 to ZAR 1 000 in the second qualifying 12 months); and
    - an employer may claim an ETI of ZAR 500 per month for employees who are not normally eligible, such as employees who are older than 29 or where the employer has already claimed ETI in respect of an employee for a 24-month period. This will apply to all normally ineligible employees earning less than ZAR 6 500 per month, if they are between 18 and 65.

The payment of ETI reimbursements (to the extent that an employer's ETI claim exceeds its PAYE liability) will, during the four-month period, be accelerated and ETI reimbursements will be increased from twice a year to monthly to get cash into the hands of compliant employers.

The relaxation of the ETI rules during this four-month period will only apply to employers that were registered with SARS as at 1 March 2020, and all of the normal compliance requirements of the ETI Act will continue to apply.

- **Extension of time periods (*dies non*)**

  The Tax Administration Act, 2011 (the TAA) and the Customs and Excise Act, 1962 (C&E Act) deal with various tax administrative processes which are subject to specific timelines. The Draft DMTRAB provides for the 21-day national lockdown period to be regarded as *dies non*, in other words, these days will not be counted for purpose of calculating the respective time periods.

  However, it is important to note that this does not apply to all time periods stipulated in these two Acts. For example, the *dies non* rule will apply to all time periods in respect of dispute resolution under Chapter 9 of the TAA, but it does not apply to other provisions such as the submission of tax returns or a response to a request for relevant material. It also applies to section 99 of the ITA, with the effect that prescription will also be extended.

  In respect of the C&E Act, the Draft DMTRAB specifically lists instances where the *dies non* rule will apply (e.g. relating to dispute resolution), and others where it will not (such as the submission of a bill of entry). Where taxpayers are subject to specific time periods in respect of the TAA or C&E Act, they are therefore urged to refer to the to the Draft DMTRAB to consider whether the *dies non* rule will apply to the specific timelines.

  Also, the Tax Laws Administration Act, 2019, introduced the principle that beneficial ownership declarations for withholding tax purposes, will only be valid for a five-year period. This was intended to come into effect on 1 July 2020, but this date will be extended to 1 October 2020.

- **COVID-19 Disaster Relief Trusts**

  Special provision is made for tax relief to be granted to trusts established for the sole purpose of providing disaster relief in respect of the COVID-19 pandemic. These trusts are referred to as COVID-19 Disaster Relief Trusts (CDR Trusts) and they will be taxed in terms of the special tax dispensation applicable to public benefit organisations (PBOs). However, this special dispensation will only apply during the four-month period.

  While the definition of a CDR Trust does not refer to Small Medium and Micro Enterprises (SMMEs), the Explanatory Memorandum to the DMTR Bill creates the impression that the focus of CDR Trusts will (or must) be to provide financial assistance to SMMEs. The Explanatory Memorandum envisages that the financial assistance could include the provision of loan funding or the payment of weekly allowances directly to employees of approved SMMEs.

  The proposed relief measures applicable to CDR Trusts are as follows:

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    - CDR Trusts are deemed to be approved PBOs, subject thereto that they comply with the PBO provisions of the ITA. As such, receipts and accruals of CDR Trusts will be exempt from income tax, similarly to PBOs.
    - Donations made to or by CDR Trusts are exempt from donations tax. Donations made to a CDR Trust will also qualify for a tax deduction as provided for in section 18A of the ITA.

- In those instances where CDR Trusts pay weekly allowances to employees of SMMEs, there will be no obligation to withhold PAYE, although these allowances will be subject to income tax in the hands of the employees and will be taxable upon assessment.

If, by 31 July 2020, a CDR Trust has not been dissolved and its assets have not been distributed, it will be deemed to be small business funding entities as contemplated in section 30C of the ITA.

The tax relief provided to these kinds of funds is very welcome. However, there is uncertainty regarding the application of these provisions, such as whether these funds must take the form of a trust, and whether they will be obliged to apply to SARS for approval.

In light of the very short lifespan of these funds, it would be problematic if they had to be structured as trusts (including the obligation for trustees to receive Letters of Authority from the Master's Office before they can act on behalf of the trust), and if application first had to be made to SARS. In view of the urgent need to provide funds to struggling business, it would be appreciated if this could be clarified as soon as possible.

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Insurance

South African companies as well as any of their African subsidiaries (regardless of whether the African subsidiary participates under a group insurance policy), need to consider whether the insurance cover they have in place relating to their business covers losses related to COVID-19.

It is likely that businesses will not have any insurance covers under business interruption insurance, public, employment or directors and officers liability. In addition where a company has provided its employees access to a group policy, a death due to COVID-19 could be excluded.

The FSCA has stipulated that any new products must follow the prescribed process as stated in the Policyholder Protection Rules. Claims assessments will be impacted by COVID-19, but delays must be avoided and communicated to customers. Exclusions impacted by COVID-19 must be clearly communicated to current and new policyholders, new exclusions must be discussed with the regulator, assessments must be made safe, medical requirements must be reassessed to avoid stress on the Health Care System and no additional costs or fees should be passed onto the policyholder during this period. On renewals, any changes to policies due to the impact of the COVID-19 should be highlighted to the policyholder and additional premium reviews must be communicated to the FSCA with the impact on the policyholder.

We suggest that businesses consult with brokers as to what cover the business has in place and undertake a risk assessment of the business, your broker can also check with your insurer if the insurer is willing to extend cover (this will be at cost). Consider measures to limit your liability and risk. Consult with attorneys to advise you from a legal perspective where your risks lie and how you can mitigate them.

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Cyber crime

The global outbreak of COVID-19 and the resultant unprecedented measures implemented by countries all over the world are creating perfect vulnerabilities in the working environment for cyber criminals to exploit. These measures are changing how people work and interact every day. More people than ever are working from home or elsewhere in isolation, often with weaker cyber security measures on their home networks than they would have in their offices. Even in essential services and other high-sensitivity environments, skeleton staff operating under severe stress and general distraction can create windows of vulnerability. And in times of worry and stress, even the most vigilant are more likely to fall for malicious scams and tricks. Reports of a sharp increase in cyber-attacks on both the public and private sector are streaming in from all over the world.

In South Africa, the lockdown that came into effect on Thursday night (26 March 2020) has emptied offices, shops and other workplaces and more South Africans than ever before are active on remote networks. This is heaven from a cyber-criminal's perspective and we expect that our clients will be subject to an increased number of cyber-attacks ranging from phishing scams to ransomware, doxware, theft of data, industrial espionage and other hacking attempts.

Guidance for Business

Steps should be taken to safeguard businesses and to create response plans. Bowmans' Forensic Incident Response Team would be happy to help clients with legal advice, investigative services and (in conjunction with our computer forensic service provider), can respond to technical challenges brought about by a cyber-attack.

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Intellectual Property

COVID-19 has had an impact on the registration of intellectual property (**IP**) across the globe. For a newflash that deals with all of our offices, please see our COVID-19 client portal. Insofar as South Africa is concerned, the CIPC has suspended its key functions in respect of registered IP. Limited electronic services and facilities became operational from 1 April 2020, while all other services and facilities will remain suspended or delayed for the duration of the lockdown. The suspension of time periods under certain IP-related legislation presents delays in the registration of registered IP applications, assignments, licences, oppositions and related matters that are conducted through CIPC. Written assignments of certain categories of IP concluded during the lockdown period remain effective. While IP licences cannot be registered with CIPC during the national lockdown, licence agreements that are concluded in respect of registered IP will be effective. The registration of IP will be suspended for the period of the lockdown.

Guidance to business

- Where IP registration is an obligation subject to a deadline or is a condition precedent to a transaction that is currently underway, consideration must be given to the terms of the transaction documents and whether the agreement contemplates suspension of the lapse of time due to the occurrence of events beyond the control of the parties to the agreement.

- It is important to adopt a practical approach to guard business interests during this time and to minimise the practical effects of the suspension of services during the lockdown and thereafter.

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Financial Services Sector

The Regulations establish the parameters of essential financial services. The FSCA has also published a communication acknowledging the impact of the COVID-19 global pandemic on financial institutions and their customers and outlining its key expectations regarding the culture and responsibilities of financial institutions (including insurers, banks, financial services providers, retirement funds, retirement fund benefit administrators and collective investment scheme managers) during the crisis. The FSCA emphasised that 'regulated entities should bear in mind the current circumstances and assist their customers with even more empathy, flexibility and understanding during these difficult times'. Specific obligations were placed on insurers, banks, advisors and intermediary services providers, investment managers, boards of management of retirement funds and retirement fund benefit administrators. Please reach out to your attorney if you need guidance in this regard.

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Telecommunications considerations

Increased home stays and remote conduct of business and transactions due to the COVID-19 pandemic means that the country's telecommunications sector will be burdened and strained in the coming weeks. We are likely to see increased phone calls, messages, use of the internet and heavy media consumption. The Minister of Communications and Digital Technologies has issued Directions which seek to use technology to combat COVID-19 through the dissemination of information; ensuring the consistent availability of communications infrastructure and digital services; automatic type approval of network equipment and handset devices; tracking and tracing; and support to other sectors (education, health, etc). Pursuant to the Minister's Directions, the Independent Communications Authority of South Africa (**ICASA**) published the Information and Communications Technology (**ICT**) Sector National Disaster Regulations on 6 April 2020 (the **ICT Regulations**). The ICT Regulations are primarily concerned with providing relief to licensees from certain mandatory minimum standards to enable flexibility and to ensure that the public has continued access to mobile voice and data services. In an attempt to broaden this access, the ICT Regulations provide that licencees may apply for high demand spectrum on a temporary basis in the 700MHz, 800MHz, 2300MHz, 2600MHz, and 3500MHz bands. The ICT Regulations also make provision for spectrum sharing between licensees; and provision for a speedier type approval application process.

Guidance for Telecommunication Businesses

- Telecommunication businesses should monitor their networks and traffic to ensure that they comply with the statutory licence conditions on quality of service.
- Telecommunications businesses should stay in constant communication with the ICASA on any abnormal spikes of traffic and work together with ICASA to mitigate any potential network failures/outages.
- Telecommunication businesses should ensure that there are efficient and effective processes in place for the resolution of complaints, should they arise.

- In terms of the ICT Regulations, licensees are exempt from the responsibility to resolve complaints within the usual prescribed time frames, but are, however, still required to resolve them within a reasonable period.
- Telecommunication businesses that have access to IMT spectrum assignments should ensure that they abide by their obligation to send their subscribers SMS's free of charge in the form of 2 public announcements per day regarding prevention and management of COVID-19 and notifications of all announcements by the Minister of Health or the Presidency.
- Telecommunication businesses should zero rate all COVID-19 sites identified by the Department of Health in accordance with their obligations in terms of the Regulations.
- Mobile network operators should work closely with the banks to ensure that the mobile payment systems interconnected with the telecommunication sector are able to continue to provide mobile payment solutions.

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Shipping, aviation and logistics considerations

COVID-19 has had, and will continue to have, a huge impact in the shipping, aviation and logistics industries on a global scale. In South Africa, sweeping regulatory controls have been introduced, almost overnight, by the principal governmental role players in the aviation, ports and shipping sectors. These Regulations are also relevant to business as it pertains to travel of employees. It may also be relevant for business to consider the directions issued by the Minister of Home Affairs regarding visa and other applications if employees require these documents in order to transport essential goods or perform essential services. Please reach out to your attorneys if you would like to know more.

Aviation

Passenger air travel

- The Minister of Transport initially published regulations which imposed a travel ban on all citizens from high-risk countries entering South Africa by air and restricted the entry of citizens from medium risk countries. These regulations have since been repealed and there is now a complete prohibition on all passenger air travel, whether domestic or international.
- There are certain limited exceptions to this prohibition, including flights operated to evacuate South African nationals from foreign countries, flights operated to repatriate foreign nationals from South Africa back to their home countries and emergency flight landings.
- The prohibition on passenger air services applies for the duration of the declared national state of disaster.

Air cargo

- Air cargo operations are permissible during the lockdown at the international airports that have been designated as Ports of Entry, provided that air cargo from medium to high-risk countries is sanitized immediately after off-loading.
- Flight crew responsible for air cargo operations are permitted to disembark from their aircraft on condition that they will be subject to the quarantine laws applicable in South Africa, which may entail a 21-day quarantine period.

Aviation insurance

- The aviation industry has been severely impacted by COVID-19 and the consequent travel restrictions imposed by governments around the world. It is anticipated that airlines, travel agencies and others who have suffered financial losses as a result of business interruption caused by government-imposed travel restrictions will seek indemnification from their insurers. In addition, airlines may be exposed to claims from passengers who may have contracted COVID-19 aboard flights.
- A careful review of each insurance policy must be undertaken to determine the extent, if any, of coverage for losses suffered as a result of COVID-19. Given that we are in uncharted territory, there is potential for disputes to arise regarding policy responses.

The Bowmans firm-wide COVID-19 client portal includes a dedicated page for aviation with links to some of the latest regulations, notices and news, which we will continue to update as this space evolves.

Ports, shipping and logistics

It is clear that international trade supply chains have been severely disrupted. This affects businesses big and small that rely on imports and exports, both directly and indirectly. We expect that parties unable to meet their contractual obligations may seek to rely on *force majeure* clauses or common law provisions relating to impossibility of performance (described in more detail in the chapter above on contractual considerations). The extent to which they are able to do so will depend on the particular wording of the contract and the applicable law.

As in the aviation industry, we expect parties to seek indemnification under their marine insurance policies for losses arising as a result of COVID-19. The extent to which they are able to do so will depend on the particular wording of their policy. P&I Clubs are already reporting an increase in inquiries and claims for this period.

In South Africa, our commercial ports remain open but with a reduced service and priority given to essential goods. There was an initial concern that a strict approach, limiting the loading and off-loading of cargo at the ports to essential goods only, would severely clog the logistics supply chain. The 2 April amendments to Regulations state that borders at designated ports of entry are open for transporting fuel, cargo and goods. Transporting cargo from the port to its intended destination is also permitted. However, there is no definition of "intended destination" and the transport of non-essential goods is not defined as an "essential service". So while the Department of Transport has made it clear that, in the interest of ensuring a functional supply chain across all ports, all cargoes will be accepted for loading and off-loading, how this plays out in practice remains to be seen.

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Other relief measures

There are several funds and relief measures that have been created for struggling business. To the extent that a business finds itself in this position, advice should be sought from your lawyers.

CONCLUSION

We have only discussed a few consequences of COVID-19 on the South African business environment. As our world copes with this pandemic, developments on legal issues affecting business will occur rapidly. Our dedicated teams at Bowmans will keep you updated on the impact of COVID-19 in the coming days and weeks, as the developments occur.

This is not a time for businesses to panic, but a moment for businesses to build resilience and work together to ensure a stable business and economic environment.