



CENTURION

Lawyers and Business Advisors

**COVID-19 LEGAL
UPDATE:
SOUTH AFRICA**

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EMPLOYMENT

REDUCING EMPLOYEES' WORKLOAD AND PAY DURING THE COUNTRY PANDEMIC/ LOCKDOWN

Section 35(1) of the Basic Conditions of Employment ("BCEA"), states: "an employee's wage is calculated by reference to the number of hours the employer ordinarily works".

The reality is that the employee is entitled to be paid in exchange for hours worked. If the hours are not worked, there would be no legal claim for a wage or a salary. The Employer will only be required to pay for only hours worked. Therefore, there is no entitlement to payment while employees are on lockdown.

OUTSTANDING LEAVE DAYS, FORCED PAID LEAVE OR UNPAID LEAVE DURING THE PANDEMIC/LOCKDOWN

The issue of forced leave is determined by the BCEA and answered by Section 20 (10)(b): "Annual leave must be taken (a) in accordance with an agreement between the employer and employee; or (b) if there is no agreement in terms of paragraph (a) at a time determined by the employer in accordance with this section."

It is therefore clear that if there is no agreement about the leave to be taken, then the employer will make a decision as to when paid leave must be taken.

The BCEA recognises certain forms of leave, which may, depending on the circumstances, be applicable to the employee's absence as a result of COVID-19.

During the lockdown period, an employee may be requested by the employer to take annual leave from his/her annual leave credits. The BCEA allows employers to determine the time that employees can take their annual leave.

In South Africa, employers have been requesting employees to use their annual leave as a first response to the lockdown. While employers are entitled to request this of their employees, Government has encouraged employers to instead get financial assistance through the Covid-19 Temporary Employer/Employee Relief Scheme (TERS), in cases where they cannot afford to pay employees.

Employers can negotiate with employees to take leave anytime deemed fit.

RENEGOTIATING TERMS OF EMPLOYMENT

The BCEA has not been suspended or overridden by any of the regulations or statements made by the president or the various ministries. Therefore, employers can renegotiate an employee's terms of employment.



REMOTE WORK

If an employer orders an employee to work from home, but the employee does not have the tools to do so, the employer will still be obliged to pay the employee's salary.

EMPLOYMENT TERMINATION

The BCEA has not been suspended or overridden by any of the regulations or statements made by the President or the various ministries. Thus, the normal principles of dismissal apply.

EMPLOYMENT BENEFITS DURING PANDEMIC/ LOCKDOWN

Employees are entitled to their usual employment benefits as stipulated under their employment contracts (such as salaries and leave entitlements etc.) when they are working remotely.

COMPANY COVID-19 POLICY AND COMPANY LIABILITIES

It is recommended that companies have a COVID-19 policy.

Employers have to ensure that employees have a safe environment to work in and employers have to mitigate the employees' risk right upfront, and initially first, before they take greater action. They have a duty to inform each employee of the risk of getting infected with the coronavirus

The Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA) protects the employer from delictual liability in respect of employees who contract an illness during the course and scope of her/ his employment. An employee who contracts an occupational disease can claim from the Compensation Fund without having to prove the employer's negligence.

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.

PERFORMING OTHER JOBS WHERE CORE FUNCTIONS ARE DOWN DURING THE PANDEMIC AND LOCKDOWN

The employer and employee may negotiate and agree that the employee perform other functions outside the core functions which they were employed to carry out.

EMPLOYMENT INSURANCE POLICIES (GOVERNMENT OR PRIVATE) DURING THIS PERIOD AND ACCESSING THESE POLICIES.

About R30-billion has been provisionally earmarked for the new disaster UIF scheme that will assist workers who have been affected by the shutdown across several sectors of the economy to contain the spread of Covid-19.

The UIF, whose operations are overseen by the Department of Employment and Labour, will be the main mechanism with which the government will ease the economic burden of the shutdown on workers and employers.

To do this, the UIF and the department have launched the new Covid-19 temporary employee relief scheme (Ters), which will provide income support to workers who have been temporarily or permanently sent home due to the Covid-19 outbreak.

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COVID-19

There is no relief for the submission of tax returns. Taxpayers must therefore ensure that returns are submitted on or before the due dates.

IMMIGRATION

CURRENT SITUATION IN THE COUNTRY

South Africa entered a nationwide lockdown for 21-days with effect from midnight on Thursday 26 March 2020.

TRAVELLING TO SOUTH AFRICA

All international travellers, including South African citizens entering South Africa, will be required to complete and submit the prescribed Health Form and hand it to the Health officials and Immigration officers upon their arrival. South African citizens returning from high-risk countries will automatically be placed under quarantine for 14 days. Furthermore, international travellers who arrived in South Africa after 9 March 2020, from high-risk countries will be confined to their hotels until they have completed a 14-day period of quarantine.

VISA EXEMPTIONS WITHDRAWN FOR THE FOLLOWING COUNTRIES:

- Germany
- Italy
- South Korea
- Spain
- United Kingdom
- United States of America
- France
- Switzerland

No foreign national departing from these countries will be allowed to enter the Republic of South Africa.

Visas issued to persons from the following countries in terms of section 10(9) of the Immigration Act, 2002, has been cancelled with immediate effect:

- Iran
- People's Republic of China

In terms of Section 10A(4)(c) of the Immigration Act, 2002, the Visa Exemption of passport holders of the medium risk countries has been withdrawn:

- Hong Kong
- Portugal

RESTRICTIONS OR CANCELLATION ON VISAS APPLICATIONS/ISSUANCE

Visa applications by foreign nationals from high-risk countries will not be approved and visas already issued to foreign nationals who have not yet entered the Republic of South Africa have been revoked with immediate effect.

High- and medium-risk countries will have their visa waiver agreements suspended and dates will be advised through the Travel Alerts by the Department of International Relations and Cooperation (DIRCO).

EXPIRATION OF LEGAL STATUS WHILE IN SOUTH AFRICA

All international and domestic flights are prohibited during the lockdown.

International tourists must inform their respective embassy's that they are still in SA and not allowed to leave the country.

Any foreign national who originates from a country affected by the COVID-19 virus outbreak or who needs to transit to a country affected by COVID-19 and is already present in the Republic of South Africa, whose temporary residence visa is due to expire or has already expired, will be allowed to re-apply for such visa after the lockdown period comes to an end. The visa may be issued/ extended until 31 July 2020.

Foreign nationals who hold temporary residence visas that expired between 31 December 2019 and 31 March 2020, will also be allowed to re-apply for the relevant visa after lockdown comes to an end. Holders of visas that expired from 31 December 2019 will be allowed to re-apply without having to obtain a FORM 20 (Authorisation for an illegal foreigner to remain in the country pending an application for status). This will only apply to foreign nationals who were admitted legally into the Republic. This is applicable until further notice, after lockdown.

LEAVING SOUTH AFRICA

South African citizens are advised to refrain from all forms of travel to or through the European Union, United Kingdom, United States, and other identified high-risk countries such as the People's Republic of China, Iran, and South Korea.

TAX

TAX EXEMPTIONS/RELIEF

In a statement made by President Cyril Ramaphosa on 23 March 2020, the below tax relief measures, which will apply to certain employers during the next few months, were announced:

- Government will provide a tax subsidy of up to R500 per month for the next four months for those private sector employees earning below R6 500 under the Employment Tax Incentive. The Employment Tax Incentives Act, 2013 encourages the employment of young workers and provides relief to qualifying employers by means of a reduction of monthly employees' tax.
- South African Revenue Service will work towards accelerating the payment of employment tax incentive reimbursements from twice a year to monthly to get cash into the hands of compliant employers as soon as possible.
- Tax compliant businesses with a turnover of less than R50 million will be allowed to delay 20% of their employees' tax liabilities over the next four months and a portion of their provisional corporate income tax payments without penalties or interest over the next six months. Note that this is only a delay of the relevant employees' tax and provisional tax obligations and not a reduction.

GRACE PERIOD FOR THE FILING OF TAX RETURNS

There is no relief for the submission of tax returns. Taxpayers must therefore ensure that returns are submitted on or before the due dates.

CORPORATE

SUSPENDING OBLIGATIONS UNDER A CONTRACT IN LIGHT OF COVID-19

If an agreement does not contain a force majeure clause, or if a force majeure clause in a contract does not name the unforeseen event that the parties wish to rely on, then the parties may be able to rely on the common law principle of 'supervening impossibility of performance' to suspend their obligations under the contract, provided that it has become objectively impossible for them to perform under the contract as a result of an unforeseeable and unavoidable event.

South African doctrine of impossibility:



- The impossibility must occur after the conclusion of the contract.
- These events must be unavoidable and make proper performance of the contract impossible.
- If performance becomes objectively or absolutely impossible, the contractual obligation is extinguished and the duty to perform and the corresponding right to claim performance falls away.
- Objective impossibility includes instances of actual physical impossibility and also where performance remains physically possible but cannot reasonably be expected to be performed.
- Both parties' obligation to perform the contract will be extinguished.
- If the event causing the impossibility was foreseen or foreseeable and could have been avoided, then the parties cannot rely on this doctrine to not perform their obligations.
- Once the force majeure event has come to an end and performance has become possible again, the contract will continue.
- The creditor will have the option to terminate the contract if the interruption is likely to endure for an unreasonably long time. The question of what is an unreasonably long period of time is one of fact. In the event of the contract being terminated due to the force majeure clause, certain financial obligations can still be applicable and could be paid at a reduced price.

COVID-19 AS A MATERIAL ADVERSE CHANGE IN A CONTRACT

It depends on how the clause is drafted in the specific agreement. This is a matter of contractual interpretation.
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A material adverse effect clause (MAE clause) is more likely to be given as a warranty, representation or undertaking, breach of which would give rise to a right of the counter party to terminate.

REMEDIES FOR A PARTY'S FAILURE TO PERFORM ITS OBLIGATION UNDER CONTRACT

It all depends on the specific clauses incorporated in the contract.

Parties may bring an action in court for specific performance or damages for breach of contract.

Note that although the functioning of courts is regarded as an essential service, the courts are not carrying on as normal. The courts remain open. However, no new civil matter (trials, appeals, reviews, unopposed or opposed motion shall be enrolled during the lockdown period. Only urgent motion applications will be issued.

Directives, which have been issued by the Minister of Justice, govern how the courts will proceed. The directives can be accessed at: <https://www.lexisnexis.co.za/news-and-insights/covid-19-resource-centre/practice-areas/covid-19-new-legislation>

REQUIREMENTS TO REGISTER DOCUMENTS UNDER THE COMPANIES REGISTRY

- The Companies and Intellectual Properties commission has launched fully automated services via its online platform (<http://www.cipc.co.za/index.php>). The COVID19 Pandemic will not have an immense effect on the registration of company documents.

GENERAL

FISCAL MEASURES TOWARD COUNTERING THE ECONOMIC EFFECTS OF THE PANDEMIC

The government will assist companies facing distress through the Unemployment Insurance Fund and special programs from the Industrial Development Corporation. Within the realm of the budget, workers with an income below a certain threshold will receive a small monthly payment during the next four months. Funds will be available to assist SMEs under stress, mainly in the tourism and hospitality sectors. Allocations will also be made to a solidarity fund to help combat the spread of the virus, which will be created with assistance of private contributions.

NEW LAWS/REGULATIONS TOWARDS COMBATING THE PANDEMIC

The Government have been proactive in passing new regulations due to the Covid19 Pandemic. The regulations can be accessed at <https://www.gov.za/coronavirus/guidelines>

The following Regulations have been passed:

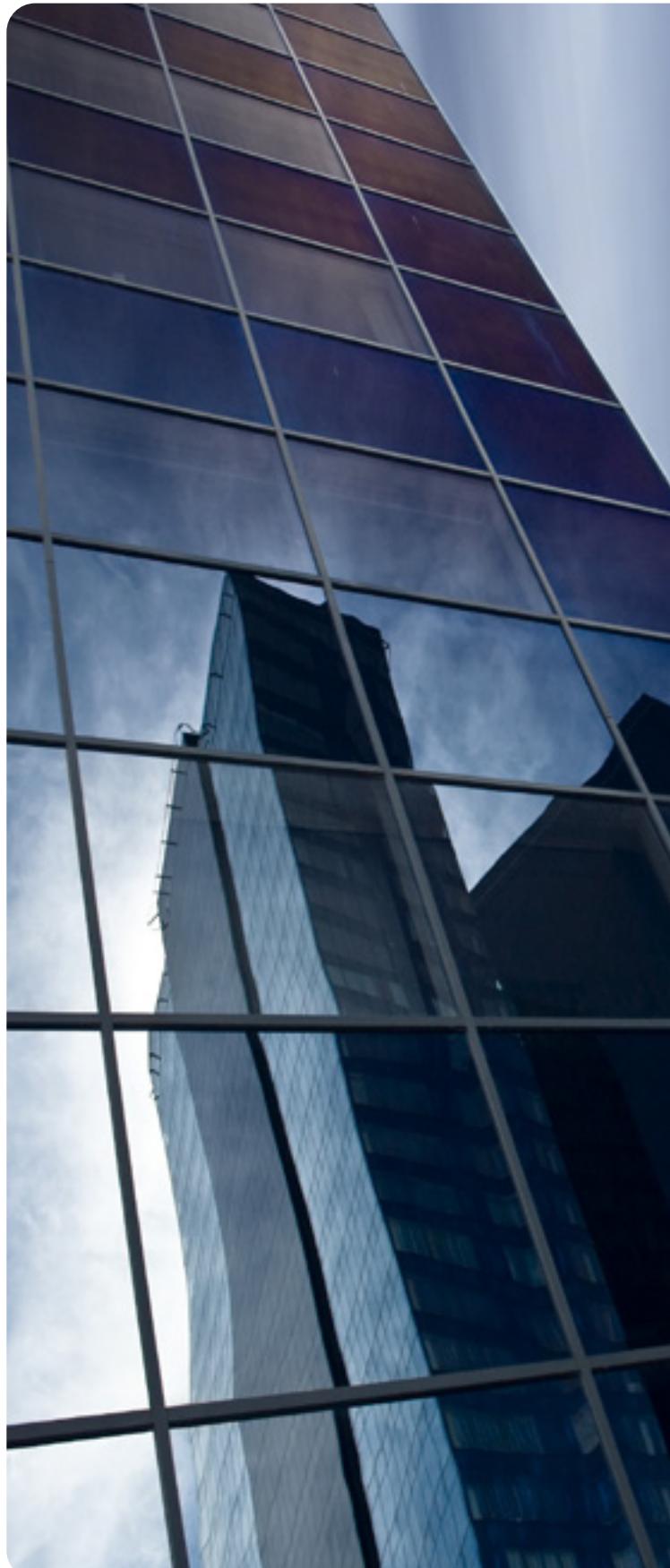
- Lockdown regulations, 25 Mar 2020
- Courts, court precincts and justice service points directions, 31 Mar 2020
- Environmental directions, 31 Mar 2020
- Air services amendment regulations, 31 Mar 2020
- Transport amendment regulations for buses and taxis, 31 Mar 2020
- Public Finance Management Act: Exemption, 31 Mar 2020
- Social development directives, 30 Mar 2020
- Transport regulations: Learner's and driving licences, 30 Mar 2020
- Amended directions to municipalities and provinces, 30 Mar 2020
- Municipal Finance Management Act: Exemption for municipalities, 30 Mar 2020

- Aviation directions amendment: Air cargo, 27 Mar 2020
- Lockdown regulations amendments, 26 Mar 2020
- Hotel industry exemption, 27 Mar 2020
- Export control regulations, 27 Mar 2020
- Air services directions, 26 Mar 2020
- Home affairs directions, 26 Mar 2020
- Transport directions, 26 Mar 2020
- Legal directions, 26 Mar 2020
- Electronic communications, postal and broadcasting directions, 26 Mar 2020
- Covid19 Temporary Employee / Employer Relief Scheme directive, 26 Mar 2020
- Air services lockdown directions, 26 Mar 2020
- Railway operations lockdown directions, 26 Mar 2020
- Cross-border road transport lockdown directions, 26 Mar 2020
- Public transport lockdown directions, 26 Mar 2020
- Municipalities and provinces directions, 25 Mar 2020
- Retail property exemption regulations, 24 Mar 2020
- Compensation for occupationally acquired Novel Coronavirus, 24 Mar 2020
- Banking sector exemption regulations, 23 Mar 2020
- Price increase protection regulations and directions, 19 Mar 2020
- Healthcare sector exemptions, 19 Mar 2020
- Disaster management regulations, 18 Mar 2020
- Ports regulations, 18 Mar 2020

DISASTER MANAGEMENT GUIDELINES AND NOTICES

- Explanatory notes for COVID-19 tax measures, 29 Mar 2020
- SMME debt relief finance scheme, 28 Mar 2020
- Business growth/ resilience facility - Guidelines for application, 28 Mar 2020
- Debt Relief Finance Scheme: Guidelines for application, 28 Mar 2020
- UIF guidelines, 20 Mar 2020
- Exemption to all holders of licences, permit and authorisations issued in terms of the Marine Living Resources Act, 1998 (Act no. 18 of 1998) to operate without valid permits for the next ninety (90) days, 24 Mar 2020
- Handy guide on what's happening in the Post School Education and Training Sector - Higher Education in a time of Coronavirus, 20 Mar 2020
- State of Disaster: Public Service guidelines for containment / management of Coronavirus COVID-19, 16 Mar 2020
- Guidance for childcare facilities and schools on COVID-19, 11 Mar 2020
- COVID-19 safety precaution measures in football - SAFA, 13 Mar 2020
- Guideline on classification of a disaster and the declaration of a state of disaster, 1 Apr 2019
- Guideline on conducting an initial on-site assessment, 1 Apr 2019
- Guideline on contingency planning and arrangements, 1 Apr 2019

DISASTER MANAGEMENT ACT



- Disaster Management Act: Declaration of a National State of Disaster: COVID-19 (coronavirus), 15 Mar 2020
- Disaster Management Act: Classification of a national disaster: COVID-19 (coronavirus) , 15 Mar 2020
- Disaster Management Act 57 of 2002, 15 Jan 2003

EFFECT OF THE PANDEMIC ON THE COUNTRY'S ECONOMY AND ANY RECESSION RISKS

The turmoil in financial markets are a clear indicator. The Dow Jones Industrial Average entered bear market territory after falling more than 20% from its peak.

There is, however, still a lot of discussion about how lasting the impacts of Covid-19 will be.

Chetan Ahya, global chief economist at Morgan Stanley stated: "With economic activity disrupted and capital markets dislocated, investors have been debating if Covid-19, known colloquially as the coronavirus, could derail the global cycle". "Given the sharp drops in global asset markets recently, the coronavirus could deliver a sizeable impact to global growth in the first half of the year. However some clear perspective on the outlook for the full year is warranted."

BANKING RESTRICTIONS

All essential banking services will remain open during the lockdown to ensure clients can continue to access financial services. All call centres, ATMs and point of sale (POS) devices will be operational.

Customers are however encouraged to transact at ATMs and from their homes – by internet and with smartphone applications – wherever possible, and only visit branches when absolutely necessary.

BORROWER PROTECTIONS AND MORATORIUM ON LOAN REPAYMENTS

Standard Bank

From 1 April 2020, Standard Bank will support small and medium-sized enterprises (SMEs) with a payment holiday for 90 days (01 April 2020 until 30 June 2020) – restructuring payments for the repayment to come into effect after the 90-period.

Absa

From the 1 April 2020, ABSA's corporate and business clients will be offered solutions based on their unique requirements and operations.

FNB

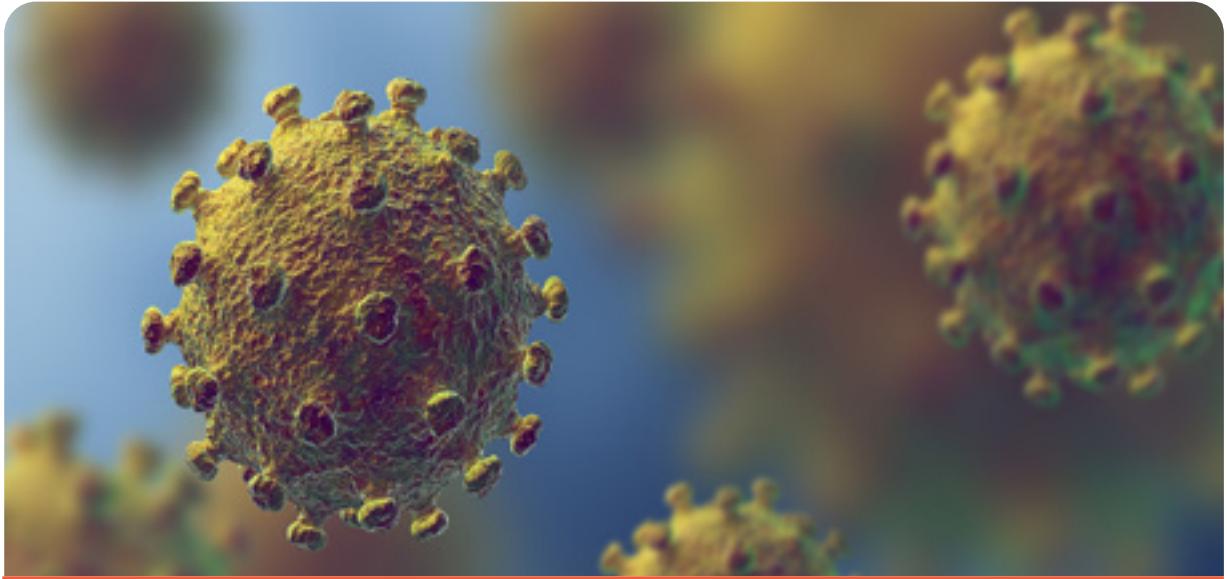
From 1 April to 30 June 2020 aimed at providing relief to individual and business FNB customers whose financial stability has been impacted by Covid-19 pandemic.

Sefa-Debt Restructuring Facility offers six-month pay holiday. Small businesses funded by the Small Enterprise Finance Agency (Sefqa) will be given a payment holiday for the next six months, with certain conditions applicable.

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