



**THE COMPETITION AND CONSUMER PROTECTION COMMISSION**

**SUBJECT: Paper on Event Cancellation and Refunds in Relation  
the Covid-19 Imposed-Restrictions**

**December, 2021**

## **Information and Relevant Background**

1. In March 2020, the World Health Organization (WHO) declared a global pandemic resulting from the rapid spread of the Covid-19 virus. Along with this declaration came stringent measures such as unprecedented lockdowns, travel bans, and social distancing measures in an attempt to curb the spread of the virus. The imposed restrictions have brought about a challenge with regards to consumer protection as many business entities are unable to meet their contractual obligations, and in other instances, consumers are unable to hold events due to gathering restrictions imposed by their governments. The most notably affected industries as reflected by the nature and number of consumer complaints, have been the hospitality industry and the transportation industry, particularly aviation. Enterprises in these industries have been faced with a challenge of managing consumer disputes relating to cancellation and refunds that have been induced by Covid-19 restrictions. Ideally, the Competition and Consumer Protection law holds that if no service has been provided, a consumer is entitled to a full refund.<sup>1</sup> However, the Covid-19 pandemic has presented a new challenge in that due to the restrictions imposed (mostly travel and gathering), business entities, despite being willing to provide the services paid for by consumers, have been unable to do so. In the same vein, despite consumers being willing to hold events that they had paid for, they are restricted from so doing. As may be clear, the non-fulfillment of the two parties' contractual obligations in this case cannot be attributed to either of them.
2. The situation is exacerbated when the agreement has no "force majeure" clause. Managing refunds in such instances poses a challenge especially for event bookings where part of the payment is used for prior preparations. In the light of these challenges, it becomes imperative to ensure mutual understanding between enterprises and consumers, and to ensure that enterprises continue treating consumers fairly amidst the pandemic. This paper outlines guidelines with regards to event cancellation and refunds, both in the general sense as well as with specificity to the Covid-19 imposed-restrictions.

## **The Position of the Law**

3. As an underlining rule, contracts once entered into must be performed, in accordance with the terms therein, this is regardless of whether it becomes onerous or even impossible to do so. This is in line with the concept of "*pacta sunt servanda*" (*agreements must be kept*). This means that the party who fails to perform his obligations under the contract becomes liable for damages. This is

---

<sup>1</sup> Section 49(5) of the Competition and Consumer Protection Act No. 24 of 2010

known as the rule of absolute contracts. It means that there are no exceptions when it comes to the performance of one's obligations under a contract unless, something out of the ordinary like a supervening event happens.

### **Zambian Context**

4. The pandemic has had unprecedented effects on business transactions in Zambia. The pandemic has affected the ability to create restrictions and limitations that could enable a party to a Zambian law contract avoid their obligations by relying on a force majeure clause and/or the common law doctrine of frustration. However, both routes have a high bar to success and parties should consider the details of each case before pursuing either route.

### **Legal Possibilities**

5. The effects of the pandemic have raised the question of whether there are legal possibilities under Zambian law in which a party to a contract can escape liability under the said contract. There are primarily two mechanisms namely, frustration, and force majeure, however a third one, supervening illegality (which is usually read with the first one) can be added to the discussion. The doctrine of frustration is established by case law while the doctrine of force majeure is normally set out in the specific contract at the time of transacting.
6. The above means that the position of the law regarding supervening events, such as the impact of the Covid-19 pandemic on commercial contracts, under common law can be grouped into three categories:
  - force majeure,
  - frustration, and
  - supervening illegality (of the governing law, or the law of the forum, or the place of performance). This is usually paired with the second one.

### **Force Majeure**

#### **What is Force Majeure?**

7. Force majeure is a French term that literally means "superior force". The Black's Law Dictionary defines Force Majeure as an event or effect that can be neither anticipated nor controlled. Force majeure refers to a clause that is included in contracts to remove liability for natural and unavoidable catastrophes that interrupt the expected course of events and prevent participants from fulfilling obligations. It is a common clause in contracts which essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as *a war, strike, riot, crime, epidemic or sudden legal changes* prevents one or both parties from fulfilling their obligations under the contract. It is related to the concept of an act of God, an event for which no

party can be held accountable, such as a hurricane or a tornado or an earthquake.

8. The French law applies three tests for whether a force majeure defense is applicable; the event must be *unforeseeable, external, and irresistible*. These concepts are defined and applied differently depending on the jurisdiction. The concept of force majeure originated in French civil law and is an accepted standard in many jurisdictions including Zambia. In common law systems, force majeure clauses are acceptable but must be more explicit about the events that would trigger the clause. However, questions about what is and is not "foreseeable" in a legal sense have been raised given the increased awareness of pandemics, cyber threats, and/or nuclear warfare.

### **Example of Force Majeure**

9. If an earthquake destroys a supplier's factory in Lusaka's industrial area, causing long logistical delays and leading their clients to sue for damages, the supplier might employ a *force majeure* defense arguing that the earthquake was an *unforeseeable, external, and irresistible* event, thus meeting the three tests applied by the French law.
10. However, unless the contract specifically named 'earthquake' as removing the supplier's liability, the court may well decide that the supplier owes damages. Similarly, a war in a conflict-ridden zone might not be "unforeseeable," nor capital controls in a struggling economy or a flood in a frequently affected area.

### **Special Considerations for Force Majeure**

11. The International Chamber of Commerce has attempted to clarify the meaning of force majeure by applying a standard of "*impracticability*," meaning that it would be, if not impossible, unreasonably burdensome, and expensive to carry out the terms of the contract. The event that brings this situation about must be *external* to both parties, *unforeseeable*, and *unavoidable*.<sup>2</sup>

### **Force Majeure vs. 'Pacta Sunt Servanda'**

12. In general, force majeure conflicts with the concept of "*pacta sunt servanda*" (*agreements must be kept*), a key concept in civil and international law with analogs in common law. It is not supposed to be easy to escape contractual liability, and proving that events were unforeseeable, for example, is difficult by design.
13. Explicitly excluded is any event described as an "*act of God*", which covers a separate domain and legally differs, yet it is still related to contract law. In practice, most force majeure clauses do not excuse a party's non-performance

---

<sup>2</sup> Equitas Legal Practitioners, 2020, 'Force Majeure and Frustration under Zambia Law: Options for discharge or suspension of contractual obligations in the Covid-19 Era'.

entirely but only suspend it for the duration of the force majeure. Force majeure, however, is generally intended to include occurrences beyond the reasonable control of a party, and therefore would not cover the following;

- *any result of the negligence or malfeasance of a party, which has a materially adverse effect on the ability of such party to perform its obligations and;*
- *any result of the usual and natural consequences of external forces; for example, an outdoor public event is abruptly called off or cancelled; If the cause for cancellation is ordinary predictable rain, then this is most probably not force majeure. However, if the cause is a flash flood that damages the venue or makes the event hazardous to attend, then this almost certainly is force majeure, except where the venue was on a known flood plain or the area of the venue was known to be subject to torrential rain.*

14. It is important to note that some causes might be arguable borderline cases (for instance, if unusually heavy rain occurred, rendering the event significantly more difficult, but not impossible, to safely hold or attend); these must be assessed considering the circumstances.
15. Force majeure in any given situation is controlled by the law governing the contract, rather than general concepts of force majeure. Contracts often specify what constitutes force majeure via a clause in the agreement. So, the liability is decided per contract and not by statute nor principles of general law. The first step to assess whether and how force majeure applies to any particular contract is to ascertain the law of the country (state) which governs the contract.

### **Common Law**

16. Under Common Law, when force majeure has not been provided for in the contract (or the relevant event does not fall within the scope of the force majeure clause), and a supervening event prevents performance, it would be a breach of contract. The law of frustration will then be the sole remaining course available to the party in default to end the contract. If the failure to perform the contract deprives the innocent party of substantially the whole benefit of the contract it will be a repudiatory breach, entitling the innocent party to terminate the contract and claim damages for that repudiatory breach.

### **Force Majeure and Frustration**

17. Typically, by its very nature, the occurrence of the force majeure should not be the fault of either party. In this current era of the Covid-19 pandemic the immediate aspects that comes to mind by most businesses when thinking about their contractual obligations is whether or not Covid-19 can effectively be invoked as a force majeure event.

18. It is commonplace for parties to include a force majeure clause in their contracts to ensure that the failure of one party to discharge their obligations under the contract can be excused whenever a force majeure event occurs. It must be appreciated that as a general rule, a force majeure event does not result in the discharge of the contract, but rather a suspension of the contractual obligations of the parties under the contract in issue. Parties are only at liberty to terminate the contract if the force majeure event persists beyond an agreed period.
19. Accordingly, the starting point of whether Covid-19 is a force majeure event will depend on how the force majeure clause was defined in the contract and the conditions for contractual termination as a result of force majeure. Parties may have already stipulated and clearly identified the specific events that the parties agreed would constitute force majeure. Therefore, the first question to be asked is, does the contract in issue contain any Force Majeure clause in it? If yes, the next question would be, does the clause cover any aspect that relates to a global pandemic whose effect can be equated to that of Covid-19? If the first two questions are answered in the affirmative, then Covid-19 would be assumed as covered under such a clause and will be construed accordingly.
20. A further question to be answered would be, can a party to a contract rely on Covid-19 as a force majeure event so as to avoid performance of obligations? In answering this question, various tests would have to be conducted and these include proving that the non-performance of a party's obligation is due to events outside their control or that such events prevented the party's performance under the contract and further that an event defined in force majeure occurred to which the parties can rely on.
21. Therefore, as stated above, for Covid-19 to be relied on by a party as an event of Force Majeure, the relevant provisions of the contracts in issue must be closely examined to determine whether such a pandemic is one that could have been in contemplation of the parties at the time of crafting the force majeure clause.
22. The effect of occurrence of a force majeure is that it renders a contract either suspended or frustrated. A frustrating event is an event that is unforeseen and is beyond any of the party's control rendering the actual performance of the parties' respective obligations practically impossible. It may also be an event that significantly changes the nature of the outstanding contractual rights or obligations of the parties. The Black's Law Dictionary defines frustration as "*the prevention or hindrance of the attainment of a goal, such as contractual performance*". If the duration of the intervening event/force majeure event is only for a short period of time compared to the length of the contract under consideration, then the contract is deemed to have been suspended instead of frustrated. This means that an intervening event of a short duration cannot frustrate a contract of longer lifespan and any termination on the basis of the intervening event is a breach of contract. It therefore follows that party to the

contract is temporarily discharged from performance of contractual duties until the intervening event ceases to exist.

23. In light of the outbreak of the Covid-19, the Government of the Republic of Zambia, like other Governments, world over, has imposed a number of measures which include *quarantine of people suspected to have travelled to Covid-19 risk areas; directive for people to stay at home, and restricted movements (except for those that are deemed necessary)*. These measures have the potential of preventing people from moving from one place to another which may ultimately make it difficult for a party to a contract to perform his/her/its obligations that requires him/her/it to move from one place to another to either deliver goods due to localised lockdown measures, for example or to perform a contract that requires their physical presence on site. This may be a frustrating event depending on the nature of the contractual obligations in issue.
24. To succeed on a claim for frustration as a result of Covid-19, a party would need to show that the object key to performance of the contract is unavailable due to a localised lockdown or quarantine or that the method of performance of the contract is impossible and no other different method of performing is available as a result of the localised lockdown. Once the above conditions are met and/or proved, frustration results into termination of the contract and relieves the parties of their respective obligations under the contract. The Law Reform (Frustrated Contracts) Act, Chapter 73 of the Laws of Zambia, recognizes frustration of contracts and provides for adjustments of rights and liabilities of parties to frustrated contracts which includes recovery by the parties of any money paid under the contract before it became frustrated.
25. In a nutshell, under Zambian law, whether Covid-19 is a force majeure or frustrating event resulting in a temporal suspension of contractual obligations or complete discharge of the contract, largely depends on the contractual provisions in issue and the nature of the obligations to be performed.

### **Guidance for the parties in an event of a Force Majeure**

- i. If any Party (the “affected Party”) to an Agreement/Contract in issue is prevented or hindered in their performance of any of their obligations in the Agreement/Contract by a force majeure event, the Affected Party shall be excused from the performance of such obligations (other than any obligation to pay money as and when due) during the existence of such event and shall not be responsible for any damages suffered by the other Party as a result of such suspended performance, and any performance deadline that the Affected Party might be obliged to meet under the said Agreement/Contract shall be extended day-for-day so long as the force majeure event continues.
- ii. The affected Party shall as soon as reasonably practicable upon the occurrence of the force majeure, give notice to the other Party of the force

majeure event, and shall keep the other Party informed of subsequent developments in such circumstances as they occur. The notification shall include details of the force majeure event, including evidence of its effect on the obligations of the affected Party and any action taken or proposed to mitigate its effect. The affected Party shall continue to take any actions within their power to comply with the Agreement/Contract in issue.

- iii. As soon as practicable following receipt of the notice of the force majeure event, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the force majeure event and facilitate the continued performance of the Agreement/Contract in issue.
- iv. If any force majeure event continues for longer than six (6) months from the date of the notice of the force majeure event, on the basis that either of the Parties would be unable (within six (6) months of the occurrence of the said force majeure event) to comply with any of Agreement/Contract obligations, then either Party shall be entitled, upon giving to the other Party two (2) weeks written notice, to terminate the Agreement/Contract in issue.

### **Frustration of a Contract**

- 26. As hinted to in the above paragraphs, under common law, a contract may be cancelled if it has been frustrated. An event is said to be frustrating if it is:
  - a. unanticipated.
  - b. beyond the parties' control; and
  - c. makes performance impossible or radically different from that which the parties contemplated at the time of entering into the contract.
- 27. The above definition means that frustrating event must "significantly change the nature of the outstanding contractual rights or obligations." For example, in the case of ***Poussard v Spiers and Pond (1876) 1 QBD 410***, where an opera singer fell ill and was not able to perform on the opening night on 28 November 1875 but recovered by 4 December 1875, it was held her contract with the opera company to be frustrated because "it must have been of great importance to the defendants that the piece should start well". The illness left the singer unable to perform and went to the "root of the matter" between the parties.

### **General Considerations**

- 28. After force majeure clauses, the next port of call is the doctrine of frustration. The doctrine of frustration is usually discussed in the same sentences as that of supervening illegality or government regulation, however, putting aside supervening illegality, frustration arises because of the effect of the supervening event on performance, or on the reason for bargaining for that performance in the

first place. The general test is laid out in the case of ***Davis Contractors Ltd v Fareham UDC [1956] AC 696*** where it was stated that:

*"frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."*

### **What is the Doctrine of Frustration?**

29. In a situation where a contract entered into by parties does not include a force majeure clause or it does, but the applicable force majeure event is not included, it may be possible for the parties to rely on the common law doctrine of frustration. A contract will, therefore, be discharged by frustration if after formation, an event occurs which renders further performance of the contract impossible, illegal or something different from what was contemplated by the parties when entering into the contract.
  
30. Therefore, in discussing the doctrine of frustration, it is important to have in mind the three important subcategories:
  - (a) impossibility of agreed performance;
  - (b) impossibility of the commercial adventure. That is, the mutually agreed purpose of the contract becoming impossible; and
  - (c) a significant change to a mutually agreed state of affairs (for example, destruction of the subject matter of the contract or cancellation of an event).
  
31. A careful analysis of the subcategories above will reveal that there is always going to be some overlapping and as such, any disputes arising from commercial contracts due to the impact of Covid-19, or as the case may be, will engage all three subcategories.

### **Impossibility of the Agreed Performance**

32. In the case English case of ***Poussard v Spiers and Pond (1876) 1 QBD 410***<sup>3</sup>, where an opera singer fell ill and was not able to perform on the opening night on 28 November 1875 but recovered by 4 December 1875, the singer's contract with the opera company can be said to have been frustrated because "it must have been of great importance to the defendants that the piece should start well" but

---

<sup>3</sup> Retrieved from <https://www.lawteacher.net/cases/poussard-v-spiers.php>

the illness left the singer unable to perform and went to the "root of the matter" between the parties.

33. The above type of impossibility may arise, when discussing the impact of the Covid-19 pandemic, in a situation where there are insufficient staff numbers, insufficient raw materials, and/or transport providers to perform the contract. The English case of *Howell v Coupland (1876) 1 QBD 258*, in which a farmer who had promised potatoes from a specific source was not liable for producing only part of the specified quantity when the remainder of the crop was killed by disease could be relied upon. That case probably depends upon the fact that the contract was for goods from a source specified in the contract which is uncommon in domestic commerce although still common in international trade, but nevertheless provides an example of disease rendering performance impossible and so (to that extent) frustrated.

### **Impossibility of Commercial Adventure and Significant Change to the Mutually Agreed Matter**

34. The English case of *Krell v Henry [1903] 2 KB 740* shows that the impossibility of a commercial adventure (or in this case, cancellation of an expected event) only amounts to frustration in exceptional circumstances. In this case, a contract to hire rooms on particular days to view the coronation of King Edward VI was frustrated where the procession was cancelled at short notice and the commercial purpose of the transaction was destroyed. This case can be distinguished from the case of *Herne Bay Steam Boat Company v Hutton [1903] 2 KB 683* in which the court's decision was in favour of the plaintiff who had hired out his steamship to the defendant for two days, as the defendant intended to attend a royal naval review on the said two days. The defendant repudiated the whole contract because the royal naval review was cancelled but the courts held that the taking place of the Royal naval review was not the sole basis of the contract, so there had been no total destruction of the subject matter of the contract.

### **Other Considerations**

35. Based on the foregoing discussion, it can be seen clearly that frustration is not a straightforward doctrine to rely on because it is dependent on interpreting the true construction of the terms of a contract in the context of the nature of that contract and the relevant surrounding circumstances when it was made. If there is a radical difference between the original contractual obligation and the performance that is possible due to a change in circumstances, the doctrine of frustration may apply.
36. Therefore, for the parties to a contract to successfully rely on the doctrine of frustration, they must have not made provision for a specific set of circumstances

in the contract as regards the event that is alleged to have frustrated the contract at the time of contracting. Further, the doctrine of frustration cannot be invoked by a party keen to escape what they may now consider to be a bad bargain, in that a contracting party cannot rely on their own default, to excuse them from liability under the contract. In other words, the doctrine of frustration only applies where the supervening event is beyond the control of the parties. Alternatively, if the parties have made express provision in the contract for the event that has alleged to have frustrated the contract, the doctrine of frustration will not apply.

37. The effect of frustration is that the contract is brought immediately to end and both parties are released from any further performance. This means that frustration will generally not occur if;
- (i) there is an existing force majeure clause in the contract which operates to cover the circumstances seeking to be deemed a frustrating event;
  - (ii) there is a delay in an obligation being able to be performed, unless such a delay is for an unreasonable time; or
  - (iii) the parties have merely suffered hardship, unforeseen loss, or the burden of performance has increased.

### **Is Coronavirus (COVID-19) a Frustrating Event?**

38. Whether Covid-19 frustrates the contract between parties, will generally vary on a contract-by-contract basis because it has the potential to impact different contracts in different ways. As has been discussed above, the question of whether Covid-19 has frustrated will depend upon whether the existence of said disease renders further performance of the contract impossible, illegal or something different from what was contemplated by the parties when entering into the contract. Therefore, in determining whether coronavirus frustrates a given contract, the courts will:

- construe the terms of the contract in light of the nature of the contract and the circumstances in place at the time the contract was made
- examine the situation existing after the occurrence of coronavirus and ascertain how the parties' contractual obligations would be performed if the words of the contract were enforced in the new circumstances
- compare performance of the relevant contractual obligation in the original circumstances (the old obligation) with performance of the same obligation in the new circumstances (the new obligation)
- in light of the comparison, determine whether the new obligation is a radical or fundamental change from the old obligation

39. The Covid-19 pandemic has seen the occurrence of several types of events whose effects on contracts has been considered by the courts before as frustrating

events. These events include travel bans, introduction of emergency legislation, government decrees, quarantine zones, and cancellation of events.<sup>4</sup>

40. Below are set out some hypothetical Covid-19 related scenarios which highlight when frustration may and may not occur.
- (i) A catering company operating in Zambia obtains its industrial kitchen materials from a factory in South Africa. Due to a substantial number of the employees at the factory having to self-isolate, the supply of building materials is delayed for two weeks. Is contract frustrated? No – a two-week delay is unlikely to be considered an unreasonably long period of time. Additionally, the catering company may be able to obtain the supply from elsewhere, and the fact that this may make the performance of the obligation more burdensome or expensive does not mean the contract is frustrated.
  - (ii) A retail store is suffering a loss of revenue due to decreased foot traffic because people wish to save money and stay at home to avoid infection. The store owner leases the store space and pays rent monthly. Is contract frustrated? No - the fact that the store has suffered financial loss due to people's reactions to the current situation is not sufficient to frustrate the contract.
  - (iii) A couple has contracted with an event organiser to provide the sound and lighting. However, due to a government ban on large indoor public gatherings, the wedding can no longer take place. Is contract frustrated? Yes – government action has meant that it is now impossible for the wedding to take place and therefore for either party to perform its obligations.

### **Can you Cancel your Contract?**

41. If a party is considering terminating a contract because the other party is unable to deliver, then generally the right to terminate a contract only arises if one party has committed an anticipatory or repudiatory breach of contract. If a party to a contract is not performing its obligations under a contract, they may be in breach of contract. In order to determine if another party is in breach, it will be necessary to understand the scope of that party's obligations under the contract by considering its terms, together with how the court is likely to ascertain the meaning and legal effect of the contract.

---

<sup>4</sup> Retrieved from [https://www.lexisnexis.co.uk/blog/covid-19/can-an-agreement-be-terminated-for-frustration-due-to-coronavirus-\(covid-19\)](https://www.lexisnexis.co.uk/blog/covid-19/can-an-agreement-be-terminated-for-frustration-due-to-coronavirus-(covid-19))

42. Once the terms have been considered it is then necessary to determine whether the party's actual performance is in line with their obligations under the contract.

### **Consequences of Frustration**

43. Whereas force majeure clauses usually temporarily suspend a contract, frustration discharges a contract. That is, frustration allows parties to a contract to cancel all current and prospective rights and obligations under the contract. Frustration does not merely suspend performance (unless dictated by case law). Further, it is important to note that frustration does not work retrospectively at common law. Past performance is not automatically unwound. Nor is the contract made void ab initio.

### **Are there any Claims available to Affected Parties?**

44. An important practical question for the party which was due to receive performance is what claims, if any, can be made against the non-performing party after frustration takes place?
45. There are statutory claims. In most cases, the parties will then have a claim under The Law Reform (Frustrated Contracts) Act<sup>5</sup>, under Section 3, which provides that:

*3. (1) Where a contract which is governed as to its essential validity by the law of Zambia has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section four, have effect in relation thereto. Adjustments of rights and liabilities of parties to frustrated contracts*

*(2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as "the time of discharge") shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable: Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.*

---

<sup>5</sup> Law Reform (Frustrated Contracts) Act, Chapter 73 of the Laws of Zambia

*(3) Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which subsection (2) applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any) not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case, and, in particular-*

- (a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under subsection (2); and*
- (b) the effect, in relation to the said benefit of the circumstances giving rise to the frustration of the contract. The Laws of Zambia Copyright Ministry of Legal Affairs, Government of the Republic of Zambia*

*(4) In estimating, for the purposes of the foregoing provisions of this section, the amount of any expenses incurred by any party to the contract, the court may, without prejudice to the generality of the said provisions, include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.*

*(5) In considering whether any sum ought to be recovered or retained under the foregoing provisions of this section by any party to the contract, the court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment.*

*(6) Where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of subsection (3) any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid*

## **Conclusion**

46. Whether Covid-19 is a force majeure or frustrating event resulting in a temporal suspension of contractual obligations or complete discharge of the contract, largely depends on the contractual provisions in issue and the nature of the obligations to be performed. It is therefore important for contracting parties to create provisions in their contract that would facilitate fair dealing in cases of

‘future’ unanticipated occurrences/events such as pandemics and naturally caused catastrophes.

**Recommendations**

47. It is therefore recommended that at the time of contracting; the contracting parties must consider the following;
  - i. Imbed in the contract, possibilities for contract performance by extension day-for-day so long as the force majeure event continues.
  - ii. Enterprises be advised to review their terms of contract and explicitly spell out what would constitute force majeure events.
  - iii. Cases be assessed on a case-by-case basis to determine the facts.
  - iv. Refunds to be determined based on factors leading to the cancellation, i.e., force majeure or frustration.
  - v. Penalty charges on consumers to be restricted to actual costs incurred by the vendor.