

The legal implications of Covid-19 on business operations in Botswana

The recent outbreak of the novel coronavirus (COVID-19) has resulted in countries implementing measures to contain its spread. While Botswana has no confirmed cases of the virus yet, the government has implemented strict measures including a travel ban for all non-citizens who are not residents, a 14-day mandatory isolation or quarantine for travellers returning from foreign countries, closure of schools and social distancing protocols (including suspension on gatherings of more than 10 people). This short article aims to provide an easily digestible summary of major legal issues businesses need to consider in order to reduce legal risk in these uncertain times.

Employee Relations

The measures introduced to contain the spread of COVID-19 have raised a broad range of novel employment law issues. In circumstances where employees are requested to not report to work by virtue of either showing symptoms of an unconfirmed disease, having travelled to a particular country or simply being exposed to a person who may potentially be infected, the usual approach to employee absence proves insufficient. Therefore, a degree of flexibility and a cautious approach is required.

This article will confine itself to four main employment issues, which are (1) employee absence, (2) confidentiality, (3) the employer's inability to provide work and (4) redundancies.

1. Employee Absence

The forms of leave recognised by the Employment Act [CAP 47:01] ("the Employment Act") are annual leave and sick leave. However, many employers have additional forms of leave such as compassionate, study, paternity and other forms of 'special leave'. Employers should exercise a degree of caution in dealing with employee absence during this time because it is a complex issue and the circumstances are not as straightforward as they may appear. These uncertain times require a careful balancing exercise of the needs of the business operations as well as those of the employees. For example, where an employee has been informed to self-isolate or quarantine, it is likely that they would not be in possession of a 'sick note' in the usual form.

At the outset, employers should promptly decide on how employee absence will be treated in accordance with the applicable laws and policies. The two main policies that employers need to consider developing are:

(1) a policy specifically relating to COVID 19, to document the treatment of employee absence, hygiene protocols and closure of offices, amongst others; and

(2) a working-from-home policy to ensure appropriate monitoring is carried out to minimise abuse.

To the extent that the employer has a responsibility to ensure the health and safety of its workers in the workplace, the following may be considered by employers:

- employees who test positive for COVID-19 are covered by the sick-leave provisions of the Employment Act and their absence can validly be so treated. What remains challenging is employees who have not tested positive but are instructed to stay home simply for having been exposed to someone who tested positive, having travelled to a high-risk country and/or displaying flu-like symptoms; and
- employees who in accordance with the government guidelines are on self-isolation or quarantine may or may not be able to work from home. Employees able to work from home are required to continue to be available to the employer and perform their duties, in turn receiving their full benefits. Those unable to work for home pose a new challenge to employers and the absence will need to be considered in conjunction with the company policies. Where such absence is not capable of being categorised accordingly, employers may consider a special type of leave or unpaid leave, having obtained appropriate legal advice tailored to its specific circumstances.

2. Employer's Responsibility to Provide Work

- In terms of section 16 of the Employment Act *"Every employer shall, unless the employee has broken his contract of employment or the contract of employment becomes, without default on the part of the employer, impossible of performance, provide his employee with work in accordance with the contract of employment during the period for which the contract is binding.*

Thus, the employer has a duty to provide work unless the employee is in breach of its contract. However, where both parties are unable to perform for reasons beyond either of their control, they are released from their respective obligations; that is, to provide work and to perform duties as instructed by employer.

Where a business is closed, the obligations of the parties depend on whether the employer can continue to provide work remotely, and whether the employee concerned is able to perform its duties in the same manner. Where this is possible, it is unlikely for the provisions of Section 16 to be utilised by an employer successfully.

Businesses are therefore to consider providing the necessary support for their employees to work from home.

3. Confidentiality Issues Relating to An Employee Who Has Contracted the Virus

Privacy is one of the fundamental rights of an individual. Health information is therefore regarded as private and withheld from public scrutiny. It is for this reason that there is no general contractual obligation for an employee to disclose their health status to their employer.

However, given the contagious nature of COVID-19, and the employer's duty to ensure health and safety in the workplace, employers need to develop disclosure procedures for their employees in a manner that continues to respect their privacy. Where an employee tests positive and therefore other employees are to be isolated and/or tested, the employer shall make such disclosures to the relevant authorities but should strive to keep the identity of the employee private.

4. Redundancies

Unfortunately this pandemic has affected many business operations. In circumstances where the business is closed resulting in a negative impact on its finances, management should consider a restructuring of the business, which may include retrenchments. Some businesses may totally collapse due to complete loss of their substratum. In these circumstances, it is advisable for businesses to consider the financial impact of these measures and proceed to plan accordingly. This should include consultations with employees together with issuance of relevant notices to the authorities.

Contractual Obligations

The measures implemented to contain COVID-19 are likely to have a profound impact on commercial agreements. Parties may experience challenges in fulfilling their obligations due to shortage of staff, movement restrictions, shortage of supplies and materials, amongst others. A review of the business's current contracts to determine which will be impacted by Covid-19 and the measures implemented to contain its spread is critical.

1. Force Majeure

In circumstances such as this, it is possible for a party to seek release from the obligation to perform. However, this depends on the specific provisions of the contracts. A party to a contract may invoke a *force majeure* clause, which is currently the subject of intense debate amongst legal practitioners worldwide regarding Covid-19. *Force majeure* is generally 'an

unforeseeable event beyond the control of a party to a contract, the effect of which is to release such party from performing the remaining obligations under the contract'. The presence of the clause is not sufficient, parties are required to prove how the event has prevented them (or is likely to prevent them) from fulfilling their obligations. Therefore, it is crucial that businesses assess their agreements and deal with the following:

- ascertain whether there are any *force majeure* clauses and if so, the specific events it covers. Most *force majeure* clauses drafted in Botswana do not include pandemics or epidemics, but this may be covered by the common phrase of 'any unforeseen event beyond the control of a party';
- *force majeure* clauses are often accompanied by notice obligations upon the occurrence of a *force majeure* event. Consequently, businesses should ascertain whether there is an obligation to give notice under these provisions and when such notice is due; and
- for contracts with no *force majeure clause*, a party may still be able to assert frustration of a contract under the common law. However, parties should be aware that frustration of a contract is extremely difficult to establish.

For contracts negotiated into after the pandemic broke out or which are currently being negotiated, parties should be aware that relying on a *force majeure* clause may be difficult. While the outbreak of the virus was unforeseeable, parties in this instance may still be liable for the performance of their obligations on the basis that the measures enforced by the Government which made it difficult to perform the contract were foreseeable at the time of conclusion of the contract.

2. Material Adverse Change, Price Adjustment

Businesses should immediately review the price adjustment and/or material adverse change clauses in their agreements. Parties may wish to invoke the above provisions, while others may want to invoke limitation of liability clauses. Whether these are tenable depends on how the clauses have been drafted. Therefore, careful review of these necessary.

Corporate Governance and Disclosures

COVID-19 presents enormous challenges for businesses and directors are obligated to obtain accurate information on the potential and/or actual impact of the pandemic on the business. Directors should also be aware of appropriate actions taken to ensure health and safety in the

workplace, assessment of business continuity risk, together with disclosures to both shareholders and regulators as appropriate.

1. Meetings:

A measure of social distancing impacts on the ability to hold meetings. In terms of the Companies Act [Cap 42:01], a company may hold virtual meeting unless this is specifically prohibited by its constitutive documents. Businesses need to review these to ensure that there is no limitation and/or prohibition on holding virtual meetings. It is anticipated that most companies are desirous to keep the schedules of their meetings intact. Where there is a prohibition, this needs to be addressed immediately. A change in the form of meeting may trigger new notices to be issued.

2. Obligations for Listed Companies

A. New Offerings:

Issuers are obligated to ensure that the disclosures made on their documents are accurate. There is a liability for misleading statements and/or omissions. There may be a need to review documentation prepared for new offerings to adequately provide for the impact of COVID-19 on the disclosures being made.

B. Continuing Obligations

Disclosures: Listed companies have an obligation to disclose both the actual and potential risks to their businesses. Companies should therefore review their continuing obligations in terms of the Equity Listing Rules of the Botswana Stock Exchange, and determine what disclosures, if any, are to be made to their shareholders during this period.

Trading: Companies need to evaluate their peculiar circumstances and determine whether current decisions being made in an effort to curb COVID-19 clothe their directors with particular information necessitating the closure of their trading window for insiders.

3. Business Continuity

Finally, the unfortunate impact of COVID-19 is the potential loss of revenue leading to financial distress and/or collapse. Directors have a duty to evaluate the financial performance of businesses on an ongoing basis and minimise the incidents of continuing operations whilst insolvent.

M & A Transactions

The halting and/or reduction of business activity will have an impact on mergers and acquisitions. The following are issues to consider for the various stages the parties may be in:

1) Pre-signing

For ongoing transactions, parties should consider providing additional information on the impact of COVID-19, which information should be included in the data room for due diligence purposes. There may be a need for heightened disclosure obligations to be put in place to ensure sellers incorporate the impact of COVID-19 in any price to be agreed.

2) Signed, before financial close

Many transactions have period between signing and closing, and an assessment of whether the measures imposed by governments constitute a material adverse change needs to be made. In addition, representations and warranties may no longer be true and require re-evaluation. In the event government offices are closed as a result of the measures introduced, it is likely that closing dates need to be extended to enable the parties to obtain requisite regulatory approvals. Parties should review these provisions to ensure such delays do not give rise to termination rights, and to obtain the necessary waivers and/or extensions beforehand.

Insurance

Businesses should assess their various insurance policies to determine whether any losses as a result of COVID-19 are covered and the procedures to be taken under such policies to lodge claims, which may necessitate providing notices promptly.

Dispute Resolution

The courts in Botswana are currently operating with measures taken by individual judges such as limiting the number of lawyers and spectators in a court room at any given time, and the supply of face masks in others. Given the communication from the Court of Appeal on 18 March 2020 that no postponements would be entertained on account of unavailability of Senior Counsel from South Africa, one can assume that it would be a long while before our courts are shut down or closed. However, businesses with ongoing matters before the courts need to prepare for such closure. This unfortunate situation presents an opportunity for our

courts to implement e-filing and e-delivery of documents, which are already provided for by the court rules. Until then, parties should take the following into account:

- while there is a debate on the binding nature of the memorandum from the Court of Appeal, particularly for matters where Senior Counsel has already been admitted to appear, any party which has engaged foreign Counsel to represent them in proceedings before the courts is best advised to urgently take steps to appoint alternative local counsel;
- parties should assume that some matters will be postponed for an indefinite period of time. As such, in the event any decisions were made which were contingent on claims before the courts being resolved within a certain period of time, this needs to be revisited.
- restriction on movement, social distancing etc may prove difficult for parties to meet deadlines set by the rules of court. Parties should keep accurate records and ensure that should the need for a condonation application arise, they would be in a position to demonstrate it clearly to the court with credible evidence.
- any party with a claim about to prescribe should proceed to lodge it immediately. There is a great deal of uncertainty and parties should minimise the risk of the prescription period lapsing during a time when filing and service of documents is impossible, thereby extinguishing their claim.

CONCLUSION

The outbreak of COVID-19 has resulted in several novel legal issues, many of which will take time to understand. Businesses should take pragmatic steps to minimise legal risk during this period and obtain advice as necessary.

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