

Third Party Liability Insurance claims for non-fulfilment of legal obligations consequent to Covid-19 disruptions

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Introduction

The recent weeks have seen the world having to grapple with a global disaster posed by the lethal novel coronavirus (covid-19) disease. The novel coronavirus outbreak which was first identified in the Wuhan city of China in December of 2019¹ soon spread to several countries world over, culminating in it being declared a pandemic by the World Health Organisation on 11 March 2020.

Authorities in different countries reacted differently to the impending threat and subsequent arrival of the covid-19 in their countries. In Zimbabwe, the government's immediate reaction was to widely publicise information about the disease, encourage the practice of good hygiene and discourage unnecessary movements by its population. The population generally embraced the overtures by the government and commenced to implement preventive measures which included suspension of social gatherings and adoption of other social distancing measures. Some businesses scaled down their operations, sending workers to work from home while others closed altogether.

After two cases of covid-19 were confirmed in the country, the government escalated preventive measures, which included promulgation of the *Public Health (COVID-19 Prevention, Containment, and Treatment) (National Lockdown) Order, 2020*,² (herein called '*the lockdown order*'). Through the lockdown order which subsisted for an initial period of 21 days, the government of Zimbabwe, subject to the exceptions that were specified in the lockdown order, closed all business establishments, banned gatherings of more than two people, banned all public transport services including aerial transport and ordered all people to remain in their homes. This was the lockdown period.

The fear of covid-19 and subsequent promulgation of the lockdown order obviously had far reaching consequences in the form of business disruptions as well as event and travel cancellations. That some affected parties might have been prevented from fulfilling their legal obligations as a result of those disruptions is not a far-fetched possibility. Some third Party liability insurance policies might respond to claims by third parties against policyholders who failed to fulfil their legal obligations as a result of the COVID-19 disruptions. The Zimbabwean insurance industry is likely to face such claims as policyholders will certainly seek to fall back on their insurers. This article carries a broad overview of the coverage of contractual claims under third party liability insurance policies for non-fulfilment of contractual obligations on account of covid-19 disruptions.

¹ http://en.wikipedia.org/wiki/coronavirus_disease_2019 [date accessed:18 April 2020]

² Statutory Instrument 83 of 2020

Coverage

The question of whether or not an insurance policy ought to respond to a certain occurrence will depend on the terms of the insurance policy concerned. In the case of third party liability insurance, the coverage of a third party's claim will be contingent on the liability of the insured towards that third party. Simply put, the insurer will be obliged to meet the claim if the policyholder is legally liable towards the third party claimant. In the context of claims that arise from non-fulfilment of contractual obligations, the terms of that contract (the underlying contract) will be of paramount importance in determining the Insurer's liability under the third party liability policy concerned. If the consequences of the policyholder's failure to perform cannot be resolved on the basis of the terms of the underlying contract, the existence of any other legally acceptable excuse for his failure to performance becomes a relevant consideration.

Parties to a contract may include in their contract a *force majeure* clause in terms of which either of them will be excused from any liability for failing to perform his contractual obligations if he has been prevented from doing so by certain factors falling outside his control. Further, and in any event, a party to a contract will be excused from any liability for his failure to perform his contractual obligations if he can show that he was prevented from doing so by circumstances which made the performance of those contractual obligations impossible. Those two scenarios are considered separately below:

Force Majeure

Force majeure (also referred to as "*vis major*" or "*casus fortuitous*") has been defined to mean "*unforeseeable circumstances that prevent someone from fulfilling a contract*"³. A party who fails to fulfil his contractual obligation on account of unforeseeable circumstances may find sanctuary in the force majeure clause and be relieved from the ordinary consequences of failing to fulfil contractual obligations, but that is only if the contract concerned contains that clause. The scope of the force majeure clause in a contract will depend on its wording. Some contracts will provide a list of items that constitute force majeure such as war, riot, epidemic or pandemic, but often ends with a general provision covering '*any such similar event*'. Others do not. The Zimbabwean courts have adopted the view that "*legislation subsequent to the making of the contract, making performance illegal either absolutely or without a specified consent which has been refused will also qualify (as vis major)*".⁴

Insurance companies faced with claims relating to the policyholder's failure to perform his contractual obligations will be minded to scrutinise the underlying contracts for a force majeure clause. There is little difficulty in proving force majeure in relation to the claims arising from the failures to perform contractual obligations as

³ https://www.lexico.com/definition/force_majeure

⁴ **Standard Chartered Bank Zimbabwe Ltd V China Shoungang International SC49/13**

a result of the implementation of the lockdown order because such failure can easily be attributed to legislation that was enacted subsequent to the conclusion of the contract. Those claims will might fall outside the policy cover on that basis.

Claims relating to the pre-lockdown order period and those involving insureds who were exempted from the restrictions that were imposed in terms of the lockdown order will depend on the wording of the force majeure clause in the underlying contract in question. If the force majeure is defined to include a pandemic or epidemic, any claim arising from the policyholder's failure to perform the contractual obligation as a result of covid-19 disruptions will be excusable and therefore not covered under the liability insurance policy concerned. If the force majeure clause is not defined, the court will have to exercise its value judgment as to whether or not the parties to the underlying contract contemplated that an outbreak of an infectious disease such as covid-19 would be covered under the force majeure clause.

It will be interesting to see how the force majeure defence will fare in the case of contracts that were concluded after December 2019 when the news of the covid-19 outbreak in Wuhan was already spreading. It is likely that the foreseeability of the outbreak at the time that the contract concerned was concluded will arise in the context of determining if its eventual arrival constitute a force majeure event. Each of those cases will have to be decided on its own facts.

Impossibility of Performance

If the underlying contract does not contain a force majeure clause, the coverage of the resultant claim will have to be determined in the context of the common law defence of impossibility of performance. This is a general rule of common law to the effect that if a supervening physical or legal act which is not attributable to the performance debtor renders the performance of the contractual obligations impossible, those contractual obligations are extinguished.⁵ The party that seeks to rely on this rule will be obliged to show that the alleged impossibility is an objective and absolute one as opposed to that which is subjective.⁶ Further, this rule can only be invoked successfully if it can be demonstrated that the contractual obligation concerned is completely and finally impossible of performance, not an event which temporarily disables one of the parties from performing.⁷ If the parties to the contract concerned contemplated the event at the time of contracting, the rule cannot be invoked.⁸ When assessing impossibility of performance in relation to a contract, the courts consider such factors as the nature of the contract concerned, the relationship between the parties, the circumstances of the case and the nature of the alleged impossibility.⁹

⁵ Beitbridge-Bulawayo/Railway (Pvt) Ltd V Commercial Union Insurance of Zimbabwe Ltd SC57/07

⁶ Chiraga V Msimuko 2002 (2) ZLR 368 (H) 380 C-E

⁷ Firstel Cellular (Pvt) Ltd V Netone Cellular (Pvt) Ltd SC1/2015

⁸ Bischofberger V Van Eyk 1981 (2) SA 607

⁹ Watergate (Pvt) Ltd V Commercial Bank of Zimbabwe 2006 (1) ZLR 9 (s)

Due to the diversity of business operations, Covid-19 affected businesses and their commercial transactions in different ways. For instance, an airline who had sold tickets for flights that were scheduled to take place during the lockdown period could not possibly fulfil those flights either because the airports had been closed or because doing so would result in the airline violating the provisions of the lockdown order. The same would apply in relation to a planner of an event which was scheduled to take place on a date that fell within the lockdown period. Fulfilling the planned event would obviously result in the organiser violating the provisions of the lockdown order. In these two examples, the insurer who is presented with a claim for the failure to perform the contractual obligations as a result of the cancellation of the flight and the event respectively will have no difficulty in showing that the underlying contractual obligations became impossible of performance on account of the lockdown order, therefore the claim will not be covered.

However, the position will be a bit murky in a scenario involving a claim against a service provider who failed to provide a contracted service prior to the lockdown order, having closed his business for fear of exposing his employees to covid-19. It is likely that impossibility of performance will be assessed on the basis of such factors as the nature of the contractual obligation concerned and the reasonableness of the fear of exposure to covid-19 in the context of the provision of the service concerned. If the provision of the service would not have exposed the service provider or his employees to the risk of contracting the coronavirus, the insured will most likely be liable for breach of contract and therefore, depending on the terms of the insurance policy concerned, the claim may fall within cover.

Conclusion

The disruptions arising from the effects of covid-19 have resulted in business disruptions which possibly prevented the performance of legal obligations by the affected parties. Some third party liability insurance policies may respond to claims brought against policyholders for the non-performance of contractual obligations on account of the covid-19 disruptions. In those events, the insurer's liability will have to be assessed in the context of the force majeure clause if the underlying contract contains such a clause. If the underlying clause does not contain a force majeure clause, the insurer's liability will have to be assessed on the basis of the common law principle of impossibility of performance.

About the author

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