

IT IS IMPERATIVE THAT YOUR CONTRACT CONTAINS A FORCE MAJEURE CLAUSE

Category: Administrative and Procurement Law, Commercial Law
written by Zandile Mthabela | April 1, 2020



Force majeure refers to a clause that is included in contracts to indemnify against liability for natural and unavoidable catastrophes that interrupt the expected course of events and restrict participants from fulfilling obligations.[\[1\]](#)

In the case of *Rumdel Cape and Others v South Africa Roads Agency Soc Ltd & Others*[\[2\]](#), the Supreme Court of Appeal defined the *force majeure* as

“an exceptional event or circumstance –

(a) which is beyond a Party’s control,

(b) which such Party could not reasonably have provided against before entering into the contract,

(c) which, having arisen, such Party could not reasonably have avoided or overcome, and

(d) which is not substantially attributable to the other Party...”

The significance of the inclusion of a *force majeure* clause in a contract

If a party is unable fulfil its contractual obligations, it can plead *force majeure* as its defense. This is provided that all other material terms of the contract are adhered to. This can include an obligation to provide the other Party with written notice of the imminent *force majeure* event where possible.

Force majeure does not constitute as a breach of contract, provided the *force majeure* was unanticipated. It simply suspends the performance of the contract. By way of an example: amidst the COVID-19 pandemic, if you had contracted to complete a house renovation by 12 April 2020, and are unable to do so due to the lockdown, if sued, you can plead COVID-19 as a *force majeure* and tender performance after the COVID-19 pandemic has been contained. Additionally, the plaintiff will not be entitled to claim damages for non-performance.

Examples of acts that are considered *force majeure*

- Strikes
- Acts of God such as tornadoes and earthquakes
- War
- Riots
- Hurricanes, lightning and explosions
- COVID-19 has not been qualified as a *force majeure*. However, a lockdown following its subsistence, may qualify it as such

Parties can agree on the duration that non-performance will be acceptable. In instances where no time was agreed upon, *force majeure* can be pleaded for as long as the circumstances exist.

A contract subsists during the *force majeure* event. The right and obligations of the contract are stayed and not cancelled. Once the *force majeure* event ceases to exist, the contract rights and obligations resume.

Every contract should make a provision for a *force majeure* clause, and should compel a party relying on *force majeure* to remedy its non-performance after a *force majeure* event has ceased. If you require assistance in drafting a water-tight contract, or if you simply want to ensure that your contractual rights are fully protected, please contact us.

[1]

<https://www.bing.com/search?q=force+majeure+meaning&q=SC&pq=force+majeuremeaning&sc=8-18&cvid=F311A851E5BA4F26B9C821C69C68DF94&FORM=QBRE&sp=1>

[2] Rumdel Cape v South Africa Roads Agency Soc Ltd (234/2015) [2016] ZASCA 23 (18 March 2016)