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South Africa

The most critical phase of the crisis

As long as measures to prevent the spread of Covid-19 restrict freedom of movement: What are the effects of the Covid-19 crisis on civil justice?

Is there special legislation on the effects of the crisis on civil justice?

The minister of Justice and Correctional Services has issued direction in terms of Regulation 10 of The Regulations under the Disaster Management Act 57 of 2002, Notice R440 of 31 March 2020 (“**Directions**”). The Directions regulate access to courts during the National State of Disaster.

Does the crisis have an effect on court hearings?

The Directions have restricted access to courts and provide that:

Civil Cases

- i. civil hearings will be limited to urgent or essential court hearings, however, Heads of courts retain the discretion to authorize hearings through use of various electronic modes, such as teleconference or videoconference;
- ii. Service of process and execution of writs by sheriff must similarly be limited to cases which are urgent or essential;
- iii. new hearing dates will be allocated by the Chief Registrar or Clerk of the Court for matters that have been set down for hearing but which are not urgent or essential;
- iv. new matters which are not essential or urgent will not be set down for hearing;

Criminal Cases

- v. all criminal trials enrolled during the lockdown must be postponed, save for where the interest of justice dictate otherwise or where special arrangements have been made;
- vi. all criminal cases where accused persons are not incarcerated may not be enrolled.

Urgent or essential matters are defined to include matters which, if not enrolled during the state of disaster, will lead to substantial injustice.

Does the crisis have an effect on deadlines (of procedural and substantive law)?

The Directions, which have replaced the directions published by Government Notice No. 418 of 26 March 2020, no longer provides for the interruption of procedural deadlines or prescription. There is also no clear provision for the deviation of the rules of service at court.

Instead, it is understood that matters which are due to prescribe may be instituted and filed on the basis of being ‘urgent and essential’ and, in practice, lawyers have opted to temporarily do away with procedural requirements to allow the filing of unsigned electronic documents, on the basis that signed (and commissioned) copies will be filed after the lockdown.

It is further arguable that the South African Prescription Act, 68 of 1969 and case precedent provides for an interruption of prescription during the lockdown. The Supreme Court of Appeal has previously held that courts

should favor an interpretation that leads to a just outcome (especially considering in our current circumstances the fact that there is very limited access to the courts).¹

Does the crisis have an effect on enforcement?

Civil Asset recovery and enforcement has, however, generally been done by way of urgent proceedings, due to the time sensitivity on the transfer of assets. These urgent matters will be unaffected.

Matters which are pending and, as such, not urgent may be adversely affected unless alternative measures has been agreed. Furthermore, given the movement and travel restrictions published in terms of the lockdown Regulations, investigatory efforts by lawyers and appointed experts will be frustrated.

How do courts work during the crisis?

In terms of the Directions, only persons with an interest as a litigant, accused or witness etc. will be permitted to enter the courts, and only with regards to urgent and essential matters. Such persons are required to comply with strict safety measurements at the courts and must adhere to ‘social distancing’.

The Directions further provide for hearings to be done through the use of various electronic modes, such as teleconference or videoconference, at the court’s discretion.

How are particularly urgent matters handled, in particular requests for interim measures such as injunctions and freeze orders?

As mentioned above, civil cases that are identified as urgent remain unaffected and may be enrolled and heard on an urgent basis. Injunctions and freeze orders are, in most instances, considered to be urgent.

Should an application fail on urgency, the application may possibly be heard via various electronic modes (at the discretion of the courts).

How do lawyers work during the crisis?

Lawyers who are able to work remotely are encouraged to do so. Those lawyers who are engaged in litigation processes during lockdown are able to continue doing so provided they are issued with a certificate of authorization from the Provincial Director of the relevant Provincial Legal Council, in terms of the Directions. Lawyers are required to present such certificate to the judge when appearing at court.

How do banks work during the crisis?

Financial services necessary to maintain the functioning of the banking and payments environment is considered to be an essential service, and accordingly remain open and operational during the lockdown. Furthermore, the Banking sector has been granted a block exemption by the Minister of Trade Industry and Competition which exempts certain practices and agreements between banks from application of the Competition Act during the period of lockdown (“Block Exemption”).

Does the crisis have an effect on insolvency law?

The injurious effect the lockdown has had and will continue to have on businesses will naturally cause an increased reliance on temporary or permanent measures offered by insolvency law for both businesses and natural persons. The effects on insolvency have, however, been mitigated through various measures aimed at alleviating financial hardship, such as: the Companies and Intellectual Property Commission has decided not to invoke certain powers it has under the Companies Act of 2008 (provided certain requirements are met).

Furthermore, the Block Exemption caters for additional debt relief measures, limitations on asset repossessions, and extended credit for businesses and individual debtors who find themselves in financial stress.

FORECAST: AFTER THE CRISIS AND LONG-TERM EFFECTS

¹ Road Accident Fund v Masindi (586/2017) [2018] ZASCA 94; 2018 (6) SA 481 (SCA) (1 June 2018)

What are the consequences of the Covid 19 pandemic once the pandemic has abated, in the gradual return to a new normality and what are the long-term effects?

Which measures will remain in place and which will be withdrawn immediately?

The Directions came into effect on the date of publication in the Government Gazette, and will remain in force for the duration of national state of disaster.

The Block Exemptions will remain in force for the period of the national state of disaster or until withdrawn by the relevant Minister, whichever comes first.

Will enforcement of economic crime, including corruption matters be weakened due to the lack of financial resources?

There has been increased attention on price gouging activities and other ‘crimes’ related to Covid-19. This includes a combined prosecutorial effort between the Competition Commission and Consumer Commission in terms of both the Competition Act and Consumer Protection Act – which provides for criminal prosecution. Furthermore, a large portion of state resources has been dedicated and assigned to the enforcement of the lockdown Regulations.

The government has also been forced to reallocate resources to limit the effect of the lockdown on small business and unemployed persons and it is not yet clear what the knock-on effects of this will be on the allocation of resources to the investigatory and prosecutorial services, which are already underfunded.

Do you expect a rise of new anti-corruption prosecutions after the crisis?

It is likely that the covid-19 pandemic will give rise to increased cases of fraud and corruption in both the private and public sectors. There have recently been a number of allegations of corruption in relation to state tenders which have abused the national state of disaster to flout proper processes. One such example is the Special Investigative Unit’s recent investigation regarding the controversial information technology tender issued by the Gauteng e-Government. The Gauteng government is alleged to have used the Covid-19 pandemic to push through a big IT contract without following proper procedures. It is alleged that the tender, to provide the government with cybersecurity, was concluded in 24 hours. This is being challenged by potential competing bidders.

In the private sector, South Africa has had similar concerns as those experienced in other jurisdictions, regarding fraud related to ‘essential’ products and services.

Will the ratio of third party funded matter rise?

Third party funded litigation is a novel concept in South Africa and, due to various uncertainties, is unlikely to be utilized more readily following the national state of disaster.