

# JBCC N/S SUBCONTRACT AGREEMENT: CLAIMING FOR DELAYS CAUSED BY COVID 19

## PANDEMIC

There is an officially declared international pandemic. There have been consequences to contractors and subcontractors resulting from this pandemic. These consequences will probably continue and manifest in different ways at different times. In addition to local effects, for subcontractors that import goods or services, the effects of the pandemic on the source countries is not part of the local experience and great care must be taken to raise and give notice of a potential delay when such a possibility becomes known to the subcontractor.

Each specific event or circumstance must be recorded in a notice, rights reserved and thereafter any actual delay claimed in a claim for the revision of the date of interim completion.

By stipulation, these formalities do not apply to any delays that do not affect interim completion and they do not need to be recorded in this manner. Such delays, if they cause the contractor prejudice, must be specifically dealt with by notices from the contractor (see comments on mora and interpellatio hereunder). There is no specific provision in the subcontract for any dates other than the interim completion date/s so there cannot be mora ex re. It is, however, prudent to record them briefly to the contractor with a reservation of rights in the event they are found to affect interim completion. Such records invariably become useful later if there are any disputes as progress inevitably becomes an issue.

By now, it is to be hoped that every subcontractor has at least recorded its intention to claim a revision of the date for interim completion as a result of the lockdown. Such delay does not start and end with the lockdown as time is needed to close sites down as well as to re-start them. Rights should also have been reserved for any ongoing consequences of the pandemic. New tenders and contracts signed after the start of the pandemic should have been qualified with regards to the effect of the pandemic.

This article is divided into the following discussion headings:

1. Background
2. General notice
3. Comparison of relevant terms in different editions
4. Proformas (including qualifications for new contracts)

The pandemic has placed the construction industry into uncharted territory and there is a large degree of uncertainty on how to handle the various issues that have and continue to arise. It is recommended that claims for the costs that result from the consequences of the pandemic should be dealt with separately from those for revisions of the completion date. This article deals only with the latter.

One of the possible challenges to be faced is the question of the cause and consequences. This manifests in the debates as to whether it is the legislation regarding the lockdown or the pandemic that is the cause of the delay

caused by the lockdown. On the one hand it is clearly legislation that decreed a lockdown and the new health and safety regulations and protocols that impinge further execution but the argument could also be that it is the spreading rate and infectiousness of the Covid 19 virus that lay at their source and now underlie regulations and protocols to contain the spread. This could become relevant in the motivation of the claim and the provisions relied on. Differences between the clauses of the different JBCC editions further complicate this debate. The advice is to try to ensure that all possibilities are covered as far as is doable.

The following is the opinion of the authors who are not lawyers and accept no liability for the use of any of the contents by any person or party. The authors trust this article will encourage careful consideration and assist the debate.

Readers are reminded that the **2014 edition has been withdrawn** and the comments on it are included only as a courtesy for those who have contracts in place that are based on it.

## 1. BACKGROUND

### 1.1 What is Vis major/casus fortuitus/force majeure?

The following is a brief overview to explain the concepts.

To quote from Lubbe, GF, Murray, CM, *Farlam & Hathaway Contract Cases Materials and Commentary*, 3<sup>rd</sup> Edtn, 1988, Juta & Co Ltd. at pp. 770-771 note 3 on what constitutes vis major/casus fortuitus: “*These concepts (the latter is but a species of the former) denote events beyond the control of the parties and not foreseen or reasonably foreseeable by them ...*” Note the sub-summption of casus fortuitus to vis major.

The key criteria here are:

1. Any event
2. Parties cannot control/unavoidable
3. Not foreseen or reasonably foreseeable

Ramsden, WA (*Supervening Impossibility of Performance in the South African Law of Contract*, 1985, Juta & Co Ltd at p. 49) explains the difference between vis major and casus fortuitus and provides his own definition of each. These are:

“*Vis major includes ‘acts of God’ in the Greek or non-Christian sense of the expression. In this narrower sense of act of God or vis divina, vis major really refers to an overwhelming occurrence of nature of a kind that could not reasonably have been anticipated and therefore guarded against.*

*The occurrence, however, need not be unique or a first occurrence of its kind, so long as it is out of the ordinary and could not reasonably have been foreseen.”*

Casus Fortuitus he defines as “*very similar to an act of God, and is also not as wide in its scope as is vis major, although it is in one sense wider since it embraces acts of man over whom the parties have no control ... In New*

*Heriot Gold Mining Co Ltd v Union Government* [(Minister of South African Railways and Harbours) 1916 AD 415<sup>1</sup>] Innes CJ stated that 'casus fortuitus, which is a species of vis major, is a term well understood and needing no formal definition. It includes all direct acts of nature, the violence of which could not reasonably have been foreseen or guarded against. The doctrine that the operation of such visitations excludes civil liability overlies the fields both of contract and tort.' [at 433] The sub-summation of casus fortuitus as a species of vis major is repeated.

Ramsden (p. 49) concludes that "there is no doubt that together vis major and casus fortuitus between them embrace natural calamities as well as the acts which man is powerless to control."

The events which Ramsden (pp. 49-51) lists as having been classified under vis major/casus fortuitus include "earthquake, fire, lightning, shipwreck, storms and flooding which are contrary to established weather patterns, pestilence, the rapacity of birds, such as jackdaws and starlings, and of locusts, mice and worms, plant diseases, such as blight, an exceptional heat wave, drought and very heavy snowfalls against the usual experience of such occurrences, death or severe illness of, or injury to, man or animal, and insanity, as well as the acts of man, such as war, unavoidable theft, riot, strikes, incendiarism and other acts of third parties over whom one has no control, for example of an insurance company or a shipper, acts of state (that is, by way of legislation, or lawfully exercised executive action – expropriation, internment, declaration of war, and the like, including the acts of foreign states and foreign laws." [own underscoring]

The key criteria of this publication are:

1. Any occurrence that is an out of the ordinary, overwhelming occurrence of nature or an act of man but need not be unique or a first occurrence
2. Parties cannot control/unavoidable
3. Not reasonably foreseeable

These publications precede the Nuclear Fuels case<sup>2</sup>. The following publications are more recent and subsequent to that case and their definitions may therefore be influenced by it.

Du Bois, F et al, (*Wille's Principles of South African Law*, 9th Edtn, 2007, Juta, Cape Town) at pp. 849 – 850 defines vis major as 'some force, power or agency which cannot be resisted or controlled by the ordinary individual. The term is now used as including not only the acts of nature, vis divina, or 'Act of God' but also the acts of man.' He defines casus fortuitus as '...inevitable accident, ... a species of vis major, and imports something exceptional, extraordinary or unforeseen, and which human foresight cannot be expected to anticipate, or which, if it can be foreseen, cannot be avoided by the exercise of reasonable care or caution.' The concept of 'human foresight' in this definition should be tempered by the more persuasive explanation as to what is foreseeable in Howie JA's comments (infra) at 1210B-C in the Nuclear Fuels case. Again casus fortuitus is sub-sumed to vis major.

The key criteria here are:

1. An event that could be vis divina or an act of man
2. The ordinary individual cannot control or avoid by reasonable care or caution

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<sup>1</sup> This was a case on delictual negligence but the respondent relied on vis major as a defence.

<sup>2</sup> Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG 1996 4 SA 1190 (A)

### 3. Not humanly foreseeable

Kerr, AJ, *The Principles of the Law of Contract*, 6<sup>th</sup> Edtn, 2002, LexisNexis at page 548 deals with vis major and casus fortuitus and says “*Vis major and casus fortuitus are related as genus and species and, taken together, the terms refer to events which cannot be avoided even if ordinary precautions are taken.*” In a footnote the significance of foreseeability is also raised and it is discussed at p. 553 where it states “*The implied assumption of risk appears to underlie certain statements that an event, if it is to be classed as vis major or casus fortuitus, must be unforeseen.*” This explanation relies on the avoidability of vis major or casus fortuitus as a requirement to prove grounds for relief<sup>3</sup> and foreseeability as grounds for proof regarding the assumption of risk. It is submitted that this is an apposite apportionment of the purpose of the criteria.

This author again sub-sumes casus fortuitus to vis major. The key criteria are:

1. An event
2. Cannot be avoided if ordinary precautions are taken
3. Unforeseen

Hutchison, D et al, *The Law of contract in South Africa*, 2<sup>nd</sup> Edtn, 2012, Oxford University Press, in its Glossary at p. 504 defines Vis major and casus fortuitus as ‘*external circumstances affecting a contract that lie beyond the reasonable control of either party – ‘acts of God’ (natural calamities such as earthquakes and floods that make proper performance impossible) and unavoidable, unforeseen ‘acts of man’ (e.g. wars, expropriation by the State and robbery).*’ In the discussion of objective impossibility at p. 383, the authors specifically mention the possibility of legislation rendering performance impossible (factually possible but objectively impossible) as a source for supervening impossibility but it is not placed under the banner of vis major/casus fortuitus although these latter are mentioned under the banner of acts of man that cause the impossibility.

The key criteria are:

1. External circumstances – acts of God or acts of man
2. Parties cannot reasonably control/avoid
3. Unforeseen acts of man

Bradfield, GB, *Christie’s Law of Contract in South Africa*, 7<sup>th</sup> Edtn, 2016, Butterworths, Durban at p. 549 defines vis major as ‘*any happening, whether due to natural causes or human agency, that is unforeseeable with reasonable foresight and unavoidable with reasonable care. The limits of vis major and casus fortuitus have not been authoritatively defined, but extend to legislative changes introduced subsequently to the conclusion of the contract rendering its performance impossible.*’ He submits that there is no need to distinguish between vis major and casus fortuitus when dealing with supervening impossibility, alleging that they both represent essentially the same. This

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<sup>3</sup> See *inter alia* Rumdel Cape/EXR Holdings/Mazcon Joint Venture v South African National Roads Agency Soc Ltd (7312/2014) [2014] ZAKZNDHC (25 Sept 2014) wherein the court denied the contractor the relief claimed because site safety could have been upgraded without exceptional effort from the contractor which meant that it was reasonably in the control of the contractor to avoid the peril.

definition seems more comprehensive and balanced than the preceding ones and accords with jurisprudence, particularly the Nuclear Fuels case.

The key criteria here are:

1. Any happening due to natural causes or human agency
2. Unavoidable with reasonable care
3. Unforeseeable with reasonable foresight

Both the latter two authors refer to a 'force majeure clause' as being a clause that deals with the assumption of risk by the parties for changed circumstances. However, Hutchison D et al, in their Glossary at p. 496, again limit it to '*an extraordinary event or circumstance beyond the control of the parties (e.g. war, strike, riot, crime) or an event described by the legal term 'Act of God' (e.g. flooding, earthquake, volcano) ...*' whereas Bradfield GB (p. 548) suggests it can be broader and could well include an arbitrator as an amiable compositeur.

For the purposes of this article, I am also going to refer to both *vis major* and *casus fortuitus* simply as *vis major* in this document as this subsuming seems to accord with the conclusions of the above authors and of jurisprudence.

To summarise then, reverting to the crisp definition by Bradfield GB, to which are added the expansion of the sort of '*happening*' from other definitions, *vis major* is:

1. Any happening, [which although it is not necessarily unique or the first happening of its kind, so long as it is out of the ordinary and beyond the control of the ordinary man]<sup>4</sup>
2. Whether due to natural causes or human agency
3. That is unforeseeable with reasonable foresight and
4. Unavoidable with reasonable care

These 4 elements are important as it is submitted that, whilst only the 2005 edition of the JBCC subcontract makes direct reference to *vis major*, they are included by reference in the provisions of the 2007<sup>5</sup>, 2014 and 2018 editions, thereby admitting jurisprudence available on *vis major* into the application of the clauses. Such jurisprudence assists, *inter alia*, in explaining the interpretation attributable to abnormality of the happening, control and avoidability and assumption of the risk for the event through foreseeability.

The significance of *vis major* is that, where it results in supervening impossibility to perform, the '*general rule*' in our law is that the parties are excused from performing<sup>6</sup>. In *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG*

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<sup>4</sup> See Ramsden and Wille

<sup>5</sup> The only criterion in this clause is the requirement that neither party could prevent it but it is submitted that the principles of contract, particularly *pacta sunt servanda*, would introduce a need to prove the entitlement to the relief and this would revert to evidence of the key criteria of *vis major*.

<sup>6</sup> See Peters, Flamman & Co v Kokstad Municipality 1919 AD 427 435: '*For the authorities are clear that if a person is prevented from performing his contract by vis major or casus fortuitus, under which would be included an Act of State as we are concerned with in this appeal, he is discharged from liability.*' (Per Solomon J who refrained from dealing with any exceptions to this rule). The exceptions to the general rule were added by Stratford J in Hersman v Shapiro & Co 1926 TPD 367 who added to it at 373 '*but [it] does not do so in all cases, and we must look at the nature of the contract, relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether that general rule ought, in the particular circumstances of the case, to be applied.*' It is submitted these qualifications are imported into any analysis of a claim for supervening impossibility unless specifically excluded. **The common law can be displaced by the contract terms.**

1996 4 SA 1190 (A) at 1207I-J Howie JA stated: "*I shall accept that [vis major] gives rise to what has been called the general rule but that it is open to the respondent to seek to avoid the legal consequences of impossibility by putting a case in its replication aimed either at negating vis major or showing that, despite vis major, appellant should not be relieved of the obligation to deliver.*"<sup>7</sup>. It is submitted that such arguments will inevitably revert to the exceptions listed by Stratford J in Hersman v Shapiro & Co which in turn will result in an enquiry into the key factors listed above.

Distinction is made between permanent, partial and temporary supervening impossibility and we have mostly to deal in this case with the latter two.

## 1.2 Temporary supervening impossibility

Claims for delays which resort under the subject matter of this article result primarily from temporary circumstances and are in essence claims for temporary supervening impossibility resulting from a form of vis major as set out above. Partial supervening impossibility may also occur in the future but the principles affecting it are the same as temporary insofar as they concern the performance that is impinged. The latest editions of the JBCC (2014 and 2018) have added as a category acts of man by way of the exercise of statutory authority by some organ of state, thereby excluding the need in such cases for linking that exercise to vis major. It is doubtful whether the exercise of authority creates a right to a claim mero moto - it is submitted that the claim would, at least, still require proof that the risk of such an exercise was not assumed by the contractor. To do this, it is submitted that the criteria for a claim of vis major, namely reasonable foresight and control/avoidability become relevant.

A few general points on vis major events and temporary or permanent supervening impossibility:

1. As a rule, supervening impossibility serves as a defence by the debtor to a claim for performance by the creditor.
2. Performance must be objectively impossible but, depending on circumstances, performance may be excused where it is possible but the cost/effort to perform is out of all proportion to the norm or if it was possible for only a very few exceptional persons.
3. The debtor carries the burden of showing that the impossibility was not the result of his own fault or negligence.
4. Foreseeability of the impossibility when the contract was concluded carries a great deal of weight as an indicator of risk assumption. Foreseeability at the time of the event may also later gain relevance in the mitigation of its consequences. However, just because it is humanly possible to foresee the possibility of the event, it does not follow that risk for it was or should have been assumed. Greenberg JA in Bayley v Harwood 1954 3 SA 498 (A) at 504B explains it succinctly when he points out '*Speaking for myself, I can only say that I would at least be as likely to foresee the possibility on the Witwatersrand, ... of damage by lightning, and this appears to be accepted as vis major*'. Per Howie JA in Nuclear Fuels Corpn of SA (Pty) Ltd v Orda AG 1996 4 SA 1190 (A) at 1210A-C "*But why should the debtor remain bound even where the cause is humanly foreseeable but understandably not foreseen as a fact? ... nothing in the judgments signifies acceptance or approval of the*

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<sup>7</sup> Note the respondent in this case was the claimant in the court a quo.

*limit of human foresight as the criterion. The indications point in the other direction: viz if the cause of impossibility is not foreseen or is not such that it ought to have been foreseen, then the usual consequences of vis major will follow even if the cause was within the bounds of human foresight.*' The ratio in the judgment is based on commercial considerations i.e. parties wishing to do business do not provide for each and every event that is humanly foreseeable but rather for those that are reasonably appropriate to the deal.<sup>8</sup>

5. In the case of temporary impossibility, the mutual obligations of the parties are suspended until the impossibility has ended, where after the obligations resume;
6. In terms of any prejudice, because it is outside the control of the parties, each party carries its own costs and cannot claim against the other;
7. If the debtor is in mora debitoris (default)<sup>9</sup> when the impossibility supervenes and it would have been avoided had it performed timeously, it is not the unforeseen event but the failure to perform timeously that makes performance impossible and the obligation is not delayed or terminated. This is particularly important on a project where the contractor or subcontractor is struck by the impossibility because it has not performed on time (i.e. a revision of the completion date is successfully refused). This is not a blanket exception to the rule because there must be mora so, in general, for the principal contractor the duly extended date for practical completion and for the subcontractor the duly extended date for interim completion must have been exceeded.
8. It is necessary to appreciate that the same unforeseen event may have different consequences that manifest at different times. Therefore, subcontractors should always reserve their rights to claim such future consequences. This is to ensure they do not present a claim as the final claim resulting from the actual vis major event and bar themselves from future claims on the grounds of res judicata and the 'once for all' rule.

When making assessments on foreseeability, whilst the interests of enforcing contracts could incline towards a harsh interpretation under the guise of *pacta servanda sunt*, this expression is really just a statement that the terms of the contract should be enforced as they are expressed and implied. Overly robust enforcement that relies on hindsight or which lacks appreciation for the true apportionment of risk reflected by the contract terms, has to be avoided so that parties are properly protected by the application of judicially applicable criteria to the interpretation of the contract and the covenanted risk apportionment between the parties.

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<sup>8</sup> It is interesting that Howie JA at paragraph 1211G-H, whilst discussing the lack of a clause reserving the seller's rights in the event of ministerial refusal goes as far as saying '*The evidence is clear that [the buyer] would not countenance any term or condition rendering the contract subject to the required authority. If it is envisaged that [Nuclear Fuels – the seller] could have tried to insist, say, on a clause absolving appellant from any liability for damages in the event of the impossibility of delivery, this was simply not investigated. Had the subject come up at the time the parties contracted one does not know for certain what [the buyer's] attitude would have been but judging by his attitude to the contract being subject to the grant of authority, the likelihood is that he would not have agreed to this possible term either. Protection by such a clause was therefore not shown to have been attainable.* Further on at 1212B '*In any trade, if the opportunity for a legitimate and possible transaction presents itself the realistic and reasonable approach is surely to go for it while the climate is right.*' The judge found that the seller, although aware that he required ministerial approval for the deal, did not reasonably expect a refusal at the time of contracting.

<sup>9</sup> A consequence of mora debitoris or creditoris is that mora perpetuates the obligation.

## 1.3 Predicting revisions to the interim completion date

The challenge to most subcontractors is that the date for interim completion after any delay to an activity is also dependent on the contractor's ability to give access for remaining activities. The subcontractor is more often than not, unable to quantify the effect of any delay on the ultimate completion of its work<sup>10</sup> unless:

1. The subcontractor is not dependent on access by the contractor for any of its remaining activities and is capable of controlling the entire subcontract programme to interim completion and therefore predicting the effect on the end date or
2. The contractor provides to the subcontractor the necessary information for a current assessment of the date for interim completion based on a currently accurate programme. The practice of not updating programmes and refusing to issue them to a subcontractor results in subcontractors only having dated information on when they will be given access and they are therefore not able to predict at the time of the delay a revised interim completion date.

Programmes and critical paths fall outside the scope of this article. There is a very significant difference between the JBCC 2005 and 2007 editions on the one hand and the later editions with regards to programmes; the former two versions require the contractor to compile a programme whereas the latter two versions place the responsibility for compiling the subcontract programme on the subcontractor.

The best the subcontractor can and should do, if it is unable to determine the effect of a delay on its interim completion, is to record each event or circumstance, the delay it causes to any activity, advise that the delay will cause a delay to interim completion and reserve its rights to claim when it has the necessary information on access to quantify the delay.

The discussion that follows tabulates the primary provisions of each JBCC edition of the N/S Subcontract Agreement under the following headings:

1. Possible grounds for the claim
2. Notice of possible delay
3. Claim for the delay
4. Granting of a revision to interim completion

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<sup>10</sup> An example of this is an electrician wiring a house who visits a site for four fixes which have to progressively follow on each other but are each individually dependent on the contractor's progress and between which there are long periods when the subcontractor does not have any presence on site. Any delay to fixes 1 to 3 may have no relevance to the date when the 4th and final fix can be completed and are no more than concurrent delays. Any delay to the proper commencement or duration of the 4th fix will result in a delay to interim completion. This example highlights why it is largely the contractor's and not just the subcontractor's internal critical path that determines the effect of a delay to an activity of the subcontract works on interim completion.

## 1.4 New contracts and foreseeability

The definitions of vis major and force majeure require that an event or circumstance must have been 'unforeseeable' in some way or another. The burden of proving vis major is on the party relying on it.

In all contracts entered into prior to the declaration of the pandemic, the events would probably safely have been unforeseeable and the consequences would be covered by provisions dealing with vis major/force majeure in the building contracts generally used in the industry. It would also probably qualify as vis major in terms of South African common law where there is no specific vis major/force majeure clause.

However, given that the pandemic is now established and effects are being experienced, it will probably become increasingly difficult to claim any such unforeseeability in tenders and contracts entered into after the announcement of the pandemic and especially after the declaration of the lockdown and subsequent worldwide events. Therefore, contracting parties may have difficulty proving lack of foreseeability and may well not be able to claim as vis major/force majeure any negative consequences on their contractual performance which are the result of the pandemic. The signing of a contract tendered before the pandemic but awarded after the lockdown would equally be a challenge because the actual signing takes place against a backdrop of knowledge of the pandemic and its consequences. To avoid this, I believe it is essential that all tenders and contracts signed after the declaration of the pandemic, and particularly after the lockdown commenced, should be qualified in some way to deal with this potential challenge.

Some thoughts on this are included in the Proforma section.

## 2. GENERAL NOTICE - PRELIMINARY WARNING OF DELAY/MORA

Subcontractors must be very careful to issue advance notice of a circumstance that could cause delay, particularly if something needs to be or can be done by another party to avoid or reduce the delay (normally done in 'Requests for Information' but care must be taken to not let any notice slip through). This is because, aside from the contractual provisions, the law of damages requires that a party must be in default (mora) before any prejudice can be claimed. Per Trengove J in the landmark case of *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977(4) SA 310 (T) (a case relating, *inter alia*, to the late issue of drawings), a programme generally cannot serve as notice of default and proper interpellatio is needed<sup>11</sup>. He explained the requirements of this demand/interpellatio:

*"The basic requirement of a proper demand is that it must state a certain date on or before which the debtor is required to perform, and it must make it clear to the debtor that the creditor insists upon performance by that date."* In support of this view he quotes from de Vos at p. 312: *"a demand or interpellatio is a call made by the creditor on the debtor to perform and serves to fix the time for performance with a sufficient degree of precision, where this has not been done in the contract itself, to give rise to mora ex persona if performance does not take place by the time mentioned."* (351H-352A)

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<sup>11</sup> At (352A-353H)

### 3. COMPARISON OF TERMS IN VARIOUS EDITIONS

#### 3.1 Possible grounds for a claim

JBCC 2005 N/S Subcontract Agreement	JBCC 2007 N/S Subcontract Agreement	JBCC 2014 & 2018 N/S Subcontract Agreement
<p>Clause 29.1.2: '<i>The inability to obtain materials and goods where the subcontractor has taken all practical steps to avoid or reduce such delay.</i>'</p> <p>Clause 29.1.4: '<i>Vis major, civil commotion, riot, strike or lockout.</i>'</p>	<p>Clause 29.1.2: As 2005 edition</p> <p>Clause 29.1.4: '<i>An event that neither party could prevent, civil commotion, riot, strike or lockout.</i>'</p>	<p>Clause 23.1.2: '<i>Inability to obtain materials and goods where the subcontractor has taken reasonable steps to avoid or reduce such delay.</i>'</p> <p>Clause 23.1.5: '<i>Exercise of statutory power by a body of state or public or local authority that directly affects the execution of the works</i>' [not just the subcontract works]</p> <p>Clause 23.1.6: '<i>Force majeure</i>'</p> <p>Clause 1.1: Definition of force majeure: '<i>An exceptional event or circumstance that</i> (a) <i>Could not have been reasonably foreseen</i> (b) <i>Is beyond the control of the parties</i> (c) <i>Could not reasonably have been avoided or overcome</i> <i>Such an event may include but is not limited to:</i> • <i>Acts of war (declared or not), invasion, and hostile acts of foreign enemies</i> • <i>Insurrection, rebellion, revolution, military or usurped power, war (whether declared or not), terror</i> • <i>Civil commotion, disorder, riots, strike, lockout by persons <u>other than the subcontractor's employees or his subcontractors</u> [own underscoring]</i></p>

JBCC 2005 N/S Subcontract Agreement	JBCC 2007 N/S Subcontract Agreement	JBCC 2014 & 2018 N/S Subcontract Agreement
<p>Clause 29.3: '<i>... any other cause beyond the subcontractor's reasonable control and which could not have reasonably been anticipated or provided for.</i>'</p>	<p>Clause 29.3: '<i>... any other cause beyond the subcontractor's reasonable control that could not have reasonably been anticipated or provided for.</i>'</p>	<ul style="list-style-type: none"> <li><i>Sonic shock waves caused by aircraft or other aerial devices, and ionising or radioactive contamination</i></li> <li><i>Explosive materials, except where attributable to the subcontractor's use of such technology</i></li> <li><i>Natural catastrophes including earthquakes, floods, hurricanes, or volcanic activity'</i></li> </ul> <p>Clause 23.3: '<i>... any other cause beyond the subcontractor's reasonable control that could not have reasonably been anticipated and provided for.</i>'</p>

## Comments on clauses

- ***Unavailability of goods and materials***

All versions have largely the same requirements but, it is submitted that 'practical' and 'reasonable' may be interpreted differently.

The differences will only be relevant if the claim is denied and a dispute is declared.

From a practical point of view, it is the objective availability that needs to be considered and not just specific subjective difficulties the subcontractor may have. Price would normally not be a justification but may become so in exceptional circumstances. A subcontractor faced with unavailability of preferred or specified materials and goods must ensure that it obtains instructions regarding a replacement product. Care should always be taken not to assume liability for the change.

- ***Vis major***

The 2005 edition clearly refers to vis major which would require proof that it is a vis major event and has resulted in supervening impossibility.

The 2007 edition has removed the words 'vis major' and requires only that neither party should have been able to prevent it (control and avoidability). It is submitted that the claim will be subject to full scrutiny in terms of the principles of and jurisprudence on supervening impossibility resulting from vis major, as they would determine whether the impossibility was unavoidable and not in the control of a party and foreseeability would determine the extent to which the subcontractor had assumed the risk.

In both these earlier editions, the risks covered by the 2014 and 2018 editions' clause 23.1.5 (actions by state organs) must be included under the principles of *vis major* and it is submitted that this conforms with our common law principles.

The 2014 and 2018 editions have provided separately for acts of state that result in delays. This is probably a more direct way of dealing with a specific event but it is submitted that it is still covered by the South African common law principles regarding supervening impossibility resulting from *vis major*. It is submitted that subcontractors in their motivation should state that the claim is made in terms of clause 23.1.5 and/or clause 23.1.6 and/or clause 23.3.

The 2014 and 2018 editions' definition of force majeure, it is submitted, are in accordance with the common law as can be seen from the discussion above. The extent to which the event is required to be 'exceptional' may be open to a degree of debate but, insofar as it means 'out of the ordinary' or 'unusual', it is submitted that this is in concurrence with the explanation of *vis major*.

- ***The application of clause 29.3/23.3***

Subclause 3 of all editions is called a 'catch-all' clause. It very clearly provides for '*any other cause ...*' and follows on the lists of specific types of events and circumstances for which the employer is at risk. This suggests that subclause 3 is only intended for events and circumstances not covered in the preceding subclauses. Furthermore, sub-clauses 1 to 3 are also linked to clauses relating to the methods of adjustment of preliminaries. Clauses should not be read in isolation. The clauses regarding the revision of completion dates provide for a covenanted risk allocation between the parties. *Inter alia* they also assist the employer with the enforcement of the penalty provisions by providing a contracted mechanism for dealing with any acts by the employer/contractor, including breaches of contract, which, but for these time adjustment mechanisms, could have rendered the penalty unenforceable. It is therefore submitted that this subclause cannot be used to avoid or circumvent the specific provisions of the preceding clauses on *vis major* and the like<sup>12</sup>.

Notwithstanding this, the importance of including these subclauses as alternative grounds for a claim for a delay is reinforced by the prevailing uncertainties amongst the experts regarding the grounds for claims resulting from the lockdown and the subsequent new regulations. When referring to alternative grounds it is essential to ensure that the facts relied on support those alternative grounds.

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<sup>12</sup> See also jurisprudence in *Group Five Building Ltd v Minister of Community Development* 1993 3 SA 629 (A) and *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1994 (1) SA 153 (A).

## 3.2 Notice of possible delay

JBCC 2005 N/S Subcontract Agreement	JBCC 2007 N/S Subcontract Agreement	JBCC 2014 & 2018 N/S Subcontract Agreement
<p>Clause 29.4.3: A written notice of an intention to claim the delay caused by any circumstance that could cause a delay to interim completion must be issued. This notice must be sent by not later than 15 working days '<i>from the date upon which the subcontractor became aware or ought reasonably to have become aware of the potential delay</i>'. Failure to do so results in the forfeiture of the right to claim.</p>	<p>This contract's provisions replicate those of the 2005 edition.</p> <p><b><u>New clause 29.4.4</u></b></p> <p>The 2007 edition added clause 29.4.4 to previous editions by excluding the automatic forfeiture contained in clause 29.4.3 in certain circumstances, namely:</p> <ul style="list-style-type: none"> <li>• A delay that occurred '<i>before the subcontractor commenced work site</i>'.</li> <li>• '<i>Where the contractor ought reasonably to have been aware of the delay</i>'.</li> <li>• A delay for which the contractor '<i>has claimed a revision of the date of practical completion in terms of the PBA for the particular circumstance causing the delay</i>'.</li> </ul>	<p>Clause 23.4.2 replicates the principles of clause 29.4.3 of the previous editions – written notice of intention to claim a delay must be issued within 15 working days '<i>from the date upon which the subcontractor became aware or ought reasonably to have become aware of the potential delay</i>'.</p> <p>Failure to do so results in the forfeiture of the right to claim.</p> <p>Clause 23.4.3 provides a caveat to the above similar to the 2007 clause 29.4.4 but limited to:</p> <ul style="list-style-type: none"> <li>• A delay that occurred '<i>before the subcontractor commenced work site</i>'.</li> <li>And</li> <li>• A delay for which the contractor '<i>is granted a revision of the date for practical completion in terms of the PBA for the particular circumstances causing the delay</i>'.</li> </ul>

### Comments on clauses

All the editions provide a time limit within which the notice must be issued failing which the right to claim a revision of the date for interim completion is forfeited. This forfeiture will be upheld by a court or tribunal and subcontractors should not run afoul of this time limit. Attempts to reduce the time limit should be opposed because of the serious consequences and experience has shown how easy it is to slip up on these notices no matter how efficient the administration.

All the editions base the forfeiture provision on the date when the subcontractor could or ought reasonably to have been aware of the delay to interim completion. This in itself may be a source for debate. It is submitted that courts would generally be inclined to interpret it subjectively (i.e. taking the circumstances of the subcontractor into consideration rather than just the objective possibility) and giving the benefit of the doubt to the subcontractor.

As pointed out in the Background, a subcontractor doesn't always know that a delay will impact its interim completion date and is therefore technically assisted to avoid forfeiture by this fact although they may experience difficulty in explaining it.

With the burden of producing a subcontract programme placed on the subcontractor in the 2014 and 2018 editions, the increased necessity for more notices to the contractor to update access dates for the remaining subcontract activities seems obvious. It is suggested that a routine notice should be sent to the contractor as part of progress updates at not more than fortnightly intervals to the effect that '*the contractor is requested to urgently provide updates of the dates when proper access to remaining subcontract activities will be available so that the subcontract programme can be updated and resources can be planned and allocated and the interim completion date re-assessed. In the event this is not done, our rights to notify and quantify any revision of the interim completion date remain fully reserved until we have the necessary information.*' The probable place for this is the regular RFI's if they are issued with enough regularity. A subcontractor would be well-advised to also follow this procedure under the 2005 and 2007 editions.

This notice is not required to go beyond:

1. Naming the circumstance. The circumstance must be properly but not necessarily comprehensively identified as this is just an advice that it could occur and that, in the event of it occurring, a delay will be claimed;
2. Recording that it may result in a delay and that it will be claimed if the interim completion date is affected;
3. There is no need to define the term/s on which the subcontractor relies other than to mention that the notice is issued in terms of clause 29.4 (NSSA 2005 & 2007) or clause 23.4.(NSSA 2014 & 2018).

- ***Exceptions to the forfeiture provision***

Whilst the 2005 Edition has no exceptions to the need for notice, the subsequent editions have - the 2007 edition at clause 29.4.4 and the 2014 and 2018 editions at clause 23.4.3. These are commented on hereunder.

1. A delay that occurred '*before the subcontractor commenced work on site*' (all editions from 2007). What constitutes commencement of work on site is not clear and it is suggested that this may include site establishment, but even this would depend on whether the establishment is attached to any presence on site or is merely a logistical undertaking prior to work commencing. The probable value of this qualification lies in the fact that, where a subcontractor signs a document with an expired commencement date or the forecast commencement date cannot be achieved due to progress on site, such delays would fall within the ambit of this clause.
2. Where the contractor ought reasonably to have been aware of the delay (2007 edition only). This clause protects a subcontractor *inter alia* from having to give notice when progress of the works is behind and the subcontract activities cannot commence. However, it is still necessary to record and have records of the inability to proceed with the subcontract activities. For this it is necessary to have evidence of correspondence addressed to or issued by

the contractor that conclusively proves the point if placed before an adjudicator because the burden of proving compliance with the subcontract lies with the subcontractor if he is the claimant.

### 3. Where the contractor

- a. '*has claimed a revision of the date of practical completion in terms of the PBA for the particular circumstance causing the delay*' (2007 edition only). Although the exception is well taken, the problem with this clause is that the subcontractor may not be privy to revisions claimed by the contractor and a contractor may attempt to conceal this from the subcontractor in case it is unsuccessful and the subcontractor still has a valid claim in terms of its subcontract. The subcontractor will bear the burden of proving this exception and may lack the evidence to do so.
- b. '*is granted a revision of the date for practical completion in terms of the PBA for the particular circumstances causing the delay*' (2014 and 2018 editions only). In addition to the above comment regarding the contractor's reluctance to disclose its claims for extension of time, changing it to claims which have been successful makes it retrogressive in nature as a contractor is rarely granted a revision within the 15-day period in clause 23.4.2. It therefore only assists a subcontractor who has defaulted on the forfeiture clause and finds itself embarrassed by forfeiture. The reason for this is that the subcontractor is required to produce its own programme and is therefore, at least in theory, monitoring progress and delays against its own delays to commencement of activities and updates to the dates when access will be available for its own activities. It is often immaterial whether the contractor has been granted an extension.
- c. Be it as it may, a subcontractor may find relief from the forfeiture threat in these clauses even though they should not really influence its programme management. The delays experienced by the contractor are generally not necessarily mundane to the subcontractor's entitlement.

**It is very important to note that these exceptions do not reduce the obligation to quantify delays in terms of clauses 29.5 and 29.6/23.5 and 23.6.**

Normally it is necessary to make reference to this notice as part of the quantification for the claim.

- ***Expected future events***

The Covid 19 pandemic will probably expose contractors to the normal consequences of a pandemic but it is also going to bring new challenges because of its infectiousness and quick spread, if not from the actual consequences of the illness which can be deadly.

Subcontractors would be well advised to ensure that they raise these possibilities in circulars and reserve their rights if they have not already done so before the shut down.

Some thoughts on this are included in the Proforma section.

### 3.3 Claim for (quantification of) the delay

JBCC 2005 N/S Subcontract Agreement	JBCC 2007 N/S Subcontract Agreement	JBCC 2014 & 2018 N/S Subcontract Agreement
<p>Clause 29.5 requires only that the subcontractor must quantify and claim the delay to interim completion '<i>once [it] can quantify the delay caused</i>'.</p> <p>There is no forfeiture of the right to claim.</p> <p>This claim must contain the following information:</p> <ol style="list-style-type: none"> <li>1. The clause or clauses on which the subcontractor relies. (Clause 29.6.1)</li> <li>2. The details of the cause of the delay (clause 29.6.2).</li> <li>3. Quantification of and substantiation for the number of working days claimed (clause 29.6.3).</li> </ol>	<p>This edition is similar to the 2005 edition but clause 29.5 places a time limit for the submission of the claim - 20 working days from the date when it became possible to quantify the claim.</p> <p>There is no forfeiture of the right to claim.</p> <p>Clause 29.6.2 specifically requires reference to '<i>the critical progress towards interim completion</i>'.</p>	<p>Clause 23.5 is similar to the 2007 version also allowing 20 working days from when it was possible to quantify the claim but adding a further relaxation that the period may be extended by the contractor.</p> <p>There is no forfeiture of the right to claim.</p> <p>The requirements set out in clause 23.6 replicate those in clause 29.6 of the previous version but the reference in clause 23.6.2 to the internal logic and critical path as well as possible changes thereto to mitigate the delay are more pointed.</p>

#### Comments on clauses

- ***The date when it is possible to quantify the delay***

This claim does not have to be a separate communication and could be incorporated in the notice if it is known at the time of notice.

Determining the date when it became possible to quantify the claim is a matter of the specific objective facts pertaining to each claim. For dispute resolution purposes it only requires an allegation to confirm compliance by the subcontractor in its statement of claim and evidence to support the statement if the contractor disputes it.

The compliance of the contractor with clauses requiring its input into programme updates, is an important, potentially essential, element in this process. With regards to the 2005 and 2007 editions requiring the contractor to provide and agree a programme and updates thereto with the subcontractor as the works proceed, the responsibility for the programme is clearly the contractor's. The 2014 and 2018 editions, despite the requirement that the subcontractor

must submit and coordinate its programme with the contractor's programme (NSSA 2014 clause 12.3.6 to 12.3.9 and NSSA 2018 clause 12.3.6, 12.3.9 and 12.3.10) also require the contractor to discuss and update programmes (NSSA 2014 & 2018 clauses 12.2.15, 12.2.18 and 12.2.19) which in turn allows the subcontractor to revise and update its own dates based on the access available from the contractor. The contractor cannot hide behind its own default to deny the subcontractor the information it needs to revise its date for interim completion. The subcontractor should persist in communications reminding the contractor of the default and its need to be given new access dates for its remaining activities to assess its probable interim completion date. It is submitted that it could, at worst, become a standard item in the RFI lists.

- ***Time to quantify the claim***

The 2005 edition does not have any specified time limit within which to present the claim and the measure will be a reasonable period in the specific circumstances. Subsequent editions have introduced a time limit of 20 working days from the date when it became possible to quantify the claim. There is no forfeiture in the event of failure to comply and a contractor is still obliged to deal with the claim on its merits and cannot summarily dismiss it on grounds of late quantification.

Possible grounds on which a contractor would be able to refuse or reduce the subcontractor's claim because of the failure to quantify the claim within the time allotted would be if the contractor can show prejudice resulting from the failure to quantify the claim. In defence against any refusal on the grounds of expiry of the time to quantify the claim, the subcontractor could claim undue hardship. The circumstances that would become relevant would also be the extent to which the contractor could not have been aware of the delay despite its compliance with requirements for programme updates.

The 2014 and 2018 editions provide for the contractor to extend the 20-day period. This is good drafting and the above arguments would assist the subcontractor if faced with a refusal to consider the claim on the basis of the expiry of the period.

- ***Why it is necessary to keep claims for delays up to date***

The urgency for this claim to be made arises from the legal consequences of *mora ex re* once the date for interim completion has expired. The consequences of this are very serious and underpin the unequivocal necessity for action to claim and to enforce the award of any revision of the interim completion date that is due. This has been raised above in the introduction but is very relevant if the subcontractor wishes to demand performance by the contractor (exceptio non adimplenti contractus) or to terminate the subcontract (NSSA 2005 and 2007 clause 38.6, NSSA 2014 and 2018 clause 29.19).

- ***Contents of the claim: sub-clause***

The subcontractor must here clearly identify the sub-clause but it is submitted that it is not always clear on which one reliance should be placed and a wrong choice could later be fatal to a claim. There is nothing preventing a subcontractor from referring to all of the sub-clauses that could apply if the particularity does not alter the facts that are presented and proved.

Given that there is no forfeiture for a failure to quantify the claim, it may be that the subcontractor would be protected by a general reference to subclauses 29.1, 29.2 or 29.3/23.1, 23.2 or 23.3 as it can always be remedied later if necessary. The difference between these three clauses is of little relevance to a subcontractor that does not wish to claim an adjustment to its preliminaries for the delay or any expense or loss.

Any reference to clause 29.1/23.1 should be very carefully considered before it is used because of its financial limitations. However, where it is the only appropriate ground, it should be used rather than to endanger the granting of the revision to the completion date.

In the oft quoted case of Imprefed (Pty) Ltd v National Transport Commission 1993 3 SA 94 (A) the court found against the claimant/appellant because it relied on one clause for its pleadings and then litigated further on the basis of another. It is submitted that properly read this judgment refers to two very different types of claim and does not peremptorily limit a claimant to a very precise reliance on a particular sub-clause. Further, once the circumstances have been clearly identified in the claim, the sub-clause relied on is often of little material difference to the pleadings. Normally, by the time the matter becomes a dispute, legal advice will be available to ensure the correct sub-clause is used if relevant.

- ***Contents of the claim: cause of delay***

It is submitted that this is probably the most important part of the quantification as it effectively constitutes the comprehensive motivation for the claim in terms of factual causation.

The motivation could include but is not limited to:

1. An explanation of the cause of the delay,
2. The stage of the works and subcontract works at the time of the delay,
3. How the delaying event or circumstance influenced the progress,
4. Evidence of the existence of the external cause of the delay,
5. What steps were taken to mitigate the delay and
6. Evidence of notices sent, etc.

As the editions progressed, so more direct reference has been made to limit the factual evidence to only such activities and events as were on and/or affected the critical path of the subcontract works to interim completion.

- ***Contents of the claim: quantification of delay***

This is an extension of the above motivation of the claim as it constitutes the demonstration of how the delay that was suffered on specific activities resulted in a delay to interim completion. The subcontractor is only required to claim the delay in terms of the number of working days by which interim completion has been delayed by the specific circumstance or event that was notified and claimed. If interim completion is only affected by access to the last activity, it is only when this activity can commence that the subcontractor can assess the impact of any delay on interim completion.

The example of the subcontractor's difficulties in predicting interim completion exclusively from its programme are discussed in the Introduction

- ***Conclusion***

It is extremely important for a subcontractor to ensure any claim submitted is comprehensive and well detailed because this document is the one on which the claim will be adjudicated in any dispute resolution forum. If it has been poorly drafted or lacks the necessary averments and detail to support it, the reference to adjudication may be unsuccessful. However, this is subject to the caveats raised in the next heading.

### 3.4 Granting of a revision to interim completion

JBCC 2005 N/S Subcontract Agreement	JBCC 2007 N/S Subcontract Agreement	JBCC 2014 & 2018 N/S Subcontract Agreement
<p>Clause 29.7 places on the contractor a peremptory obligation to respond to any claim for a revision of the date for interim completion within 25 working days of receipt of a claim for the revision of the interim completion date. The response must (peremptorily):</p> <ol style="list-style-type: none"> <li>1. <i>Grant, refuse or reduce the working days claimed.</i> (Clause 29.7.1)</li> <li>2. <i>Determine the revised date for interim completion in relation to the working days granted making due allowance for the holiday period where such is noted in the n/s schedule.</i> (Clause 29.7.2)</li> <li>3. <i>Identify each circumstance and relevant subclause for each revision granted and give reasons for amending or refusing the claim.</i> (Clause 29.7.3)</li> <li>4. <i>Assess a claim in terms of clause 29.3 in the same manner and principles as are applicable to 29.1 and 29.2.</i> (clause 29.7.4)</li> </ol> <p>Clause 29.8 provides that a failure by the contractor to respond, complying with all the above formalities within the 25 working day period permitted automatically activates a deeming provision that the claim has been refused.</p>	<p>Clause 29.7 provides for the same general requirements for approval as the 2005 edition. There are, however, changes to the wording of subclauses 29.7.1 to 29.7.3. The details are as follows:</p> <p>The response must (peremptorily):</p> <ol style="list-style-type: none"> <li>1. <i>Grant, refuse or reduce the working days claimed.</i> (Clause 29.7)</li> <li>2. <i>Determine the revised date for interim completion in relation to the working days granted</i> (Clause 29.7.1) and</li> <li>3. <i>Identify each circumstance and relevant subclause for each revision granted or amended.</i> (Clause 29.7.2) or</li> <li>4. Give reasons for refusing such claim (Clause 29.7.3).</li> </ol> <p>The differences are obvious but the principles remain the same. The part of any amended or rejected claim must be justified.</p> <p>Clause 29.8 remains unchanged from the 2005 edition.</p>	<p>The provisions of clause 23.7 and its subclauses virtually replicate the provisions of the 2007 edition's clause 29.7.</p> <p>Clause 23.8 replicates clause 29.8 of the previous editions but it is expanded to also provide that the subcontractor can give notice of disagreement where the contractor refuses or reduces a claim or fails to act. This is a drafting improvement but the ultimate effect in everyday contracting is probably the same as the previous versions as the option to give notice of disagreement has always been there in a similar format. The dispute resolution clauses are slightly different from previous editions but that falls outside the ambit of this article.</p>

## Comments on clauses

- ***Only the contractor can grant a revision of the date for interim completion***

The provisions of the contract are very clear that the only party authorised to grant any revision of the date for interim completion is the contractor. Whilst agents can be approached and kept in the loop by copying correspondence to them they have no authority to intervene except for such limited powers as they are given in terms of:

1. With regards to the 2005 and 2007 editions - PBA clauses 20.5 and 6 (nominated s/c) and 21.5 and 6 (selected s/c) and NSSA clause 35 if the contractor withholds payment from the subcontractor on spurious grounds and it is in the employer's interests to interfere.
2. With regards to the 2014 and 2018 editions – PBA and NSSA clauses 14.4.5 and 14.5 (nominated s/c) and 15.2.5 and 15.5 (selected s/c) if the contractor withholds payment from the subcontractor on spurious grounds and it is in the employer's interests to interfere.

The adjustment of the n/s value is the responsibility of the principal agent and not the contractor's. This applies also to the adjustment of the preliminaries. To the extent that any adjustment of preliminaries is not for the account of the employer, the principal agent must recover such adjustment through the Recovery Statement.

- ***Deemed refusal of claim (Clause 29.8 (NSSA 2005 and 2007) or clause 23.8 (NSSA 2014 and 2018))***

'Deemed' is explained at clause 1 (1.5 in NSSA 2005 & 2007) and 1.2 in NSSA 2014 & 2018) as '*conclusive that something is fact regardless of the objective truth.*' These clauses summarily place the subcontractor in a position to forthwith issue a notice to resolve a dispute in terms of clause 40.1 (NSSA 2005 and 2007) or 30.1 (NSSA 2014 and 2018)<sup>13</sup> if the contractor has not complied with all the formalities listed in the subcontract in its response to the claim. A summary rejection or a request for a postponement of the response or any other ambiguous response all become rejections of the claim.

The consequence of the deeming provision, read with the preceding clauses defining the details that must be provided in the response (which include the reasons and clauses relied on for each circumstance), has some very important benefits for the subcontractor. Amongst these, it is submitted, are:

1. The claim is not incomplete if information already in the contractor's possession or of which it should reasonably be expected to know are not incorporated. Any documents referred to in the claim and which are already in the possession of the contractor do not need to be attached to the claim (but they must be clearly identifiable by the contractor) and any attempt by the contractor to request them or further particulars as a delaying tactic can just be ignored as they will not extend the period for the contractor to adjudicate the claim. Such documents/evidence will however have to be attached to a statement

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<sup>13</sup> A mere failure to act does not necessarily result in what is called an arbitrable dispute in terms of the Arbitration Act.

- of case in the dispute resolution forum and care should be taken that they do not differ materially from the information the contractor had at its disposal when adjudicating the claim as that could alter the matters in dispute.
2. Similarly, if reliance is subsequently placed on facts of which the contractor was or ought reasonably to have been aware of but were not specifically raised in the claim quantification, the contractor would be embarrassed if the claim was declined and these facts were disregarded in the reasons for the rejection, only to be raised by the subcontractor in the dispute resolution forum. Such facts would include evidence that the contractor was behind programme and that it was impossible for the subcontractor to gain access in terms of its programme, evidence that the subcontractor did not delay the works or that the subcontractor's delay was concurrent with delays to the contractor's works, evidence of attempts to reduce the subcontractor's available durations and stacking of activities, etc.
  3. Any obstructive attempts to request further particulars from the subcontractor or a refusal to provide reasons for declining or reducing a claim become part of the contractor's defence to the claim in the dispute resolution forum but do not delay the reference to dispute resolution in terms of clause 29.8 and 40.1/23.8 and 30.1.

- ***Acceleration***

The only options available in terms of the provisions of clause 29.7/23.7 are to grant, reduce or refuse the claim and to provide reasons with clause numbers for such responses to the claims.

There is no provision at clause 17 in the subcontract authorising the contractor to instruct the subcontractor to make up lost time for delays which qualify as grounds for a revision of the date for interim completion. Such an instruction would be ultra vires and lack binding force.

Furthermore, none of the provisions regarding execution/programme<sup>14</sup> provide any entitlement for the contractor to unilaterally reduce the durations or to increase overlapping of activities without the consent/agreement of the subcontractor. It is submitted that such actions, when seen with the penalty and damages provisions, would attract the same remedies as would the employer's reduction of the contractor's construction period.

All the editions require the subcontractor to mitigate the effect of a delay. The mitigation means only that it has to do what a reasonable subcontractor would do to keep the prejudice to a minimum and costs reasonably incurred in mitigating the consequences of a default are recoverable as damages. To the extent that it involves any costs to the subcontractor, they would be recoverable from the contractor as acceleration is effectively an agreement between the parties to reduce the subcontract period and it is additional and distinct from the subcontract agreement. If it is done as an amendment to the terms of the

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<sup>14</sup> NSSA 2005 clause 15.2.2; NSSA 2007 clauses 15.2.2, 15.6, 15.8; NSSA 2014 clauses 12.3.6 to 12.3.9, 12.3.15 & 12.3.17; NSSA 2018 clauses 12.3.6 to 12.3.11.

subcontract agreement it must be confirmed in writing and signed by the parties to be valid<sup>15</sup>. If it is done as a separate agreement, then it should still be reduced to writing and signed by the parties. In both cases, the subcontractor is entitled to require agreement of its compensation and should insist on it.

The flipside to this is that the contractor is the subcontractor's client and, at least in theory, the subcontractor would like to build a cordial and mutually beneficial relationship with its client in the hope of securing future work. It may be possible to negotiate a revision of the programme that suits both parties.

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<sup>15</sup> See non-variation clauses NSSA 2005 and 2007 clause 1.8 and NSSA 2014 p. 32 & NSSA 2018 p. 30

## 4. PROFORMAS

I am generally opposed to pro-forma documents because, firstly, people tend to assign the responsibility for these important formalities to others who are not adequately qualified for the task but, secondly and very importantly, because those responsible for them tend to try to fit each and every situation into the pro-forma document and do not give proper attention to and address the specific circumstances they are dealing with.

### 4.1 General Covid 19 notice

To the contractor, principal agent and agent (engineer):

*Re Covid-19 virus outbreak & infections: general notice and reservation of rights*

*We have been placed into a situation wherein we are regrettably being forced to take steps to limit damage from the effects of the Covid pandemic. We are all dependent on staff who are out there and will be exposed to people who test/ed positive for the virus and will have to be isolated or themselves become infected and further spread the disease and the spread of the isolation through enterprises. A large proportion of our staff are dependent on public transport with its inherent infection risks.*

*As everybody is aware, the lives of a large proportion of people in this country are potentially threatened by the virus due to HIV, tuberculosis, high blood pressure, diabetes and other challenges. We should not place their lives at risk unnecessarily through ill-conceived conduct of any sort.*

*We have no doubt that the consequences of the pandemic resort at worst under vis major/casus fortuitus and we are, with immediate effect, hereby giving notice that all our rights are reserved.*

*The effects of this pandemic and our claims for vis major do not end with the lockdown. They go much further and will include but not be limited to the following events and circumstances and their consequences:*

1. *Logistical challenges;*
2. *Availability of goods;*
3. *Lockdowns in other countries;*
4. *Staff transport, public and our own;*
5. *On site regulations resulting from the Covid threat;*
6. *Segregation of teams from each other to limit infectious spread through both businesses and sites;*
7. *Production limitations created by intrusive PPE and sanitation of people and equipment,*
8. *Dealing with vulnerable people and people's fears,*
9. *Destruction and/or limitation of administrative and managerial capacity at head office and/or site level through contamination and/or isolation.*

*To the extent that any of the above and any other unforeseen consequences affect service delivery we apologise for any inconvenience but must keep the interests of our staff and their dependents in mind as well as this enterprise's and industry's ability to continue essential operations throughout this pandemic.*

*We will deal with each challenge as it arises and all our rights remain reserved.*

*We trust that we will be able to count on the understanding of our clients.*

## **4.2 Possible notice of intention to claim for potential delay to interim completion**

To the contractor (copied to the principal agent and responsible agent e.g. engineer):

*Re: Notice of possible delay in terms of clause 29.4 [2005 & 2007] /23.4 [2014 & 2018]*

*We hereby give notice of a potential delay to our progress resulting from [brief description of circumstance] and of our intention to claim a revision of our interim completion date if and to the extent it is delayed.*

*[option 1 if applicable] We have no means of assessing whether this delay will impact our interim completion date as we are dependent on your provision of access for the remaining activities as well as other factors such as agreement of updates to your programme showing actual dates when activities will indeed take place, but believe a delay to interim completion is likely. We await, as a matter of extreme urgency your revised programme showing the necessary actual future dates when we will be given access to the remaining subcontract activities so that we can assess, comment on it and agree it and confirm whether this is a concurrent delay on and/or has no effect on your critical path or whether it is the cause of a delay to interim completion.*

*[option 2 if applicable] The activity directly impinged by this will delay our completion of our programmed subcontract activities on site (try to list the programmed activity first impinged) i.e. activity no ... [description] which in turn will affect the completion of all further remaining activities and our subcontract works' interim completion dates.*

*All our rights are reserved.*

## **4.3 Contracts tendered or signed after the pandemic was declared**

Possible wording of a qualification to be added to any subcontract before signing and to any tender submitted follows.

Covid 19 pandemic:

*We are all in uncharted territory with regards to the Covid 19 pandemic and its national and international effects and consequences.*

*Therefore, notwithstanding anything to the contrary anywhere provided, this tender/contract is conditional upon:*

- *agreement of and adherence to safe site processes; and*
- *agreement of a programme, and any necessary revisions thereto as the project proceeds, that allows sufficient time for the proper and safe execution of the subcontract works.*

*We further reserve all our rights to deem as vis major/force majeure any detrimental or prejudicial effects and/or consequences of whatever nature on any element of the performance of any of our contractual obligations resulting directly or indirectly, whether through legislation or any other causes/consequences, from the ongoing effects of the pandemic. This also includes but is not limited to any:*

- *national and international supply, logistical and administrative constraints we may experience in our supply chain;*
- *civil commotion or unrest, riot, strike and/or any other labour related disruption, including those involving our own staff;*
- *compromise to the health of the workforce and resulting reduction in available labour;*
- *slowdown in production rates and business interruption, whether through legislative, regulatory, health protection or business protection measures of any kind;*
- *site or business closures (whether partial or total) due to infections, whether voluntary or compulsory;*
- *Inability to operate, whether partial or total, due to attrition through infection and/or isolation of administrative and/or managerial capacity, whether at site or head office level and whether voluntary or compulsory.*

The advice of a lawyer is always recommended.