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NEWSFLASH KENYA

COVID 19 LEGAL ALERT:
CONSIDERATIONS FOR
BUSINESSES

Issue:
31 March
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→ Background

The Government of Kenya has chosen a pro-active approach to responding to the coronavirus or COVID-19 outbreak. In the few days following the announcement by the Cabinet Secretary for Health Mr. Mutahi Kagwe (the Cabinet Secretary) of the first confirmed cases of coronavirus in Kenya, the government announced the closures of schools and higher learning institutions, government institutions such as courts, registries and other bodies, requested those who can to work from home, prohibited gatherings in social, recreational and religious places, and set out rules and

restrictions on public transport including passenger flights.

All individuals, businesses and institutions are concerned about the consequences the outbreak and the lockdown will have on their lives and affairs and what steps they can take to ensure continuity and to mitigate the effects of the disruption.

In this newsletter we will analyse the impact the outbreak has on businesses from a legal perspective and with the intention of providing guidance on how these can be addressed.

→ Considerations for Businesses

LABOUR LAW

For some business it may come down to a decision to lay off or wind up. It is a matter of fact that the economic and business environment around the world has declined and may continue to do so for months. For many businesses and businessmen in Kenya, some more than others depending on their industry, a key concern will be whether and to what extent they can continue to operate in a radically changed business climate with the same level of expenses. Many SMEs for example are unlikely to have the cashflow to sustain expenditures at pre-COVID-19 levels.

As such, for many businesses in Kenya, turning to a reduction in payroll expenditure will be among the first options.

While we have already heard the national carrier announcing pay cuts for some of its staff, what is the legality of imposing **salary cuts**, or **salary ‘freezes’** (periods without paying) and ultimately **redundancy**?

Subject to minimum wage prescriptions as may be gazetted from time to time, the employment law in Kenya gives the employer and employee freedom to determine salary levels. Once employment terms and conditions (including salaries) are agreed upon in an employment contract, the law still gives the parties leeway to re-negotiate and agree on changing those terms. Provided the employee consents or agrees, an employer can legally effect a salary cut or salary freeze in these COVID-19-created financially constraining circumstances.

In “Ibrahim Amoni v Kenital Solar Ltd (2018) eKLR” for example, the court, in determining the legality of a salary cut effected by the employer, found that an employer ought to obtain the approval of an employee by communicating the reduction to an employee in a letter and causing the letter to be accepted by the employee. This is because salary is a fundamental term of employment whose reduction has a negative impact on an employee’s livelihood and should not be done arbitrarily or unilaterally by an employer.

In the event a business does not anticipate to be in a position to recover financially such that it opts to declare some positions redundant, the law lays down the procedure that must be adhered to, and companies ought not assume that the COVID-19 crisis will give them a right to overlook the procedures set out in the Employment Act. These include conducting an objective assessment of the positions to be declared redundant, notifying the labour office, meeting with the employees whose positions are to be declared redundant and discussing the company’s intention to declare the positions redundant etc.

Additionally, businesses ought to review the ‘Statement by Mr Simon Chelugui, CS, Ministry of Labour and Social Protection on Labour Sector Response to the COVID-19 Pandemic’ of 23rd March 2020 which provides the Ministry’s recommendations as far as workers and employees are concerned.

PERSONAL DATA PROTECTION

Since the announcement of Kenya's first coronavirus case, the question on the mind and lips of many Kenyans has been why the Cabinet Secretary (or other health officials) has not similarly announced the name of that particular individual. And with the number of people in Kenya who have tested positive for the virus having risen since that first announcement, the question remains why the government has not disclosed the names or identities of the patients, even as it seeks to 'contact trace'. Wouldn't it be better for the public to know, for example, that a person called Ms. Waceke Kunta Ouma (fictional name) has tested positive for the virus, in case the health officials and other contact tracing machinery do not have on their radar all the persons whom Ms Ouma had contact with? Are governments around the world not naming confirmed cases (merely?) on the basis of likely stigmatization of patients? Or does personal data protection legislation override public interest in such patient identity disclosures?

Kenya's personal data protection legislation, the Data Protection Act, came into force in November 2019. It mandates all persons, including government and government bodies, private companies and organisations to process personal data in a manner that, among others, ensures the rights of the data subject whose data is being *processed* are upheld.

'Processing' personal data includes its collection, publication, disclosure and storage. As such disclosing the identities of persons with the coronavirus, whether by revealing their names directly or by disclosing any information which can result in them being identified from the set of information (*personal identifiable information*)- for example by disclosing that patient number O is male, in his 30s, resident of Kawangware, and who had been on a business trip to his company's headquarters in country Y- amounts to processing personal data.

A person in Kenya has as enshrined in both the Constitution of Kenya and the Data Protection Act, a right not to have *information relating to their family or private affairs unnecessarily required or revealed*. The Data Protection Act additionally gives every person a right to object to collection, storage or disclosure of their personal data.

As such coronavirus patients, (whose positive status is 'health data', a special category of personal data) have a right not to have their identities disclosed as this would amount to an infringement on their personal data protection rights. They can enforce these rights against the

government and government agencies, their employers, service providers (such as hospitals) and even journalists and media houses.

Unlawful disclosure of the identities of coronavirus patients can make the disclosing entity liable to pay a fine of up to KSh 5 million or 1 per cent of its preceding year's annual turnover.

Only in limited, legitimate and specific circumstances provided in law (generally public and legitimate interest in nature), or with a patient's consent, can their identities legally be revealed.

It appears, from the manner that many governments have handled coronavirus patients' identities, that there is generally no genuine or legitimate 'public interest' in the members of the public knowing the identities of patients (there may be a genuine public interest in revealing that a particular Governor or Prime Minister has the virus).

Consequently, companies and businesses in Kenya ought to be particularly careful should they have an employee who is found to be positive. Not only should the matter be dealt with as a sensitive Human resource issue and accordingly handled confidentially, the company should also either avoid processing this health data altogether, that means not recording, storing, disclosing that their employee X has tested positive for the virus- or they should do so only as may be strictly required by the authorities for purposes of contact tracing, and in any case always in-keeping with data protection principles such transparency, accuracy, purpose and storage limitation, lawfulness and transparency.

COMMERCIAL CONTRACTS

The 'Force Majeure' Clause

The various measures being taken by governments around the world in relation to the coronavirus outbreak are causing disruptions to commercial transactions and the performance of contracts in general. In some instances these disruptions may make it impossible for parties to perform their obligations putting them at risk of incurring liability for their default.

Contracts and contract law generally anticipate the occurrence of such events and provides a means for their resolution. Many contracts will typically have a 'force majeure' clause whose intention is to release or to excuse parties from liability for their failure to perform their contractual obligations.

The consequences of the occurrence of a 'force majeure event' will usually be specified in the force majeure clause itself. The clause as drafted in each individual contract should therefore be the first reference point for the parties.

Some contracts may provide that immediately upon proof of existence of a force majeure event that the parties may be completely excused and released from further performance of their obligations with no liability to each other. They may also provide for the deferral of the performance of the contract until such time as circumstances permit or for a defined period of time following which parties may be released from their obligations.

It is also important to note that the force majeure clause may specify the types of force majeure events that will trigger the operation of the clause. This specification will limit the types of events that parties may rely on. Examples of wording that may be used in relation to the coronavirus outbreak include ‘epidemics’ and ‘pandemics’. Other wording describing the outcomes or effects of the outbreak may also be relied on. Examples of these include ‘government action’ for example where a government has ordered a shut-down.

The doctrine of frustration

Where a force majeure event has not been specified in the contract or where force majeure has not been provided for at all, then parties may turn to the doctrine of frustration of contract.

The doctrine of frustration may be relied on where there is an occurrence of a supervening event not caused by either party (it must not be self-induced); it must render the performance of the contract impossible or make it radically different from what the parties anticipated at the time of the contract (it must be fundamental in nature and not just something that makes the contract more onerous or expensive to perform); it must be unforeseeable and not capable of reasonable anticipation by the parties.

Whether an event constitutes a frustrating event, justifying the discharge of the parties from their obligations is highly dependent on the particular contract and the facts surrounding the occurrence of the frustrating event. The courts generally only admit frustration in limited circumstances.

We recommend that existing contracts be reviewed in cases where parties fear non-performance (either by themselves or by a counterparty) in order to assess the risk, potential consequences and solutions. Parties are always free to renegotiate their contracts in order to accommodate the impact of the outbreak and to ensure performance once the situation improves and circumstances permit.

Repayment of bank loans and mortgages

Measures have been taken by Central Bank and private banks to help cushion individuals and businesses during this pandemic. Local banks have announced that they are willing to allow their individual and business customers an extension of their loan repayments for upto a year. Customers will negotiate these extensions individually with their banks. The banks may be willing to reach an arrangement deferring payment of the loan and interest altogether, deferring just the payment of the principle, or to allow the payment of a part of the principle and interest.

The Central Bank of Kenya on its part has also taken steps to support the banks. Some of the measures it has announced is the lowering of the Central Bank Rate to 7.25 per cent which is intended to allow for more affordable credit. It has also lowered the cash reserve ratio to 4.25 per cent which will lead to additional liquidity of KES 35.2 billion. Further additional measures may be announced upon further review of the situation as it develops. Should the situation not improve, we may see measures such as those taken in countries hardest hit by the outbreak such as in Italy where the government has offered to provide guarantees to enable further lending.

IMMIGRATION

In a bid to quickly curb the spread of the corona virus, the Kenyan Government issued a 30 day directive running from the 17th March 2020 restricting travel into the country to only citizens and foreign residents. Subsequently, further directives have been issued suspending all international flights into Kenya from 25th March 2020. This has an effect on the movement of foreigners currently in the country.

At present, members of the public are not allowed to access the immigration offices. Officials in many government offices including the immigration offices have been asked to work from home. In view of the sensitive nature of government operations, we do not expect that the employees will be in a position to work from home efficiently. It is without doubt that the electronic processes will also be greatly affected during this time.

During this period however, applications for permits can be submitted electronically, which is recommended due to the expected increase in demand for these services when normal operations resume.

So far, it is not clear how the immigration office will treat any expired permits,

but we do expect that a directive will be issued concerning regularization of status that may have been caused by the unexpected suspension of services.

CORPORATE ISSUES

It is uncertain to what extent companies must adhere to the compliance requirements under The Companies Act, 2015 (the Act).

The Registry of Companies remains active on its electronic platforms, for this reason certain services remain available including registration of companies, filing of annual returns and changing of members and directors of a company. Registration of debentures and charges is also ongoing, the Registry has created a drop-off point for these documents. The rest of the services remain unavailable, thereby creating a compliance challenge as companies cannot comply with all the reporting requirements under the Companies Act.

Since public gatherings are at the moment illegal, companies are not capable of holding physical Annual General Meetings (AGMs). Nevertheless, where the Articles of Association of a company allow for virtual AGMs, the same can be conducted during this period. Virtual meetings will only be practical for companies with few shareholders.

We expect that the Registrar of Companies will issue guidelines on how companies can comply with the requirements of the Companies Act in light of the measures that have been put in place and continue to be put in place by the government to curb the spread of the coronavirus. The Registrar of Companies may also consider waiving all the compliance requirements that cannot be met by companies due to the measures that have been put in place by the government, until the time when this measures will be lifted.

MERGERS & ACQUISITIONS AND COMPETITION LAW

Merger notifications and applications for exemption

Given the nature of M&A transactions, M&A agreements are carefully drafted and they ordinarily contain the 'force majeure' clause whose intention is to release or to excuse parties from liability for failure to perform their contractual obligations on the occurrence of circumstances outside the control of the parties that prevent the performance of the contract. In any event, the doctrine of frustration can also be used in cases where the clause is missing. The application of both the 'force majeure clause' and the doctrine of frustration, are dependent on the stage of the specific transactions, the nature of the

obligations of the parties and the prevailing circumstances.

The Competition Authority of Kenya (CAK) has shared a publication notifying stakeholders that even during the pandemic, it will continue to operate virtually through its online platform. Therefore all the merger notification and exemption applications can be filed online.

It is worthy of note therefore, that parties to notifiable mergers, must first seek the CAK approval before implementing such transactions. It is an offence to implement such a merger (implementation means payment of full purchase price or payment of a deposit of more than 20 per cent of the purchase price) without the approval of the CAK.

A person who fails to adhere to these requirements is liable on conviction to imprisonment for a term of upto five years or to a fine of upto ten million shillings, or to both the fine and imprisonment. The CAK may also impose a financial penalty in an amount not exceeding 10 per cent of the preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question.

Restrictive Trade Practices (RTPs)

Protection of consumers is one of the main roles of CAK. The CAK is therefore very keen on RTPs that are likely to oppress consumers. CAK has indicated that its online platform is available to those wishing to register Restrictive Trade Practices (RTPs) as well as consumer complaints.

A notable RTP relevant to this time is the abuse of dominance experienced through directly or indirectly imposing unfair prices, limiting or restricting production and limiting or restricting market outlets or market access through predatory practices. Such practices are prohibited under the Competition Act.

Persons convicted of this are liable to imprisonment for a term of up to five years or to a fine not exceeding ten million shillings or to both the fine and imprisonment.

CAK has risen to the occasion by taking action against manufacturers and retailers engaging in illegal price increases. A notable example of this is the actions it took against Cleanshelf Supermarkets, a retailer well known in the market. CAK issued an order for the retailer to refund all the customers who had purchased overpriced hand sanitizers at a time that consumers rushed to purchase hand sanitizers as a protective measure from the coronavirus.

With a view of protecting the public interest, the CAK on 20th March has exercised its powers under Section 37(1)d of the Act and issued a cease and desist order. The order required all

manufacturers and distributors of essential commodities including maize flour, wheat flour, edible oils, rice, sanitizers and toilet papers to expunge exclusivity clauses from their contracts. Distributors operating retail outlets were ordered to avail the essential commodities to other retail outlets on non-discriminatory terms.

COURT CASES/LITIGATION

The Chief Justice and President of the Supreme Court of Kenya has issued directives on measures the judiciary has taken to mitigate the effects of the prevailing pandemic. The measures include, inter alia, barring members of the public from entering court premises, each court maintaining skeleton staff to attend to filing of urgent matters and each court to have one duty judge/magistrate.

Cases scheduled for hearing, mention or delivery of judgement have been put on hold. Deputy Registrars across the various High Courts in the country issued directions regarding cases scheduled for the month of March, for instance the Employment and Labour Relations Court in Nairobi directed that cases being heard/mentioned in the week beginning March 17th 2020 will be mentioned after 30 days.

Further practice directions were issued on 20th March 2020 to ensure access to justice, efficient disposal of court business, efficient use of judiciary resources, timely disposal of proceedings and to encourage use of suitable technology. The practice directions are applicable for 30 days.

The practice directions provide that, advocates should indicate their email addresses on filed pleadings for ease of service, pleadings should be emailed to court first and thereafter presented for stamping and later scanned and emailed to the counterparty, hearings to be canvassed through written submissions or teleconferencing depending on court directions and the nature of the case. If an application filed under urgency satisfies the court that it is urgent, interim orders will be granted in chambers based on pleadings or affidavits without conducting a hearing. Reserved rulings are to be delivered by transmission to the advocates by email. There is an automatic stay of execution for judgements and rulings for 14 days. The court may however in a ruling indicate the length of stay.

In summation, in as much as court sessions have been suspended the practice directions of 20th March 2020 provide an avenue through which urgent matters may be filed and ventilated. The same directions also provide for filing of time bound pleadings.

REAL ESTATE

Contracts for the sale of land

An ordinary land transaction follows the following sequence; negotiation between buyer and seller, due diligence by buyer, preparation and execution of a sale agreement, payment of deposit, submission of completion documents (documents that will facilitate transfer of title to the buyer) in exchange for payment of the balance of purchase price. In the course of the transaction and in order to protect the parties, certain safeguards are usually spelt out in the sale agreement. For instance, the deposit and balance of the purchase price should be held by the advocate of the seller as stake holder pending successful completion of registration of the transfer in favour of the buyer. Holding funds as stake holder means the sellers Advocate is holding funds in trust or at the demand of the buyer. The seller's advocate cannot release the funds without the consent of the buyer or until registration is complete.

In the overall structure of a transaction, the above means that a seller does not have access to the purchase price until the title is registered in favour of the buyer. In the wake of the coronavirus pandemic, the Cabinet Secretary in charge of the Ministry of Lands and Physical Planning, issued a notice to the effect that all land offices and registries across the country will be closed for 28 days effective Tuesday March 17th 2020. Transactions that were currently pending cannot now be completed. In essence a transaction where funds were being held by a seller's advocate as stake holder will be frustrated.

Parties that are caught in this predicament have a number of options they can consider. The parties can agree to maintain status quo and wait for the registry to resume operations. The seller can agree to grant the buyer possession pending re-opening of the registry and registration of the transfer, especially since the seller's advocate is already holding the full purchase price. Where the buyer is confident the due diligence conducted at the start of the transaction affords sufficient protection, the buyer could agree to release of the purchase price to the seller.

We need to emphasize that in all sale agreements for property sufficient warranties and indemnities have to be included to protect the parties in case of any eventuality. The options provided above are not exhaustive and ideally where the transaction cannot be completed due to closure of the lands office the parties should agree on the best available options to complete depending on the nature of the transaction, use of land and need for the proceeds of sale.

Commercial and Residential Leases

A lease is an implied or written agreement specifying the conditions under which a landlord accepts to let out a property to be used by a tenant. The agreement promises the tenant use of the property for an agreed length of time while the owner is assured consistent payment over the agreed period. The coronavirus outbreak has seen businesses scale down operations with employees / businesses being directed to let employees work from home until the pandemic is contained. As such businesses and or commercial premises will likely be unoccupied. In such a situation one may wonder whether it is possible to request for a rebate on rent or withhold payment of rent in view of the unprecedented times.

A lease creates an obligation on the tenant to pay rent as long as the tenant is in occupation of the rented premises. Withholding rent while in occupation will amount to breach of the tenants obligation under the lease. In the event a tenant is unable to pay rent owing to the pandemic, the tenant can request for reprieve from the landlord claiming the lease has been frustrated. It is not a guarantee that by claiming frustration the landlord will automatically agree to non-payment of rent or to offer a rebate on rent. This however will create an avenue of engaging the landlord in light of the prevailing circumstances.

Owing to the unprecedented nature of the pandemic and its consequences, parties are best suited to renegotiate, agree, consent or even cede some benefits or rights accruing from a contract in order to encourage continuity of business.

CONCLUSION

As discussed above, the regulatory authorities and government bodies have given specific guidance regarding their service delivery during this period. They have advised on how service suspension will affect specific processes and have provided alternative mechanisms for continuation of services electronically.

Companies are advised not to presume that certain laws are no longer applicable or any matters dealing with the government agencies and regulators are suspended. We recommend that professional guidance be sought immediately a case arises to avoid unnecessary liability.

We are your caring partner during this tough time and we undertake to support you with professional guidance and advice on any legal challenges you may experience while keeping you updated of any legal and regulatory changes during the course of the pandemic.

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This is a general guideline tax and legal alert and should not be a substitute for proper advice. For queries and clarification, kindly get in touch with Rödl & Partner

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