

In the face of the COVID-19 disaster:

# A quick guide to business relief

*(Updated as at 20 April 2020)*

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# What relief is available to businesses and employees during the lockdown?

## EXISTING UIF BENEFITS

### REDUCED WORK TIME BENEFIT

Where a company shuts down for a certain period or implements reduced working hours, an employee (assisted by the employer) can apply for the short-term UIF benefits, as set out in section 12(1B) of the Unemployment Insurance Act. Also, see the section below on the COVID-19 - Temporary Employer/ Employee Relief Scheme

The benefits payable will be the difference between the amount paid by the employer and the normal UIF benefits payable upon termination of employment. Payment is made directly into the employee's bank account, subject to the employee having enough credits.

#### Documents required:

- UI19 and UI2.7 (completed by employer)
- UI 2.1 b
- UI 2.8 (Bank form completed by the Bank)
- Letter from employer confirming reduced work time due to COVID-19
- Copy of ID document.

Completed documents can be submitted to the nearest UIF processing Centre via fax or email.

### ILLNESS BENEFIT

Where an employee is in quarantine for 14 days due to COVID-19 pandemic, the employee will qualify for illness benefits.

Confirmation from the employer and the employee must be submitted together with the application as proof that the employee was in an agreed precautionary self-quarantine for 14 days. Should an employee be quarantined for more than 14 days, a medical certificate must be submitted together with a continuation form for payment of the benefits.

#### Documents required:

- UI19 and UI2.7 (completed by employer)
- UI2.2 (a portion of which is completed by the Doctor)
- UI 2.8 (Bank form completed by the Bank)
- Copy of ID document.

The completed documents can be submitted online at [www.ufiling.co.za](http://www.ufiling.co.za)

### DEATH BENEFIT

In the event that a UIF contributor passes on as a result of COVID-19, contracted in the workplace, death benefits are payable to the deceased's beneficiaries. Persons eligible to apply for death benefits include the spouse, life partner, children and a nominated person (in that order).

#### Documents required:

- UI19 and UI 53 (completed by the employer)
- UI 2.5 or UI2.6 (deceased application)
- Death Certificate
- ID of deceased and applicant
- UI 2.8 (Bank form completed by the Bank)
- Copy of ID document.

Completed documents can be submitted to the nearest UIF processing Centre via fax or email.

## NATIONAL DISASTER BENEFIT

### COVID-19 TEMPORARY EMPLOYER/EMPLOYEE RELIEF SCHEME (AS AMENDED ON 8 APRIL 2020)

The COVID-19 Temporary Employer/Employee Relief Scheme (COVID-19 TERS) provides for a payment mechanism for employees who are not working from home during the lockdown period and are therefore not able to render services to their employers and to be remunerated for such services by their employers.

The benefits to be paid by the scheme may only be used for the cost of employees' salaries during the temporary closure of business operations and will not form part of the employer's or bargaining council's general assets. The maximum salary amount used to calculate the benefit is capped at of R17 712.00 per month, which will be paid in terms of the income replacement rate sliding scale (38%-60%), as provided for in the Unemployment Insurance Act. This means that the maximum benefit amount that an employee will be entitled to is R6 730.56 per month. Where an employee's calculated benefit falls below the minimum wage, the employee will be paid a replacement income equal to the minimum wage (currently R 3 500.00).

The Amended COVID-19 TERS Directive, issued on 8 April 2020, extends the definition of "temporary lay-off" to allow businesses that have closed a part of their operations, whilst still rendering certain services, to also apply for the scheme. The requirement that a business must suffer financial distress has also been done away with.

#### Qualifying criteria:

- Business closure, whether total or partial, must be as a direct result of the COVID-19 pandemic, which can last for a period of up to three months.
- The company must be registered with the UIF and must comply with the application procedure.

#### Documents required:

- Letter of authority.
- Signed Memorandum of Agreement from the employer or bargaining council with the UIF, or alternatively, a written or electronic confirmation of acceptance of the terms and conditions of the scheme by an employer or bargaining council.

Employers are prohibited from applying for the scheme where such application has already been made by the relevant bargaining council. In such an instance, the bargaining council must have concluded a MoA with the UIF to disburse the benefits to the employees who fall within the scope of the collective agreement and to any other employees identified in the MoA. Informal business, freelancers and commission workers do not qualify for the scheme. The scheme also allows employers to supplement the benefits received from the UIF with other payments made to their employees, provided that the total amount received by an employee does not exceed the remuneration that he/she would have ordinarily received for such period.

Applications can be made directly to the Department of Employment and Labour by reporting the business closure to the following email address: Covid19ters@labour.gov.za. An automated response will be generated setting out the application process in detail. Payment will be made by UIF to an account created by the Employer to receive the benefits.

## OTHER BENEFITS

### COMPENSATION FUND

An employee who contracts the virus through exposure at the workplace will be paid through the Compensation Fund. The Fund shall make payment for temporary total disablement as a result of COVID-19 for a period not exceeding 30 days.

For more information on this, please read our article published on 23 March 2020 titled: *Notice for compensation for occupationally acquired novel corona virus disease under COIDA.*

### NON COVID-19 RELATED TERS

This is another temporary relief scheme which is available to businesses in distress where there is a risk of employees being retrenched or subjected to reduced working hours or income. This may also require special attention under our laws relating to business rescue.

The scheme enables distressed companies to conclude a funding agreement with the UIF in terms of which the UIF pays 75% of employees' salaries whilst employees attend a training programme for a period between 6 and 12 months.

The scheme consists of an application process to the CCMA and requires the consent of the affected employees/bargaining council.

Although this scheme is available to employees affected by COVID-19, it can only be applied for after the 21-day lockdown period.



#### WHAT ABOUT ANNUAL LEAVE?

Employees may be requested by their employers to take annual leave during the lockdown period. Section 20 of the Basic Conditions of Employment Act, 1997 allows employers to determine when employees can take their annual leave, in the absence of an agreement between the employer and employee. Employees are entitled to their full remuneration for any annual leave taken during this period and may not be required to work when utilising their annual leave.

The Department of Employment and Labour however encourages employers not to request employees to utilise their annual leave credits for the lockdown, but instead to rely on the financial assistance made available by the Department through the COVID-19 TERS.

**“Employees may be requested by their employers to take annual leave during the lockdown period.”**



## OTHER MEASURES INTRODUCED BY THE GOVERNMENT TO ASSIST BUSINESSES DURING THE LOCKDOWN

### PROPOSED LEGISLATIVE AMENDMENTS

On 1 April 2020, the Draft Disaster Management Tax Relief Bill and the Draft Disaster Management Tax Relief Administration Bill was published for public comment. The draft bills provide the necessary legislative amendments required to implement the COVID-19 tax measures announced by the President, including the employment tax incentive, delay in employer payment liabilities and accelerated tax reimbursements. The invitation for comments closes on 15 April 2020.

### DELAY IN EMPLOYER PAYMENT LIABILITIES

Tax compliant businesses with a turnover of less than R50 million will be allowed to delay 20% of their pay-as-you-earn liabilities over the next four months and a portion of their provisional corporate income tax payments without penalties or interest over the next six months.

### ACCELERATED TAX REIMBURSEMENTS

SARS has committed to work towards accelerating the payment of employment tax incentive reimbursements from twice a year to monthly to get cash into the hands of compliant employers as soon as possible.

### SOLIDARITY FUND

The government has set up a Solidarity Fund to which South African businesses, organisations, individuals, and members of the international community can contribute. The Fund is aimed at preventing and tracking the spread of the virus, and to care and support affected persons and businesses. More details on how to apply to receive assistance from the Fund must still be made available.

**“The government has committed to assist employers by providing for a temporary reduction of employer and employee contributions to the UIF and employer contributions to the Skills Development Fund.”**

**“National Treasury and SARS announced a VAT exemption and a full rebate of customs duties on importation for essential goods during the COVID-19 pandemic.”**

#### **EMPLOYMENT TAX INCENTIVE (“ETI”)**

The current ETI programme allows an employer to claim ETI for employees between the ages of 18 and 29 who earn less than R6 500. The maximum monthly ETI claimable per employee is currently limited to R1 000 in the first year of employment and R500 in the second year of employment and can only be claimed for the first 24 months of employment.

**The Draft Disaster Management Tax Relief Bill proposes to expand the current ETI programme for a period of four months, beginning 1 April 2020 and ending 31 July 2020 (“the prescribed period”) as follows:**

- By increasing the maximum amount of ETI claimable during the prescribed period for employees eligible under the current ETI Act from R1 000 to R1 500 in the first qualifying twelve months and from R500 to R1 000 in the second twelve qualifying months.
- By allowing a monthly ETI claim in the amount of R500 during the prescribed period for employees from the ages of 18 to 29 who are no longer eligible for the ETI as the employer has claimed ETI in respect of those employees for 24 months; and 30 to 65 who are not eligible for the ETI due to their age.

#### **VAT**

National Treasury and SARS announced a VAT exemption and a full rebate of customs duties on importation for essential goods during the COVID-19 pandemic.

**The term “essential goods” is defined in the COVID-19 Regulations and include:**

- Any food product (which is non-alcoholic) and includes chemicals, packaging and ancillary products used in the production of the food product;
- Cleaning and hygiene products;
- Medical and hospital supplies;
- Fuel, which includes both coal and gas; and
- Basic goods, which includes airtime and electricity.

#### **TEMPORARY REDUCTION OF UIF CONTRIBUTIONS**

The government has committed to assist employers by providing for a temporary reduction of employer and employee contributions to the UIF and employer contributions to the Skills Development Fund. The details surrounding this relaxation have not yet been released.

INCOME TAX AND DONATIONS TAX RELIEF AVAILABLE FOR DONORS AND QUALIFYING PUBLIC BENEFIT ORGANISATIONS (PBO)  
ESTABLISHED TO ASSIST WITH COVID-19 DISASTER RELIEF EFFORTS

Income tax and donations tax relief measures have been made available for donors and qualifying PBOs.

**THE INCOME TAX RELIEF INCLUDES:**

1. An exemption from income tax on receipts and accruals of the PBO (other than from certain business undertakings and trading activities);
2. An exemption from donations tax on donations made to or by the PBO from donations tax; and
3. An income tax deduction on donations made to a PBO will be tax deductible in the hands of the donor. (The amount of tax deductible donations allowable in any year of assessment is limited to 10% of the taxable income of that donor.)

**In light of the above-mentioned COVID-19 tax relief measures the following retrospective amendments have been proposed in terms of the Disaster Management Tax Relief Bill published by National Treasury on 1 April 2020:**

1. COVID-19 disaster relief funds will on application and approval by the Commissioner for SARS be deemed to be PBO's as contemplated by the Income Tax Act and will be subject to the same criteria prescribed to all PBO's in terms of the Act, on the following basis:
  - a. The approval as a PBO in terms of sections 30 and 18A of the Act will only apply for a limited period of 4 months beginning from 1 April 2020 until 31 July 2020;
  - b. Receipts and accruals of COVID-19 disaster relief fund will be exempt from income tax;
  - c. Donations made to or by the COVID-19 disaster relief funds will be exempt from donations tax;
  - d. The COVID-19 disaster relief fund will also qualify for approval in terms of section 18A in respect of donations made to it; and
  - e. Donations made to a COVID-19 disaster relief fund will qualify for a tax deduction in the hands of the donor, subject to the limitation provided in section 18A (This limitation provides that the donor may deduct in any year of assessment the amount of the donation made by that person, limited to 10% of the taxable income of that donor before a section 18A deduction or section 6quat deduction).

**TRANSFER OF ASSETS OF A COVID-19 DISASTER RELIEF FUNDS**

At the end of the period of four months, the COVID-19 disaster relief funds will cease to apply the provisions set out in the Disaster Management Tax Relief Bill.

In addition, amendments are made in the Disaster Management Tax Relief Bill to deem, at the end of the period of 4 months, COVID-19 disaster relief funds that have not dissolved and the assets thereof are not distributed on or before 31 July 2020, to be small business funding entities as contemplated in section 30C of the Income Tax Act.

CORPORATE GOVERNANCE: APPLYING KING IV

Boards of companies, and individual directors in the exercise of their fiduciary duties, should take careful cognizance in these difficult times and continue to apply the four underpinning philosophies of King IV in all their decision-making. The four philosophies are (i) Integrated thinking, (ii) Corporate Citizenship, (iii) Stakeholder inclusivity, and (iv) the company as an integral part of society. This is particularly so when decisions taken too hastily now may be tested and possibly disputed in the months and years to come.

i

Integrated thinking

ii

Corporate citizenship

iii

Stakeholder inclusivity

iv

The company as an integral part of society

# Industry specific financial assistance

## TRADE, INDUSTRY AND COMPETITION

### COMPETITION EXEMPTIONS FOR BANKS AND RETAIL

Commercial banks have been exempted from the Competition Act to coordinate on measures which can be used to support business and citizens.

**In particular, the exemptions will enable banks to coordinate in respect of:**

- payment holidays and debt relief for business and individual citizens subject to financial stress.
- limitations set on asset repossessions of business and individual citizens subject to financial stress.
- the extension of credit lines to individuals and businesses subject to financial stress.

### IDC FACILITY

The IDC has put a package together with the Department of Trade, Industry and Competition of more than R3 billion for industrial funding to address the needs of vulnerable firms and to fast-track financing for companies critical to our efforts to fight the virus and its economic impact.

This facility will be available to South African owned businesses. In addition, the IDC has made available a capital allocation of R3 billion in the next quarter to support businesses during this crisis.

### COVID-19 BLOCK EXEMPTION FOR THE RETAIL PROPERTY SECTOR

On 24 March 2020, the Minister of Trade, Industry and Competition published regulations which exempt certain categories of agreements or practices between designated retail tenants and landlords from the application of sections 4 and 5 (restrictive horizontal and vertical practices) of the Competition Act, for the sole purpose of responding to the COVID-19 pandemic.

**The purpose of the exemption is to allow retail tenants and landlords to reach agreements in respect of:**

- Payment holidays and/or rental discounts for tenants
- Limitations on evictions of tenants.
- Suspension or adjustment to lease agreements that restrict retail tenants from undertaking reasonable measures required to protect viability during the national disaster.

The exemption only applies to the following three categories of retailers: clothing, footwear and home-textile retailers, personal care services and restaurants.

**“Commercial banks have been exempted from the Competition Act to coordinate on measures which can be used to support business and citizens.”**

### RETAIL TENANT RELIEF PACKAGE

On 7 April 2020, the newly formed Property Industry Group, consisting of SA REIT Association, SA Property Owners Association and SA Council of Shopping Centres announced the Retail Tenant Relief Package for retail tenants affected by the COVID-19 pandemic. The primary focus of the relief package is aimed at SMMEs across all sectors, however larger retailers affected by the lockdown will also be able to apply for support from the group.

The initiative aims to preserve jobs for retailers, their suppliers and service providers. To qualify for the relief, retail tenants must undertake not to retrench any staff during the relief period.

For April and May 2020 (“the relief period”), retail landlords will offer relief in the form of rental discounts and interest-free rental deferrals which includes rent, operating costs and parking rental but excludes all rates, taxes, utilities and insurance, which tenants will still be required to pay in full during the relief period. The package is premised on the assumption that the lockdown will not extend beyond 21-days, in which case tenants will have to rely on the relief provided by the government, the banking sector and the Solidarity Fund.

Although the package stipulates the minimum relief that tenants can expect to receive, each landlord has the discretion to determine the ultimate relief that it will give to a tenant, which may not be less than the specified minimum.

The package also stipulates that there will not be any evictions for the next two months for tenants whose accounts were in good standing at 29 February 2020.

Retailers trading in non-essential services (who are prohibited from trading during the lockdown), and in good standing, are also offered assistance from landlords, depending on the severity of the impact on the business.

Retailers that have insurance or receive relief from other sources will receive less support from the package.

### SMES IN TOURISM AND HOSPITALITY SECTOR

#### COVID-19 Tourism Relief Fund

On 7 April 2020, the Minister of Tourism announced that the Tourism Relief Fund is open for applications with effect from 7 April until 30 May 2020.

The funding, which is capped at R50 000 per entity, will be guided by the B-BBEE Amendment Act, 2013 and Codes of Practices which is aimed at achieving economic transformation. Preference will be given to enterprises with the highest score in terms of the criteria, which serve as a pre-qualification. The funds will also be distributed equally amongst provinces.

#### The following categories are eligible to apply for the Tourism Relief Fund:

- Accommodation establishments: Hotels; Resort properties; Bed and Breakfast (B&B's); Guest houses; Lodges and Backpackers.
- Hospitality and related services: Restaurants (not attached to hotels); Conference venues (not attached to hotels), Professional catering; and Attractions
- Travel and related services: Tour operators; Travel agents; Tourist guiding; Car rental companies; and Coach Operators.

More information on the fund and qualifying criteria can be found on the Department of Tourism's website, accessible at [www.tourism.gov.za](http://www.tourism.gov.za). Funding applications can be submitted by completing a form accessible online at [www.tourism.gov.za/Pages/COVID19tourismrelieffund.aspx](http://www.tourism.gov.za/Pages/COVID19tourismrelieffund.aspx)

Inquires on the fund can be emailed to [callcentre@tourism.gov.za](mailto:callcentre@tourism.gov.za) or [COVIDrelief@tourism.gov.za](mailto:COVIDrelief@tourism.gov.za).

**“On 7 April 2020, the Minister of Tourism announced that the Tourism Relief Fund is open for applications with effect from 7 April until 30 May 2020.”**

#### SMALL AND MEDIUM ENTERPRISES

The Department of Small Business Development has made over R500 million available to assist small and medium enterprises that are in distress. The Department is finalising the SMME Support Intervention Plan which comprises of the Debt Relief Fund and Business Growth/Resilience Facility.

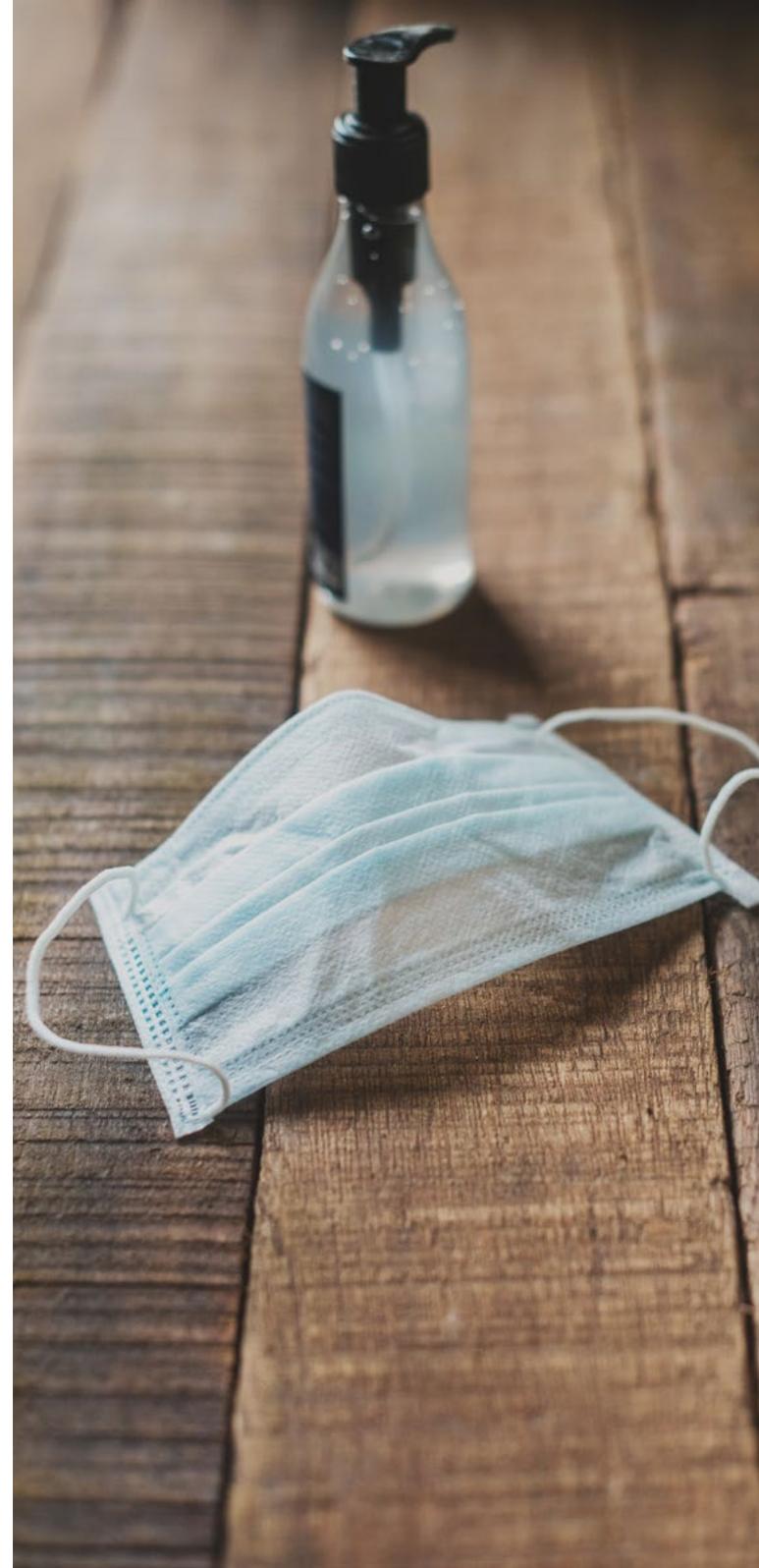
SMMEs requiring assistance will be required to enrol on the SMME South Africa platform at [www.smmesa.gov.za](http://www.smmesa.gov.za)

SMMEs already funded by the Small Enterprise Funding Agency (SEFA) and which are negatively affected by the COVID-19 outbreak will qualify for the SEFA-Debt Restructuring Facility in terms of which SEFA will grant a payment holiday for up to six months.

#### AGRICULTURE AND FOOD SECTOR OF SOUTH AFRICA

The Department of Agriculture, Land Reform and Rural Development has set aside a package of R1.2 billion to address the effects of the virus and to ensure sustainable food production after the pandemic. Further details of this package, together with the application process, will soon be provided by the Department. A further R100 million has also been made available to the Land Bank to assist farmers under distress.

“The Department of Small Business Development has made **over R500 million available to assist small and medium enterprises that are in distress.**”



# ***Force majeure* and supervening impossibility of performance**

Parties to contracts whose obligations are now difficult or impossible to meet because of the lockdown are asking whether they are excused from their contractual obligations because of the lockdown.

## **WHAT IS THE LAW?**

The position of contracting parties with the foresight to include a *force majeure* clause in their contract will be regulated by that clause.

In the absence of a clause dealing specifically with *force majeure*, then the common law will apply.

## **WHAT IS A FORCE MAJEURE CLAUSE?**

A *force majeure* – or *vis major* – is a superior force or event or circumstance beyond the control of contracting parties and as a result of which contractual performance is impossible. It is an act of God or man that is unforeseen or unforeseeable to either contracting party. *Force majeure* normally terminates contractual obligations, but the specific legal position between contracting parties will depend on their intention expressed in the *force majeure* clause in their contract.

### **An example of a force majeure clause is:**

*“In the event of force majeure, the contract will be suspended for the entire period during which the force majeure occurrence continues. Should the occurrence exceed 6 (six) months, either party becomes entitled to terminate the contract by giving written notice of termination to the other party.”*

Parties to a contract are free to customise the clause to suit their needs and specific industry. A well-constructed force majeure clause can eliminate a lot of the uncertainty that may arise in the event of the occurrence of a force majeure. The intention with the clause is effectively to agree in advance, where the risk will lie on the happening of a future event.

## **TYPICAL OCCURRENCES THAT ARE CLASSIFIED AS FORCE MAJEURE EVENTS**

- Strikes, lockouts or riots; Acts of god, fire, storm, earthquakes; Acts of State, regulation or law; Breakdown, malfunction, or damage to plant, machinery, equipment or facilities; Epidemics or quarantines; Delay, shortage, lack of, or interruptions to supplies, electricity, gas, water, equipment, fuel and other materials; Road closures or lack of access to roads; and Inability to obtain or renew the required permits or licenses.

A lockdown such as the one we are experiencing may be regarded as an Act of State, law or regulation.

#### YOU HAVE NO WRITTEN CONTRACT, OR IT IS SILENT ON FORCE MAJEURE

In the absence of a force majeure clause, the position is regulated by the common law principle of “supervening impossibility of performance”. An impossibility that arises after the conclusion of a contract is called supervening impossibility of performance, which means that performance has become objectively impossible without the fault of the debtor as a result of an unavoidable and unforeseen event.

#### THE EFFECT OF “SUPERVENING IMPOSSIBILITY OF PERFORMANCE”

Supervening impossibility of performance affects both the obligation that has become impossible as well as any counter-obligations. If the impossibility is permanent, it generally excuses the creditor from rendering any counter-performance and obligations are extinguished on both sides. If the seller objectively through no fault on their part cannot deliver, the purchaser does not have to make payment. If the service provider cannot deliver the service, the client is not liable to make payment. Restitution of whatever was performed under the contract must take place, which can be enforced by an enrichment action.

If the impossibility is either temporary or partially impossible the circumstances of the case will determine the effect on contractual obligations. It is possible that a performance is divisible, in which case the debtor will only be released from those parts of the obligation which have become impossible to perform.

#### REQUIREMENTS FOR SUPERVENING IMPOSSIBILITY OF PERFORMANCE

**Two requirements must be met before supervening impossibility of performance can terminate a contract:**

- The performance must be objectively impossible; and
- The impossibility must be unavoidable by a reasonable person.

Objective impossibility means it must be impossible for anyone to perform under the contract; it is not enough that it is impossible for the specific contracting party to perform. Neither is it enough that performance has become difficult or expensive. The second requirement means that the impossibility cannot be due to any of the contracting parties – it must be attributable to any unavoidable act of nature or human beings.

# Business rescue

The business rescue process, as implemented by the Companies Act No. 71 of 2008, is a mechanism designed to enable financially distressed businesses to restructure its affairs with the help of a business rescue practitioner.

## HOW TO ENTER INTO BUSINESS RESCUE AND WHEN IT SHOULD BE CONSIDERED

The board of a company may adopt a resolution to enter into voluntary business rescue if a company is financially distressed and there appears to be a reasonable prospect of rescuing the company. The required resolution must be filed with CIPC and notice thereof must be sent to all shareholders, creditors, employees and registered trade unions.

Alternatively, an application to place a company in business rescue can be brought by a shareholder, a creditor, a registered trade union representing employees or, if there is no trade union, the employees or their representatives.

CIPC has indicated that it will not issue compliance notices to companies which it has reasonable grounds to believe are trading recklessly or negligently due to trading difficulties caused by COVID-19 and the national lockdown. However, it is imperative that companies keep looking towards the future and take into account the possible ripple effect and liability of directors which may flow from a failure act responsibly. In the recent judgment of *Ziegler South Africa (Pty) Ltd v South African Express Airways SOC Limited and Others (1205/2020) [2020] ZAGPJHC 29 (6 February 2020)* the Johannesburg High Court indicated that directors who oppose a business rescue application unreasonably and on spurious grounds may be held personally liable for the costs thereof.

Directors and business owners of companies who may become financially distressed during this time are urged to seek further legal advice to explore the benefits and relieve which may be provided to it during business rescue proceedings.

## WHO IS THE BUSINESS RESCUE PRACTITIONER AND WHAT IS THEIR ROLE?

The business rescue practitioner supervises the company and manages its affairs, property and business during business rescue. A business rescue must investigate the affairs of the company to determine whether the company can be rescued. If so, they must draft and, if accepted, implement a business rescue plan to rescue the company.

## THE ROLE OF DIRECTORS DURING BUSINESS RESCUE

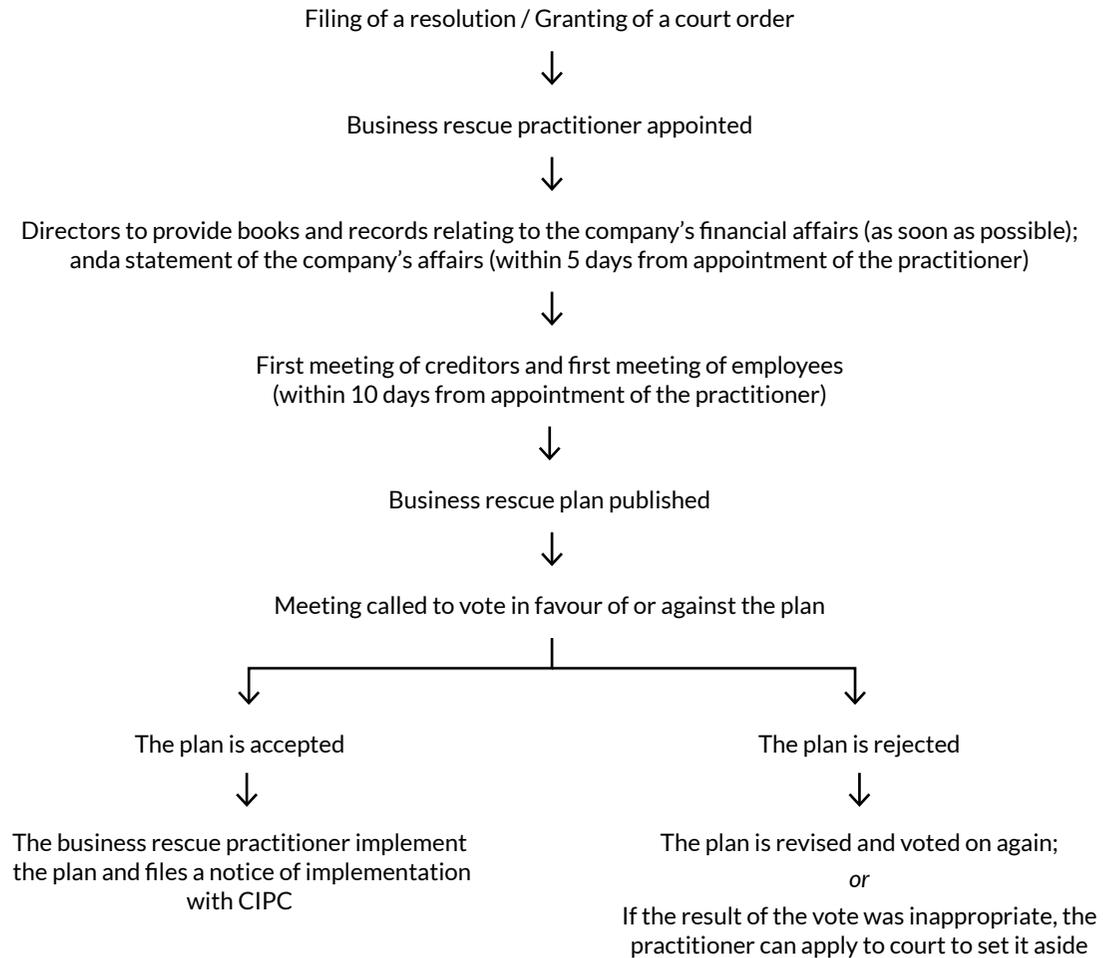
Directors continue to exercise their duties and functions, subject to the authority of the business rescue practitioner. They must also provide the business rescue practitioners with the records relating to the company's financial position as well as a statement of its affairs.

## WHEN IS A COMPANY "FINANCIALLY DISTRESSED"?

A company is financially distressed if, within the immediately ensuing six months,

- it is unlikely that the company will be able to pay its debts as they become due and payable in the ordinary course of business; or
- it is likely that the company will become insolvent.

## AN OVERVIEW OF THE PROCESS



## BENEFITS OF BUSINESS RESCUE

**Business can provide much needed breathing space to a company, enabling it to achieve solvency, in that:**

- There is a general moratorium, or suspension, of legal proceedings against the company during business rescue.
- The company continues its operations during business rescue.
- The business rescue practitioner may suspend (entirely, partially or conditionally) specific contractual obligations of the company and may even apply to court for the cancellation thereof on just and reasonable grounds.
- Job losses are prevented or limited.
- Employees are classified as preferred unsecured creditors (i.e. any remuneration that becomes due and payable to them during business rescue proceedings will take preference over all other secured and unsecured claims against the company).
- It aims to achieve a result for creditors which is more favourable than immediate liquidation of the company.
- Property interests are protected as the rights of creditors in respect of property in possession of the company is suspended.
- Business rescue benefits the greater economy in that it leads to continuity, in turn, results in employment opportunities being preserved and continued contribution to the economy by the business itself as well as its employees in their capacity as consumers.

# Companies and Intellectual Property Commission (the “Commission”) eases the prohibition on reckless trading for companies

**On 24<sup>th</sup> of March 2020, the Companies and Intellectual Property Commission (the “Commission”) issued a practice note which read as follows:**

*In light of the COVID-19 pandemic and the declaration of a national state of disaster under the Disaster Management Act, 57 of 2002, the Commission will not invoke its powers under section 22 of the Companies Act, in the case of a company which is temporarily insolvent and still carrying on business or trading. This is only applicable where the Commission has reason to believe that the insolvency is due to business conditions, which were caused by the COVID-19 pandemic.*

**Section 22(2) of the Companies Act 71 of 2008 (the “Companies Act”) provides the following:**

*If the Commission has reasonable grounds to believe that a company is engaging in conduct prohibited by subsection (1), or is unable to pay its debts as they become due and payable in the normal course of business, the Commission may issue a notice to the company to show cause why the company should be permitted to continue carrying on its business, or to trade, as the case may be.*

**The purpose of section 22 of the Companies Act is to prohibit reckless trading. On a reading of section 22(1) of the Companies Act in particular, the following two separate segments are identified as it relates to the purpose of the section:**

1. by prohibiting reckless trading occasioned by gross negligence, with intent to defraud any person or for any fraudulent purpose; and
2. by discouraging the continued trade of a company where it is unable to pay its debts as they become due and payable in the normal course of business

**The first segment above requires a certain standard of fault on the part of the directors, as the controlling mind of a company. The test here would ordinarily be attributed to the mechanisms employed under delict in ascertaining fault, namely:**

- where a wrongdoer had foreseen the harm and reconciled himself to the effects of his action, in the case of intention; and
- where a wrongdoer had failed to show due care, skill and diligence as expected of his office and further failed to act in accordance with how a reasonable man would have acted in his position, in the case of gross negligence.

However, under section 22, the Commission is not burdened with such a heavy onus. All that needs to be showed by the Commission is that the company on whom the relevant notice has been issued against as contemplated by section 22(2) above, failed within 20 business days to satisfy the Commission that it is not engaging in conduct prohibited by subsection (1), or that it is able to pay its debts as they become due and payable in the normal course of business. The procedural ease with which the Commission is empowered with in issuing a compliance notice to a company requiring it to cease trading is testament to the intention of the legislator to prohibit reckless trading and impose a culture of honesty in our corporate environment.

**The test used to determine whether a company is financially distressed is highlighted in section 128(1)(f):** *Financially distressed in reference to a particular company at any particular time, means that it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months, or that it appears to be reasonably*

*unlikely that the company will become insolvent within the immediately ensuing six months.*

*The Practice Note furthermore mentions that it will only extend to companies whose financial distress was caused as a result of the COVID-19 pandemic. This could mean that the Practice Note only relates to the second segment above in permitting companies to trade even where it is unable to pay its debts as they become due and payable. This is not spelled out clearly in the Practice Note. Given the ambiguity in the Practice note, may directors now perform their functions and exercise their duties with no regard to the degree of care, skill and diligence that may be reasonably be expected of him? We can surely not nod to this notion in the affirmative but this is the effect of the Practice Note by the Commission.*

**Many companies are facing a harsh reality of having to brace for a deteriorating financial position during these unprecedented times. Sailing a company further through the insolvency waves will only worsen its financial position. In this regard, section 129(7) states the following:**

*If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution ... the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128(1)(f) that are application to the company, and its reasons for not adopting a resolution contemplated in this section.*

The Commission ought to have encouraged companies in this time to progressively and rigorously implement measures and other restructuring plans to curb losses as opposed to relaxing certain crucial corporate governance principles as it relates to maintaining the best interests and expectations of trade creditors.

# Business interruption claims

Business interruption insurance is designed to compensate the business for the financial impact of the interruption/interference as a result of physical damage to the insured property or other key external events, for example damage at a key customer or supplier's property (the latter is known as contingent business interruption).

Businesses can purchase contingent business interruption coverage, an aspect of business interruption insurance, where the coverage is triggered by property damage at the premises of a supplier or customer, or other trigger such as loss of utility, denial of access or the act of a local authority which results in a financial loss a business may suffer. "Contingent" losses are losses stemming from damage to property not owned, controlled, or operated by the insured.

Most contingent coverages are designed to protect an insured when suppliers, customers, or property on which an insured may depend suffer damage or are prevented from delivering or receiving goods and/or services.

Not all contingent coverages require damage to property. Some merely require loss caused by an insured peril or in the case of all-risk policies, a non-excluded peril. For example, losses suffered as a result of the national lockdown in an all risk policy may trigger a policy response. In *Fountain Powerboat Indus. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552 (E.D. N.C. 2000) a policy that covered "the necessary interruption or reduction of business operations conducted by the insured and caused by loss, damage, or destruction by any of the perils not excluded" did not require physical damage to trigger civil authority or ingress/egress coverage.

The purpose of business interruption insurance is to restore the business to the same financial position as if the loss had not occurred as well as to cater for additional increased costs/expenses incurred to minimize further loss of revenue and lessen the time to do so, subject always to the terms and conditions of the policy.

Examples of impacts associated with COVID-19 may include (i) contingent business interruption loss as a result of government-imposed quarantines of individuals and communities deemed to have clusters of cases, as well as enforced closures or severe restrictions on businesses, (ii) income loss and business interruption resulting from closure of a business or significant curtailment of business activity or extra expenses due to the closure of a facility of a key customer or supplier (iii) resulting loss of income, either from the closure of the insured premises or loss of customers due to identification of the coronavirus at the insured premises (iv) costs of evacuation of insured property and (v) costs of testing and sanitizing of insured's premises.

**Generally, the applicable standard conditions for coverage for a contingent business interruption include:**

- 15km radius within the insured premises and territorial limitation;
- specified suppliers/customers listed in the policy schedule;
- interference/interruption to endure up to 30-60 days; and
- applicability of sublimit.

**“The purpose of business interruption insurance is to restore the business to the same financial position as if the loss had not occurred...”**

From decided international cases it is evident that the requirement of “physical damage” or “loss” to trigger a policy response can be given an expansive meaning depending on the policy wording and the cause of the interruption/interference of business. For example, in *Wakefern Food Corp. v. Liberty Mutual Fire Ins. Co.* 2009 New Jersey Appellate Division, the court determined that the term “physical damage” was ambiguous and should be construed in favour of coverage where a grocery store suffered loss following a blackout. Similarly, in *Gregory Packaging Inc. v. Travelers Prop. Cas. Co. of Am.* (D.N.J. Nov.25 2014), the District Court for the District of New Jersey found that “courts considering non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gasses or bacteria suffered direct physical loss or damage.

In *American Guarantee & Liability Insurance Co. v. Ingram Micro Inc.*, 2000, the court held that “physical damage” could not be restricted to “physical destruction or harm” to the computer network system, but includes “loss of use, loss of access & loss of functionality”.

COVID-19 was included as a notifiable medical condition/disease on 8 January 2020. This date could have a significant impact on the “trigger date” for a relevant insurance policy. But in South Africa, COVID-19 has not been declared as a notifiable medical condition/disease. This further complicates issues.

One of the key considerations to determine coverage of claims arising from COVID-19 related losses will be whether businesses incurred “direct physical loss or damage” to the insured peril(s). International cases, in part, may have offer an answer or some guidance in this regard.

There is no standard business/contingent interruption policy and coverage will need to be determined based on the specific facts and type of insurance cover. All businesses must immediately take steps to carefully evaluate their insurance coverage. If there is a possibility that coverage is available, the insured should promptly notify their insurers, take steps to minimize damage (where possible), and diligently quantify and categorize their losses. Similarly, insurers need to assess and determine their exposure for potential claims arising from the COVID-19 outbreak and the resultant lockdown.

# Guidance on the processing of personal information for the purpose of COVID-19

On 3 April 2020, the Information Regulator published a Guidance Note on the processing of personal information in the management and containment of COVID-19. This follows the publication of the Amended Lockdown Regulations which provides for the establishment of a national database to enable the tracing of persons who are known or reasonably suspected to have come into contact with any person known or reasonably suspected to have contracted COVID-19. The Amended Regulations also allows the Director-General: Health to direct an Electronic Communications Service Provider (ECSP) to provide him/her with location-based data for the purpose of tracking data subjects to manage the spread of COVID-19.

The Guidance Note stipulates that the ECSPs should provide the Government with the location-based data of data subjects which can be used for managing COVID-19 if such provision complies with an obligation imposed by law, amongst other requirements. However, the Government must ensure that it complies with all other applicable conditions for the lawful processing of personal information outlined in the Guidance Note.

#### These conditions include the following:

- to ensure that personal information is processed in a responsible, lawful and reasonable manner;
- to ensure that, in the absence of express consent by the data subject, there is a justifiable reason for the processing of the information;
- to ensure that personal information is collected for a specific purpose (i.e. to detect, contain and prevent the spread of COVID-19);

- to not retain records for longer than necessary to achieve its purpose and to destroy or delete the record as soon as possible if no longer required;
- to prohibit further processing not compatible with the original purpose, unless necessary to prevent a serious and imminent threat to public safety or health;
- to ensure that the personal information is complete, accurate, not misleading and updated where necessary; and
- to implement the necessary security measures to ensure the integrity and confidentiality of the personal information.

The Guidance Note further stipulates that an employer is allowed to request specific information on the health status of an employee in the context of COVID-19 to ensure a safe and hazardous free working environment, as set out in the Occupational Health and Safety Act. Employers are also entitled to force employees to undergo testing for COVID-19.

Data subjects are not allowed to refuse consent to be tested for COVID-19 and has a legal duty to disclose his/her status if tested positive.

Although most of the provisions of the Protection of Personal Information Act (POPIA) has yet to come into effect, the Regulator is encouraging proactive compliance by public and private bodies to give effect to the right to privacy.

**“The Guidance Note stipulates that the ECSPs should provide the Government with the location-based data of data subjects which can be used for managing COVID-19.”**

# Workplace preparedness: COVID-19

In the wake of the COVID-19 pandemic, the Department of Employment and Labour has published a guideline for employers on workplace preparedness.

The guideline is informed by the legislative requirements set out in the Occupational Health and Safety (OHS) Act, 1993, as amended, read with the Hazardous Biological Agents Regulations. Section 8 (1) of the OHS Act requires the employer to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risks to the health of employees. Specifically, section 8(2)(b) requires an employer to take such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard before resorting to personal protective equipment (PPE).

## CLASSIFYING WORKER EXPOSURE

### VERY HIGH EXPOSURE RISK

#### Workers in this category include:

- Healthcare workers (e.g. doctors, nurses, dentists, paramedics, emergency medical technicians) performing aerosol-generating procedures (e.g. intubation, cough induction procedures, bronchoscopies, some dental procedures and exams, or invasive specimen collection) on known or suspected COVID-19 patients.
- Healthcare or laboratory personnel collecting or handling specimens from known or suspected COVID-19 patients.
- Morgue workers performing autopsies, which generally involve aerosol-generating procedures, on the bodies of people who are known to have, or suspected of having, COVID-19 at the time of their death.

### HIGH EXPOSURE RISK

#### Workers in this category include:

- Healthcare delivery and support staff exposed to known or suspected COVID-19 patients (when such workers perform aerosol-generating procedures, their exposure risk level becomes very high).
- Medical transport workers moving known or suspected COVID-19 patients in enclosed vehicles.
- Mortuary workers involved in preparing (e.g. for burial or cremation) the bodies of people who are known to have or suspected of having COVID-19 at the time of their death.

### MEDIUM EXPOSURE RISK

This refers to jobs that require frequent and/or close contact with (i.e. within 2 meters of) people who may be infected with COVID-19, but who are not known or suspected COVID-19 patients.

### LOWER EXPOSURE RISK (CAUTION)

Lower exposure risk (caution) jobs are those that do not require contact with people known to be or suspected of being infected with COVID-19, nor frequent close contact with (i.e. within 2 meters of) the general public. Workers in this category have minimal occupational contact with the public and other co-workers.

## HAZARD IDENTIFICATION AND RISK ASSESSMENT

In accordance with section 8(2)(d) of the OHS Act, employers have an obligation to conduct a risk assessment in the workplace to determine the risk of exposure to COVID-19 which should be communicated to all workers. Different workers have different risk exposures based on job specific risk assessments.

**This should be assessed with all other hazards like:**

- Biological, Physical, Chemical, Ergonomic hazards.
- Psychosocial – exposure to long working hours, psychological distress, fatigue, occupational burnout, stigma, physical and psychological violence.

With COVID-19, it may not be possible to eliminate the hazard, the most effective protection measures are (listed from most effective to least effective): engineering controls, administrative controls, safe work practices (a type of administrative control), and PPE.

“...employers have an **obligation to conduct a risk assessment** in the workplace to determine the risk of exposure to COVID-19 which should be communicated to all workers.”



## IMPLEMENTING WORKPLACE CONTROLS

### ENGINEERING CONTROLS

**Engineering controls involve isolating employees from work-related hazards by:**

- Installing high-efficiency air filters.
- Increasing ventilation rates in the work environment.
- Installing physical barriers such as face shields.
- Specialised negative pressure ventilation in some settings (e.g. airborne infection isolation rooms in healthcare settings and autopsy rooms in mortuary settings).

### PERSONAL PROTECTIVE EQUIPMENT (PPE)

**While engineering and administrative controls are considered more effective in minimising exposure to COVID 19, PPE may also be needed to prevent certain exposures. While correctly using PPE can help prevent some exposures, it should not take the place of other prevention strategies.**

**Examples of PPE include gloves, goggles, face shields, face masks, gowns, aprons, coats, overalls, hair and shoe covers and respiratory protection, when appropriate. Recommendations for PPE specific to occupations or job tasks may change depending on geographic location, updated risk assessments for workers, and information on PPE effectiveness in preventing the spread of COVID-19.**

**All types of PPE must be:**

- Selected based upon the hazard to the worker.
- Properly fitted (e.g., respirators).
- Consistently and properly worn when required.
- Regularly inspected, maintained, and replaced, as necessary.
- Properly removed, cleaned, and stored or disposed of, as applicable, to avoid contamination of self, others, or the environment.

### ADMINISTRATIVE CONTROLS

- Encouraging sick workers to stay at home.
- Minimising contact among workers, clients, and customers by replacing face-to-face meetings with virtual communications e.g. conference calls, Skype, Teams Microsoft, Zoom etc.
- Minimising the number of workers on site at any given time e.g. rotation or shift work.
- Discontinuing non-essential local and international travel.
- Developing emergency communications plans, including a task team for answering workers' concerns and internet-based communications, if feasible.
- Providing workers with up-to-date education and training on COVID-19 risk factors and protective behaviours (e.g. cough etiquette and care of PPE).
- Training workers who need to use protective clothing and equipment on how to put it on, use/wear it and take it off correctly, including, in the context of their current and potential duties. Training material should be easy to understand and available in the appropriate language and literacy level for all workers.

### SAFE WORK PRACTICES

- Providing resources and a work environment that promotes personal hygiene. For example, no-touch refuse bins, hand soap, alcohol-based hand rubs containing at least 70 percent alcohol, disinfectants, and disposable towels for workers to clean their hands and their work surfaces.
- Requiring regular hand washing or using of alcohol-based hand rubs. Workers should always wash hands when they are visibly soiled and after removing any PPE.
- Display handwashing signs in restrooms.
- Employers must make sure that workplaces are clean and hygienic because contamination on surfaces touched by employees and customers is one of the main ways that COVID 19 spreads.

## WHAT TO DO WHEN AN EMPLOYEE SHOWS SYMPTOMS OF COVID-19

**Employers should have a response plan to deal with employees who show symptoms of COVID-19. This plan should at least:**

- Identify a room or area where someone who is feeling unwell or has symptoms can be safely isolated.
- Have a plan for how they can be safely transferred from there to a health facility.
- Know what to do if a meeting participant, staff member or service provider tests positive for COVID-19 during or just after the meeting.
- The plan should be discussed in advance with your partner healthcare provider.
- Provide contact details or a health hotline number that participants can call for advice or to give information.





## Useful links

- **Article published on COVID-19 TERS :**  
**Some Certainty for Employers & Employees during the COVID-19 lockdown**  
[www.lawtonsafrica.com/post/some-certainty-for-employers-employees-during-the-COVID-19-lockdown](http://www.lawtonsafrica.com/post/some-certainty-for-employers-employees-during-the-COVID-19-lockdown)
- **COVID-19 TERS Benefits Easy-Aid:**  
**Unemployment Insurance: COVID-19 TERS Benefits Easy-Aid**  
[www.labourwise.co.za/wp-content/uploads/2020/03/Easy-aid-guide-for-employers-DOLMarch2020-COVID19.pdf](http://www.labourwise.co.za/wp-content/uploads/2020/03/Easy-aid-guide-for-employers-DOLMarch2020-COVID19.pdf)
- **UIF Benefits:**  
**Easy-Aid Guide for Employers**  
[www.labourwise.co.za/wp-content/uploads/2020/03/Easy-aid-guide-for-employers-DOLMarch2020-COVID19.pdf](http://www.labourwise.co.za/wp-content/uploads/2020/03/Easy-aid-guide-for-employers-DOLMarch2020-COVID19.pdf)  
  
**Easy Guide for Electronic Claims:**  
[www.labour.gov.za/DocumentCenter/Publications/Unemployment%20Insurance%20Fund/Easy%20guide%20for%20electronic%20claims.pdf?platform=hootsuite](http://www.labour.gov.za/DocumentCenter/Publications/Unemployment%20Insurance%20Fund/Easy%20guide%20for%20electronic%20claims.pdf?platform=hootsuite)
- **Guidelines for Applications: business Growth/Resilience Facility:**  
[https://www.gov.za/sites/default/files/gcis\\_documents/Guidelines%20for%20Business%20Growth%20Resilience%20Facility%20Application%20%2028%20March...pdf](https://www.gov.za/sites/default/files/gcis_documents/Guidelines%20for%20Business%20Growth%20Resilience%20Facility%20Application%20%2028%20March...pdf)
- **SMME Debt Relief Scheme: Guidelines**  
<http://www.dsb.gov.za/wp-content/uploads/2020/03/SMME-Debt-Relief-Scheme-1.pdf>

Changes to the regulations are ongoing. We will provide updates as and when these are announced.

To view these changes and updates, please visit our website:

[www.lawtonsafrica.com/news/categories/COVID-19](http://www.lawtonsafrica.com/news/categories/COVID-19)

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