

# SESSION II - DEFENCES TO COVID-19 INDUCED CONTRACTUAL DISPUTES

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# This Presentation

- Non-Performance: concept of actual and anticipatory breach
- Contractual and non-contractual excuses and defences for non-performance of employment and service agreements as a result of COVID-19
- Effect of these excuses and defences on the future performance of contractual obligations
- Likelihood of success of arbitration claims relying on these defences for the non-performance of contractual obligations

## NON-PERFORMANCE: CONCEPT OF ACTUAL AND ANTICIPATORY BREACH

- **Breach:**
  - Failure to perform or fulfill obligations, partially or wholly, or otherwise appears not to be able to perform obligations
- **Actual breach:**
  - Failure to perform their obligation under the contract.
- **Anticipatory breach:**
  - Acting with an intention not to perform future obligations or the contract has become impossible to perform due to the defaulting party's own act.
- Finding of breach will entitle the non-breaching party to a claim for damages

## CONTRACTUAL AND NON-CONTRACTUAL EXCUSES AND DEFENCES FOR NON-PERFORMANCE OF EMPLOYMENT AND SERVICE AGREEMENTS AS A RESULT OF COVID-19

- Contravening the terms of the employment contract would make the employer liable to the employee for damages.
  - The National Industrial Court is empowered by Section 19(d) of the National Industrial Court Act 2006 to grant an award of compensation or damages in any circumstance contemplated by law in terms of the Court's jurisdiction this would include compensation for loss of employment and earnings and for unfair labour practice.

## CONTRACTUAL EXCUSES

- Employment contracts:
  - Generally governs the employer/employee relations.
  - Necessary to review the provisions of each contract to determine the options that are available to the parties.
  - Relevant provisions:
    - variation of terms, suspension, termination, Force Majeure, or other contractual terms that may provide an excuse for non-performance or reduced obligations.
    - Where any of these provisions are in the contract, whatever action to be taken thereunder must be done in accordance with the contractual provisions.

## Non-Contractual Excuses

- There is currently no legislation in Nigeria which enables a company to temporarily lay off employees without pay or otherwise suspend the payment of salaries.
- The Labour Act Cap L1, LFN 2004
  - Applicable to unskilled persons who perform manual labour or clerical work.
    - Section 17 of the Labour Act allows an employer to avoid paying salaries to the employees where the employer is unable to provide work to its employees for more than a 7-days period due to a temporary emergency or other circumstances beyond the employer's control.

## Common law:

- Excuses based on an unforeseeable event occurring AFTER the contract was made.
- Impossibility:
  - Where performance is “objectively impossible”.
- Frustration of purpose:
  - Limited to instances where the primary purpose of the contract is frustrated.

## EFFECT OF THESE DEFENCES ON THE FUTURE PERFORMANCE OF CONTRACTUAL OBLIGATIONS

- Termination of the employment/contract:
  - The employer may terminate the contract by giving the contractual notice or payment in lieu of notice as stipulated under the contract. In addition, the employer will be required to pay the employees their entitlements under the contract.
- Suspension of performance until a future date
- Variation of the terms of the contract (i.e. reduced working hours for reduced pay, etc.)
  - **Variation/amendment:** May be done by mutual agreement as neither party can unilaterally amend the provisions of the employment contract.

**THANK YOU**