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## ANSWERS TO QUESTIONS SUBMITTED AT THE SAPOA/GVS WEBINAR ON LEASE AGREEMENTS DURING THE COVID-19 PANDEMIC

### QUESTION 1:

An Offer (“OTL”) is valid if the name, title and contact details of the authorised person reflects on the trailing e-mails, irrespective if it reflects the signature of the authorised person. Correct?

#### Answer 1:

An OTL may be made in writing, orally, or tacitly. If it is in writing, it is only valid if it is properly signed by or on behalf of the person making the offer. It is important to note that the case law referred to dealt with the consensual cancellation of an agreement via e-mail, in circumstances where the agreement contained a non-variation clause. It did not deal with conclusion of an agreement. I would therefore be hesitant to infer that a written agreement has been concluded where the OTL document is unsigned, but is merely accompanied by e-mails indicating the electronic signature of the authorised person. In such an instance, I would prefer to rely on a partly written partly tacit agreement, the written portion being the OTL document, and the tacit portion being the acceptance of those terms through the conduct of those parties.

### QUESTION 2:

A Landlord receives OTL from a Tenant and it is signed electronically by the Landlord’s authorised signatory (e.g. Asset Manager) without amendments. The copy that is delivered/forwarded to the Tenant and this OTL is a binding Offer, even is sent by the Asset Manager’s PA. What if the document was signed and sent on behalf of the Asset Manager by the PA (who is not authorised to conclude deals), can the document’s validity be questioned?

#### Answer 2:

Again, I would be hesitant to rely on a written agreement having been concluded between the parties. In my view, it would be prudent to rather rely on a partly written partly tacit agreement.

It is also important to keep in mind that, in terms of the provisions of section 20(7) of the Companies Act, 71 of 2008, where a person deals with a company in good faith, that person is entitled to presume that the company has complied with all of its formal and procedural

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requirements in order to make a decision or exercise its powers. In other words, if a lease agreement is concluded with a company by a representative of the company, irrespective of whether a resolution is obtained or not, the company cannot later on attempt to say that the person concluding the lease was not authorised to do so. The only exception to this rule is if you knew, or ought to have known, that the person was not authorised to represent the company.

**QUESTION 3:**

Presuming that there is a signed lease that contains a variation clause, and the parties wish to vary the terms via various e-mails. The final variation is recorded as “summary of the parties discussions re selected amendments” via the computer of the PA and the mail sent on behalf of the Asset Manager (with all relevant parties were copied in the mail). The PA’s “signature” will reflect on the bottom of the e-mail. Will this stand up as valid Offer? (The supporting e-mails between the parties with the necessary authority is historically available).

**Answer 3:**

The variations will probably be accepted, and held as valid, especially if both parties acted in accordance with those variations for some period of time.

**QUESTION 4:**

Signing of leases: Kindly advise if a LEASE that is signed electronically by the Tenant (initialled each page electronically and signed at signature line in full) and forwarded to the Landlord for signature, which is then also done electronically would be a valid document that would stand up in court.

**Answer 4:**

In my view, electronic signatures also valid as set out in the previous questions. It will be more difficult for a tenant to allege that the agreement was not validly concluded if both parties acted in accordance with its terms for at least some period of time.

**QUESTION 5:**

A commercial company’s lease terminated on 31 March 2020 but they were unable to vacate due to lockdown. The new commercial tenant was due to occupy these premises on 1 April but were unable to do so due to lockdown. They paid their deposit and April rent. The incoming tenant is claiming a refund for April and the occupying tenant is refusing to pay rent for April. Who is responsible for the rent during this period?

**Answer 5:**

The common law rule, as explained in the relevant case law, is that a tenant remains liable for rental until it actually quits the leased premises, and from the time that it receives occupation of the leased premises. In the circumstances of this question, and depending on the wording of the respective lease agreements, the outgoing tenant, who remains in occupation of the premises due to the lockdown, remains liable for rentals in respect of April 2020 and further, until such time it actually vacates the premises and hands back the keys, and the new tenant only obtains

liability for rental from the time that it receives occupation of the premises. One will, however, need to assess the provisions of the respective lease agreements.

**QUESTION 6:**

A month-to-month storage tenant paid 1 month's deposit and rent for April but has been unable to take occupation and will not be able to do so in May either. The tenant has now cancelled the contract and demanding repayment of the deposit and rent. What rights do the landlord and tenant have in this situation?

**Answer 6:**

The answer will depend on the wording of the lease agreement concluded between the parties. In general, and if no lease agreement was signed, it may indeed be so that the tenant might be entitled to a refund in respect of the April rental. In any event, as the lease was on a monthly basis, no claims for further rentals after April 2020 will in any event be entertained, unless a new lease agreement is concluded.

**QUESTION 7:**

A commercial tenant whose lease terminated on 31 March 2020 managed to vacate the bulk of their equipment from the premises but could not arrange transport for some heavy timber. Can the landlord continue billing rent for the premises?

**Answer 7:**

In terms of the common law and the applicable case law, a tenant remains liable for rent in respect of a premises until the tenant has actually quitted the premises. Accordingly, in these circumstances, the tenant remains liable until the final equipment and timber have been removed.

**QUESTION 8:**

Some landlords are including personal guarantees into their leases instead of suretyships. In your opinion, which one is better?

**Answer 8:**

In our view, a deed of suretyship is preferable, as it goes wider than a personal guarantee. With the usual wording of a suretyship, the surety binds itself as co-principle debtor with the tenant, with the result that the parties become jointly and severally liable for the full debt. A personal guarantee only guarantees payment in the event of the tenant failing to make full and timeous payment.

**QUESTION 9:**

Does South African law provide for supervening change in circumstances and does the doctrine of frustration apply?

**Answer 9:**

Neither of these principles apply in the South African law. South African Law uses the concept of a supervening impossibility of performance.

**QUESTION 10:**

What is your remedy if it becomes commercially unaffordable to perform, as a result of a change in circumstances?

**Answer 10:**

Normally there is not much that one can do in those circumstances, unless the agreement includes a force majeure clause which makes provision for such circumstances. Unless of course performance becomes impossible, in which event supervening impossibility may be relied upon. In any event, the usual options of business rescue and/or liquidation in terms of the Companies Act remain available if one complies with the relevant requirements.

## **ANSWERS TO QUESTIONS SUBMITTED AT THE SAPOA/GVS WEBINAR ON THE PRACTICAL IMPLICATIONS OF LEVEL 4 REGULATIONS**

**QUESTION 1:**

- Is there a duty on employers to ban the use of cigarettes and alcohol on their premises during level 4?

**Answer 1:**

In light of the total ban on the use of liquor and tobacco products during level 4, there is no further need for employers to ban the use for those products on their premises, as the regulations in any event apply.

**QUESTION 2:**

- How should requests for concessions from restaurants who elect not to open at all during alert level 4 be dealt with?

**Answer 2:**

The legal prohibition against restaurants to trade has been lifted with effect from Friday 1 May 2020. Accordingly, these tenants can no longer state that they are legally prohibited from trading. In our view, therefore, landlords may rely on continuous trading clauses, and request from these tenants ought to be rejected. In terms of the applicable case law, difficulty, or even harshness, does not equate to impossibility, and even though it might therefore be difficult or even onerous for these tenants to trade, this does not constitute impossibility, and they will therefore no longer be entitled to rely on the principles of impossibility in order to avoid trading and/or payment of rent.

**QUESTION 3:**

- Is the employer required to screen staff on arrival at the premises?

**Answer 3:**

Temperature screening is not required in terms of the regulations, but a health assessment ought to be performed before an employee is allowed to attend work, in order to ascertain that the employee does not show any symptoms of having contracted Covid-19.

**QUESTION 4:**

- Will construction works undertaken to accommodate Government qualifies public works?

**Answer 4:**

If the construction is merely carried out in order to lease the building to Government, on our understanding of the regulation currently same will not constitute public works, and accordingly such construction will not be able to proceed at this stage. The regulations are, however, unclear in this regard, and confirmation must be sought from Government.

**QUESTION 5:**

- Is the reading of meters for tenant billing permitted?

**Answer 5:**

On our understanding same will be permitted as it falls within the financial services category in order to allow for the proper functioning of the tenants who are operating.

**QUESTION 6:**

- May an essential services business such as a medical practice move premises under level 4?

**Answer 6:**

No moving of premises is allowed. Therefore, tenants cannot vacate premises or take occupation of new premises.

**QUESTION 7:**

- Does the 30% rule apply to have employees return to work?

**Answer 7:**

The final regulations do not make provision for a 30% staggered return to work. The duties are placed on employers to ensure a phased return in accordance with their requirements.