



The South African Institution of Civil Engineering

**Dealing with the effects of COVID-19
in the ambit of the
SAICE Suite of GCC Contracts**

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*Issued by
Vishaal Lutchman
Chief Executive Officer
South African Institution of Civil Engineering
Tel: +27 (0) 11 805 5947
Fax: +27 (0) 11 805 5971
Email: civilinfo@saice.org.za
Web: www.saice.org.za*

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For the purposes of this document the *SAICE Suite of Contracts and its companion publications* explicitly include the following publications:

- ISBN No 978-0-6399234-0-6
General Conditions of Contract for Construction Works, Third Edition, 2015, 2nd Print – also referred to hereinafter as "GCC 2015" or "GCC";
- ISBN No 978-0-6399234-1-3
Guide to the General Conditions of Contract for Construction Works Second Edition 2015, 2nd Print – also referred to hereinafter as "Guide";
- ISBN 978-0-6399234-2-0
General Conditions of Subcontract for Construction Works First Edition (2018), 1st Print – also referred to hereinafter as "GCSC 2018";
- ISBN 978-0-6399234-3-7
General Conditions of Contract for Construction Works (Simplified Form) First Edition (2018), 1st Print – also referred to hereinafter as "SGCC 2018"; and
- ISBN 978-0-6399234-4-4
General Conditions of Contract for Construction Works (Short Form) First Edition (2018), 1st Print – also referred to hereinafter as "GCCSF 2018".

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ABOUT THIS DOCUMENT

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This document has been compiled by the Contractual Affairs Subcommittee of the SAICE Project Management and Construction Division. Inputs were received from all Subcommittee members and moderated and collated under the leadership of Theunis van Zyl. Subcommittee members at the time of publication of this version of the document, were:

Andrew Comley
Willie Claassen
Benti Czanik
Gordon Druce
Steven Kaplan
Tom McDonald
Norman Milne
Mike Rivarola
David Stephen
Theunis van Zyl
Bryan Westcott

*BT Czanik
Chairperson
SAICE PMCD Contractual Affairs Subcommittee
Johannesburg,
April 2020*

*T van Zyl
Portfolio Manager: FAQ
SAICE PMCD Contractual Affairs Subcommittee
Cape Town
April 2020*

ENQUIRIES

All enquiries concerning this document must be directed to:

*The Chief Operating Officer
South African Institution of Civil Engineering
Tel: +27 (0) 11 805 5947
Fax: +27 (0) 11 805 5971
Web: www.saice.org.za*

c/o: benti@saice.org.za

COVID-19 and the SAICE Suite of GCC Contracts

1. Background and Scope of this Document

Over the past months, the worldwide COVID-19 pandemic has also started having an effect on South Africa and many of its economic sectors.

The South African construction industry is one of the industries which is severely affected not only by a national lockdown, but also by other unforeseen situations related to prevailing conditions that may be related to the COVID-19 pandemic. Most construction projects have become under threat within a short period of time resulting in unforeseen delays, disruptions and additional costs, as caused by the COVID-19 pandemic.

This document analyses the generic impact on construction projects under the SAICE Suite of Contracts and gives guidance on the roles, rights, obligations and remedies of the Employer, Contractor and Subcontractor under conditions related to the COVID-19 pandemic.

The SAICE Suite of Contracts includes the following publications:

General Conditions of Contract for Construction Works, Third Edition, 2015, 2nd Print – also referred to as “GCC 2015” or “GCC”;

General Conditions of Subcontract for Construction Works First Edition (2018), 1st Print – also referred to as “GCSC 2018”;

General Conditions of Contract for Construction Works (Simplified Form) First Edition (2018) , 1st Print – also referred to as “SGCC 2018”; and

General Conditions of Contract for Construction Works (Short Form) First Edition (2018), 1st Print – also referred to as “GCCSF 2018”.

This document does not cover previous editions such as the GCC 2010.

2. Proclamation of National State of Disaster

As a result of the COVID-19 pandemic, a National State of Disaster for South Africa was proclaimed on 15 March 2020 by the Minister of Cooperative Governance and Traditional Affairs in terms of the Disaster Management Act, 2002.

Government Gazette No 43096 of 15 March 2020 contained Notice 313 wherein the Declaration of a National State of Disaster appeared.

After the proclamation of the National State of Disaster, Regulations were published in the following Separate Gazettes:

43178 30-3 StateBudget
43179 30-3 SARS
43180 30-3_NatTreas
43181 30-3 NatTreas
43182 30-3 SocialDev
43183 30-3 Transport

43169 27-3 SARB
43170 27-3 ProcDPSA
43171 27-3 NatTreasury
43173 27-3 EnvAff
43174 27-3 EnvAff
43172 27-3 MineralResources
43175 27-3 DTI
43176 27-3 Transport
43177 27-3 DTI
43150 26-3 SAQA
43151 26-3 Energy
43152 26-3 Labour
43153 26-3 NationalTreasury
43154 26-3 HighEduTraining
43155 26-3 SResBank
43156 26-3 SARS
43157 26-3 Transport
43158 26-3 Transport
43159 26-3 Transport
43160 26-3 Transport
43161 26-3 Labour
43162 26-3 HomeAffairs
43163 26-3 Transport
43164 26-3 Telecommunications
43165 26-3 Transport
43166 26-3 Transport
43167 26-3 COGTA
43168 26-3 COGTA
43136 25-3 WaterSanitation
43137 25-3 Labour
43138 25-3 Transport
43139 25-3 Labour
43140 25-3 Labour
43141 25-3 DTI
43142 25-3 Presidency
43143 25-3 SocialDev
43147 25-3 COGTA
43148 25-3 COGTA
43131 24-3 NationalTreasury
43132 24-3 Icasa
43133 24-3 Icasa
43134 24-3 DTI
43126 23-3 Labour
43125 23-3 Energy
43124 23-3 ArtsCulture
43128 23-3 CoopGov
43129 23-3 ICASA
43130 23-3 ICASA
43127 23-3 DTI
43117 20-3 ChiefJustice
43118 20-3 Labour
43119 20-3 Labour
43120 20-3 Labour
43121 20-3 Labour
43122 20-3 CoopGovernance

43123 20-3 DTI
43112 19-3 Labour
43111 19-3 Labour
43113 19-3 Transport
43116 19-3 DTI
43115 19-3 ICASA
43114 19-3 DTI
43101 18-3 SARS
43102 18-3 Labour
43104 18-3 Labour
43103 18-3 Transport
43105 18-3 Transport
43107 18-3 COGTA
43099 17-3 NationalTreasury
43097 16-3 HigherEduTrain
43098 16-3 Labour
43096 15-3 CoOperativeGovTradAff

3. Proclamation of Restriction on the Movement of Persons and Goods

Government Gazette No 43148 of 25 March 2020 contained Notice No R.398.

The definition of *lockdown* appeared under Section 8 under “CHAPTER 2, Subsection 11A”.

Restriction on the *movement* of persons and goods appeared under Section 8 under “CHAPTER 2, Subsection 11B”.

Implementation of Notice No R.398 became effective on 23:59 on Thursday, 26 March 2020, and the implementation was to stay effective until 23:59 on Thursday 16 April 2020.

4. Definitions of “lockdown” and “movement”

For the purpose of this document, the definitions of “lockdown” and “movement” shall be the same as given in Government Gazette No 43148 of 25 March 2020 which contained Notice No R.398 wherein the definitions of lockdown and movement appeared under Section 8 under “CHAPTER 2, Subsection 11A”. The definitions are reproduced as follows:

***'lockdown'** means the restriction of movement of persons during the period for which this regulation is in force and effect namely from 23H59 on Thursday, 26 March 2020, until 23H59 on Thursday 16 April 2020, and during which time the movement of persons is restricted; and*

***'movement'** means entering or leaving a place of residence or, in the case of people not ordinarily resident in the Republic, their place of temporary residence while in the Republic.*

For the purpose of this document, all references to the defined specific above term of “lockdown” has been capitalised, for example, “*the period before the Lockdown*” means “*the period before the original lockdown as proclaimed in Government Gazette No 43148 of 25 March 2020 which contained Notice No R.398 wherein the definitions of lockdown and movement appeared*”.

5. The three COVID-19 Scenarios

Three possible COVID-19 scenarios have been identified:

SCENARIO 1: Before Lockdown

This scenario applies specifically to only the period before Lockdown.

During this time, a Contractor (or Subcontractor) may have experienced loss of resources (labour) through no fault of his own, but which was attributable to the COVID-19 pandemic before any legislation was promulgated to counter the pandemic.

This is when one or more members of his labour force were tested positive (or were in contact with one or more members who were tested positive), and was duly ordered into quarantine by a medical professional or statutory authority, or died from the pandemic.

Consequently, the Contractor (or Subcontractor) was left with a reduced workforce which resulted in delay(s) and additional costs to the Contract. Such instances are subject to written proof such as a medical certificate or death certificate, and will have to be submitted to support a contractual claim.

It may also be a case where the Contractor (or Subcontractor) experiences delay(s) or additional costs due to a delay in the manufacturing, supply and delivery of materials or plant to the Site due to the impact of the COVID-19 pandemic on a manufacturer or supplier.

SCENARIO 2: During Lockdown

This scenario applies separately to:

- the original Lockdown period; and
- each subsequent lockdown period.

During this time, a Contractor (or Subcontractor) and his employees and other members of his workforce are legally prevented from movement due the Lockdown. He therefore was prevented to progress with the execution of the Works (or Subcontract Works).

Failure to achieve a successfully “flattened” curve may not only have led to a likely extension of the Lockdown, but perhaps to multiple extensions of the Lockdown.

All separate Gazettes related to the various different activities and spheres of population that came forth from the original lockdown may then be made to re-apply. Such instances are subject to written proof of the relevant legislation which must be submitted to support a contractual claim.

SCENARIO 3: After Lockdown

This scenario applies separately to:

- the period after the original lockdown period; and
- each separate period after each of multiple lockdown periods subsequent to the original lockdown period.

During this period, a Contractor (or Subcontractor) may have experienced loss of resources (labour) through no fault of his own, but which was attributable to the COVID-19 pandemic irrespective of whether any legislation was promulgated to counter the pandemic.

This is when one or more members of his labour force were tested positive for COVID-19 (or were in contact with one or more members who were tested positive), and was duly ordered into quarantine by a medical professional or statutory authority, or died from the pandemic.

Consequently, the Contractor (or Subcontractor) was left with a reduced workforce which resulted in delay(s) and additional costs to the Contractor (or Subcontractor). Such instances are subject to written proof such as a medical certificate or death certificate, and must be submitted to support a contractual claim.

It may also be a case where the Contractor (or Subcontractor) experiences delay(s) or additional costs due to a delay in the manufacturing, supply and delivery of materials or plant to the Site due to the impact of the COVID-19 pandemic on a manufacturer or supplier.

Clear distinction must be made by a Contractor between the various scenarios.

Scenario 1 and 2 differ because scenario 1 is not governed by legislation related to a lockdown, while scenario 2 is governed by legislation.

Scenario 1 and 3 differ because the Contractor's workforce (or supply of materials and/or plant) is foreseen to be affected differently by each of these scenarios because different skillsets (or key resources) are affected during each scenario (i.e. different sets of individuals from the Contractor's workforce for each scenario because of the temporal nature of the COVID-19 pandemic), and hence, different delays and additional costs shall apply to each scenario.

6. All current SAICE Forms of Contract deal with the COVID-19 scenarios

The three COVID-19 scenarios are those mentioned above.

The SAICE Suite of Contracts includes the following publications:

- ISBN No 978-0-6399234-0-6
General Conditions of Contract for Construction Works, Third Edition, 2015, 2nd Print – also referred to as “GCC 2015” or “GCC”;
- ISBN 978-0-6399234-2-0
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General Conditions of Contract for Construction Works (Short Form) First Edition (2018), 1st Print – also referred to as “GCCSF 2018”.

Each of the above-named forms of contract of the SAICE Suite of Contracts deals with the three above-named COVID-19 scenarios. In terms of Clause 4.3 of each of the above-named publications (or Clause 4.2.4 of the SGCC), a Contractor shall comply with all “*applicable laws, regulations, statutory provisions and agreements*”.

This document does not cover previous forms of contract published by SAICE in the past and which are not endorsed by the CIDB Standard for Uniformity such as, for example, the GCC 2010.

7. Flow Chart for a claim under the SAICE GCC Suite of Contracts

The flow diagram shown below is extracted from the Guide and is self-explanatory.

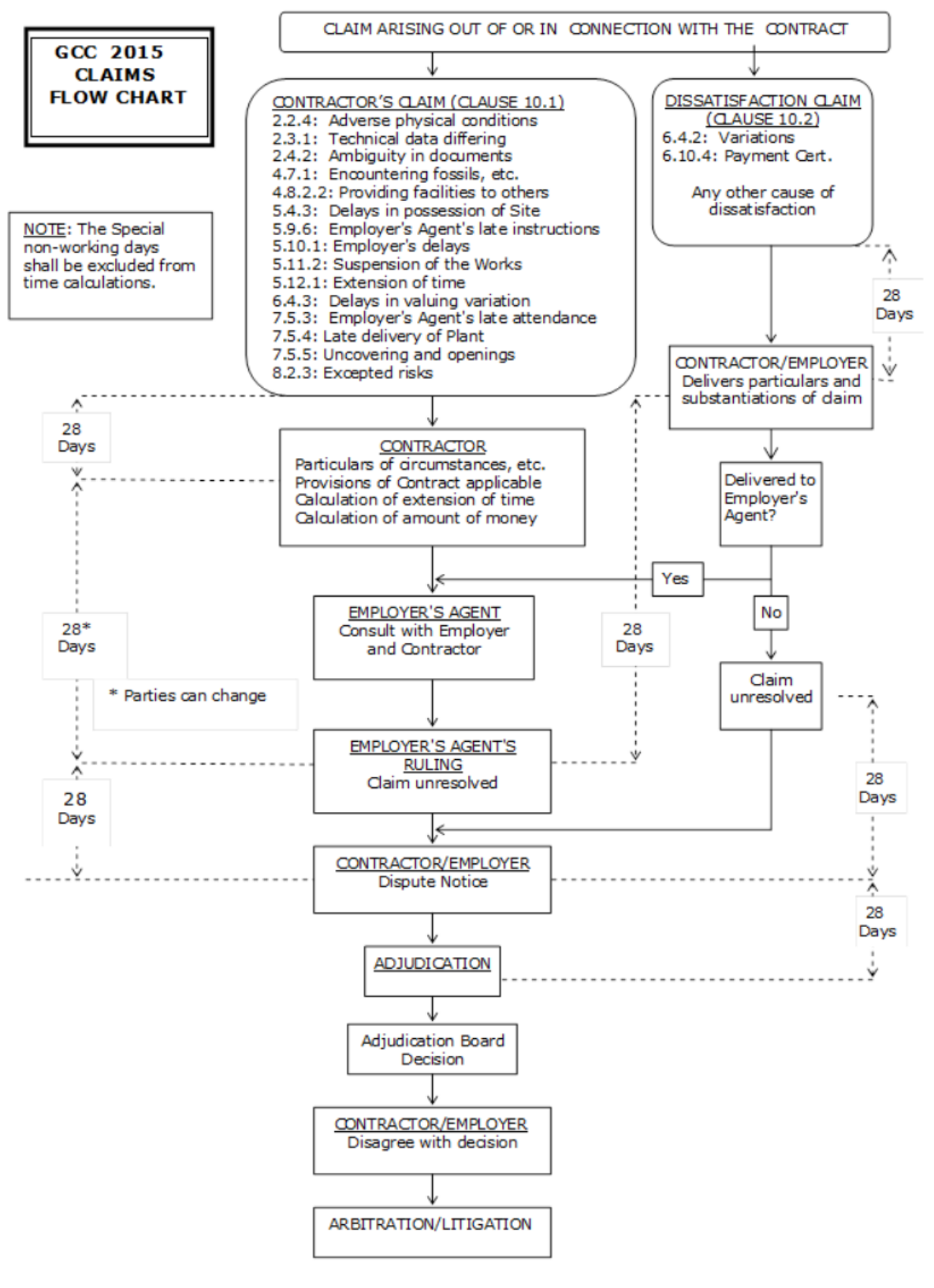


Figure 1: GCC 2015 Claims Flowchart

8. Standard Clauses from the SAICE GCC Suite that may relate to Claims

For the purposes of this document, it must be taken that all clauses apply “as they stand”. Should clauses have been amended, deleted or supplemented for a specific Contract, then this document may not apply or any guidance provided may be restrictive.

GCC 2015

GCC 2015 Clause 10: CLAIMS AND DISPUTES

In terms of Clause 10.1.1.1 of the GCC 2015 the *“Contractor shall within 28 days after the circumstance, event, act or omission giving rise to such a claim has arisen, or occurred, deliver to the Employer’s Agent a written claim”*.

In terms of Clause 10.1.1.2 of the GCC 2015 provides that in the event that the Contractor cannot reasonably comply with all or any of the provisions of Clause 10.1.1.1 of GCC 2015, the Contractor shall, within the said 28 days, notify its intention to claim in terms of Clause 10.1.1.2.1, and deliver monthly updates (if the events of circumstances are ongoing) in terms of Clause 10.1.1.3 of GCC 2015.

In terms of Scenario 1 the Contractor should be able to comply with the provisions of Clause 10.1.1.1 of GCC 2015 within the 28 day period specified.

In terms of Scenario 2 the Contractor should only notify its intention to claim in compliance with Clause 10.1.1.2 of GCC 2015 as the actual (and not predicted) period of the Lockdown period can only be determined once the Lockdown (or extended, or even reduced) period comes to an end. The same applies to quantifying a claim for proven additional costs as proven additional costs can only be proved once it was incurred.

In terms of scenario 2, the circumstance or event should be interpreted to be the limitations, impacts and resultant effects on the progress of the Works, as imposed by *Government Gazette No 43148 of 25 March 2020* and issued as a result of the COVID-19 pandemic. The 28 day period to submit a notice of intention to make a claim should therefore commence to run from 25 March 2020.

In terms of Scenario 3 the Contractor should be able to comply with the provisions of Clause 10.1.1.1 of GCC 2015 within the 28 day period specified unless the events or circumstances are of an ongoing nature, then the provisions of Clause 10.1.1.2 of GCC 2015 should apply.

GCC 2015 Clause 5: TIME AND RELATED MATTERS

Sub-Clause 5.4 Access to the Site

Sub-Clause 5.4.3 Delays in giving possession

A claim under the provisions of Clause 5.4.3 of GCC 2015, as a result of the COVID-19 pandemic, will only become applicable once the obligations in Clauses 5.3.1 and 5.3.3 of GCC 2015 have been discharged and on the premise that the Employer’s Agent’s instruction (or deemed instruction in terms of Clause 5.3.3 of GCC 2015) to commence carrying out the Works has been issued.

Upon the issuing of the instruction to commence carrying out the Works, the Employer has a duty to give the Contractor right of access and possession of the Site. If the Employer cannot now fulfil this obligation due to the limitations imposed by *Government Gazette No 43148 of 25 March 2020*, then the Contractor is entitled to submit a claim in accordance with Clause 10.1, 5.12, 5.12.2, 5.12.2.3, 5.12.2.4, 5.12.3 and 5.4.3 of GCC 2015. The 28 day period for such a claim only commence to run once the Contractor is given possession of the Site. A claim under Clause 8.3.1, 8.3.1.7 and 8.3.2 of GCC 2015 will not be applicable as the *“carrying out of the Works”* (Clause 8.3.2) has not commenced yet.

It should also be noted that once possession of the Site is given to the Contractor, it cannot be retracted due to the COVID-19 pandemic and the limitations imposed by *Government Gazette No 43148 of 25 March 2020* unless the Contract was duly terminated or Completion was achieved.

In the Imprefed¹ case, the judge ruled that once the Employer has given possession of Site (or portions successively) on due date (or due dates), this duty is discharged and the clause has no further function in the carrying out of the Contract. A subsequent deprivation of possession by the Employer, or someone acting on his behalf, does not reinstate the clause, though such conduct, if wrongful, would undoubtedly give rise to some other course of action in terms of the Contract.”

Sub-Clause 5.10.1 Delays attributable to the Employer

Relevant Sub-Clause wording (from the GCC 2015):

“The Contractor may, in writing to the Employer's Agent, demand compliance within a stated time by the Employer with the terms of the Contract, which terms shall be specified in such demand. If the Contractor suffers delay to Practical Completion and/or incurs proven additional cost from failure or delay on the part of the Employer, his agents, employees or other contractors (not employed by the Contractor) in fulfilling any necessary obligations in order to enable the Works to proceed in accordance with the Contract, the Contractor shall be entitled to make a claim in accordance with Clause 10.1, for which purpose the time limit of 28 days provided in Clause 10.1.1.1 shall commence to run only from the time when compliance with the said terms has actually taken place.”

Relevant Sub-Clause interpretation (from the Guide):

“The intention of this clause is to allow the Contractor to claim (and not to terminate the Contract) if the Employer/Employer's Agent withholds provision, approval, permission or consent not covered by the guidelines given in Clause 10.1 for claiming extension of time or additional payment. This includes matters such as the Employer's failure to provide basic survey control points, permits necessary to construct the Works, or Construction Equipment, materials or labour set out in the Scope of Work to be provided by the Employer, or not returning the performance guarantee. It also covers the Employer's Agent's failure to determine the value of the Works or to issue required certificates, such as for payment and completion, and a service owner not relocating his service.

The Contractor must state a time within which the Employer must comply with the terms of the Contract. Such a time should take the approved programme into account. For example, SANS 1921-1, Clause 4.1.2(b) requires the Employer to obtain the necessary permits to construct a bridge across a railway line. If such a permit has not been obtained, the Contractor should demand compliance well in advance of the planned start of construction on the specific bridge. If the Contractor waits until the due date for the permit starts delaying the construction of the bridge, the time for the Employer to comply may become unreasonably short.

As in the case of delays in giving possession of Site and notified additional instructions and drawings required, the Contractor only needs to make his claim within 28 days of compliance with the demand and not when the lack of demanded action starts to cause delays and additional cost.”

Recommended Sub-Clause interpretation related to the COVID-19 pandemic:

The provisions of Clause 5.10.1 of GCC 2015 may only become applicable before the Lockdown period commenced and after the Lockdown period has ended and the Employer still has not given the Contractor access and possession of the Site after the end of the Lockdown period.

To place a demand on the Employer in terms of Clause 5.10.1 of GCC 2015 during the Lockdown period and to place any reliance on Clause 5.10.1 to pursue a claim in terms of Clause 10.1 of GCC 2015 will be misplaced as performance cannot be demanded in the event that it is legally impossible for the Employer to perform during the lockdown period.

SCENARIO 1: Before Lockdown

This Sub-Clause may apply, as read with the guidance given under Clause 5.4.3, if the Contractor has not been given access to and possession of the Site.

¹ Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A).

SCENARIO 2: During Lockdown

This Sub-Clause does not apply if the Contractor wants to demand access to and possession of the Site.

SCENARIO 3: After Lockdown

This Sub-Clause may apply, as read with the guidance given under Clause 5.4.3, if the Contractor has not been given access to and possession of the Site.

Sub-Clause 5.11 Suspension of the Works

Suspension of the Works by the Contractor is only permissible if the Contractor has not been issued a payment certificate or full payment has not been made to the Contractor for a certified payment certificate.

Relevant Sub-Clause wording (from the GCC 2015):

“5.11.2 The Contractor shall, on the written order of the Employer's Agent stating the cause for suspension, suspend the progress of the Works, or any part thereof, for such time or times and in such manner as the Employer's Agent shall order.”

“5.11.4 Unless such suspension or alteration is otherwise provided for in the Contract, or by reason of some default or breach of the Contract by the Contractor, the Contractor shall in respect of delay to Practical Completion and/or to proven additional cost as a result of the suspension, be entitled to make a claim in accordance with Clause 10.1”

“5.11.6 If the progress of the Works, or any part thereof, is suspended in terms of Clause 5.11.2 for more than 84 days in total, the Contractor may deliver a written notice to the Employer's Agent requiring permission to proceed with the Works, or that part thereof in respect of which progress is suspended.

If such permission is not granted within 28 days after the Employer's Agent's receipt of the written notice, the Contractor may, by a further written notice to the Employer, elect to treat the suspension, where it affects only part of the Works, as an omission of such part under Clause 6.3 or, where it affects the whole Works, as a repudiation of the Contract by the Employer, in which case Clause 9.3 shall apply.”

Relevant Sub-Clause interpretation (from the Guide):

“5.11.2 Suspending the Works or part thereof by the Employer's Agent is a serious instruction that should not be ordered without considering the substantial costs that would result upon the consequential halting of the Works, and in the case of a prolonged suspension, the possible termination of the Contract by the Contractor.”

“5.11.4 ... Notification of a suspension in the Scope of Work without the proper payment items, will not exempt the Employer from a claim for such a suspension. [A claim for] a forced suspension for which the Contractor may claim [must include] for protection and securing the Works, demobilising and remobilising his employees, inactive Construction Equipment, General Items, and costs like making good deteriorations and defects when resuming with the carrying out of the Works. The Contractor must submit his claim in accordance with Clause 10.1 within 28 days of the date of the suspension order.”

“5.11.6 During a prolonged suspension due to default by the Employer of more than 84 days in total (adding individual suspensions to prevent avoiding termination by fractioning of a prolonged suspension), the Employer's Agent must ... face the possibility that such work will not be carried out. If part of the Works was suspended for a prolonged period, it would be treated as a Variation Order in terms of Clause 6.3, with the subsequent valuation for the omission by the Employer's Agent. If the whole of the Works was suspended, the Contractor may terminate the Contract and claim payments of amounts due to him in terms of Clause 9.3.

If the Contractor is prepared to wait for resumption of the Works beyond the 84 days, he may require the Employer to take over the risks of the Works until permission is granted to proceed. The applicable risks are set out in Clauses 8.1: Protection of the Works, 8.2: Care of the Works, 8.4: Indemnifications, and 8.6: Insurances.”

Recommended Sub-Clause interpretation related to the COVID-19 pandemic:

SCENARIO 1: Before Lockdown

Sub-Clause 5.11.2 only applies if the Employer’s Agent instructs the Contractor to suspend the progress of the Works. However, should the Employer’s Agent instruct the Contractor to suspend the progress of the Works, the Contractor may make a claim in terms of Sub-Clause 5.11.4, as read with Clauses 10.1, 5.12, 5.12.1, 5.12.2, 5.12.2.3, 5.12.2.4 and 5.12.3 of GCC 2015.

Sub-Clause 5.11.4 applies only if the Employer’s Agent instructed the Contractor to suspend the Works and remains subject to compliance with the claims procedure set out in Clause 10.1 of GCC 2015.

SCENARIO 2: During Lockdown

There is no need for the Employer’s Agent to issue written order for suspension to the Contractor to suspend the progress of the Works. The Contractor is obliged by the issuing of Government Gazette No 43148 of 25 March 2020 to not continue with carrying out the Works as compliance with Clause 4.3.1 of GCC 2015 is temporarily preventing the Contractor from discharging its obligations under the Contract.

However, in the event that the Employer’s Agent did issue a written order for suspension, the Contractor is obliged to comply with such order (or instruction) in terms of Clause 4.2.1 of GCC 2015 and accordingly the Contractor must then make a claim in accordance with Sub-Clause 5.11.4, as read with Clauses 10.1, 5.12, 5.12.1, 5.12.2, 5.12.2.3, 5.12.2.4 and 5.12.3 of GCC 2015.

SCENARIO 3: After Lockdown

Sub-Clause 5.11.2 only applies if the Employer’s Agent instructs the Contractor to suspend the progress of the Works. However, should the Employer’s Agent instruct the Contractor to suspend the progress of the Works, the Contractor may make a claim in terms of Sub-Clause 5.11.4, as read with Clauses 10.1, 5.12, 5.12.1, 5.12.2, 5.12.2.3, 5.12.2.4 and 5.12.3 of GCC 2015.

Sub-Clause 5.11.4 applies only if the Employer’s Agent instructed the Contractor to suspend the Works and remains subject to compliance with the claims procedure set out in Clause 10.1 of GCC 2015.

Sub-Clause 5.12 Extension of time for Practical Completion

Relevant Sub-Clause wording (from the GCC 2015):

“5.12.1 If the Contractor considers himself entitled to an extension of time for circumstances of any kind whatsoever which may occur that will actually extend Practical Completion of the Works beyond the Due Completion Date, the Contractor shall claim in accordance with Clause 10.1 such extension of time as is appropriate. Such extension of time shall take into account any special non-working days and all relevant circumstances, including concurrent delays or savings of time which might apply in respect of such claim.

5.12.2 Without limiting the generality of Clause 5.12.1, the circumstances referred to in that Clause include:

...

5.12.2.3 Any provision of these Conditions which allows for an extension of time, and

5.12.2.4 Any disruption which is entirely beyond the Contractor’s control.

5.12.3 If an extension of time is granted, the Contractor shall be paid such additional time-related General Items, including for special non-working days, if applicable, as are appropriate

regarding any other compensation which may already have been granted in respect of the circumstances concerned.”

Relevant Sub-Clause interpretation (from the Guide):

Users are referred to pp72-76 of the Guide which contain extensive details on these sub-clauses.

Recommended Sub-Clause interpretation related to the COVID-19 pandemic:

In the light of the world-wide COVID-19 pandemic, the whole of South Africa is also affected, which makes the remedy for a situation of a decimated workforce nearly impossible for a Contractor and its Suppliers of plant and materials to resolve.

SCENARIO 1: Before Lockdown

In the event that a decimated workforce (which is not limited to the workforce of the Contractor but also include that of its Subcontractors or Suppliers if one have regard for the wording of Clause 8.3.1 of GCC 2015) causes the Contractor to suffer delay to Practical Completion and/or brings about proven additional costs, the Contractor shall be entitled to make a claim in accordance with Clause 10.1 of GCC 2015, as read with Clauses 5.12, 5.12.1, 5.12.2, 5.12.2.3, 5.12.2.4, 5.12.3, 8.3.1, 8.3.1.7 and 8.3.2.

However, should the Employer’s Agent instruct the Contractor to suspend the progress of the Works, the Contractor may make a claim in terms of Sub-Clause 5.11.4, as read with Clauses 10.1, 5.12, 5.12.1, 5.12.2, 5.12.2.3, 5.12.2.4 and 5.12.3 of GCC 2015.

The burden of proof to claim a delay is set out in Clause 5.12.1 of GCC 2015.

SCENARIO 2: During Lockdown

The Contractor is obliged by the issuing of Government Gazette No 43148 of 25 March 2020 to not continue with carrying out the Works as compliance with Clause 4.3.1 of GCC 2015 is temporarily preventing the Contractor from discharging its obligations under the Contract.

The Contractor shall be entitled to make a claim in accordance with Clause 10.1 of GCC 2015, as read with Clauses 5.12, 5.12.1, 5.12.2, 5.12.2.3, 5.12.2.4, 5.12.3, 8.3.1, 8.3.1.7 and 8.3.2.

The burden of proof to claim a delay is set out in Clause 5.12.1 of GCC 2015.

SCENARIO 3: After Lockdown

In the event that a decimated workforce (which is not limited to the workforce of the Contractor but also include that of its Subcontractors or Suppliers if one have regard for the wording of Clause 8.3.1 of GCC 2015) causes the Contractor to suffer delay to Practical Completion and/or brings about proven additional costs, the Contractor shall be entitled to make a claim in accordance with Clause 10.1 of GCC 2015, as read with Clauses 5.12, 5.12.1, 5.12.2, 5.12.2.3, 5.12.2.4, 5.12.3, 8.3.1, 8.3.1.7 and 8.3.2.

However, should the Employer’s Agent instruct the Contractor to suspend the progress of the Works, the Contractor may make a claim in terms of Sub-Clause 5.11.4, as read with Clauses 10.1, 5.12, 5.12.1, 5.12.2, 5.12.2.3, 5.12.2.4 and 5.12.3 of GCC 2015.

The burden of proof to claim a delay is set out in Clause 5.12.1 of GCC 2015.

GCC 2015 Clause 6: PAYMENT AND RELATED MATTERS

Sub-Clause 6.8.4 Subsequent changes in legislation

Clause 6 of GCC 2015 covers payment and related matters. Sub-Clause 6.8 covers adjustment in rates and/or prices. Sub-Clause 6.8.4 covers subsequent changes in legislation. None of these Sub-Clauses apply in the COVID-19 pandemic context.

GCC 2015 Clause 8: RISK AND RELATED MATTERS

Clause 8.3.1.7 Epidemic famine or plague

The term “Force Majeure” is not recognised in South African law. This has been researched much, and an example is given by van Schalkwyk².

In South Africa, the equivalent of “Force Majeure” may in certain instances be taken as “vis major”.

Such an instance may be seen as a *supervening impossibility*. The leading case law on supervening impossibility is *Peters Flamman & Company v Kokstad Municipality 1919 AD page 427*, where it was held by the Appellate Division that “...if a person is prevented from performing his contract by vis major or casus fortuitus he is discharged from liability”.

In the COVID-19 context, the principle of a “natural disaster” applies. An epidemic and pandemic may both be taken as natural disasters, as may tsunamis, earthquakes and the like. These terms are not all listed in the SAICE Suite of Contracts, but the GCC 2015 does have a clause that covers Excepted Risks. The relevant clause is Clause 8. The relevant Sub-Clause and its interpretation are covered below.

The word “epidemic” is listed in Clause 8.3.1.7 of the GCC. From this, it stands to reason that any unlisted natural disaster arising “as a consequence of” an “epidemic” is also covered by this clause by virtue of its header subclause 8.3.1 as follows:

“8.3.1 *The excepted risks are risks of damage or physical loss or any other loss caused by or arising directly or indirectly as a result or consequence of:*

...

8.3.1.7 ***Epidemic famine or plague,***

... ” (emphasis added).

It may be argued in a court of law that a pandemic may be reasonably taken as “a result or consequence of” an “epidemic”.

It is by reference to the *Merriam-Webster* online information service that the COVID-19 started off as an epidemic as referenced by recognized authorities such as the World Health Organization (WHO), and that the WHO has played a significant role in its declarations of the specific phenomenon such the COVID-19 as a pandemic.

There is a distinct difference between an epidemic and a pandemic. The *Merriam-Webster* online information service³ gives an extensive explanation as shown in Appendix A of the differences, which in all reasonability may be taken as valid and applicable for the purposes of this document.

Relevant Sub-Clause wording (from the GCC 2015):

“8.3 *Excepted Risks*

8.3.1 *The excepted risks are risks of damage or physical loss or any other loss caused by or arising directly or indirectly as a result or consequence of:*

...

8.3.1.7 *Epidemic famine or plague,*

...”

Relevant Sub-Clause interpretation (from the Guide):

“ *Force Majeure is not part of the South African law – it has its origin in France where the Civil Code deals with it. Force Majeure covers a range of events such as war, insurrection,*

² van Schalkwyk, Annerine, *The Nature And Effect Of Force Majeure Clauses In The South African Law Of Contract*, LLM Thesis, University of Pretoria, February 2018.

³ Merriam-Webster, Usage Notes, <https://www.merriam-webster.com/words-at-play/epidemic-vs-pandemic-difference> , last accessed 2020-03-31.

natural disasters, etc. preventing a party from performing its contractual obligations. The suffering party will then be exempted from the delay or even from meeting the obligation. The lists of events and remedies for Force Majeure vary in terms of each specific form of contract. GCC 2015 does not contain a Force Majeure clause. This does not mean that the risks of similar events are not dealt with – most of these risks are dealt with in Clause 8.3.1 as the Employer's excepted risks.

The excepted or excused risks are the Employer's risks for anything in connection with loss or damage to the Works, Plant or materials on Site caused by:

- External influences such as war, invasion, etc.*
- Internal influences like insurrection, mutiny, strikes, riots, etc.*
- Natural events like famine, meteorites, pressure waves, ionising etc. Note that floods, earthquakes, landslides, wind, lightning and negligence by third parties are not included because such risks are insurable.*
- Use of the Works by the Employer or his designs, specifications and instructions.*

Therefore, if damage by external, internal or natural events or if a design, specification or instruction must be corrected by the Contractor, such work will be carried out under Clause 8.2.2.2 and valued and paid for as a Variation Order.

The question is how any other loss, except damage or physical loss to the works, should be handled, for example, a claim by the Contractor for costs and delays due to an excepted risk?

A typical application of "Excepted Risks" presented itself when an international oil embargo was placed on Iranian crude oil, which was used to produce 60/70 penetration grade bitumen at the refinery in Cape Town. Contractors in the Western Cape had to seek alternative suppliers at extra costs to comply with the specified 60/70 penetration grade bitumen.

Neither the Contractor nor the Employer could control the risk of the unavailability of the specified 60/70 penetration grade bitumen in the Western Cape. Therefore, in accordance with the risk appropriation principles of GCC 2015, it is a risk that has to be carried by the Employer. However, a Contractor must fit his claim into the Contract. He must show that his claim is based on an express provision in the Contract that allows him to claim.

For the unavailability of 60/70 penetration grade bitumen in the Western Cape, Clause 8.3, which deals with excepted risks, would be the express provision for the Contractor to claim his costs and Clause 5.12, dealing with extension of time, the express provision to claim extension of time.

Clause 8.3 (Excepted risks) deals with three types of risks. The first two risks mentioned deal with "damage or physical loss". The "damage or physical loss" to the Works is dealt with in terms of Clause 8.2.2 according to which the Employer's Agent gives an instruction to the Contractor for repairing the damage or physical loss to the Works. The cost of such work is then valued and paid as a variation order in terms of Clause 6.4. The third risk deals with "any other loss caused by or arising directly or indirectly as a result or consequence of - - - (a listed activity)". This would typically include the proven costs for protection, removal and standing time for Construction Equipment due to an excepted risk. Clause 8.3.1.12 stipulates that a specification, such as the specified 60/70 penetration grade bitumen that could no longer be manufactured in the Western Cape, is such an excepted risk.

A claim for the third type of risk for any other loss caused by or arising directly or indirectly as a result or consequence of the unavailability of 60/70 penetration grade bitumen in the Western Cape, was claimed by the Contractor in terms of Clause 10.2 as a dissatisfaction claim in GCC 2010. However, in GCC 2015 this claims procedure has been simplified. If any

of the excepted risks, other than pertaining to damage or physical loss to the Works, causes delay and/or additional costs, this may now be claimed as a Contractor's entitlement in accordance with the procedures set out in Clause 10.1 for a Contractor's claim.

Clause 5.12 deals with extension of time for Practical Completion. The unavailability of 60/70 penetration grade bitumen in the Western Cape can be seen as a disruption caused by an excepted risk that is entirely beyond the Contractor's control. Therefore, as Practical Completion was actually delayed beyond the Due Completion Date by the unavailability of 60/70 penetration grade bitumen in the Western Cape, the Contractor was entitled to an extension of time for Practical Completion that could be claimed in accordance with the procedures set out in Clause 10.1, which deals with a Contractor's claim.

The circumstance, from whence the time-bar of 28 days is measured, is the time that the Contractor became aware that he would have to pay more for the specified 60/70 penetration grade bitumen that used to be, but no longer was available in the Western Cape. Such a notice, given within the required time of 28 days, would have given the Employer the opportunity to mitigate his damages; for instance, changing the unavailable specified penetration grade of the bitumen to a locally available penetration grade bitumen.

Please note that the excepted risks are rarely covered by the insurance required under Clause 8.6.1."

Recommended Sub-Clause interpretation related to the COVID-19 pandemic and the "but for" test:

SCENARIO 1: Before Lockdown

Subclause 8.3.1.7 of GCC 2015 applies, and a Contractor can make a claim based on the grounds of a supervening impossibility for the Contractor to discharge his duties. An end of the period was not defined until the proclamation of the Lockdown.

SCENARIO 2: During Lockdown

Subclause 8.3.1.7 of GCC 2015 applies as the Lockdown was caused by an Excepted Risk and a Contractor can make a claim based on the grounds of a supervening impossibility for the Contractor to discharge his duties.

SCENARIO 3: After Lockdown

Subclause 8.3.1.7 of GCC 2015 applies as the Lockdown was caused by an Excepted Risk and a Contractor can make a claim based on the grounds of a supervening impossibility for the Contractor to discharge his duties.

Would the national lock down have occurred had the Coronavirus not been declared as a pandemic by the World Health Organisation ("WHO")?

The principle of *conditio sine qua non* is a legal test more commonly known as the "but for" test and is the test utilised to determine factual causation. In simple terms, an event is the cause of a result if the event cannot be thought away without the result disappearing simultaneously. In order to dispose of the "but for" test the question arises whether the national Lock down could be seen to be a *novus actus interveniens* or a new intervening action. In other words, we have to determine if the declaration of the Lock down can be seen to be a new link, or nexus, in the chain of events. It is clear that had it not been for Coronavirus pandemic the Minister of Cooperative Governance and Traditional Affairs would have not declared a national state of disaster and would further not have imposed the national lock down in terms of the Disaster Management Act 57 of 2002.

It is our interpretation that "but for" the declaration of the Coronavirus pandemic by the WHO the Minister would not have declared the national lock down. It is thus clear that in terms of the *conditio sine qua non* the Coronavirus pandemic is the factual cause of the national lock down.

GCSC 2018

Clause numbering of the GCSC 2018

The clause numbering and their titles of the GCSC 2018 run parallel to that of the GCC 2015, and the interpretations that apply to the GCC 2015 may be applicable *mutatis mutandis* to the GCSC 2018.

Users who are in doubt may contact SAICE at 011-805-5947 or by sending an e-mail to benti@saice.org.za.

SGCC 2018

Clause numbering of the SGCC 2018

The clause numbering and their titles of the SGCC 2018 run parallel to that of the GCC 2015, and the interpretations that apply to the GCC 2015 may be applicable *mutatis mutandis* to the SGCC 2018.

Users who are in doubt may contact SAICE at 011-805-5947 or by sending an e-mail to benti@saice.org.za.

GCCSF 2018

Clause numbering of the GCCSF 2018

The clause numbering and their titles of the GCCSF 2018 run parallel to that of the GCC 2015, and the interpretations that apply to the GCC 2015 may be applicable *mutatis mutandis* to the GCCSF 2018.

Users who are in doubt may contact SAICE at 011-805-5947 or by sending an e-mail to benti@saice.org.za.

9. Claims Guidelines

No form of contract in the SAICE Suite of GCC contracts provides for an Extension of Time only. Clause 5.12.3 of GCC 2015 allows for an automatic entitlement for the payment of additional time-related General Items, for the extension of time granted. Also, provided that a Contractor complied with the provisions of Clause 10.1 of GCC 2015 in terms of claims procedure, the Contractor will also be entitled to proven additional costs. Each claim must therefore include:

- 1: Extension of time
- 2: Time-related General Items for the extension of time claimed
- 3: Proven additional costs (those costs that are a function of production and not a function of time)

GCC 2015 and GCCSF 2018

Consult the section on claims as published in the Guide. The Guide is a separate publication and may be purchased from the SAICE bookstore at <https://store.saice.org.za/book-store>.

See details of the Guide at <https://store.saice.org.za/book-store/guide-to-the-general-conditions-of-contract-2015-second-edition>.

When ordering online or telephonically, use the reference ISBN No 978-0-6399234-1-3 Guide to the General Conditions of Contract for Construction Works Second Edition 2015, 2nd Print.

SGCC 2018

Consult the section on claims as bound in the Guide, also bound in the SGCC 2018. The SGCC 2018 may be purchased from the SAICE bookstore at <https://store.saice.org.za/book-store>.

See details of the SGCC 2018 at <https://store.saice.org.za/book-store/general-conditions-of-contract-for-construction-works-simplified-form>.

When ordering online or telephonically, use the reference ISBN 978-0-6399234-3-7 General Conditions of Contract for Construction Works (Simplified Form) First Edition (2018) , 1st Print.

GCSC 2018

Consult the section on claims as published in the Guide to the GCC 2015. The Guide to the GCC 2015 is a separate publication and may be purchased from the SAICE bookstore at <https://store.saice.org.za/book-store>.

See details of the Guide at <https://store.saice.org.za/book-store/guide-to-the-general-conditions-of-contract-2015-second-edition>.

When ordering online or telephonically, use the reference ISBN No 978-0-6399234-1-3 Guide to the General Conditions of Contract for Construction Works Second Edition 2015, 2nd Print.

Users should bear in mind that when using the Guide to the GCC 2015 for the GCSC 2018, a *mutatis mutandis* mindset change is required for the GCSC 2018, in the sense that roles as defined in the GCC 2015 are not the same in GCSC 2018. The Subcontractor's Employer in the GCSC 2018 is the Contractor of the GCC 2015. When in doubt, contact SAICE at 011-805-5947 or by sending an e-mail to benti@saice.org.za.

10. Claims to be kept apart

Imprefed (Pty) Ltd. v National Transport Commission (13/91) [1993] ZASCA 36

This is a case law of a Contractor who consolidated seven claims into one single claim. The dispute resolution process took 13 years and finally ended up in the Supreme Court of Appeal, only to be judged that every single claim must be kept apart and be managed independently.

Therefore, each Scenario must have its own set of separate claims.

11. A Final Word

The COVID-19 pandemic requires contractual interventions

The COVID-19 is an extraordinary crisis and there needs to be “give and take” from both contracting parties to try and reach equitable solutions – release of some or all retention being held, earlier payments and the like. Such measures may need negotiation between the parties and be incorporated as Supplementary Agreements to the Contract before they can apply.

Given the parlous state of the civil engineering industry to start off with this must not be permitted to be the literal straw that breaks the camel's back.

Call SAICE for further advice on their Suite of GCC Contracts

Any user of the SAICE Suite of Contracts is invited to contact SAICE for further advice at 011-805-5947. However, users must accept that any advice is given in good faith and without prejudice, and that such advice is used at own risk.

Users are reminded that not even case law may hold all the answers. This is demonstrated in the Constitutional Court judgement of the decision in Botha v Rich 2014 (4) SA 124 (CC) and Paulsen v Slip Knot Investments 2015 (3) SA 479 (CC) where the CC effectively rewrote or changed the contract for the

parties, and which placed some uncertainty onto the direction a legal outcome would have, should any matter ever end up being decided/heard at that level.

The legal fraternity may decidedly be split on the desirability and appropriateness of the CC's interventions in contractual relationships with certain very learned scholars, with lesser political aspirations, highlighting the dangers of having opened the door to contractual uncertainty notwithstanding the principles that led the to the CC's decisions in both *Botha v Rich* 2014 (4) SA 124 (CC) and *Paulsen v Slip Knot Investments* 2015 (3) SA 479 (CC) which were substantively different from construction disputes.

As for the future of the construction industry in South Africa, SAICE wish to express that the COVID-19 pandemic will forthwith be brought under control without any lasting delay and disruption to the construction industry in South Africa.

Appendix A 'Pandemic' vs 'Epidemic'

Source:

Merriam-Webster, Usage Notes, <https://www.merriam-webster.com/words-at-play/epidemic-vs-pandemic-difference>, last accessed 2020-03-31.

APPENDIX A: “Pandemic” vs “Epidemic” How they overlap and where they differ

How they overlap and where they differ

12 Mar 2020

What to Know

A disease can be declared an *epidemic* when it spreads over a wide area and many individuals are taken ill at the same time. If the spread escalates further, an epidemic can become a *pandemic*, which affects an even wider geographical area and a significant portion of the population becomes affected.



Wash hands. Moisturize. Repeat.

On March 11th, 2020, the World Health Organization officially changed its designation of COVID-19, the illness caused by a coronavirus, from an epidemic to a pandemic. This shift prompted a considerable number of people to turn to the dictionary, in order to ascertain the difference between the two -demics. What is the difference between an epidemic and a pandemic?

Epidemic vs. Pandemic

An epidemic is defined as “an outbreak of disease that spreads quickly and affects many individuals at the same time.” A pandemic is a type of epidemic (one with greater range and coverage), an outbreak of a disease that occurs over a wide geographic area and affects an exceptionally high proportion of the population. While a pandemic may be characterized as a type of epidemic, you would not say that an epidemic is a type of pandemic.

Adjectives Before Nouns

Both words have functions and meanings in addition to the ones given above. Each word entered English as an adjective before being used as a noun, beginning in the 17th century.

An Epidemick plague, is a common and popular sicknesse, hapning in some region, or countrey, at a certaine time, caused by a certaine indisposition of the aire, or waters of the same region, producing in all sorts of people, one and the same kind of sicknesse.

— Thomas Lodge, *A treatise of the plague*, 1603

These Praedicates certainly are not convertible with the fore-mentioned Diseases, and therefore ought not so rashly to be pronounced the Scorvey; which moreover is Endemick, the others Epidemick and Pandemick.

— Gideon Harvey, *The disease of London*, 1675

Epidemic began being used as a noun later in the 17th century; *pandemic* did not undergo this functional shift until the 19th.

CHAP. X. Of Pestilential and malignant Feavers, together with the small Pox, and such other Epidemics, as are Communicated by infection.

— Anon., *Pyretologia*, 1674

Those diseases which have some strong resemblance in their general characters, and attack many individuals in a large extent of country at about the same time, are commonly called *epidemics*. If all, or about all the inhabitants of a country be similarly attacked, at or near the same time, with a particular complaint, it is more properly called a *pandemic*.

— J. A. Allen, *The Boston Medical and Surgical Journal*, 5 Sept. 1832

Origins of Epidemic and Pandemic

Epidemic, which may be traced to the Greek *epidēmios* (“within the country, among the people, prevalent (of a disease)”), may carry broader meanings, such as “excessively prevalent,” “contagious,” or “characterized by very widespread growth or extent” (often used in a non-medical sense). *Pandemic* is less often encountered in a broad and non-medical sense, but does have additional senses, including “affecting the majority of people in a country or a number of countries”, “found in most parts of the world and in varied ecological conditions,” and “of or relating to common or sensual love” (in this last sense the word is usually capitalized). *Pandemic* comes from the Greek *pandēmos* (“of all the people”), which itself is from *pan-* (“all, every”) and *dēmos* (“people”).

On the Novel Coronavirus

Some organizations and scientists had recommended calling the coronavirus a *pandemic* in the weeks prior to the World Health Organization deciding to do so. It is worth noting, however, that there is no clear line distinguishing an *epidemic* from a *pandemic*. The latter

is, from a public health perspective, worse than the former, but there is sufficient overlap between the two that at certain points consensus is unlikely. The *coronavirus* has, unfortunately, spread now to such a global extent, and with such severity, that we appear to have moved past the point of semantic ambiguity; the disease has taken on *pandemic* proportions.