



KRIEK WASSENAAR & VENTER ING
PROKUREURS - ATTORNEYS

Our Ref: PJ Wassenaar/es/QB0952

Your ref:

12 May 2022

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

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President/Minister/Sir/Madam

URGENT: NATIONAL HEALTH ACT REGULATIONS: 4 MAY 2022

URGENT MEETING SOUGHT WITH PRESIDENT AND/OR MINISTER OF HEALTH

1. We act on instructions of Sakeliga NPC ("our client").
2. Our client's main objective is the protection of a constitutional order, the rule of law, market principles, and a just and sustainable business environment within the Republic of South Africa. Pursuant to its objectives, our client lobbies for reforms and supports institutional initiatives to

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• Reg: 2012/030418/21
Docdate 20220308



create a favourable business environment and flourishing society in the interest of its supporters and for the common good.

3. Our client has had the opportunity to consider and consult as widely as possible with its various supporters and stakeholders on the National Health Act Regulations of 4 May 2022 (“the Regulations”) that have been published. Our client is of the view that the Regulations are exceedingly burdensome on civil society, infringe unreasonably on constitutional rights and freedoms, are unnecessary and should be repealed with immediate effect.
4. Our client emphasises that the Regulations, even beyond their specific restrictions on masking, gathering, and so forth will harm social stability, levels of trust, and cohesion on an additional level: By transferring responsibility for enforcement of these restrictions, compulsions, and discrimination from the executive branch of the state to organisations in civil society such as businesses, churches and other religious groups, educational institutions, and more, these elements of organised society are turned into executive agents of the state. Besides the constitutional impermissibility of this development, it has the further consequence of driving deep wedges between, on the one hand, a public which overwhelmingly rejects in one way or another the regulations and, on the other hand, the organisations that make up organised society. In the case of businesses, this risk is especially pertinent, given the frequency and scale by which they are victims of crime and targeted during social unrest. The breakdown of civil co-operation from these regulations will structurally raise the cost of operating as organised civil society, including of doing business, in South Africa, to lasting detriment of public welfare.
5. We note that the Regulations published differ drastically from the Draft Regulations which were published for comment and to which our client submitted submissions.
6. We have taken legal advice on the Regulations and have been advised that the Regulations are *ultra vires*, unconstitutional and fall to be set aside on various grounds including:
 - 6.1 an inadequate and unlawful public participation process;
 - 6.2 the regulations are substantively and procedurally irrational;
 - 6.3 the regulations are *ultra vires* section 90(1) of the Act;
 - 6.4 the regulations were published for an ulterior purpose;
 - 6.5 the regulations impermissibly infringe various constitutional rights and freedoms; and

- 6.6 the regulations will continue to cripple the economy and infringe on economic activity.
7. We have also noted and perused the applications already brought by various organisations including AfriForum and Solidariteit in which the urgent review and setting aside of the Regulations is sought. Even though the applicants' various positions on the Regulations differ slightly from each other, and in turn too ours from theirs, the aforesaid applications are well-founded and the Regulations will not stand constitutional scrutiny.
 8. The Regulations seek to create an unlawful regime of coercion based on a person's medical decisions. This is even more concerning in view of the lifting of the 'state of disaster' and a decrease in the effect of COVID-19 on the health care system. We stress that it is clear from the documentation available in the public domain and recommendations of leading medical experts (including the Ministerial Advisory Committee on COVID-19) that there is currently no serious public health risk anticipated from COVID-19.
 9. The time to return to pre-Covid normality has arrived but the Regulations constitute an astounding about-turn in policy and a rejection of what should be the natural direction of change toward restored constitutional rights and freedoms. The Regulations regrettably seek to keep the public enchained by the excessive powers that the government has tasted during the 'state of disaster'. The cost to the government in the loss of trust and faith by the general population as a result of the policies deployed over the last two years is immeasurable.
 10. Our client works toward positive solutions and wants to engage with the government on the best way forward. Our client is willing to meet with the President and / or the Minister of Health to in order to avoid litigation.
 11. Kindly advise if you are prepared to engage with our client in a proposed meeting at your earliest convenience, but to be held no later than 18 May 2022 at 12h00.
 12. Should you not be prepared to meet with our client or withdraw the Regulations, we hold instructions to join other litigants in approaching the Courts to uphold the constitutional rights and freedoms of our client, its supporters and the general public. To this end we point out that (in addition to the grounds referred to above) the regulations fall to be set aside on *inter alia* the following further considerations:

- 12.1 Regulations 16B and 16C contain unconstitutional provisions based on vaccination status. There do not appear to be any rational grounds to discriminate between vaccinated and unvaccinated persons. The purpose of the regulations is said to be to “contain” the disease. It appears now to be common cause that vaccinations do not prevent infection, illness or the spread of COVID-19. The distinction between vaccinated and unvaccinated persons is accordingly irrational and without foundation.
- 12.2 Furthermore, persons who have natural immunity / protection against serious illness due to previous infection are not provided for in Regulation 16B. It appears that natural immunity has been overlooked and that the State only relies on vaccination for its containment strategy. (The “containment” strategy is also in conflict with the MAC and recent medical advice to the State.)
- 12.3 The limitation of public freedoms, based on vaccination status, is effectively a government vaccine mandate. Businesses or those in charge of public gathering places are called on to enforce this policy on behalf of the government in order to coerce the public into vaccinating. This is unconstitutional and unlawful.
- 12.4 The approach of the State in the Regulations infringes the individual rights and choice of members of the public to elect their own medical treatment and preventative measures (including the right to contract COVID -19 so as to build up antibodies in a natural manner as opposed to vaccination).
- 12.5 Notwithstanding that Regulation 16B makes no mention of past infections (and the consequent natural immunity arising), the efficacy of natural immunity is clearly recognised by the Minister of Health in Regulation 16C (3)(d) for those entering the country. If natural immunity is good enough for travel and is not a threat then it must be good enough for gatherings which should no longer be limited or prevented on the basis of vaccination status.
- 12.6 The monitoring of people for the purposes of maintaining “vaccinated” versus “unvaccinated” gatherings is practically impossible. The impact on businesses (including costs to “police” and administer this policy of government) is unreasonably burdensome.
- 12.7 Society cannot be expected to enforce what is unfair, unreasonable, and unconstitutional.

- 12.8 As you are aware, non-compliance with the Regulations is a criminal offence with a penalty of up to 10 years imprisonment (Regulation 20). This is a particularly severe punishment which far exceeds the sanction for failure to comply with regulations under the former 'state of disaster'. Our client opposes any attempt to penalise or prosecute persons who rely on their constitutional freedoms.
13. Should you fail to engage with our client as suggested above and / or should the Regulations not be withdrawn 12h00 on Wednesday 18 May 2022, we hold instructions to launch an application on an urgent basis to have the decision to publish same reviewed and the Regulations set aside.
14. We await your urgent response.
15. All our client's rights are reserved.

Yours faithfully,



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