



SAKELIGA
SELFSTANDIGE SAKEGEMEENSKAP

5 May 2020

Dear Members of the Media and Media Organisations,

Legal opinion on your rights and the rights of your guests and collaborators

Through unpleasant personal experience it has come to our attention that law-enforcement is obstructing your guests and collaborators from reaching you, or discouraging them through attempted intimidation, incorrect information, and illegal instructions from accepting your invitations to attend discussions and live interviews with you at your offices and studios.

This letter is accompanied by a legal opinion regarding your freedom to invite, interview, and collaborate with persons who are not members of the media. The opinion also offers guidelines on what you could do to mitigate the risks your guests face when travelling upon your invitation.

Whether unjustified obstruction by law-enforcement is the result of incorrect instructions to police officers from their superiors, or by incorrect interpretation of the regulations by the police officers themselves, or by wilful misconstruction of the regulations by officers with a view to gaining personal advantage through bribes or otherwise, is not of key importance. What matters is that the media's vital role in the maintenance of a constitutional order, characterised by a distribution of power – by checks and balances – cannot be overstated. Given the current extensive infringements on the rights of the public and the unprecedented centralisation of power in the executive branch of the state, the ability of the media to perform its functions should be closely guarded.

Please find attached a note from our attorneys and a legal opinion from counsel on your freedom to invite guests and collaborators to visit you where you deem it necessary for

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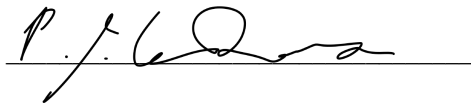
Sakeliga NPC (Reg. nr. 2012/043725/08)

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the execution of your duties, as well as on the rights of your guests to accept such invitations.

The legal opinion includes guidelines on documentation that you might wish to provide your guests with to decrease their risk when stopped by law-enforcement. Please note that the guidelines are presented without knowledge of your specific circumstances. As such, it would be advisable for you to present our opinion to your legal departments for supplementation and application to your particular circumstances as they may be.

Sincerely,

A handwritten signature in black ink, appearing to read 'P. J. le Roux', is written over a horizontal line.

Piet le Roux

CEO

Sakeliga



KRIEK WASSENAAR & VENTER ING

Prokureurs • Aktevervaardigers • Attorneys • Conveyancers

Our ref: PJ Wassenaar/es/QB0665

Your ref:

4 May 2020

**CHIEF EXECUTIVE OFFICER
SAKELIGA NPC
PRETORIA**

By e-mail: p.leroux@sakeliga.co.za

Sir

IN RE: MEDIA PERMITS

1. It was our instruction to provide you with advice regarding the issuing of permits by the media in terms of regulation 28 of the amended regulations issued by the Minister of Cooperative Governance and Traditional Affairs (COGTA) in terms of Section 27(2) of the Disaster Management Act 57 of 2002.
2. Our instruction follows the amendment to the previous regulations and specifically the change in the wording of regulation 28 of the amended lockdown regulations if compared to the previous regulation 11A and 11B. The [opinion](#) of Advocate Ben Bester of the Pretoria Bar is attached hereto.
3. You will note that the regulations no longer provide that permits may only be issued to a member of an organisation's "staff". We specifically refer to the [earlier opinion](#) of Advocate Bester dated 30 March 2020. A copy of this opinion is also attached hereto. The new regulations however provide that the head of an institution may issue a permit to a "person" who is necessary in order to provide an essential or permitted service. It is therefore the opinion of counsel that a person who is necessary for the functioning of an essential or permitted service provider, may be issued a permit in terms of regulation 28(4) of the amended lockdown regulations.
4. This amendment implies that an essential or permitted service provider may issue such permits even to persons who are not remunerated or otherwise contracted for their services (as would be the case with the word "staff"). An essential service provider may therefore in our respectful view issue permits to persons who are necessary for the functioning of an essential or permitted service.
5. In the case of the media, we are of the view that they may, in the view of the above, issue permits to any person necessary for the functioning of their essential or permitted service. This however assumes that the specific media production qualifies as an essential or permitted service under the new regulations. A permit may therefore in our view be issued by the head of a media institution in order to secure the attendance of an expert, witness, interviewee and/or other person necessary for the production. These persons no longer need to form part of the organisation's staff as with the previous versions of the regulations.

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Direkteure/ Directors: Johan Kriek (B Proc, LLM), Péter Johannes Wassenaar (LLB)

Bygestaan deur/assisted by Tertia Johanna Wassenaar (LLB);

Konsultante / Consultants: Catherina Elizabeth Pienaar (BA, BCur, LLB, LLM, PhD), Sylvia Adriana Venter (LLB)

• Reg: 2012/030418/21

DocDate 2019/04/01

6. The media is a vital constitutional institution. In our view it has a right to effectively operate under the lockdown regulations. It is therefore not only sensible but also necessary for the media (and other organisations who perform essential and permitted services) to have the ability to issue permits to any person who is essential to the production.
7. It is however important when applying the regulations that one considers the regulations as a whole. The following consideration should also be taken into account before issuing a permit to any person, whether they are a member of staff or a necessary third party:
 - 7.1. The person must actually be necessary in order for the service provider to provide the essential service. Where possible, persons should be allowed to work or participate from home (see heading to Table 1 – Alert Level 4 Schedule).
 - 7.2. Unnecessary face-to-face meetings should where possible be avoided. Where it is not effective or possible to avoid face-to-face interaction, the media institution must ensure that there is full compliance with the general measures to contain the spread of COVID-19 as set out in the regulations and other directives issued by government, including but not limited to regulations 5, 16(6) and 28(2).
8. Each media institution must ensure that they are indeed compliant when conducting any business under the regulations. It is also important that the opinion of Advocate Bester as well as the contents of this letter be independently considered in the light of each specific institution's facts before any party acts on the basis of its contents.
9. We trust you find the above in order.

Yours faithfully,



KRIEK WASSENAAR & VENTER INC
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Elektronies geteken
Electronically signed

OPINION

To : Kriek, Wassenaar & Venter Inc

From : Adv BC Bester

Re : Sakeliga NPC

Date : 05 May 2020

Ref : PJ Wassenaar / es / QB0665

INTRODUCTION AND BACKGROUND

- 1 Consultant is Sakeliga NPC ("**Consultant**").
- 2 Consultant is non-profit company focussed on protecting the constitutional rights of the South African public, business and the communities in which they reside, operate and conduct business.
- 3 On 15 March 2020, and pursuant to section 27(1) of the Disaster Management Act, No. 57 of 2002 (the "**DMA**"), the Minister of Cooperative Governance and Traditional Affairs (the "**Minister of COGTA**") declared the outbreak of COVID-19 a national state of disaster (the "**State of Disaster**").
- 4 In terms of section 27(2) of the DMA, and pursuant to the State of Disaster, the Minister of COGTA issued disaster regulations on 18 March 2020, which were published in Government Notice R318 (the "**Disaster Regulations**"). These

Disaster Regulations were subsequently amended on 25 March 2020,¹ 26 March 2020,² 2 April 2020,³ 16 April 2020⁴ and 20 April 2020.⁵

- 5 On 29 March 2020, I was requested to provide Consultant with an urgent opinion advising how the “essential good/essential service” exemption set out in the Disaster Regulations (as amended at that stage) was to be applied, specifically an opinion as to how essential service employees were to be determined and designated in terms of the Disaster Regulations.
- 6 On 30 March 2020, I gave an opinion on the advice sought (the “**Previous Opinion**”). In short, the Previous Opinion concluded that the services to be performed by an institution could be performed by a person other than an “employee”, provided that the person can be considered as part of the “staff” of the institution in question.
- 7 Since issuing the Previous Opinion, and on 29 April 2020, the Minister of COGTA, acting in terms of section 27(2) of the DMA, repealed and replaced the Disaster

¹ Amendment regulations in terms of section 27(2) of the DMA, published on 25 March 2020 in Government Notice R398 (the “**First Amendment Regulations**”).

² Amendment regulations in terms of section 27(2) of the DMA, published on 26 March 2020 in Government Notice R419, (the “**Second Amendment Regulations**”).

³ Amendment regulations in terms of section 27(2) of the DMA, published on 2 April 2020 in Government Notice R446, (the “**Third Amendment Regulations**”).

⁴ Amendment regulations in terms of section 27(2) of the DMA, published on 16 April 2020 in Government Notice R465, (the “**Fourth Amendment Regulations**”).

⁵ Amendment regulations in terms of section 27(2) of the DMA, published on 20 April 2020 in Government Notice R471, (the “**Fifth Amendment Regulations**”).

Regulations with so-called “risk-adjusted”/”alert level 4” regulations, which were published in Government Notice R480 (the “**Replacement Regulations**”).⁶

8 In terms of regulation 16(2) and (3) of the Replacement Regulations:

- “16. (1) Every person is confined to his or her place of residence.
- (2) A person may only leave their place of residence to -
- (a) perform an essential or permitted service, as allowed in Alert Level 4;
 - (b) go to work where a permit which corresponds with Form 2 of Annexure A, has been issued;
 - (c) buy permitted goods;
 - (d) obtain services that are allowed to operate as set out in Table 1 to the Regulations;
 - (e) move children, as allowed;
 - (f) walk, run or cycle between the hours of 06H00 to 09H00, within a five kilometre radius of their place of residence: Provided that this is not done in organised groups.
- (3) *Every person is confined to his or her place of residence from 20H00 until 05H00 daily, except where a person has been granted a permit to perform an essential or permitted service as listed in Annexure D, or is attending to a security or medical emergency”*

9 Following from the Previous Opinion, Consultant wishes to update concerned members as to how the “essential service”/”permitted service”/”work” exemption is to be applied under, and in terms of, the Replacement Regulations.

⁶ See in this regard, regulation 2(1) of the Replacement Regulations which provides as follows:

“The regulations published by Government Notice No. 318 of 18 March 2020, as amended by Government Notice Nos. R. 398 of 25 March 2020, R.419 of 26 March 2020, R. 446 of 2 April 2020. R. 65 of 16 April 2020 and R. 471 of 20 April 2020, are hereby repealed”.

OPINION SOUGHT

- 10 I have been requested to update the Previous Opinion, advising how the “essential service”/“permitted service”/“work” exemption is to be applied under, and in terms of, the Replacement Regulations, specifically an opinion as to whether the services or work to be performed must still be performed by a person forming part of the “staff” of the institution delivering or rendering such services or work, as the case may be.
- 11 The requested opinion is an interpretational exercise. As such, the interpretational approach adopted in the Previous Opinion will apply equally in this regard.

LEGAL ANALYSIS AND OPINION

- 12 As outlined above, regulation 16 of the Replacement Regulations provides that every person is confined to his or her place of residence, and for purposes of this opinion, may only leave his or her residence:
- 12.1 to perform an essential or permitted service, as allowed in Alert Level 4; or
- 12.2 to work where a permit which corresponds with Form 2 of Annexure A, has been issued to such a person.
- 13 Each of these exemptions will be dealt with separately herein below.

As an aside, notwithstanding the Disaster Regulations being repealed and replaced, all directions issued in terms of the Disaster Regulations continue to apply unless, varied, amended or withdrawn by the cabinet member responsible for such directions (see regulation 2(3) of the Replacement Regulations).

14 Essential service or permitted service (regulation 16(2)(a) of the Replacement Regulations)

14.1 Both “essential services” and “permitted services” are defined for purposes of the Replacement Regulations. Essential services are defined as “... *the services listed in Annexure D*”,⁷ whereas permitted services are defined as “...*the services permitted in Table 1*”.⁸

14.2 However, when one has regard to the meaning of the terms “essential service” and “permitted service” for purposes of regulation 16(3) of the Replacement Regulations, Paragraph A of Annexure D of the Replacement Regulations provide as follows:

“Essential and permitted services referred to in section 16(3) of the Regulation shall refer to:

- (a) the list of essential services as set out in B below; and*
- (b) such other service as are set out in Alert Level 4 and where the technological, industrial, structural or similar requirement of the service necessitates a continuous or shift operation, as set out in directions, as set out below”*

14.3 The reason for this distinction is not immediately apparent.⁹ Be that as it may, regulation 28(4) of the Replacement Regulations requires that:

“Persons performing essential services or permitted services, must be duly designated in writing by the head of an institution, or a person designated by him or her, on a form that corresponds with Form 2 in Annexure A: Provided that Cabinet member responsible for small

⁷ Regulation 1 of the Replacement Regulations, definition of “essential services”.

⁸ Regulation 1 of the Replacement Regulations, definition of “permitted services”.

⁹ It seems, when the Replacement Regulations are interpreted as a whole (specifically regulations 16(3) and annexure D), that the combined reference to essential services and permitted services relate to the curfew provisions set out in regulation 16(3) only. It is, however, far from clear.

enterprises may issue directions in respect of small and micro enterprises, cooperatives. informal traders and spaza shops in respect of those entities”

14.4 A “head of an institution” means “... the accounting officer of a public institution and the chief executive officer or the equivalent of a chief executive officer of a private institution”,¹⁰ and “institution” means “... any public or private institution, including a sole practitioner and any other business owned and operated by a single person, that is engaged in the supply or distribution of a good or service as set out in the Table 1, or which regulates such supply or distribution, including professional regulatory bodies designated in directions made in terms of regulation 4 of the Regulations”.¹¹

14.5 When one has regard to Form 2 of Annexure A, the form provides, *inter alia*, the following:

“Please note that the person to whom the permit is issued must at all times present a form of identification together with this permit. If no identification is presented, the person to.

...

I, being the head of institution, with the below mentioned details, ... [h]ereby certify that the below mentioned official/employee is performing services in my institution.”

14.6 The provisions of the Replacement Regulations are thus different from the corresponding provisions in the Disaster Regulations (as amended), which provided as follows:

¹⁰ Regulation 1 of the Replacement Regulations, definition of “head of an institution”.

¹¹ Regulation 1 of the Replacement Regulations, definition of “institution”.

“(2) The head of an institution must determine essential services to be performed by his or her institution, and must determine the essential staff who will perform those services: Provided that the head of an institution may delegate this function, as may be required in line with the complexity and size of the business operation

(3) Persons performing essential services as determined in subregulation (2), must be duly designated in writing by the head of an institution, on a form that corresponds substantially with Form 1 in Annexure C”.¹²

14.7 Whereas the Disaster Regulations (as amended) required the head of an institution to (i) firstly, determine what essential services were to be performed by the institution and (ii) secondly, to determine who the essential staff would be to perform the services in question (as explained in the Previous Opinion), the Replacement Regulations merely require the head of an institution to “designate”, in writing, persons performing essential services or permitted services.

14.8 The fact that the Replacement Regulations no longer refer to “essential staff”, but only to “persons”, is significant. This is because of the rule of legal interpretation that each word of a statute must be given meaning and, as a corollary thereto, that different words are meant to generate different meanings.¹³

¹² Regulation 11B of the Disaster Regulations (as amended).

¹³ LAWSA (Volume 25(1), 2nd edition) at par 353. Also see, for example, *Van den Berg v SAS&H* 1980 1 SA 546 (T) at 558F where it was held that: “*Ek wil nie te veel van die aangeleentheid maak nie, behalwe om aan te dui dat waar die Wetgewer verskillende woorde gebruik hy dit doen nie uit nalatigheid nie, maar dat hy dit doen met 'n doel*”.

14.9 While it is true that Form 2 of Annexure A still refers to “official/employee”, when the Replacement Regulations are read as a whole, it seems clear that the head of an institution can designate a “person” to perform essential services or permitted services. Form 2 of Annexure A itself provides that “... the person to whom the permit is issued must at all times present a form of identification together with this permit”. In addition, regulation 28(4) only requires that a person be designated by a head of an institution on a form that “... corresponds with Form 2 in Annexure A”. In light of the fact that the word “corresponds” is not defined for purposes of the Replacement Regulations, the ordinary meaning of the word must be attached thereto, namely to “... have a close similarity; match or agree almost exactly” – i.e. the designation need not be identical to Form 2 in Annexure A.¹⁴

15 Work, where a permit has been issued to a person (regulation 16(2)(b) of the Replacement Regulations)

15.1 As mentioned above, regulation 16(2)(b) of the Replacement Regulations provides that “... [a] person may only leave their place of residence ... to go to work where a permit which corresponds with Form 2 of Annexure A, has been issued”.

15.2 This is subject to regulation 16(3) of the Replacement Regulations which provides that “... [e]very person is confined to his or her place of residence from 20H00 until 05H00 daily, except where a person has been granted a

¹⁴ See, for example, <https://www.lexico.com/definition/correspond> <last accessed 4 May 2020>.

*permit to perform an essential or permitted service as listed in Annexure D, or is attending to a security or medical emergency”.*¹⁵

15.3 Not all business and entities may commence operations, but only those businesses and entities set out in Table 1 of the Replacement Regulations.¹⁶

15.4 In terms of Table 1 of the Replacement Regulations, the following applies in respect of Alert Level 4, namely:

“All persons who are able to work from home should do so. Persons in the following list of industries and activities will be permitted to perform work outside the home, and to travel to and from work, under Alert Level 4, subject to-

(a) strict health protocols, and social distancing rules;

(b) return to work to be phased in to enable measures to make the workplace COVID- ready; and

(c) return to work to be done in a manner that avoids and reduces risks of infection”.

15.5 There are no clear provisions in the Replacement Regulations as to the procedure and requirements relating to the issuing of a permit in terms of regulation 16(2)(b) of the Regulations – the regulations merely stating that “... [a] person may only leave their place of residence to go to work where a permit which corresponds with Form 2 of Annexure A, has been issued”.

15.6 While regulation 28(4) of the Replacement Regulations does refer to persons performing “permitted services”, the regulation does not seem to be

¹⁵ From the wording of regulation 16(3) of the Replacement Regulations, a person relying on regulation 16(2)(b) of the Replacement Regulations must, as such, be confined to his or her place of residence from 20h00 to 05h00 – something which is seemingly not applicable to persons performing an essential or permitted service.

¹⁶ Regulation 28(1) of the Replacement Regulations.

directly applicable to persons referred to in regulation 16(2)(b). This is seemingly acknowledged in Form 2 of Annexure A, which, in its heading, states as follows:

“FORM 2

PERMIT TO PERFORM AN ESSENTIAL OR PERMITTED SERVICE

Regulations 16(2)(b) and 28(4)”

- 15.7 From the above, it seems that there is a difference between a person performing a “permitted service” (for purposes of regulation 16(2)(a) of the Replacement Regulations) and a person who goes to work where a permit which corresponds with Form 2 of Annexure A has been issued (for purposes of regulation 16(2)(b) of the Replacement Regulations) – regardless of the fact that they both relate to Table 1 of the Replacement Regulations.
- 15.8 This distinction, while not expressly addressed in the Replacement Regulations, seems to be that a regulation 16(2)(b) permit is issued to persons who go to work (for example, employees or staff), whereas a section 16(1)(a) permit is issued to any person performing an essential service (as set out in annexure D to the Replacement Regulations) or a permitted service (as set out in Table 1 to the Replacement Regulations).
- 15.9 Depending on the circumstances, this distinction will most likely be academic by virtue of the fact that both regulation 16(2)(a) and regulation 16(2)(b)

require a permit to be issued which corresponds with Form 2 of Annexure A (i.e. the permits will, in all likelihood, look the same regardless of whether it is issued by the head of an institution in terms of regulation 16(2)(a) or 16(2)(b)).

CONCLUSION

- 16 Turning back to the advice sought, the Replacement Regulations no longer require that the services to be performed by an institution must be performed by a member of the institution's staff.
- 17 The Replacement Regulations, by virtue of regulation 16(1)(a) (read with regulation 28(4)), now authorises a head of an institution to designate, in writing, "a person" as performing an essential or permitted service.

- - -

Advocate BC Bester

Pretoria Bar

Circle Chambers