

RSM Alert: COVID-19 Regulations

[Correct as at 8 April 2020]

GN 318 OF 18 March 2020: Regulations issued in terms of section 27(2) of the Disaster Management Act, Act No. 57 of 2002 (Government Gazette No. 43107) as amended by Notice R.398 (Government Gazette No. 43148), Notice R.419 (Government Gazette No. 43168) and Notice R.446 (Government Gazette No. 43199) and related Directives and Regulations

The World Health Organisation has categorised COVID-19 as a pandemic. In the result, President Ramaphosa declared a state of national disaster in South Africa on 15 March 2020 in terms of the Disaster Management Act, Act No. 57 of 2002 ("the DMA") and on 18 March 2020, Regulations in terms of section 27(2) of the DMA were published with immediate effect.

The initial set of Regulations issued on 18 March 2020 made provision for the restrictions in light of COVID-19 including a prohibition on gatherings of more than 100 persons, the closing of schools, limitations on the sale, dispensing and transportation of liquor, and a prohibition on a person who has tested positive for COVID-19 (or a person who has been in contact with a person who has tested positive) refusing to be submitted for medical examination, admission to a health facility or quarantine or isolation, or submission to treatment. These initial Regulations also criminalised non-compliance with some of the restrictions and prohibitions imposed by such Regulations.

Subsequently, on 23 March 2020, President Ramaphosa announced a nation-wide lockdown for 21 (twenty one) days with effect from midnight on Thursday, 26 March 2020 and the amended Regulations in terms of the DMA were published on 25 March 2020, 26 March 2020 and 2 April 2020 with immediate effect ("COVID-19 Regulations").

This Alert flags and concisely discusses some significant commercial and legal matters which have arisen in light of the COVID-19 Regulations and related Directives and Regulations.

GENERAL MEASURES: APPLICABLE DURING THE PERIOD OF LOCKDOWN FROM 26 MARCH 2020 AT 23H59 TO 16 APRIL 2020 AT 23H59

Important Definitions

- Essential Goods, for the time being, refer to, inter alia, food, cleaning and hygiene products, medical products, fuel (including oil and gas) and basic goods (including electricity and airtime). A full list of the Essential Goods as defined in the COVID-19 Regulations is available on the RSM COVID-19 Resource Centre (<https://www.rsm.global/southafrica/rsms-covid-19-resource-centre>).
- Essential Services, for the time being, means the services as defined in section 213 of the Labour Relations Act, Act No. 66 of 1995 ("LRA") and designated in terms of section 71(8) of the LRA and as listed in paragraph B of Annexure B to the COVID-19 Regulations. A full list of the Essential Services as defined in the COVID-19 Regulations is available on the RSM COVID-19 Resource Centre (<https://www.rsm.global/southafrica/rsms-covid-19-resource-centre>). Examples of Essential Services include, inter alia, medical, health (including mental health), laboratory and medical services, financial services necessary to maintain the functioning of the banking and

payments environment, including the JSE, and similar exchanges, as well as insurance services, the production and sale of Essential Goods, grocery stores (including spaza shops), and electricity, water, gas and fuel production, supply and maintenance.

Restrictions on movements of persons and goods

- Every person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service, obtaining an essential good or service, collecting a social grant, or seeking emergency, life-saving, or chronic medical attention.
- All foreign tourists who arrived in the Republic prior to, or after, the Lockdown, and who remain in the Republic, must remain in their place of temporary residence in the Republic for the duration of the Lockdown or 14 days, as the case may be, and may be subject to screening for COVID-19 and be quarantined or isolated as required.
- All gatherings regardless of the number of participants and whether in or outdoors is prohibited, except for funerals. Attendance at funerals is limited to 50 people, and no night vigil shall be held and all safety measures are to be strictly adhered to.
- Movement between a metropolitan or district area, or province by a person wishing to attend a funeral is permissible subject to certain conditions. In addition, each person, whether traveling alone or not, wishing to attend a funeral or cremation and who has to travel between metropolitan and district areas, or between provinces to attend a funeral, or a cremation must obtain a permit which corresponds substantially with Form 2 of Annexure C to the COVID-19 Regulations, from his or her nearest magistrate's office or police station to travel to the funeral or cremation and back.

Commercial Restrictions

- Save for businesses and entities involved in the manufacturing, supply, or provision of Essential Goods or Services, all businesses and entities shall cease operations (unless such businesses can be operated remotely).
- Whilst this is not prescribed, businesses that provide Essential Services may clarify their status with the Department of Trade, Industry and Competition (the "DTIC") by contacting the DTIC on lockdownexemptions@thedtic.gov.za. In addition, businesses may apply to the Companies and Intellectual Property Commission (CIPC) for a (non-compulsory) certification as an essential services provider through CIPC's Bizportal website at www.bizportal.gov.za.
- Retail shops and shopping malls must be closed, except where Essential Goods are sold and on condition that the person in control of the said store must put in place controls to ensure that customers keep a distance of at least 1m² (one square meter) from each other, and that all directions in respect of hygienic conditions and the spread of Covid-19 are adhered to.

- Retail stores selling essential goods are prohibited from selling any other goods. For the duration of the Lockdown, the sale of liquor is completely prohibited.
- All commuter transport services including passenger rail services, bus services, taxi services, e-hailing services and private motor vehicles for purposes of rendering Essential Services, obtaining Essential Goods, seeking medical attention, funeral services and to receive payment of grants, are permitted, provided that all directions in respect of hygienic conditions and the limitation of exposure of persons to COVID-19, are adhered to, and:
 - bus services, e-hailing services and a public transport sedan shall not carry more than 50% of the licensed capacity.
 - the following public transport vehicles must not carry more than 70% of their maximum licensed capacity as follows:
 - A minibus licensed to carry 10 passengers, is limited to carry a maximum of 7 passengers
 - A minibus licensed to carry 15 passengers, is limited to carry the maximum of 10 passengers
 - A midibus licensed to carry a maximum of 22 passengers, is limited to carry a maximum of 15 passengers
 - private vehicles shall not carry more than 60% of the licensed capacity.
- All borders of the Republic are closed during the period of Lockdown, except for transportation of Essential Goods.
- Annexure D to the COVID-19 Regulations sets out the places and premises that are closed to the public during the Lockdown. A full list of such places and premises is available on the RSM COVID-19 Resource Centre (<https://www.rsm.global/southafrica/rsms-covid-19-resource-centre>).

Offences and Penalties

- A person is guilty of an offence and, on conviction liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment, if such person, inter alia, fails to comply with or contravenes the COVID-19 Regulations.

EMPLOYMENT MEASURES

Responsibilities of Employers in respect of Persons rendering Essential Services during the period of Lockdown:

- 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. This function may be delegated.

- Persons performing Essential Services must be designated in writing by the head of an institution on a form which substantially corresponds with Annexure C to the COVID-19 Regulations. An electronic copy of Annexure C is available on the RSM COVID-19 Resource Centre (<https://www.rsm.global/southafrica/rsms-covid-19-resource-centre>).
- Where a person rendering Essential Services is unable to travel to and from his or her place of employment, the employer must make the necessary transport arrangements, provided that no more than 50% of the licensed capacity of the vehicle or vessel is exceeded and all hygienic conditions adhered to.

Compensation for occupationally acquired COVID-19

- An employee may claim compensation in terms of the Compensation for Occupational Injuries and Diseases Act, Act No. 130 of 1993 ("COIDA"), provided the employee, inter alia, contracted COVID-19 after single or multiple exposures to confirmed cases of COVID-19 in the workplace or after an official trip to a high-risk area, and there is a reliable diagnosis as per the World Health Organisation guidelines.
- Claims should be submitted to the Compensation Commissioner, the employer individually liable or the mutual association concerned.

Temporary Employee Relief Scheme ("TERS")

- Should an employer as a direct result of COVID-19 pandemic close its operations for a period of 3 months or less, affected employees shall qualify for the COVID-19 Temporary Employee Relief Scheme ("TERS") benefit.
- The benefit shall be de-linked from the Unemployment Insurance Fund's ("UIF") normal benefits.
- The benefits will only pay for the cost of salary for the employees during the temporary closure of the business operations. The TERS benefit will be calculated in terms of the income replacement rate sliding scale of 38% (for high earners) up to 60% (for low earners) as provided in the Unemployment Insurance Act, Act No. 63 of 2001. The salary to be taken into account in calculating the TERS benefits will be capped at a maximum amount of R17 712.00 per month, per employee. Therefore, the maximum benefit for a high earner would be 38% of R17 712.00 per month, which amounts to R6 730.56 per month.
- Should an employee's income in terms of the income replacement sliding scale fall below R3 500.00, the employee will be paid a replacement income equal to that amount. Qualifying employees will receive a TERS benefit calculated in terms of Sections 12 and 13 (1) and (2) of the Unemployment Insurance Act, Act No. 63 of 2001, provided that an employee shall receive a benefit of no less than R3 500.00.
- In terms of the TERS process, the UIF may fund employers directly in relation to the TERS Allowance. The employer will only be funded if it meets the following requirements:

- The employer must be registered with the UIF;
- The employer must comply with the application procedure for the financial relief scheme; and
- The employer's closure must be directly linked to the COVID-19 pandemic.
- To obtain application forms in respect of TERS and all relevant details, an applicant employer is required to send an email to Covid19ters@labour.gov.za and there shall be an automatic response outlining the application process.
- The employer is required to furnish the UIF with the following completed documents:
 - Letter of authority from the employer;
 - Signed memorandum of agreement from the employer or Bargaining Council with the UIF, or written or electronic confirmation of acceptance by an employer or bargaining council of the terms and conditions of the scheme provided to the employer or bargaining council or published in writing by the UIF.
- Subject to certain requirements, an employer whose employees are entitled to receive the TERS benefit provided by the UIF during the period of lockdown from a bargaining council may not make an application in terms of TERS and the employees of that employer may not receive any payment in terms of TERS, other than through the bargaining council.
- An employee may only receive a TERS benefit if the total of the benefit together with any additional payment by the employer in any period is not more than the remuneration that the employee would ordinarily have received for working during that period.
- All amounts paid by or for the UIF to employers or Bargaining Council(s) under the terms of the Scheme are required to be utilized solely for the purposes of the TERS Scheme and for no other purpose, irrespective of whether the employer or Bargaining Council is in breach of its overdraft or similar contractual arrangements with the bank concerned.
- An employer is required to inform the UIF immediately on the recommencement of its business operations that were subject to temporary closure. The employer must then return any unutilised TERS funds, including interest, to the UIF within 10 (ten) days of the recommencement of its business operations, or the termination of memorandum of agreement, whichever is the earlier.

National Disaster Benefit Fund

- A measure through UIF has been implemented which will compensate qualifying employees through a new "National Disaster Benefit" and its existing Illness, Reduced Work Time and Unemployment benefits. If an employer is unable to pay its employees for any period of shutdown as a result of COVID-19, the employer is entitled to apply for the "National Disaster Benefit" from the UIF.

- Minister of Labour, Thulas Nxesi has indicated that, *"It is important though, that all parties understand that the UIF cannot deal with millions of individual claims – this would lead to delays in the processing of such claims. Rather we have put in place systems to pay out UIF benefits through companies, sectoral associations and bargaining councils."* Having regard to the foregoing, it is evident that the Minister envisages a system in respect of the "National Disaster Benefit" whereby employer's pay their employees during this period of shutdown and then claim back from UIF in order to assist with the backlog on the UIF system and to prevent it from becoming completely overburdened.
- UIF will pay compensation in the amount equal to National Minimum wage for three months – which is R3 500.00 a month per employee. This benefit will be delinked from the UIF's normal benefit structure and this benefit will be at a flat rate equal to the national minimum wage per employee for the duration of the shutdown or a maximum of three months, whichever period is the shortest.
- The maximum benefit (R3 500.00) will be paid as per the UIF benefit structure if the employer makes no payment to the employee during the shutdown period. However, if payment is made during the shutdown period, the benefit will be reduced accordingly.

COMPETITION MEASURES

Banking Sector Exemptions in Co-Ordination with the Minister of Finance or the Minister of Trade, Industry and Competition

- The following agreements and practices will be exempt from the provisions of sections 4 and 5 of the Competition Act, Act 89 of 1998 (which relate to prohibited restrictive horizontal and vertical practices), undertaken at the request of, and in coordination with, the Minister of Finance or the Minister of Trade, Industry and Competition for the sole purpose of responding to the COVID-19 pandemic as a national disaster and which exclude communication and agreements in respect of prices, unless specifically authorised by the Minister of Finance or the Minister of Trade, Industry and Competition:
 - Agreements or practices with the sole purpose of ensuring essential payment systems continue to operate during the COVID-19 national disaster, which are limited to the development of industry monitoring, operational policies and contingency plans in respect of:
 - the continued availability of bank notes to ATMs, branches and businesses.
 - the continued provision of essential ATM, branch and corporate banking services.
 - the continued provision of electronic payments systems.
 - Agreements or practices with the sole purpose of ensuring the management of debtors and extension of credit continue during the COVID-19 national disaster, which are limited to the development of industry policies and monitoring in respect of:

- payment holidays and debt relief for business and individual debtors subject to financial stress.
 - limitations set on asset repossessions of business and individual debtors subject to financial stress.
 - the extension of credit lines to individuals and businesses subject to financial stress.
- The Banks, Banking Association of South Africa and/or Payments Association of South Africa must keep minutes of meetings held and written records of any agreements or practices falling within the scope of these exemptions.

Retail Property Exemptions in Co-Ordination with the Department of Trade, Industry and Competition

- Designated Retail Tenants refer to:
 - Clothing, footwear and home textile retailers;
 - Personal care services; and
 - Restaurants.
- The following agreements and practices will be exempt from the provisions of sections 4 and 5 of the Competition Act, Act No. 89 of 1998 (which relate to prohibited restrictive horizontal and vertical practices), between designated retail tenants and retail property landlords, if undertaken at the request of, and in coordination with the Department of Trade, Industry and Competition, for the sole purpose of responding to the COVID-19 pandemic as a national disaster, and which exclude communication and agreements in respect of prices unless specifically authorised by the Department of Trade, Industry and Competition:
 - Agreements or practices amongst and between designated retail tenants and retail property landlords with the sole purpose of ensuring the survival of tenants of retail properties during the COVID-19 national disaster, which are limited to agreements or practices in respect of:
 - Payment holidays and/or rental discounts for tenants.
 - Limitations on the eviction of tenants.
 - The suspension or adjustment to lease agreement clauses that restrict the designated retail tenants from undertaking reasonable measures required to protect viability during the national disaster.
- To qualify for an exemption, such agreements must extend to all South African retail tenants in the designated retail lines, including small, independent retailers, unless otherwise authorised by the Minister or the Competition Commission.

Regulations regarding the pricing and supply of goods

- During the national disaster, a material price increase of the below goods or services which does not correspond to or is not equivalent to the increase in the cost of providing that good or service or increases the net margin or mark-up on that good or service above the average margin or mark-up for that good or service in the 3 month period prior to 1 March 2020 is prohibited (in terms of the Consumer Protection Act, Act No. 68 of 2008) and a relevant and critical factor for determining whether the price is excessive (in terms of the Competition Act, Act No. 89 of 1998): (i) basic food and consumer items, (ii) emergency products and services, (iii) medical and hygiene supplies and (iv) emergency clean-up products and services.
- A supplier is required develop and implement reasonable measures to ensure the equitable distribution to consumers or customers (including small businesses) and maintain adequate stocks of the goods mentioned above. These measures may include limiting the number of items of certain goods and services which a customer or consumer may purchase at a time.
- A retailer is required to prominently display a notice in each of its stores that states that it has developed and will implement as well as carry out the measures mentioned above.
- A wholesaler must take all reasonable steps to ensure that purchases by customers and consumers are not intended to circumvent the measures related to developing and implementing the reasonable measures to ensure the equitable distribution to consumers or customers (including small businesses) and maintaining adequate stocks
- Subject to the Competition Act, the Consumer Protection Act and the Regulations, a person or firm that contravenes the Regulations referred to in the aforementioned paragraphs in this section could have one of the following penalties imposed: (i) a fine of up to R 1 000 000.00, or (ii) a fine of up to 10% of a firm's annual turnover, or (iii) Imprisonment of a period not exceeding 12 (twelve) months.

Healthcare Sector Exemptions in Co-Ordination with the Department of Health

- The purpose of these Regulations is to exempt a category of agreements or practices in the healthcare sector from the application of sections 4 and 5 of the Competition Act, Act 89 of 1998 in response to the declaration of COVID-19 pandemic as a national disaster.
- The categories of agreements or practices which are exempted are those agreements which are undertaken at the request of, and in coordination with, the Department of Health, and aimed at responding to the COVID-19 pandemic. They specifically exclude communication and agreements in respect of prices unless authorised by the Minister of Health. The exemption applies to various participants in the healthcare sector, namely hospitals and healthcare facilities; medical specialists and radiologists; pharmacies; manufacturers and suppliers of medical and hygiene supplies and healthcare funders.