IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No.: 25226/22

In the matter between:

AFRIFORUM NPC	First Applicant
DEAR SA	Second Applicant
and	
THE MINISTER OF HEALTH	First Respondent
THE DIRECTOR – GENERAL: NATIONAL DEPARTMENT OF HEALTH	Second Respondent

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APPLICANTS' SUPPLEMENTARY FOUNDING AFFIDAVIT

TABLE OF CONTENTS

THE STATE OF THE RULE 53 RECORD IN THESE PROCEEDINGS.....3

ORIGINAL REVIEW GROUNDS.....12

THE PUBLIC PARTICIPATION PROCESS WAS CONDUCTED IN BAD FAITH ...20

MINISTER IGNORED THE COMMENTS IN ANY EVENT.....34

SHAMBOLIC PROCESS UNLAWFUL AS NO CONSULTATION WITH THE NHC35

THE MINISTER FAILED TO APPLY HIS MIND TO RELEVANT CONSIDERATIONS 39

THE MINISTER ACTED UNDER THE DICTATION OF THE NCCC AND CABINET IN MAKING THE NEW SURVEILLANCE REGULATIONS 50

REGULATIONS *ULTRA VIRES* THE MINISTER'S POWERS 58

CONCLUSION.....66

I, the undersigned,

MONIQUE TAUTE

state under oath:

1. I am an adult female and the Head of Campaigns for Afriforum.

2. On 9 May 2022, I deposed to the founding affidavit on behalf of AfriForum and Dear SA, in an application to review and set aside, and declare as unconstitutional and invalid, the New Surveillance Regulations made by the Minister of Health. My details remain as set out in that affidavit and I remain authorised to depose to this affidavit on behalf of the applicants.

3. The abbreviations, acronyms and defined terms used in the applicants' founding affidavit will be used throughout this affidavit.

4. Submissions of a legal nature are made on the advice of AfriForum and Dear SA's legal representatives.

THE STATE OF THE RULE 53 RECORD IN THESE PROCEEDINGS

5. On 24 May 2022, the Minister of Health under the guidance of his own appointed attorneys filed a rule 53 record. This affidavit is filed in terms of rule 53(4) of the Uniform Rules of Court and in terms of the direction of this court at

the Case Management Meeting of 25 May 2022, as amended (by agreement) by subsequent correspondence. The agreed filing date for this affidavit is 8 June 2022. That amendment to the originally agreed dates for filing arose because of various mishaps by the Minister as regard the record – detailed further below. The Minister's legal team indicated to all the parties in an email dated 1 June that the dates for filing of affidavits would be adjusted, and the Minister's attorney undertook as follows in that email: "*If we do not hear from you by 17h00 on Wednesday 1 June, we will assume that this revised timetable is in order and will write to the DJP recording that this is the case by agreement*". The applicants have assumed that the timetable has been so adjusted and that the Minister's lawyers did or will write to the DJP as they had undertaken to do.

6. It is necessary to comment on the record of the Minister in these proceedings, both in its substance and in the process by which it was provided.

7. Regrettably, the record filed has not been properly indexed, or paginated. This application involves multiple parties who each have access to the record. Undoubtably, there will be considerable cross–referencing by the parties to large portions of the record, which reference would have been aided by proper pagination. The failure to properly paginate the record also means that the Court, for whose benefit a record has been filed, is not able to conveniently consider the contents of the record, with the aid of proper pagination.

8. The applicants have included the materials they seek to rely on that form part of the rule 53 record as annexures, for ease of the Court's reference. But it

remains the applicants' view that it would be convenient to both the litigants and the Court for the Minister to prepare a properly paginated rule 53 record to make what is already a voluminous record more accessible, and to load this onto Caselines so that there can be one unified record that follows the same pagination. If that is done, the applicants undertake to reference that page numbering in any heads of argument filed in due course.

9. On 24 May 2022, the record was delivered electronically to the applicants' attorneys who immediately downloaded and saved it. On 25 May 2022, it was confirmed on behalf of the Minister at the case management meeting that the record had been delivered and on that basis timelines were agreed for the filing of the supplementary founding affidavit and later affidavits to ensure an expedited hearing before the Full Court.

10. Then, two remarkable letters were sent on behalf of the Minister, which sought to undo the filing of the record, and a third letter was sent, which blithely wished away the imbroglio as if the Minister's record failings could simply be ignored.

11. On 26 May 2022, a letter was received by email from the Minister's attorneys ("**the Minister's first letter**").

11.1. The letter stated that parts of the record which had been disclosed in an email comments folder had been disclosed by virtue of an IT error, and were confidential, privileged and irrelevant. The letter specifically and solely referred to "*privileged correspondence between [the Minister] and*

its counsel as well as irrelevant confidential emails" as being the material which was accidentally included in the record.

11.2. The email comments folder had – by the time the Minister's first letter had been received – been unilaterally deleted by the Minister's attorneys from the electronic version of the record on the SharePoint file sharing platform.

11.3. The Minister's letter provided an undertaking that the revised email comments folder would be uploaded as soon as possible and that the applicants' attorneys would be advised of progress in this regard later that day.

12. A copy of the Minister's first letter is annexed as **"SFA1"** hereto.

13. The contents of and allegations in the Minister's first letter placed the applicants' legal team in a difficult position as the record had, by then, already been considered – not surprisingly, given the short timelines agreed between the parties at the case management meeting for the preparation and filing of supplementary founding affidavits by the applicants. After careful consideration, and having regard to the applicants' legal team's legal and ethical duties a decision was taken by the applicants' legal team collectively to respond to the Minister's attorneys' letter and not to raise any objection with the deletion of the email comments folder. This was done on three bases:

13.1. Firstly, because the applicants accepted the Minister's attorneys say-so that certain of the contents of the email comments folder had been disclosed in error;

13.2. Secondly, that Rule 61.10 of the LPC Code of Conduct precluded a legal representative from relying on otherwise privileged material which had been unlawfully or mistakenly disclosed;

13.3. Thirdly, the Minister's team had given the assurance that a suitably redacted email comments folder would be uploaded in due course.

14. The applicants' team – reasonably, cooperatively and in good faith – responded to the Minister's first letter, which letter is attached as **"SFA2"**. It will be appreciated that the applicants and their legal team had to expend unfortunate time, energy, and costs, to deal with the Minister's first letter, quite aside from the distraction and delays this was causing in the drafting of their supplementary founding affidavit.

15. No update on the progress of redacting the email comments folder was received later that day on 26 May 2022 or even later that week.

16. Instead on 30 May 2022, a letter was received from the Minister's attorneys reflecting an about-turn (**"the Minister's second letter"**).

16.1. In the Minister's second letter, he sought to resile from his undertaking in the first letter to re-upload the redacted email comments folder.

16.2. He did so on the stated basis that the process of redacting the folder had proven to be laborious and that he had – aside from the mistake reflected in the Minister's first letter by which his attorneys had included purportedly privileged material in the Rule 53 record – changed his mind about the necessity and relevance of disclosing the remaining material in the email comments folder as part of the record in terms of Uniform Rule 53.

17. A copy of the Minister's second letter is annexed as **"SFA3"**.

18. The change of tack was unacceptable, contrary to the Minister's undertaking and contrary to Rule 53. The applicants' attorneys said so in a letter of 31 May 2022 to the Minister's attorney. Yet again, in the spirit of cooperation, the applicants' attorneys proposed a reasonable *via media*: it was proposed firstly that the Minister's team take the additional time, until the end of the week (i.e. by 3 June), to do the work of redacting the folder and re-uploading it, as the Minster's team had undertaken to do, and secondly, it was proposed that the timeframes for the exchange of affidavits be adjusted accordingly. The applicants' letter made clear that if the folder would not be uploaded with acceptable redactions, then the email comments folder already downloaded (prior to the Minister's first letter), without the ostensibly legally privileged materially, would be relied on in this supplementary founding affidavit.

19. The applicants' attorney's letter of 31 May 2022, making this proposal and setting out the applicants' position, is attached as **"SFA4"**.

20. The proposal was ignored by the Minister. Instead of dealing with the proposal, or explaining whether and why the redaction remained impossible in the light of the extension, the Minister side-stepped the issue altogether and wrote a generic letter stating that the Minister stood by the position in his letter, and would defend his decision in the necessary forum ("**the Minister's third letter**"). The Minister's third letter came by email on 1 June 2022 and is annexed hereto as **"SFA5"**.

21. It too is remarkable:

21.1. Given its generic nature, the Minister's third letter failed to deal with the applicants' detailed letter, and hence the applicants' proposal was unchallenged and no reasons at all had been presented for why redaction was not possible.

21.2. The allegations in the applicants' letter to the effect that the material sought was both material and its disclosure not protected by the claim of confidentiality had also not been rebutted or dispelled and fell to be accepted.

21.3. However, the Minister's third letter proceeded off the curious and incorrect premise that the Minister was entitled unilaterally to remove material out of the Rule 53 record of decision. The premise was erroneous as the Minister had by then already disclosed the material that he considered as part of the decision-making, and it was already in possession of the applicants and clearly material and relevant. The unilateral deletion of a portion of the electronic record, which had by then already been downloaded and distributed, did not have the practical or legal effect of removing the email comments folder from existence or from the record.

21.4. The Minister accordingly was not permitted to fillet the record, as the material was available to be used by the applicants and ultimately for the court's benefit. Indeed, the applicants had made clear that they intended to use those parts of the record which were not legally privileged and which the Minister had previously [TP1]disclosed as the record of documents that were before him, taken into account by him as part of the decision-making, and/or which shed light on his decision-making – and which record was materially relevant for the court to make a proper determination of the nationally important issues at stake in this matter.

22. Given the Minister's efforts in his first and second letters to remove previously produced portions of his rule 53 record, coupled with the failure to deal with the applicants' letter, and the mistaken premise of the Minister's unilateral approach reflected in his third letter, it was necessary for the applicants' attorneys to

address yet further correspondence to the Minister confirming that the applicants intended to approach the matter on the basis set out in the letter on 30 May 2022.

23. The applicants' letter, dated 1 June 2022, is annexed as **"SFA6"**.

24. The Minister did not respond to this letter and this affidavit has been drafted on the basis expressly set out therein, which basis the Minister was forewarned of and to which he raised no objection.

25. The above debacle with the record – which arose entirely of the Minister's doing – required that the timeframes for the exchange of papers was adjusted accordingly. This was by agreement between the parties.

26. The applicants have attempted to be cooperative, heedful and pragmatic. However, above all, the applicants have sought to ensure fastidious observance of their legal representatives' duties including those owed to the Court.

27. Those duties require the applicants to reserve their rights, and depending on what is ultimately said by the Minister in his answering affidavit and done subsequent to the filing of this affidavit, to ensure that the applicants are not a party to any incorrect or misstated facts about what transpired during the course of the public participation process culminating in the decision.

28. It is therefore incumbent on the Minister only to make allegations in his answering affidavit in these proceedings which are true and consistent with the record – not only as the record now stands (without any legally privileged material) but based on the full record, seen by the applicants' legal team but which is not before the Court.

ORIGINAL REVIEW GROUNDS

29. There are five separate and self–standing grounds of review raised in the founding affidavit:

29.1. Firstly, that the public participation process embarked on by the Minister in respect of the New Surveillance Regulations was unsatisfactory, inadequate, and unlawful;

29.2. Secondly, that the New Surveillance Regulations are both substantively and procedurally irrational;

29.3. Thirdly, that the New Surveillance Regulations are *ultra vires* sections 90(1)(j), (k) and (w) of the National Health Act 61 of 2003 (the empowering provisions relied on by the Minister of Health), and are therefore unlawful;

29.4. Fourthly, that the New Surveillance Regulations were made for an ulterior purpose – that is, to address the spread of COVID-19 as a public

health emergency, in a manner that is inappropriate and constitutionally impermissible; and

29.5. Fifthly, that the New Surveillance Regulations impermissibly infringe various rights in the Bill of Rights and are inconsistent with the Constitution and invalid.

30. The Rule 53 record of decision confirms each of these review grounds and grounds others.

31. The record consists of seven bundles:

31.1. Bundle A – advisory reports from the Covid – 19 Ministerial Advisory Committee (MAC);

31.2. Bundle B – daily updates from the National Institute for Communicable Diseases (NICD) from December 2021 to May 2022;

31.3. Bundle C – presentations by the Centre for the Aids Programme of Research in South Africa (CAPRISA) between 6 April 2022 and 1 May 2022;

31.4. Bundle D – presentations at, and minutes of, two National Health Council Meetings on 21 February 2022 and 3 May 2022;

31.5. Bundle E – daily Covid – 19 progress reports and presentations prepared by the National Department of Health for the Minister between March 2022 and May 2022;

31.6. Bundle F – materials relating to the regulations on ports of entry;

31.7. Bundle G – spreadsheets of comments from the public generally.

32. In addition to the seven bundles, there is also a folder titled *"record of comments"* that records the data, and meta–data, of all the comments on the various platforms utilised for the public participation process.

33. Email and Microsoft online and WhatsApp messenger have been deleted. Only hand – delivered comments remain. According to the updated index:

33.1. The "email comments" folder has been "removed";

33.2. The "Microsoft Online Platform Comments" have been "removed, duplication from Bundle G, Comments 1.5";

33.3. The "Whatsapp comments" folder has been removed, duplication from Bundle G, Comments 1.6";

33.4. Hand-delivered comments (which remains in the folder).

34. As explained above, and despite the "removal" of the "email comments" folder in the Record of Comments section, the applicants have had regard to that correspondence contained in that folder which is not legally privileged. Such communication pertains principally to communication between the health department officials in the days leading up to the enactment of the New Surveillance Regulations by the Minister.

35. The relevant communication has been extracted from the email comments folder, and pasted into a Word document, for this Court's ease of reference. Legally privileged material has been redacted from it. This communication is annexed as **"SFA7"**.

36. What is notably absent from the record is any reasons for the decision, despite such reasons being called for in the applicants' notice of motion and disclosable under Uniform Rule 53. The consequence of this is that this Court is entitled to understand that the Minister took the decision for no reasons whatsoever, and that the decision is therefore substantively irrational.

37. However, even if this Court attempts to extract reasons from the record, and annexure **"SFA7"** in particular, it is clear that the Minister's decision and the New Surveillance Regulations are susceptible to review for multiple reasons.

38. The record supports the grounds of review and the relief sought in this application – importantly it now confirms that the Minister was intent on pushing through with the New Surveillance Regulations in order to prevent the perceived lacuna created by the termination of the national state of disaster on 4 May 2022.

39. I explained in the founding affidavit that the Minister's efforts to fit lockdown style regulations into the mould of the National Health Act was a misguided effort to fit a square peg in a round hole. It may be convenient for the Minister and Cabinet, but it is not lawful to do so under the National Health Act and our constitutional scheme.

40. A lawful route was available to the Minister. It was available in two different *fora* – firstly in Parliament, through amending the National Health Act and/or related legislation to cater for national state of disasters arising from public health emergencies; or secondly, through lawfully extending the national state of disaster under the Disaster Management Act for so long as it was required to be in place, or the legal regime under that Act, through approaching the Courts.

41. The MAC advised the Minister of this, in the MAC advisory of 8 February 2022, which said:

> "**3. *Disaster Regulations***
>
> *The Department of Health is currently revising existing regulations issued in terms of the National Health Act. However, any attempt to rely on the existing National Health Act to issue regulations that potentially restrict the rights of the population may be vulnerable to challenge in the courts. The flexibility currently exists to not only extend the declaration of a national state of disaster as needed, but also to limit the application of regulations issued in terms of the Disaster Management Act as needed.*
>
> *In the medium-term, consideration should be given to strengthening the capacity of the Minister of Health, either through amendment to the International Health Regulation Act or the National Health Act, to more precisely enable the development of effective regulations to deal with emerging epidemic and pandemic threats. These amendments will be informed by global progress in relation to the Pandemic Treaty and/or the strengthening of the IHR (2005).*" (my emphasis).

42. The MAC advisory report of 8 February 2022 is annexed as **SFA8**.

43. That advice was ignored, and there is no explanation in the record for why it was ignored. A materially relevant consideration was thus ignored, and a

material mistake of law perpetrated, by the Minister continuing along this flawed legal path.

44. The Minister's now clear attempt to use the National Health Act as a surrogate for the National State of Disaster legislation has the following further reviewable consequences, as the record confirms:

44.1. *First:* the public participation process the Minister conducted was in bad faith - the Minister was intent on making the regulations, and its contents had been determined without public comment being invited and regardless of the input by South Africans in the public participation process. The Minister embarked on the public participation process merely to lend credibility to the regulations. The process was a sham.

44.2. Secondly, the process was rushed and ill–considered. The Minister ignored the overwhelming sentiment by South Africans and concerns expressed by his own Ministerial Advisory Committee. The Minister's mind was closed.

44.3. *Thirdly*: the decision to publish the New Surveillance Regulations, and to delay the publication of draft regulations, on which the Minister had invited public comment, was mooted on approximately 11 April 2022, but never conveyed to the public or even the National Health Council ("**NHC**") timeously. Only the day before the Minister's final decision (on 3 May 2022), in a rushed and shambolic process, was the NHC informed

of the New Surveillance Regulations. The NHC was not even invited to provide input, as the record of the meeting of 3 May 2022 of the NHC bears out and no consultative process took place.

44.4. *Fourthly*: in the rush, the Minister failed to apply his mind, and have due regard to a number of relevant and important aspects to the regulations including the penalties attached to contravening the regulations.

44.5. *Fifthly:* the Minister made the regulations acting under the dictation of the National Coronavirus Command Council (**NCCC**) and Cabinet. The record reveals that it was perceived to be necessary to make the New Surveillance Regulations because the NCCC and Cabinet resolved that the so–called "lacuna" created by the termination of the state of disaster, be filled by the New Surveillance Regulations. The Minister allowed himself to be used as a conduit to enact regulations under the dictates of his political masters, and thus permitted impermissible executive law-making (including law-making by political masters who never bothered to consider the public comments that the regulation-making generated).

44.6. *Sixthly*, the New Surveillance Regulations are substantively irrational as the record now bears out that there are no reasons at all for any of the arbitrary distinctions and provisions of the regulations.

44.7. *Seventhly*, the New Surveillance Regulations are *ultra vires* the National Health Act and the Minister's regulation-making powers.

44.8. *Eighthly,* the adoption of the New Surveillance Regulations was done without due regard being given to their impact on the competencies of provinces relating to healthcare, provinces' inputs into the proposed regulations and consequently it flaunts the principles of co-operative governance, fails to take into account materially relevant considerations, and violates the manner and form in which laws are ordinarily to be made where they impact on provinces.

45. In the remainder of this affidavit, I deal with each of these aspects in turn.

THE PUBLIC PARTICIPATION PROCESS WAS CONDUCTED IN BAD FAITH

46. The Minister did not engage in the public participation process because he was open to being persuaded about the content of the regulations. He engaged in the process in bad faith, and with a closed mind.

47. On 21 February 2022, a special National Health Council Meeting was convened in order to set out the procedure to be adopted for the '*Proposed Amendments to Health Regulations To Deal with Covid – 19 and Other Notifiable Medical Conditions Outside the National State of Disaster (NSOD)'.* I annex the minutes and presentation of this meeting as **"SFA9"** and **"SFA10"** respectively. At this stage, the Draft Regulations (and not the ultimately published New Surveillance Regulations) were under discussion.

48. The following is set out in the presentation regarding the '*process to be followed*' (annexed as **"SFA10"**)

> *"**Presentation to the NHC**: All four draft Regulations must be dealt with as a set as they complement each other.*
>
> ***Publication for public comments**: Once approved by the NHC, they will be published for public comments. In terms of section 90(4) (a) of the National Health Act of 2003, "the Minister must publish all regulations proposed to be made under this Act in the Gazette for comment at least three months before the date contemplated for their commencement". This means that the Regulations cannot come into operation within three months from the date of publication for public comments unless the provision of section 90(4)(c) have been invoked. Unfortunately, it will be very difficult to invoke this section. These draft Regulations will attract much public interest and as such the public must be given sufficient time to comment.*
>
> *In light of the urgency for the promulgation of the Health regulations to deal with Covid – 19 outside the NSoD, the regulations will be published for at least 30 days for public comments."*

49. There are three notable features to the process outlined at the NHC meeting of 21 February 2022:

49.1. *First*, there is the suggestion of an urgent need to publish regulations to deal with Covid–19 outside the national state of disaster. This urgency

arose because of the expiration of the state of disaster as declared in terms of the DMA and the perceived need to "plug the gap" using the National Health Act.

49.2. *Second*, there is recognition and an acceptance that the Minister cannot gazette the Regulations less than three months from the date on which the regulations were published for public comment, precisely because the public "*must be given sufficient time to comment*"; and

49.3. *Third*, the reason why the Minister opted nevertheless to rush a public participation process, given the self-created "*urgency*" of the draft regulations, is because "*unfortunately, it will be very difficult to invoke this section*" i.e. section 90(4)(c), which allows the Minister to forego public participation.

50. The NHC was correct to note that it would "*be very difficult*" to invoke section 90(4)(c) of the Act. The reason for this is obvious. The government had two years to consider, plan and develop the machinery necessary to respond to public health emergencies outside of a state of disaster. It chose not to do so. And in particular, it chose not to engage the proper engine for law–making: Parliament.

51. Not only did the Minister circumvent the proper legislative process, the Minister sought to make regulations that do not align with the National Health Act and under a process so rushed as to be simultaneously a sham and shambolic.

Instead of proper law-making and meaningful consultation, the Minister went for a short-cut: a 30-day process which is neither provided for nor lawful under the National Health Act, nor was it suggested that 30 days would be adequate for the purpose – on the contrary, every suggestion was to the effect that, given the public interest, more time needed to be provided.

52. Rather, 30 days was recommended (and as one knows, was approved, as this was the timeframe initially applicable for public comment on the Draft Regulations, before the first extension was provided). There is no apparent reason for 30 days, a seemingly arbitrary length of time (and unlawful - I have already explained that section 90(4) of the National Health Act, the route chosen by the Minister, requires the Minister to publish the proposed regulations for comment, **at least** three months before the date of their "*commencement*").

53. The NHC meeting on 21 February 2022 reveals that the public participation process was not intended to be meaningful.

53.1. The Minister had already resolved that the draft regulations needed to be published. As indicated in the presentation, "*there is an urgent need to publish the regulations*".

53.2. The making of the regulations was therefore a foregone conclusion. It was always going to happen, in the form predetermined by the Minister, regardless of the public participation process.

53.3. All that the public participation process was designed to do, was create the façade that the Minister would meaningfully engage with the public before making the regulations and to tick a box (inadequately, as it so happens), when he had no real intention of engaging the public, obtaining the public's views or enhancing his decision-making through a plurality of views timeously sought and properly considered.

53.4. The approach, and the Minister's treatment of the public is not only unlawful and in bad faith, it is also disrespectful of the public who were put to the task of submitting comments on lengthy, extensive Draft Regulations, only for those comments to be ignored. Such a high-handed approach engenders no faith in government, it breeds distrust and cynicism in government law-making, at a time when the government was well aware – as the National Health Committee meeting had stressed – that these *"draft Regulations will attract much public interest".*

53.5. That the Minister did not intend to conduct the public participation in good faith, is clear from the reasons for invoking section 90(4)(a) of the National Health Act instead of section 90(4)(c). Quite correctly, the Minister realised that he could not justify foregoing the public participation process on the basis of 'urgency' because such urgency was entirely self–created. The government had two years to prepare for a post-state of disaster legal regime, but did not do so.

53.6. The urgency was of the government's own making.

53.7. The minutes of the NHC meeting of 21 February 2022 reveal precisely the dynamic that led to this. It explained:

"*2.5 The country is now at the tail end of the fourth wave, which has become complicated because it was thought that it would go at the same speed as it came in, but it is not going as quickly as it came in.*

2.6 The scientists are now talking about sub variants called BA.2 as well as BA.1 which are doing rounds and complicating the exit of the fourth wave. The infection rate is however at the low level.

2.7 Many things have changed over time, including the level of restrictions, which have progressed from a hard lockdown adjusted risk approach of Level 4 to Level 1 with very few restrictions, however there are significant restrictions, particularly in relation to gatherings, masks, and maintaining social distance.

2.8 Alert Level 1 has also been significantly adjusted, resulting in the ability to hold election campaigns for local government after the Constitutional Court ruled that the elections should go ahead.

2.9 Various role-players and stakeholders are putting a lot of pressure on the national government to end the state of disaster.

2.10 There was a discussion even within the National Coronavirus Council (NCCC) about the possibility of using other measures towards the end of October 2020 to consider exiting the state of disaster.

2.11 The President, for example, has stated unequivocally that the health department, in collaboration with other departments, must find other ways to assist the country in taking the necessary precautions while also allowing more activity and exiting the state of disaster as there is a view that it is not good for economic and social activities.

2.12 The last NCCC instructions were that the health fraternity should find means in terms of the national health regulations, within the National Health Act, as well as all other departments that are relevant to their respective departments legislation in order to help to exit the Disaster Management Act and also to use other means to help with any mitigating interventions.

2.13 In light of the foregoing, the health department has been working on the legal framework for the Health Regulations, and when it was examined in 2020, it was discovered that the national health regulations would fall far short of what was still required at the time.

2.14 With all of the experience, particularly with the nature of the fourth wave, this task has been assigned to examine what is possible, and the view is that health regulations will take the lead, and then it can be indicated where other departments are required in terms of other mitigating interventions that are still required."

53.8. The Minister, accordingly, elected to follow a public participation process not because he sought truly to benefit his decision-making from that process, but because he could not justify excusing public participation on the basis of urgency under section 90(4)(c). The government had,

despite already in 2020 considering the legal framework for exiting the Disaster Management Act, left the regulations so late that the Minister then embraced finalising them with nothing more than a pretence at public participation, under section 90(4)(a).

54. Equally concerning is the fact that the rule 53 record demonstrates that the Minister was determined to enact all four sets of the Draft Regulations shortly after the public participation process had come to an end.

55. The correspondence set out below indicates three things: (a) the Minister was aware that the process for public participation was inadequate but was not concerned about the adequacy of the process; (b) the Minister did not deem it necessary to give himself or his team sufficient time to digest and consider the representations; and (c) the process for public participation was conducted entirely in bad faith, with the intent to publish all of the regulations shortly after the public participation period. The new and impugned Surveillance Regulations are thus infected by all these process errors, given that this was the process by which the Regulations were published.

56. On 11 April 2022, Mr Lufuno Makhosi, a legal advisor in the Department of Health received a request from a member of the public, Mr Murray Hunter, seeking an extension so that he may comment on the proposed regulations. In the request, Mr Hunter indicates that it was not possible to meaningfully comment on the regulations given their "*length/complexity*".

57. The Deputy–Director General for the Department of Health indicated on 11 April 2022, in response to the request, that he supported a certain proposal (which is not set out as it is legally privileged), and wrote:

> *"Dear Colleagues*
>
> *[redacted] I think that we will get greater credibility if the public knows that we are listening and that we are not steam–rolling regulations. But we do need to indicate that the regulations generally require amendments so there will be other changes coming in due course.*
> *An official announcement that we plan a two–stage approach aimed at protecting the public when necessary will go a long way to calming our critics and adversaries."*

58. A copy of this correspondence appears in **"SFA7"**. It therefore appears that the Department of Health conveyed that it was intent on receiving comments on all the Draft Regulations before "the regulations are enacted". There was no indication of any "two-stage" approach, and no extensions were granted in any public communication from the Department of Health at that stage. Accordingly, Mr Hunter (along with the rest of the public, including the applicants) was forced to spend time commenting under that extreme deadline on the full range of "lengthy" and "complex" draft Regulations. That obviously compromised the process fundamentally.

59. The compromising of the process – by way of rationality, and fairness – did not end there. It further appears that whatever the DG's views, despite the week–long extension to the period for public comment on 14 April 2022, and the publication of the New Surveillance Regulations having been mooted internally in the Department as early as 11 April 2022, the Minister was still intent on publishing the full set of regulations shortly after the deadline of 24 April 2022, and to do so even if it was impossible in the time available properly to consider the public's comments.

60. This is apparent from the daily reports of the Department of Health sub–task team responsible for sorting and collating public comments.

61. On 19 April 2022, the sub–task team responsible for collating public comments noted the following in their daily report:

> *"The team has drafted a project plan based on the directive to finalise the whole process 72 hours after the closing date of commenting. It must be reported that based on the daily report of the 17th April 2022 it became clear that the expected time to finish the project based on the available staff, resources, network coverage and speed, etc, the project can be completed on the 14th May 2022 unless the following issues are attended to urgently. There are 223 000 comments left as of 17th April 2022, the team was able to do 15 000 for the day. If this pace is maintained it would take up to the 14th [of May] as indicated above and this is not an option as the task must be finalised by the 27th April 2022."*

62. The directive referred to by the sub–task team is not contained in the rule 53 record – it ought to have been included, and the Minister is obliged in his answering affidavit, when responding to this paragraph, to disclose it to the Court as an annexure (and the applicants reserve their rights to deal therewith in reply, if necessary).

63. In any event, it is clear that the team collating the information were pressured to complete the task of collating all of the public comments three days after the period for public comment had closed on 24 April 2022. Any delay, as the report notes, was *"not an option"* – whether the task could be completed in this time or not.

64. Accordingly, it was apparent that the Minister did not care about the impact such truncation and impossibility may have had on the process. The end was all that mattered – the full regulations would be published on time, no matter what. A copy of the sub–task team report for 19 April 2022 is annexed as **"SFA11".**

65. The only reason for the extraordinary deadline imposed on the sub–task team, was because the Minister had set an impossible deadline for implementation of the regulations, to coincide with when the state of disaster was set to expire on 4 May 2022.

66. But it was not possible for the sub–task team to comply with the Department's unreasonable deadline. On 25 April 2022, the sub–task team noted in their daily report (annexed as **"SFA12"**) that:

> *"The team cannot estimate the finish period, the plan is aligned to the 72 hours after closure of commenting. The team has planned to finalise everything by the 27th April 2022. The team envisaged to remain in operation until the final report is prepared, this could go until the 29th April 2022.*

67. On 2 May 2022 (three days before the New Surveillance Regulations became operable), the sub–task team noted in their report (annexed as **"SFA13"**) *"the team is of the view that the comments may be finalised if they are allowed to continue processing as planned until 20th May 2022" (my emphasis).*

68. What is clear, is that the sub–task team could only complete the processing of comments by 20 May 2022. The process could not be completed before then, and certainly not at the stroke of midnight on 4 May 2022 – and certainly not in a way that allowed the Minister any time to consider the comments meaningfully.

69. The Minister knew – because he had been told – that the timeframes for public comment were inadequate. AfriForum submitted its representations to the Minister under a strict reservation of rights regarding the inadequacy of the

public participation process and in particular the extreme pressure under which the submissions had to be made.

70. He persisted with his intention to implement the Draft Regulations notwithstanding this knowledge and complaint and appeared to change his mind on this score at the eleventh hour, to instead, publish the New Surveillance Regulations.

71. So, the Minister made the New Surveillance Regulations in the face of not only an incomplete public participation process, but one in respect of which he failed to invite any comment at all.

72. The Minister and his team had discussed (and presumably agreed) on 11 April 2022 that the New Surveillance Regulations would be enacted but chose not to be candid with the public, by failing to advise the public. Instead, the Minister allowed the public to continue to comment on draft regulations which the Minister knew would not be enacted (at that stage, or necessarily in that form). The Minister invited the public to comment on a broad and sweeping set of draft regulations under extreme pressure when there was no need for this, in a façade aimed at duping the public into feeling their views had been heard and concerns ventilated.

73. Had the Minister disclosed that he intended only to enact three discrete provisions of the draft Regulations, the applicants and other South Africans would have devoted their focus to comment only on those three regulations,

and provided comment on the exact regulations proposed for publication (rather than an iteration contained in the Draft Regulations, and with their time, energy, resources and – where they had engaged legal representatives – money being diluted and wasted by comments on regulations that were ditched at the last minute).

74. The approach by the Minister has ensured that the entire public participation process is a sham and irrational. It could not and was not designed to serve the purpose of obtaining comment, feedback or input on the regulations to be published. It could not and did not achieve the purpose of public participation, including the duty to ensure that people feel that their views are respected and that democratic law-making is a process tailored to lawful ends that reflects the inputs of the people.

75. And it could not and did not allow the Minister to obtain the fullest and considered input on the regulations to be published, but instead had the public making and the sub-task team spending inordinate and wasted hours considering inputs on irrelevant regulations that were not published, rather than focusing on the regulations that were published.

76. There remains, from the record disclosed, no explanation for why the Minister deemed it necessary to only publish three discreet amendments to the Surveillance Regulations, and not the Draft Regulations as planned, and why those provisions were not adopted in the form in which they had been published in the Draft Regulations. This change of strategy, in the light of the Minister's

published comments and the public's reasonable expectation about what was to be published and what was to be commented on by them, is irrational as it not supported by any reasons, basis or justification. It was entirely arbitrary, as the record now bears out.

MINISTER IGNORED THE COMMENTS IN ANY EVENT

77. To the extent that the public participation process for the Draft Regulations is relied on as a surrogate for the public participation process which should have taken place in respect of the New Surveillance Regulations, this process was in any event defective. There is no indication at all from the rule 53 record that the Minister applied his mind to any of the comments or any report on the comments.

78. That the Minister ignored the comments is not surprising because the Minister was not at all concerned with the public participation process, but it is confirmed by the substance of the comments, none of which featured in any decision-making.

79. The comments were ignored, not engaged with and therefore did not feature in the Minister's decision making at all.

80. That is furthermore not surprising, given that the sub–task team could only complete the processing of comments by 20 May 2022. As I pointed out earlier, the record reveals that the process could not be completed before then, and

certainly not by midnight on 4 May 2022. So the Minister did not have any time to consider the comments meaningfully, but pushed on regardless.

SHAMBOLIC PROCESS UNLAWFUL AS NO CONSULTATION WITH THE NHC

81. The decision to publish the New Surveillance Regulations, and to delay the publication of draft health regulations, on which the Minister had invited public comment, was mooted on approximately 11 April 2022, but never conveyed to the public or even the National Health Council ("**NHC**") timeously.

82. The NHC consists *inter alia* of the Minister, his deputy, various members of executive councils, local government representatives, the heads of provincial health departments, the head of the South African Military Health Service. The nature therefore of the NHC is to be a representative body that advises the Minister.

83. Only the day before the Minister's decision (on 3 May 2022), in a rushed and token process was the NHC informed of the impending enactment of the New Surveillance Regulations.

84. The NHC was not invited to provide input or "consulted" in any meaningful sense, as the record of the meeting of 3 May 2022 of the NHC bears out. Even it became a party and a silent witness to the Minister's sham consultation process.

85. The National Health Act, section 90, requires that the Minister publish regulations "in consultation" with the NHC. In a woeful attempt to meet this requirement, at the eleventh hour, the Minister hurriedly assembled an urgent NHC meeting. The earlier NHC meeting (held on 21 February 2022) had been held in respect of the Draft Regulations. In recognition of the fact that the Draft Regulations and the New Surveillance Regulations were different, a NHC meeting was convened on 3 May 2022, the day before their publication.

86. While termed a "consultative meeting", the minutes reflect that there was nothing consultative about the process at all. The Minutes are annexed as **"SFA14"**.

87. The opening and welcome make this much clear. It states:

> *"The NHC Chairperson, honourable Minister J. Phaahla welcomed all participants on the call and declared the meeting opened.*
>
> *He further regretted the convening of the special meeting within short notice and indicated that it will not take long as the purpose thereof was to finalize the amended Health Regulations relating to the surveillance and the control of notifiable medical conditions."*

88. The purpose of the meeting was not consultation, but finalisation. This is confirmed by the meeting proceedings. It reflected:

"MEETING PROCEEDINGS

There being a quorum for the meeting to proceed, the Chairperson requested the task team members responsible for the process of amending the regulations to take the meeting (NHC) through the key issues relative to the Regulations to be amended before they can be promulgated."

89. The Minister's "consultation" with the NHC was treated, as in the case of the public participation process, as a formality to be rushed through no matter what.

90. There was no discussion about the content and details of the New Surveillance Regulations at the meeting and no "consultation", debate, or deliberation. Instead, the NHC was provided with a summary of what the amendments pertain to, referred to the New Surveillance Regulations, and the minutes reflect that no comments were made or invited and the meeting then closed.

91. The minutes state on this score:

"KEY ISSUES PRESENTED AMENDMENTS

The following were presented for consideration by NHC as per the draft copy of Regulations that was circulated before the meeting:

- *Wearing of face masks to contain the spread of COVID-19*

• Gatherings to contain the spread of COVID-19

• Persons entering the country to contain the spread of COVID-19

4. The meeting welcomed the contents of the amendments to the regulations and was further advised that they will be referred to regulations relating to the surveillance and the control of notifiable medical conditions and that they will come into operation on publication in the Gazette.

5. CONCLUDING REMARKS AND MEETING ADJOURNMENT

There being no further comments from the meeting, the Chairperson, thanked all the participants on the call and adjourned the meeting at 18h30."

92. Plainly there was no consultation with the NHC as required by the Act– the NHC was urgently presented with finalised regulations to be enacted the following day and that was the end of the "engagement". The process was reduced to a façade that amounted to no more than a rushed presentation of that which was regarded by the Minister as obviously finalised and awaiting implementation, after the obligatory but ultimately vacuous "consultation" with the NHC. This is in stark contrast to the minutes of the meeting of 21 February 2022 which demonstrated engagement on the regulations under discussion.

93. The process – and publication of the New Surveillance Regulations in those circumstances – was unlawful and contrary to the National Health Act.

94. Moreover, the inadequate consultations with the NHC flies in the face of the principles of co-operative government which requires the Minister to co-operate with the NHC in mutual trust and good faith.

THE MINISTER FAILED TO APPLY HIS MIND TO RELEVANT CONSIDERATIONS

95. The rule 53 record illustrates that the Minister failed to apply his mind to several relevant considerations, and on other occasions simply ignored those relevant considerations.

96. Firstly, the Minister did not apply his mind at all to the fact that contravention of any of the New Surveillance Regulations attracts a penalty of a term of imprisonment not exceeding 10 years or a term of imprisonment and fine as determined by a Court.

97. These penalties are clearly disproportionate to the offence, and further illustrate how inapt the New Surveillance Regulations are to the empowering provisions in the National Health Act that permit the making of regulations.

98. It is, with respect, absurd in the extreme that individuals may be sentenced to a 10–year term of imprisonment for failing to wear a mask properly, or attending a gathering that exceeds the number of persons permitted.

99. The Minister had a duty to consider whether it was appropriate to adopt these regulations in light of the severe penalties imposed. As is clear from the rule 53 record, he did not do so. No thought was given to the penalties imposed and no such consideration is reflected in the record.

100. Secondly, and equally concerning, the Minister wilfully ignored certain information and advice. I have explained above that the Minister ignored the comments and representations of the public. He also ignored the advice of the MAC, whose very purpose was to provide advice.

101. As of 8 February 2022, the MAC advice highlighted the need for a shift in approach in the response to COVID-19. The MAC advisory recorded the fact of the high degree of community prevalence and prior infection amongst the South African population, the evidence of the omicron variant being less severe, that containment measures would not hold and should be abandoned, and advocated for the adoption of measures with the highest level of acceptability and feasibility and proven effectiveness and which minimize the negative consequences on health and wellbeing of all members of society and the economy, weighed against the wider impact of the measures on health and well-being. The MAC advice of 8 February 2022 stated:

> "*The fourth wave has highlighted several key features of the changing COVID-19 landscape in South Africa. The most important of these is the substantial population-level immunity that has been built up through a*

combination of prior infection and vaccination. The PHIRST-C community cohort study found that by the end of August 2021, 62% of individuals had experienced at least 1 SARS-CoV-2 infection (57% at the rural site and 68% at the urban site).

1 A survey conducted in Gauteng at the start of the fourth wave found an overall seroprevalence of 73%.

2 The large numbers of infections during the fourth wave, and evidence of high levels of community prevalence in some settings, suggests that the overall attack rate for previous SARS-CoV-2 infection in South Africa is extremely high. Furthermore, as of mid-January 2022, approximately 40% of the adult population has been fully vaccinated and booster doses are widely available. Vaccine coverage is higher among high-risk age groups (60% in individuals age 60 and above).

Since the start of the fourth wave, substantial evidence has accumulated that, despite Omicron's ability to infect those with some form of immunity, this immunity is strongly protective against severe disease outcomes including hospitalisation and death.

Mounting evidence, primarily from outside the South African context, also suggests that Omicron may be inherently less severe than prior variants; however, this effect is relatively small and the variant causes substantial levels of severe disease and deaths in unvaccinated individuals without a prior infection. Both hospitalisations and excess

deaths were substantially lower in the fourth wave compared to the previous three waves.

Beyond the fourth wave, it is necessary to consider health policy changes to the management of COVID-19. At this point in time, it is clear that the virus will not be eliminated from South Africa. Although it is impossible to know the future trajectory of the virus or precisely predict the emergence of new variants, surges of SARS-CoV-2 transmission are likely to put substantially less pressure on the health system moving forward. Over the next few years, we are likely to reach an endemic state similar to influenza and seasonal endemic human coronaviruses, which continue to result in seasonal illness and death at levels that are tolerated without requiring lockdowns, masks, and social distancing. New medicines and vaccines for the prevention and treatment of COVID-19 will become available as new evidence emerges.

While the economic cost of restrictions such as curfews and limited gatherings were warranted given the public health crisis caused by the pandemic, the economic damage and large-scale job losses suffered since March 2020 (when lockdowns were first imposed) cannot be ignored in 2022, with an official unemployment rate of 34.9% and an expanded unemployment rate now above 44%. South Africa's fiscal position has also deteriorated dramatically relative to pre-COVID projections, with the debt-to-GDP ratio of 70% and debt-servicing costs

expected to consume more than 15% of the national budget by financial year 2023/24.

Of note, key WHO principles for implementing PHSM aimed at reducing SARS- CoV-2 transmission include:

- *Adoption of measures with the highest level of acceptability and feasibility and proven effectiveness – and which minimize the negative consequences on health and wellbeing of all members of society and the economy*
- *Decisions to apply PHSMs must be weighed against the wider impact of the measures on health and well-being*

Furthermore, there is increasing realization that the premises/assumptions on which containment efforts are based do not hold:

- *Substantial transmission of SARS-CoV-2 occurs from asymptomatic or pre-* symptomatic cases
- *Inability of testing in South Africa to rapidly identify the vast majority of cases with a diagnosed fraction of under 10% of cases (calculated from seroprevalence studies and excess deaths)*
- *Inability to rapidly identify and quarantine all contacts of a case Emergence of variants with increased transmissibility*
- *Socio-economic circumstances that render quarantine, isolation, and effective social distancing unfeasible*

The threat of a COVID-19 surge resulting in overwhelmed health services has been substantially reduced by widespread access to vaccines which are effective at preventing severe disease and death, high seroprevalence from prior infection which affords similar protection, growing experience of rapidly increasing health service capacity during previous COVID-19 waves and the emergence of new therapeutic options.

In this context, we propose a deliberate shift to an evidence-based mitigation approach23 as COVID-19 moves towards endemicity. It is envisaged that this shift will reduce socio-economic harms and shift resources currently used for ineffective containment measures to those that will provide the greatest mitigation benefit, including reducing the burden of disease that has resulted from neglected non-COVID-19 services, especially mental illness." (*my emphasis)*

102. The MAC advisory of 8 February 2022 is attached as **"SFA8"**.

103. Given the MAC's advice, the Minister's decision to publish the New Surveillance Regulations without any warning to the public and without hearing from the public on those regulations first is all the more alarming. The entire thrust of the MAC's advice was to the effect that measures should be adopted which have a "highest level of acceptability" and which "minimize the negative

consequences on health and wellbeing of all members of society and the economy".

104. The Minister could not adopt such an approach if he failed to even hear from the public to assess the degree of acceptability, the negative consequences of measures and determine how to enhance wellbeing.

105. Nowhere does the record bear out that any regard was had to these factors.

106. The Minister also ignored the MAC's specific advice on the topics to which the New Surveillance Regulations relate.

MAC advice on ports of entry restrictions – 15 February 2022

107. As to ports of entry requirements, the MAC advisory stated:

> "*The National Health Laboratory Service has raised concerns about capacity constraints and the cost implications of providing antigen testing at ports of entry. Currently over 200 tests are performed to find one positive result, representing a cost of R70,000 – R170,000 per positive test. The NHLS have recommended that testing at all borders cease.*
>
> • *In addition, it has been pointed out that a PCR test is prohibitively expensive in some countries, making it unaffordable to many travellers.*"

"***Remove SARS-CoV-2 test requirements for cross-border travellers***

• There is a MAC on COVID-19 Advisory on travel, including cross border travel from neighbouring states.

• Travellers with SARS-CoV-2 entering South Africa are unlikely to significantly alter the epidemic trajectory unless it results in introduction of a new variant.

• However, as the recent international spread of Omicron has clearly shown, travel restrictions and pre-travel testing do not contain spread of variants, possibly delaying the spread by a few days if at all."

108. On 15 February 2022, the MAC advised:

"As the region moves towards recognizing COVID-19 as endemic, with a view to a mitigation strategy to address the health risk of the infection, the MAC on COVID-19 therefore recommends that entry requirements for all international travelers to South Africa be reduced and even removed, opening the country to increased incoming travel, for economic or tourism purposes.

For entry into South Africa by air or sea (except from a neighbouring country), the following requirements should apply:

□ A completed Traveler Health Questionnaire at all border entry points according to Port Health data requirements; symptom screening is not

recommended for travelers to prevent the transmission of COVID-19, but may remain in place to recognize other emerging infectious diseases.

 Unvaccinated travelers in South African border and ports should be offered vaccinations in South Africa and where possible at the border. This vaccination program should be offered at no cost to the traveler, and can be used to enhance the vaccination numbers in the region amongst the highly mobile population."

109. The MAC advisory is attached as **"SFA15".**

110. This advice was ignored in favour of the New Surveillance Regulations which, in Regulation 16C, contains the stipulation that all international travellers arriving at South African ports of entry must either be vaccinated against COVID-19 and produce a valid vaccination certificate; or produce a valid certificate of a negative PCR COVID-19 test; or produce a valid certificate of a negative antigen COVID-19 test; or produce a valid certificate of a positive PCR COVID-19 test, for a date less than 90 days prior to the date of arrival.

111. No reason or justification appears from the record demonstrating that the advice was considered or why the advice was ignored or not followed. This is irrational.

MAC advice on gatherings – 16 February 2022

112. On 16 February 2022, the MAC advice on gatherings was:

"The MAC position paper highlighted the principles for implementing public health and social measures (PHSMs) which have been advanced by the World Health Organization (WHO):

o That, measures with the highest level of acceptability and feasibility and proven effectiveness, and which minimize the negative consequences on health and wellbeing of all members of society and the economy, should be adopted.

o That the decisions to apply PHSMs must be weighed against the wider impact of these measures on health and well-being.

That the current restrictions applicable to outdoor gatherings be lifted.

o In accordance with the previous MAC on COVID-19 position paper, the wearing of masks outdoors and physical distancing should no longer be mandatory. Good ventilation continues to be recommended where possible."

113. The MAC advisory is annexed as **"SFA16"**.

114. Instead of following this advice, the Minister enacted Regulation 16B which contains the regulations on gatherings, including restrictions thereon, venue capacity restrictions and requirements for entrance, including in respect of outdoor venues.

115. No reason or justification appears from the record demonstrating that the advice was considered or why the advice was ignored or not followed. This is irrational.

MAC advice on mask mandates – 8 February 2022

116. As to mask mandates, the MAC advice (on indoor use dated 8 February 2022) was inconclusive, indicated more research was required but provided some advice regarding long term mask use. It said:

> *"The use of masks indoors needs further research and guidance. Indoor mask mandates should not be imposed indefinitely and criteria for the removal of indoor mask mandates should be clearly defined".*

117. The MAC advisory is annexed as **"SFA8"**. Instead of undertaking further research, or creating criteria for the removal of indoor mask mandates, the Minister enacted Regulation 16A, which prescribes that a person, when entering and being inside an indoor public place, must wear a face mask; and may not use public transport if they do not wear a face mask.

118. No reason or justification appears from the record demonstrating that the advice was considered or why the advice was ignored or only selectively followed.

119. The Minister also ignored advice that the Draft Regulations were likely unconstitutional. The minutes of the National Health Council Consultative meeting held on 21 February 2022 (annexed as **"SFA9"**) state insofar as four Draft regulations were concerned:

"4.2.7 There has been engagement with the State Law advisors on this regulation

While the preliminary view is that these may be unconstitutional, they were engaged and subsequently promised that they would engage with them and that they would be able to work up something that would allow the country to deal with a pandemic without resorting to issues of the HODs going to the High Court."

THE MINISTER ACTED UNDER THE DICTATION OF THE NCCC AND CABINET IN MAKING THE NEW SURVEILLANCE REGULATIONS

120. The rule 53 record illustrates that the New Surveillance Regulations were made on the instruction of the NCCC (an executive committee consisting of certain Cabinet Ministers) and Cabinet, and that the Minister's decision-making was directed fixatedly on complying with that instruction.

121. At the National Health Council meeting on 21 February 2022, the Minister noted that:

*"The **last NCCC instructions** were that the health fraternity should find means in terms of the national health regulations, within the National*

Health Act, as well as all other departments that are relevant to their respective departments legislation in order to help exit the Disaster Management Act and also use other means to help with any mitigating interventions."

122. I attach this meeting's minutes as **"SFA9".**

123. It is also clear from the rule 53 record that Cabinet scrutinised the content of the regulations, and vetoed certain regulations. On 3 May 2022, the Director–General, sent an email in which the following is stated:

"*Dear Dr Thulare and [redacted]*

I have just had a discussion with the Minister, and he has requested that Reg 16B (9) be amended to focus on basic educational institutions only ***as that is what was approved by Cabinet***". (emphasis added).

(annexed previously as part of **SFA7**).

124. Cabinet did not merely consider the proposed regulations and provide input on their content. Cabinet **approved** the regulations that would become operatable. The final decision on the content of the regulations was not left to the Minister, and the National Health Council. It was a decision for Cabinet to make.

125. There are at least two problems with this:

125.1. First, Cabinet being permitted to veto any of the proposed regulations is clearly at odds with and *ultra vires* the lawfully prescribed process in section 90 of the National Health Act. This section does not envision a role for Cabinet to approve those regulations that become operable and veto those regulations that it determines should not be adopted. Cabinet did not merely play a consultative role in the making of the regulations, it approved the regulations that would be made. By allowing Cabinet this role in the law-making function is akin to abdicating law-making to the executive.

125.2. Second, Cabinet does not have the benefit of the National Health Council views on a particular regulation, or the public's input through the participation process, when it determines which regulations should be "*approved*" and those regulations that should not be abandoned. It is clear that this type of executive law-making fails all of the usual democratic principles that are associated with proper law-making by the legislative branch; and in any event fails the public consultation component of regulation-making as a form of delegated law-making power under the Act (assuming that such powers to make these Regulations are afforded under the Act, which they are not).

REGULATIONS IRRATIONAL AND ARBITRARY

126. The record now bears out that certain of the regulations are entirely irrational and make distinctions on no justifiable basis. For example, there is

nothing from the record to justify why Regulation 16B(9) excluded basic education institutions from the operation of this regulation but not tertiary institutions or early childhood education centres, or why Regulation 16C requires a traveller who arrives, tests positive for Covid – 19 and is asymptomatic to self-isolate for ten days, but not any other person in the same position within the country.

127. Additionally, and as explained above, the Minister ignored the advice of the MAC on 15 February 2022 in which it confirms that the National Health Laboratory Service ("NHLS") recommended that testing at borders cease. The reasons for this were two – fold: (a) first, because the evidence confirms that persons entering South Africa do not contribute to the overall number of positive COVID–19 cases in South Africa, and (b) second, the NHLS and private laboratories across South Africa do not have adequate capacity to keep up with the demands of testing for every person who enters South Africa.

128. Because in–bound travellers do not meaningfully contribute to the rise in domestic COVID–19 infections, it would be irrational to place extreme pressure on the NHLS and private laboratories across South Africa who simply do not have capacity to meet the demands of requiring each person entering South Africa to be tested.

129. On 3 May 2022, a mere one day before the New Surveillance Regulations came into operation, the Director of Port Health in the Department

of Health noted that regulation 16C and the requirement for antigen tests at ports of entry will result in capacity issues for the NHLS:

> *"Capacity issues relating to NHLS were looked at for alternatives and a process for alternative testing services to be provided by the private lab services who have already shown interest, this has been considered based on the issues raised by neighbouring countries during the last Ministers of Health meeting that the SADC region is not ready to do away with travel entry requirements".* (see annexure **"SFA7"**).

130. The Minister and the Department did not ensure that there was sufficient capacity to conduct antigen testing. All the Department had, was an *"interest"* by private health laboratories, without there being an assurance or any evidence – and none contained in the record – that the demands imposed by regulation 16C could be met. Of course, the Minister did not consider the fact that the MAC advised on 15 February 2022, that even private health laboratories do not have capacity to keep up with the demands for testing at ports of entry. This further illustrates not only the irrationality of regulation 16C, but also the bad faith with which it was made. Despite the capacity issues created by regulation 16C, the Minister was still intent on adopting it.

131. Equally concerning, is the general justification for the regulations. A day before the New Surveillance Regulations were made, Ms Aneliswa Cele, the Chief Director in the Department of Health, defended the regulations, and in particular regulation 16C, on the following basis:

"... Minister will be able to defend this. COVID – 19 has been declared by the WHO as the "public health emergency of international concern" which means an extraordinary event which is determined

(i) *to constitute a public health risk to other States through international spread of disease*

(ii) *to potentially require a coordinated effort.*

Above is quoted directly from IHR 2000, which means we therefore as a Country and as the Member State has (sic) this responsibility of ensuring that we are also doing our part to curb the spread.

WHO further declared this as a pandemic which also place an extra responsibility to all Member States (sic).

The Technical Team has looked at Section in relation to Quarantine and has agreed that it should be removed to algn (sic) with the current applicable provisions to Quarantine." (see annexure **"SFA7"**)

132. The justification provided is nothing short of extraordinary. The Department relies on a declaration by the WHO on 11 March 2020, to support the New Surveillance Regulations made in 2022, two years after the a global pandemic was declared by the WHO.

133. The reliance on the WHO declaration ignores the developments between 2020 and 2022 concerning vaccination, population immunity, the rates of infections, and the number of deaths occasioned by COVID 19 in South

Africa. All of these considerations (ignored by the Minister as it turns out in the rule 53 record) are entirely different in 2022, than in 2020, when there was no vaccine against COVID–19, no prospect of reaching population immunity, enormous strain on healthcare facilities, and large numbers of people dying from COVID–19.

134. The Minister did so despite the MAC advisory of 8 February 2022 pointing out to him the changed landscape.

135. Quite clearly the Minister's reliance on the WHO declaration is directly at odds with, and fails to take account of the materially obvious and relevant advice of the MAC advice of 8 February 2022 (previously attached as **"SFA8"**).

136. The Department's justification is simply illogical. It cannot rely on the WHO declaration because even it accepts that exceptional measures are no longer required to respond to COVID–19, because the state of national disaster has been terminated, which was designed to respond to an exceptional state of affairs.

137. What is clear is that the justification for the regulations are premised on outdated considerations that have no place in how the Minister and the Government ought to respond to COVID–19 today. I am advised that a decision-maker commits a material irregularity if he takes into account outdated considerations – or fails to take into account updated considerations – in arriving at a decision. The Minister's reliance on the WHO declaration, thus

appears to be the overriding reason for his decision to adopt the new Regulations, and infects the rationality of the process overall.

138. Moreover, the reliance on the International Health Regulations (IHR) is of no assistance to the Department and the Minister. The IHR recognises that member states have a duty to ensure that they respond to public health emergencies of international concern within the ambit of their domestic laws, and obligations. This means that the Minister must ensure that the substantive and procedural rationality demands imposed by the Constitution are satisfied. He has not done so.

139. Regrettably, the justification for the New Surveillance Regulations can only be described as desperate. Reliance is placed on outdated considerations, and relevant and material considerations that concern the COVID–19 virus today, were overlooked including factors relating to vaccination rates, population immunity, positive COVID – 19 cases, and mortality rates.

140. Finally, the details contained in the regulations do not stand up to scrutiny or basic logic.

141. There appears to be no reason or purpose for the Minister's self-arrogated power to *"determine that the measures in this Regulation, in part or in their entirety, are no longer necessary to contain the spread of COVID-19 and give notice of this determination in the Government Gazette, whereupon*

the measure concerned will no longer be in operation; and at any time after having made such a determination, determine that the measures concerned are once again necessary to contain the spread of COVID-19 and give notice of this determination in the Government Gazette, whereupon the measures concerned will resume operation".

142. There is no established need for the Minister to once again "switch on" the regulations – all MAC indications are to the effect that the pandemic has become or is becoming endemic with seasonal fluctuations.

143. Nothing in the record suggest that this requires the Minister to legislate in such circumstances and if so, what circumstances might justify it.

REGULATIONS *ULTRA VIRES* THE MINISTER'S POWERS

144. There can be no doubt that the New Surveillance Regulations were made for the purpose of keeping the legal machinery applicable to a state of disaster alive through the New Surveillance Regulations.

145. It is also clear from the presentation at the National Health Council meeting of 21 February 2022, where it was put plainly: '*the basis for these amendments is the current National State of Disaster and the Health Directives*'.

146. As I pointed out in the founding affidavit, the New Surveillance Regulations accord more with the DMA Regulations than they do with Draft Regulations for public comment. The National Health Act does not permit the Minister to enact regulations for the purpose of keeping alive the government's drastic response measures in a state of disaster. The National Health Act was not enacted to respond to a public health emergency, and it does not provide the legal machinery necessary to combat communicable diseases.

147. I have already explained that the Minister's reliance on section 90(1)(j), (k) and (w) of the Act is misplaced. These provisions do not permit the Minister to make regulations to combat or contain a communicable disease or a notifiable medical condition.

148. The National Health Act is not concerned with public health emergencies or states of disaster. That is what the Disaster Management Act is for, and the Constitution regulates emergencies under section 37 as read with the State Emergency Act 64 of 1997.

149. It was therefore impermissible for the Minister to make the regulations for the purpose of filling a gap created by the expiration of disaster. And because this was the driving motivation behind the making of the regulations, it is unlawful altogether. The National Health Act simply does not recognise the government's motive for making the regulations, as a legitimate exercise of subordinate law – making under the Act.



150. The MAC advised as such. It said, under the topic "**Legislative considerations**":

> *"A more challenging question concerns the ability of the Minister of Health to intervene, when the state of disaster is no longer in place, in order to enable an appropriate response to an ongoing threat from SARS-CoV-2. The Minister of Health would need to rely on the National Health Act (Act 61 of 2003), which requires that "within the limits of available resources", the Minister "endeavour to protect, promote, improve and maintain the health of the population". Limited powers are provided in terms of treating a patient without consent, which can be done if "failure to treat the user, or group of people which includes the user, will result in a serious risk to public health". Whether the Minister of Health can restrict the rights of the general public, in anticipation of their being at risk of exposure to disease, needs to be considered in terms of the Constitution. Section 36 of the Constitution (Act 108 of 1996) states that rights may only be limited "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". The following issues need to be taken into account: the nature of the right being limited, the importance of the purpose of the limitation, the nature and extent of the limitation, and the relation between the limitation and its purpose. Critically, the limitation must represent a less restrictive means to achieve the stated purpose.*

COVID-19 has been declared a category 1 notifiable medical condition, requiring reporting within 24 hours. The National Health Act enables the Minister of Health to make regulations regarding "notifiable medical conditions". No additional detail is provided in the Act, but existing regulations deal with the management of suspected and confirmed cases, and measures to enable "control of the spread of notifiable medical conditions". The current regulations are narrowly focused on cases and contacts, rather than on the general population.

It remains unclear, and untested in a court of law, whether the Minister of Health could rely on the National Health Act to impose such restrictions as are currently in force in terms of the Disaster Management Act. This includes the imposition of curfews, restrictions on gatherings (such as limits on capacity, or absolute limits), mandatory wearing of face masks in public and mandatory screening. Restrictions on travel, or the sale and transport of alcoholic beverages, would likely require collaborative action with other Ministries, relying on other legislation."

151. The Minister proceeded in the face of this advice, and thereby ignored a materially relevant consideration, in violation of established case law that will be drawn to this Court's attention at the hearing.

152. I am further advised that the Minister's abuse of power falls foul of very recent Constitutional Court authority. Attention will be drawn thereto at the hearing too, in particular to confirm that if the Minister (or more accurately Cabinet, which issued the directions) wished to effect a desired health policy,

then he (or Cabinet) could introduce a Bill in Parliament to lawfully achieve that end, rather than abuse the National Health Act for that purpose.

153. The Minister cannot arrogate to himself a power that he does not have under the Act, and his perceived need for a particular type of gap-filling exercise after the end of the disaster under the Disaster Management Act is simply not enough.

154. That is because – so the Constitutional Court has confirmed – the regulation making power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. The Minister is not authorised to attempt to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the Legislature has adopted to attain the Act's ends.

155. That is true for the New Surveillance Regulations as a whole, as legal argument will attest. And as a helpful illustration thereof, the ports of entry regulation is nakedly *ultra vires* the National Health Act. The Department of Health "Rationale for the development and publication of port health regulations" expressly states that the regulations of ports of entry are to be made under the National Health Regulations Act. This is plainly the correct legal basis to make such regulations – yet the Minister arrogated to himself the power to push those regulations through a statute that is not fit for that purpose, being the National Health Act.

THE CORRECT LAW-MAKING PROCESS WAS OVERLOOKED AND THE REGULATIONS ARE NOT TAILORED TO THE DEMANDS OF THE PROVINCES

156. It is clear from the record that the Minister ignored the demands of the provinces, and their individual ability to respond to COVID–19.

157. The record does not contain any of the submissions by each of the Provinces regarding the proposed regulations that the Minister made. There is no indication as to whether all of the Provinces supported the proposed regulations, and their input on the regulations generally.

158. That the Provinces were ignored, and not meaningfully engaged, is evident from the email correspondence of the Department one day before the New Surveillance Regulations were made. In it Dr Aquina Thulare, an official in the Department, notes the following:

> *"Kindly note that due to pressure of time, the draft Regulations circulated for this afternoon's NHC did not include the last inputs from Ms Bongweni.* ***If inputs are material for provinces, they will have to be highlighted during engagements with the NHC****". (my emphasis).*

159. The Department did not have sufficient time – or appear in any way interested – to consider how the regulations impact Provinces, and whether it was appropriate to enact the regulations at a national level, bearing in mind that Provinces are able to respond to an outbreak of Covid–19 in varying ways,

some with better healthcare capabilities than others. These factors ought to have been taken into account when the Minister decided to adopt regulations at national level, which treats all Provinces in the same way. He did not do so.

160. It is clear that provinces may have had something important to say about this process. For example, in a Digital Press Conference by the Western Cape Provincial Government on 7 June 2022, the Premier of the Western Cape remarked that *"it's time to do away with all Covid–19 restrictions on mask wearing and gatherings".* He also mentioned that the data illustrates that *"we can now safely and fully reopen our economy"* because COVID–19 hospitalisations only make up 3% of all available acute hospitalisations capacity in the Cape metro and rural regional hospital areas. What the conference reveals is that the Western Cape Provincial government's views may have been central to any meaningful debate about the New Surveillance Regulations, particularly as regards questions about (a) the data on hospitalisations; and (b) impediments to the economy of the Western Cape.

161. The conference may be accessed at:

canva.com/design/DAFC_9hUu4c/f8DVQl79ARgySOMmrP-uew/watch?utm_content=DAFC_9hUu4c&utm_campaign=designshare&utm_medium=link&utm_source=publishsharelink

and a newspaper article reporting on the conference is annexed as **"SFA17"** and the media statement by the Premier of the Western Cape is annexed as **"SFA18"**.

162. The concerns of the provinces are important because it goes to the heart of the applicants' complaint that the correct law making process was not followed. When legislation is enacted the demands, and the unique considerations affecting each Province is considered in the scrutiny of the National Council of Provinces (NCOP).

163. Through the NCOP, the Provinces tailor national legislation to ensure that the legislation takes into account the concerns and realities of the provinces. This was not done. Instead, the Minister sought to side–step the democratic legislative process, and ignore the deliberation that is required of the Provinces, by making the New Surveillance Regulations through arrogated and rushed powers under the inapt National Health Act.

164. Regrettably, what the rule 53 records shows is that the Minister had no regard at all to the proper democratic process for law–making. He deliberately sought to circumvent the correct law–making process because of a *"lacuna"* entirely of the Government's own doing.

CONCLUSION

165. For all the reasons above, the applicants submit that the orders sought in the notice of motion fall to be granted.

MONIQUE TAUTE

Signed and sworn before me at Pretoria on this 8 day of June 2022 the deponent having acknowledged that she knows and understands the contents of this affidavit, has no objection to taking the prescribed oath and considers the oath to be binding on her conscience.

COMMISSIONER OF OATHS

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26 May 2022

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Dear Sirs

RE: THE RULE 53 RECORD IN CASE NOS. 25226/22, 24917/22, 25363/22 & 27477/22

It has come to our attention that due to an IT error the email comments folder in the Rule 53 record that was uploaded in respect of the above applications included privileged correspondence between our client and its counsel as well as irrelevant confidential emails that should not form part of the record.

Only the emails folder in the comments folder in the uploaded Rule 53 record has therefore been removed temporarily in order for us to assess which emails should be excluded before the folder can be re-uploaded. The folders containing the comment spreadsheets, daily reports re NDOH comment processing, ICT Technical Report re allegedly deleted emails and the summary of comments have not been removed.

We will revert to you by the end of today with our progress and an estimation of when we expect to be able to re-upload the email comments folder.

We trust that if you have already downloaded the email comments folder containing the privileged and irrelevant correspondence, you will ignore and delete those emails.

Yours sincerely

PP

Halton Cheadle

Bradley Conradie Halton Cheadle

On behalf of the State Attorney

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Our ref. DJ Eloff / MAT4730 **Your ref. WRTC0001**

28 May 2022

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Dear Sirs/Madams,

AFRIFORUM & DEAR SOUTH AFRICA // THE MINISTER OF HEALTH AND OTHERS - THE RULE 53 RECORD IN CASE NOS 25226/22, 2417/22, 25363/22 & 27477/22

1. We refer to your letter of 26 May 2022, wherein you request that we "*ignore and delete*" the email comment folder delivered in the original Rule 53 record and you explain that its disclosure arose from an IT error.

Directors: WD [illegible] JP Voges LLB (Unisa), DJ Eloff LLB LLM (UP); M van Schalkwyk LLB (UJ)
HE Swan-Schultz B Proc LLB LLM (UP)
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Acting as caretaker of the former practice of [illegible] Pretorius Attorneys

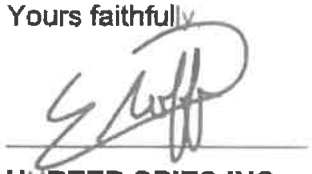
2. After serious consideration of the request, and after having regard to our obligations in terms of section 61.10 of the Code of Conduct For Legal Practitioners, Candidate Legal Practitioners And Juristic entities, published under the Legal Practice Act, which provides:-

"A legal practitioner shall not make use of any privileged information of the opposing party that has accidentally or unlawfully come into the possession of the legal practitioner, and shall at once he or she has knowledge of such circumstances, notify the legal representatives for the opposing party. However, if such information subsequently becomes available to the legal practitioner through lawful means, he or she shall not be inhibited from making use thereof."

We undertake to delete the email comments folder which we had downloaded prior to receipt of your letter, and to ignore the contents of such folder for purpose of preparing our clients' supplementary founding affidavit.

3. We understand that a suitably redacted email comments folder will be uploaded as part of the record. The adjustments to the record may impact on our timeframes for preparation of the supplementary founding affidavit and we reserve our rights in this regard.

Yours faithfully



HURTER SPIES INC.

Per. Daniël Eloff
Email: eloff@hurterspies.co.za



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30 May 2022

TO: **HURTER SPIES INCORPORATED**
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Dear Sirs

RE: THE RULE 53 RECORD IN CASE NOS. 25226/22, 24917/22, 25363/22 & 27477/22

The above matter and our letter dated 26 May 2022 refer.

We note that no party has taken issue with the proposition that the original email folders referred to inadvertently disclosed privileged materials and those folders should therefore be deleted and not be referred to. We thank you for that appropriate and constructive approach and are proceeding on the basis that it is agreed.

We apologise for not writing to you earlier regarding the email folders, but unfortunately assessing the email comments folder consisting of more than 400 000 emails in excess of 20 gigabytes of data has been a laborious and time-consuming process even with additional technical resources having been allocated to do so.

We draw your attention to the following facts, which will in due course be confirmed by our client's answering affidavit:

- Given the number of comments received via email, our client needed to find a practical way to share the comments between our client's various internal stakeholders in a workable format. This was inter alia because of the time it would have taken to upload the more than 400 000 emails and for the Minister and senior officials to read each and every email.
- Our client therefore used both a computer script and a manual process to extract the comments from the email. This was a laborious process over weeks with teams of officials working overtime to read and process the comments received and to compile further spreadsheets for consideration by the Minister and our client's senior officials. The comments that were received were therefore summarized in the spreadsheets, with the more substantial comments being copied and pasted verbatim into the spreadsheets.
- It is those spreadsheets (rather than the original emails themselves) which were then shared with the Minister and our client's senior officials for purposes of drafting of the Regulations and deciding what Regulations to enact.
- The spreadsheets were therefore uploaded into folder G as part of the Rule 53 record provided last week and have remained available to your clients.

That discharged (and continues to discharge) our client's obligations under Rule 53, as this is what was considered by the Minister and our client's senior officials in the drafting and enactment of the Regulations.

However, in addition, when the Rule 53 record was being prepared, our client attempted to upload the original emails concerned to make them available to your clients via the Rule 53 process.

- In its attempts to do so, our client attempted to sift out the comment emails from the other emails various mailboxes to which the emails were sent by conducting IT searches based on certain key words and then transferring those sections from the various mailboxes into a folder which was then shared via SharePoint.
- We now know that this process was not successful because it produced the difficulty we referred to in our letter of 26 May 2022, whereby the key word searches resulted in large privileged and irrelevant portions of the various mailboxes also being included.
- Unfortunately, it is now clear that (a) this does not relate to only a handful of emails which can easily be identified and deleted; and (b) trying to sift out the true comment emails would require our client to work through each of the mailboxes and to manually transfer more than 400 000 email comments into a folder.
- This would take a great deal of time and, as indicated, this process was already undertaken over weeks by a whole team of our client's officials when the relevant emails were summarized into the spreadsheets as and when they were received.
- It is therefore not practical or possible to provide the emails themselves, particularly given the expedited process for the litigation. Nor, with the benefit of hindsight, is this required by Rule 53.

In the circumstances, we wish to advise you that:

(a) We and our client are comfortable that the documents originally disclosed in the folder called "Main Record" in the seven sub-folders (A to G) suffices as the Rule 53 record, particularly given that the spreadsheets referred to above are all included in sub-folder G;
(b) Attempting to re-upload the emails themselves would in any event not be practical or possible; and
(c) In all the circumstances, does not intend to re-upload the email folders concerned.

Your clients are of course at liberty to advance any arguments that they wish in relation to this issue. Should your clients seek to compel the email comments being re-uploaded or contend that some adverse inference should be drawn from them being removed, our client will resist this and will explain its position as set out above on affidavit.

Lastly, we confirm that all of the applicants in the four applications have now been given access to the other matters on Caselines.

Yours sincerely

Liezl-Mari Mouton

Bradley Conradie Halton Cheadle

On behalf of the State Attorney

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Our ref. DJ Eloff / MAT4730

Your ref. WRTC0001

31 May 2022

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Dear Sirs/Madams,

RE: AFRIFORUM & DEAR SOUTH AFRICA // THE MINISTER OF HEALTH AND OTHERS - THE RULE 53 RECORD IN CASE NOS 25226/22, 2417/22, 25363/22 & 27477/22

1. We refer to the above matter and your letter dated 30 May 2022.

2. We note that your clients will not upload the email comments folder to the rule 53 record, with the legally privileged information redacted from this portion of the record. Regrettably, the

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of the former of: LT Pretorius

position now adopted by your clients (as of late yesterday afternoon, despite the record having been filed a week earlier on 24 May 2022) is that the email comments folder will not be uploaded altogether.

3. We point out that the contents of your letter dated 30 May 2022 deviates from your undertaking on 26 May 2022 to reupload the email comments folder after removing it "*temporarily in order ... to assess which emails should be excluded before the folder can be uploaded*". The removal was temporary, for the purpose of assessing emails to be excluded, and you undertook to re-upload the folder. You also undertook to revert later that day (26 May 2022) with your progress and an estimation of when you could be expected to be able to re-upload the email comments folder. We heard nothing from you regarding your progress (or lack thereof) and only in the late afternoon on 30 May 2022 were we informed of your changed position.

4. The position now adopted by your clients is unfortunate. We have placed reliance on your undertaking and assurance. Your clients' position is also at odds with his duties in terms of rule 53 of the Uniform Rules of Court. Your clients have a heightened duty to ensure that both the Court and the parties are provided with a complete record in order for the parties to exercise their rights under section 33 and 34 of the Constitution, and for the Court to discharge its review function. Confidentiality is no preclusion to disclosure of material under Rule 53.

5. Moreover, we dispute that the contents of the email folder are irrelevant. The public comments as well as the internal departmental communications between persons in the Department of Health are both relevant and material to the review application, and have a direct bearing on how the Court assesses the rationality and lawfulness of the impugned regulations.

6. It is for that reason, that we expressly indicated in our letter dated 28 May 2022, that we understand that a "*suitably redacted email comments folder will be uploaded as part of the record*". We did not understand that this folder would be excluded altogether. That is the basis on which we gave the undertaking in paragraph 2 of our letter of 28 May 2022.

7. Your client has now twice obstructed and stalled the applicants' preparation of their supplementary founding affidavit.

   7.1. First, by your client unilaterally deleting from the shared record it had previously filed as the full rule 53 record the comments folder, on the basis that portions of the record fall to be excluded because they were legally privileged and/or confidential and/or irrelevant, without the leave of the Court to do so. Our clients accordingly had to spend time taking legal advice on this newfound position by your client, while awaiting the uploaded comments folder;

   7.2. Second, and further belatedly, your client now indicates that the entire email comments folder will not be uploaded, despite the earlier undertaking that it would be reuploaded (with redactions as necessary).

8. The approach is unsatisfactory. As the Constitutional Court has stressed:

   "*A simple illustration will help. Let us consider correspondence as a class of information. If relevant, it ordinarily forms part of the record. However, some correspondence – such as attorney-client communications – may be privileged and thus exempt from inclusion in a rule 53 record. It does not then follow that, because there is privilege in respect of this type of correspondence, all correspondence is exempt from inclusion in a rule 53 record. In each instance any claim to exemption must be founded on some legally cognisable basis. So,*

within the class "correspondence", some correspondence would be included in the rule 53 record, and some excluded."[1]

9. Your approach means that the applicants and the court are deprived of material, at least some of which you yourself regarded as relevant and liable to be disclosed until your change of stance on 30 May 2022. This change of tack arises not because those documents have lost their relevance, but because it has proven too difficult to undertake the exercise you undertook to perform.

10. In light of the above, the time constraints (now compounded unfairly and intolerably by your client's repeated adjusting of its position in relation to the record it chose to file with the benefit of legal advice by a professional firm of attorneys) do not permit contesting the removal of the entire email comments folder. Your haphazard treatment of the record has left the timetable agreed during the Case Management meeting in tatters and stands to prejudice our clients, the Court and the public in this matter of enormous public importance.

11. The current imbroglio is of your making, not ours. We wish to avoid wasting time, (further) costs, and unnecessary interlocutory delays arising from your clients' mistakes.

    11.1. Accordingly, we call on you to do what you undertook to do, and upload the email comments folder, suitably redacted, and to do so by no later than Friday 3 June 2022. This is sufficient time to get your house in order, as you have had since last Tuesday (24 May, when the record was delivered) to do the necessary.

[1] Helen Suzman Foundation v Judicial Service Commission (CCT289/16) [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) (24 April 2018) para 30.

11.2. When performing the redaction, we remind you of the Constitutional Court's clear authority that stresses that the Minister has a duty to file "every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially." An essential purpose of this obligation is to enable a court to perform its constitutionally entrenched review function. We wish to avoid unnecessary further time wastage and call on you to do your duty – guided by the Constitutional Court's authority.

11.3. It is thus incumbent on the Minister to redact only that which is truly privileged – and to leave for the Court's benefit the other information that your client originally regarded as relevant for inclusion.

11.4. In our view, the only material your client was entitled to expect be deleted (and which it was entitled to redact) is that which is legally privileged. Any material outside of this sought to be deleted is not irrelevant, as our client will demonstrate in its supplementary founding affidavit.

11.5. Should there be any material redacted in that folder, once uploaded, which we believe ought not to have been redacted, you will have left us no choice but to deal with this in due course, and we reserve our client's rights in that regard.

12. Should you not perform the immediate and lawful redactions that you should already have affected many days ago, we record that our clients intend to deal with aspects of the email comments folder, with the relevant annexures previously drawn from the folder, *excluding any legally privileged information*.

13. To the extent that the Minister is of the view that certain aspects of the supplementary founding affidavit dealing with the contents of the email comments folder, are irrelevant or to be excluded on any other basis, he is at liberty to explain why this is so in his answering affidavit and seek appropriate relief if so advised. What he cannot do is to pre-emptively exclude what is already contained in the record on the basis of what he considers irrelevant or his lawyers now consider too difficult to separate (but previously did not so contend).

14. Our clients are willing to be collegial and to assist where mistakes are made. But it cannot be expected to wish away its or the public's rights to relevant material forming part of the Rule 53 record, not least of all where the Record is for the Court's benefit and was disclosed as such. It thus reserves its right to argue that the attempts by the Minister to adjust the record in this way violates the obligation to ensure openness, accountability, and transparency in the decision–making process that led to the impugned regulations and its obligations under Rule 53.

15. It further appears that it will now be necessary to seek an adjustment to the timetable for the filing of the applicants' supplementary founding affidavits (assuming receipt of the redacted record by this week Friday), and with consequential adjustments to the filing of papers thereafter. We propose that the Minister, who is responsible for the current situation, should call for that meeting by close of business tomorrow, and should propose a meeting for any day

within this week on an urgent basis, failing which our client will do so and reserves the right to place this and related correspondence before the Judge President for his assistance.

Yours faithfully,

HURTER SPIES INC.

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Email: eloff@hurterspies.co.za

Johann Venter

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Sent: Wednesday, 01 June 2022 07:33
To: eloff@hurterspies.co.za; johann@hurterspies.co.za; ck@hurterspies.co.za; franlie@svslaw.co.za; reyno@libertyfighters.co.za; peter@kriekprok.co.za; jd@svslaw.co.za; niekie@svslaw.co.za
Cc: NaQongqo@justice.gov.za; Halton Cheadle; Jeannette Vlok; Liezl-Mari Mouton
Subject: FW: THE RULE 53 RECORD IN CASE NOS. 25226/22, 24917/22, 25363/22 & 27477/22 (HIGH COURT, PRETORIA)

Importance: High

Dear Sirs

We refer to the above matter.

In response to the repeated requests from the applicants in the Liberty Fighters Network matter, we have uploaded the Rule 53 record onto Caselines in that matter under section 020. All parties have access to the Caselines file for that matter.

We suggest that all parties use the pagination from that version of the Rule 53 record going forward. This will avoid the risk of multiple versions of the Rule 53 record. Insofar as is necessary, we tender to do identical uploads onto the other three Caselines files over the next couple of days.

We trust you find the above in order.

In order to avoid any suggestion of prejudice, we hereby indicate that we will not object to the applicants filing their supplementary affidavits on Wednesday 8 June 2022, rather than Friday 3 June, provided that it is understood that the timelines will then be consequentially adjusted as follows:

- Supplementary founding affidavit to be delivered by 8 June 2022;
- Answering affidavits to be delivered by 16 June 2022;
- Replying affidavits by 23 June 2022;
- Applicants' heads of argument to be delivered by 30 June 2022;
- Respondent's heads of argument to be delivered by 7 July 2022; and
- Practice notes to be delivered by 11 July 2022.

If we do not hear from you by 17h00 on Wednesday 1 June, we will assume that this revised timetable is in order and will write to the DJP recording that this is the case by agreement.

In so far as some of the applicants may have taken issue with our client's decision not to include the actual email comments in the record, our client stands by the contents of its letter of 30 May 2022 and reserves its right to defend its decision in the appropriate forum, should it become necessary to do so. We also reserve the right to deal with the contents of the applicants' letters in this regard, at the appropriate time, should the need arise.

Kind Regards

Keagan Barkhuizen

Office +27 21 418 2196
Fax +27 21 418 2197
Email keagan@bchc.co.za

Web www.bchc.co.za

BCHC
bradley conradie · halton cheadle

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Hurter Spies Incorporated
Reg. no. 2008/009761/21
Attorneys/Notaries/Conveyancers

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Docex 34, Centurion
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e-mail : admin@hurterspies.co.za
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Our ref. DJ Eloff / MAT4730 **Your ref. WRTC0001**

01 June 2022

STATE ATTORNEY PRETORIA
Cnr Thabo Sehume and Francis Baard Street (Schoeman)

By email: naqongqo@justice.gov.za

BRADLEY CONRADIE HALTON CHEADLE
G04 The Gatehouse, Century Way, Century City, Cape Town

By email: Keagan@bchc.co.za & liezl@bchc.co.za
halton@bchc.co.za & jeannette@bchc.co.za

Dear Sirs/Madams,

RE: AFRIFORUM & DEAR SOUTH AFRICA // THE MINISTER OF HEALTH AND OTHERS - THE RULE 53 RECORD IN CASE NOS 25226/22, 2417/22, 25363/22 & 27477/22

1. We refer to the above matter and your email dated 1 June 2022.

Directors: WD Spies B Com LLB MBA DJ Eloff LLB LLM (UP); M van LLB (UJ)
LLB LLM (UP)
Professional Assistants: D du Plessis B Com LLB (UP); HP Ferreira BA LLB (UP)
Consultants: JJ Hurter Dip Proc (UP), J du Toit Böning B Tech (TUT), BA LLB LL M (Unisa)

Acting as caretaker of the former practice of T Pretorius Attorneys

2. We note the contents of your above-mentioned email and in the light of the refusal to respond to our proposal as contained in paragraph 11 of our letter dated 31 May 2022, we will proceed as indicated in paragraphs 12 and 13 of our letter, namely that:

2.1. Our clients intend to deal with aspects of the email comments folder, with the relevant annexures previously drawn from the folder, *excluding any legally privileged information*.

2.2. To the extent that the Minister is of the view that certain aspects of the supplementary founding affidavit dealing with the contents of the email comments folder, are irrelevant or to be excluded on any other basis, he is at liberty to explain why this is so in his answering affidavit and seek appropriate relief if so advised.

Yours faithfully,

HURTER SPIES INC.

Per. Daniël Eloff
Email: eloff@hurterspies.co.za

[redacted]

Sent: Tuesday, 12 April 2022 10:51:04 (UTC+02:00) Harare, Pretoria

To: Nicholas N. Crisp <Nicholas.Crisp@health.gov.za>; Lufuno Makhoshi <Lufuno.Makhoshi@health.gov.za>; 'Qongqo Nangamso' <NaQongqo@justice.gov.za>

Cc: Sandile S. Buthelezi <Sandile.Buthelezi@health.gov.za>; Valerie Rennie <valerie.rennie@health.gov.za>; Aquina Thulare <Aquina.Thulare@health.gov.za>; Ramphelane Morewane <Ramphelane.Morewane@health.gov.za>; Aneliswa Cele <Aneliswa.Cele@health.gov.za>; Kgorohlo Moabelo <Kgorohlo.Moabelo@health.gov.za>; Tsakani Furumele <tsakani.furumele@health.gov.za>

Subject: Re: Request for Extension of public comment period

[redacted]



From: Nicholas N. Crisp <Nicholas.Crisp@health.gov.za>

Date: Monday, 11 April 2022 at 23:39

[redacted] Lufuno Makhoshi <Lufuno.Makhoshi@health.gov.za>, [redacted]

Cc: Sandile S. Buthelezi <Sandile.Buthelezi@health.gov.za>, Valerie Rennie <valerie.rennie@health.gov.za>, Aquina Thulare <Aquina.Thulare@health.gov.za>, Ramphelane Morewane <Ramphelane.Morewane@health.gov.za>, Aneliswa Cele <Aneliswa.Cele@health.gov.za>, Kgorohlo Moabelo <Kgorohlo.Moabelo@health.gov.za>, Tsakani Furumele <tsakani.furumele@health.gov.za>

Subject: RE: Request for Extension of public comment period

Dear Colleagues

[redacted] I think that we will get greater credibility if the public knows that we are listening and that we are not steam-rolling regulations. But we do need to indicate that the regulations generally require amendments so there will be other changes coming in due course.

An official announcement that we plan a two-stage approach aimed at protecting the public when necessary will go a long way to calming our critics and adversaries.

Regards

Nicholas

Dr Nicholas Crisp

MBChB, Dip Occ Health, MMed(CH)

DDG: National Health Insurance

nicholas.crisp@health.gov.za<mailto:nicholas.crisp@health.gov.za>

National Dept of Health

1112 Voortrekker Rd

Pretoria Townlands 351-JR

Pretoria

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

From: Lufuno Makhoshi
<Lufuno.Makhoshi@health.gov.za<mailto:Lufuno.Makhoshi@health.gov.za>>

Date: Monday, 11 April 2022 at 08:20

[redacted]

Cc: Sandile S. Buthelezi
<Sandile.Buthelezi@health.gov.za<mailto:Sandile.Buthelezi@health.gov.za>>, Nicholas N. Crisp
<Nicholas.Crisp@health.gov.za<mailto:Nicholas.Crisp@health.gov.za>>, Valerie Rennie
<valerie.rennie@health.gov.za<mailto:valerie.rennie@health.gov.za>>, Aquina Thulare
<Aquina.Thulare@health.gov.za<mailto:Aquina.Thulare@health.gov.za>>, Ramphelane Morewane
<Ramphelane.Morewane@health.gov.za<mailto:Ramphelane.Morewane@health.gov.za>>,
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Moabelo <Kgorohlo.Moabelo@health.gov.za<mailto:Kgorohlo.Moabelo@health.gov.za>>, Tsakani
Furumele <tsakani.furumele@health.gov.za<mailto:tsakani.furumele@health.gov.za>>

Subject: Fw: Request for Extension of public comment period

[redacted]

Below is the WhatsApp message for the request for the extension from Mr Murry Hunter.

The view of the Department is that extending the comment period will result in a legal lacuna to deal

with Covid-19. This may be a potential legal challenge. [redacted]

Regards

Lufuno

[redacted]

From: "Sandile S. Buthelezi" <Sandile.Buthelezi@health.gov.za>

Date: Tuesday, 03 May 2022 at 14:41

To: Aquina Thulare <Aquina.Thulare@health.gov.za>, [redacted] "Funeka FP. Bongweni" <Funeka.Bongweni@health.gov.za>, Aneliswa Cele <Aneliswa.Cele@health.gov.za>, "Nicholas N. Crisp" <Nicholas.Crisp@health.gov.za>, Lufuno Makhoshi <Lufuno.Makhoshi@health.gov.za>, Dimakatso Moreroa <dimakatso.moreroa@health.gov.za>, Tsakani Ngobeni <tsakani.ngobeni@health.gov.za>, Kgorohlo Moabelo <Kgorohlo.Moabelo@health.gov.za>

[redacted]

Subject: RE: Further version of Health Regulations

Dear Dr Thulare [redacted]

I have just had a discussion with the Minister, and he has requested that Reg 16B (9) be amended to focus only on basic educational institutions only as that is what was approved by Cabinet.

Dr Sandile Buthelezi

Director-General: Department of Health

[cid:image001.png@01D85EFE.ABF6EC20]

Private Bag X828, Pretoria, 0001

Dr AB Xuma Building, 1112 Voortrekker Road, Pretoria Townlands 351-Jr, Pretoria, 0187

Tel. No.: 012 395 9150

[redacted]

[redacted]

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From: Aquina Thulare <Aquina.Thulare@health.gov.za<mailto:Aquina.Thulare@health.gov.za>>

Sent: Tuesday, May 3, 2022 1:49:26 PM

To: Funeka FP. Bongweni <Funeka.Bongweni@health.gov.za<mailto:Funeka.Bongweni@health.gov.za>>; Aneliswa Cele <Aneliswa.Cele@health.gov.za<mailto:Aneliswa.Cele@health.gov.za>>; [redacted] Nicholas N. Crisp <Nicholas.Crisp@health.gov.za<mailto:Nicholas.Crisp@health.gov.za>>; Lufuno Makhoshi <Lufuno.Makhoshi@health.gov.za<mailto:Lufuno.Makhoshi@health.gov.za>>; Dimakatso Moreroa <dimakatso.moreroa@health.gov.za<mailto:dimakatso.moreroa@health.gov.za>>; Tsakani Ngobeni <tsakani.ngobeni@health.gov.za<mailto:tsakani.ngobeni@health.gov.za>>; Kgorohlo Moabelo <Kgorohlo.Moabelo@health.gov.za<mailto:Kgorohlo.Moabelo@health.gov.za>>; Sandile S. Buthelezi

<Sandile.Buthelezi@health.gov.za<mailto:Sandile.Buthelezi@health.gov.za>>

[redacted]

Subject: RE: Further version of Health Regulations

Dear Colleagues [redacted]

Kindly note that due to pressure of time, the draft Regulations circulated for this afternoon's NHC did not include the last inputs from Ms Bongweni. If the inputs are material for provinces, they will have to be highlighted during the engagement with NHC.

Kind regards, Aquina

From: Funeka FP. Bongweni
<Funeka.Bongweni@health.gov.za<mailto:Funeka.Bongweni@health.gov.za>>

Sent: Tuesday, May 3, 2022 9:42 AM

To: Aneliswa Cele <Aneliswa.Cele@health.gov.za<mailto:Aneliswa.Cele@health.gov.za>>; [redacted] Nicholas N. Crisp <Nicholas.Crisp@health.gov.za<mailto:Nicholas.Crisp@health.gov.za>>; Aquina Thulare <Aquina.Thulare@health.gov.za<mailto:Aquina.Thulare@health.gov.za>>; Lufuno Makhoshi <Lufuno.Makhoshi@health.gov.za<mailto:Lufuno.Makhoshi@health.gov.za>>; Dimakatso Moreroa <dimakatso.moreroa@health.gov.za<mailto:dimakatso.moreroa@health.gov.za>>; Tsakani Ngobeni <tsakani.ngobeni@health.gov.za<mailto:tsakani.ngobeni@health.gov.za>>; Kgorohlo Moabelo <Kgorohlo.Moabelo@health.gov.za<mailto:Kgorohlo.Moabelo@health.gov.za>>; Sandile S. Buthelezi <Sandile.Buthelezi@health.gov.za<mailto:Sandile.Buthelezi@health.gov.za>>

[redacted]

Subject: Re: Further version of Health Regulations

Good day

In addition, to the communique shared by Ms Cele:

Please see the attached with a further amendment on the proposed provision for travellers who have recently recovered ,its important to specify the required document as laboratory test result and not a certificate as this has created confusion and also antigen test to be that done by a health practitioner as there self-testing kits on the market with questionable accuracy /reliability ,a proposal with the removal of 3b) relating to quarantine to align with the current country position on quarantine.

Capacity issues relating to NHLS were looked at for alternatives and a process for alternative testing services to be provided by the private lab services who have already shown interest ,this has been considered based on the issues raised by neighbouring countries during the last Ministers of Health meeting that the SADC region is not ready to do away with travel entry requirements .

Regards

Ms Funeka P Bongweni

Director Port Health Central Region

Environmental Health &Port Health Services

National Department of Health

012 395 9728

060 993 0107

From: Aneliswa Cele <Aneliswa.Cele@health.gov.za<mailto:Aneliswa.Cele@health.gov.za>>

Sent: Tuesday, 03 May 2022 09:02

To: [redacted] Nicholas N. Crisp <Nicholas.Crisp@health.gov.za<mailto:Nicholas.Crisp@health.gov.za>>; Aquina Thulare <Aquina.Thulare@health.gov.za<mailto:Aquina.Thulare@health.gov.za>>; Lufuno Makhoshi <Lufuno.Makhoshi@health.gov.za<mailto:Lufuno.Makhoshi@health.gov.za>>; Dimakatso Moreroa <dimakatso.moreroa@health.gov.za<mailto:dimakatso.moreroa@health.gov.za>>; Tsakani Ngobeni <tsakani.ngobeni@health.gov.za<mailto:tsakani.ngobeni@health.gov.za>>; Kgorohlo Moabelo <Kgorohlo.Moabelo@health.gov.za<mailto:Kgorohlo.Moabelo@health.gov.za>>; Funeka FP. Bongweni <Funeka.Bongweni@health.gov.za<mailto:Funeka.Bongweni@health.gov.za>>; Sandile S. Buthelezi <Sandile.Buthelezi@health.gov.za<mailto:Sandile.Buthelezi@health.gov.za>>

[redacted]

Subject: Re: Further version of Health Regulations

Good Morning

[redacted] Minister will be able to defend this . COVID-19 has been declared by WHO as the "public health emergency of international concern" which means an extraordinary event which is determined

i) to constitute a public health risk to other States through international spread of disease

ii)to potentially require a coordinated effort.

Above is quoted directly from IHR 2000, which means we therefore as a Country and as the Member State has this responsibility of ensuring that we are also doing our part to curb the spread.

WHO further declared this as a pandemic which also place an extra responsibility to all Members States

The Technical Team has looked at Section in relation to Quarantine and has agreed that it should be removed to algn with the current applicable provisions to Quarantine

Kind regards

Aneliswa PR Cele,

National Department of Health

Chief Director

Environmental Health and Port Health Services

Tel: 012 395 8521/2

Cell: 0823054134

Email: Aneliswa.cele@health.gov.za<mailto:Aneliswa.cele@health.gov.za>

[cid:image002.png@01D85EFE.ABF6EC20]

[redacted]

Sent: Monday, 02 May 2022 20:00

To: Nicholas N. Crisp <Nicholas.Crisp@health.gov.za<mailto:Nicholas.Crisp@health.gov.za>>; Aquina Thulare <Aquina.Thulare@health.gov.za<mailto:Aquina.Thulare@health.gov.za>>; Lufuno Makhoshi <Lufuno.Makhoshi@health.gov.za<mailto:Lufuno.Makhoshi@health.gov.za>>; Dimakatso Moreroa <dimakatso.moreroa@health.gov.za<mailto:dimakatso.moreroa@health.gov.za>>; Tsakani Ngobeni <tsakani.ngobeni@health.gov.za<mailto:tsakani.ngobeni@health.gov.za>>; Kgorohlo Moabelo <Kgorohlo.Moabelo@health.gov.za<mailto:Kgorohlo.Moabelo@health.gov.za>>; Aneliswa Cele <Aneliswa.Cele@health.gov.za<mailto:Aneliswa.Cele@health.gov.za>>; Funeka FP. Bongweni <Funeka.Bongweni@health.gov.za<mailto:Funeka.Bongweni@health.gov.za>>; Sandile S. Buthelezi <Sandile.Buthelezi@health.gov.za<mailto:Sandile.Buthelezi@health.gov.za>>

[redacted]

Subject: Re: Further version of Health Regulations

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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From: Nicholas N. Crisp <Nicholas.Crisp@health.gov.za<mailto:Nicholas.Crisp@health.gov.za>>

Sent: Monday, May 2, 2022 7:26:30 PM

To [redacted] Aquina Thulare <Aquina.Thulare@health.gov.za<mailto:Aquina.Thulare@health.gov.za>>; Lufuno Makhoshi <Lufuno.Makhoshi@health.gov.za<mailto:Lufuno.Makhoshi@health.gov.za>>; Dimakatso Moreroa <dimakatso.moreroa@health.gov.za<mailto:dimakatso.moreroa@health.gov.za>>; Tsakani Ngobeni <tsakani.ngobeni@health.gov.za<mailto:tsakani.ngobeni@health.gov.za>>; Kgorohlo Moabelo <Kgorohlo.Moabelo@health.gov.za<mailto:Kgorohlo.Moabelo@health.gov.za>>; Aneliswa Cele <Aneliswa.Cele@health.gov.za<mailto:Aneliswa.Cele@health.gov.za>>; Funeka FP. Bongweni <Funeka.Bongweni@health.gov.za<mailto:Funeka.Bongweni@health.gov.za>>; Sandile S. Buthelezi <Sandile.Buthelezi@health.gov.za<mailto:Sandile.Buthelezi@health.gov.za>>; Kgorohlo Moabelo <Kgorohlo.Moabelo@health.gov.za<mailto:Kgorohlo.Moabelo@health.gov.za>>

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Deputy Director General: National Health Insurance

National Department of Health

nicholas.crisp@health.gov.za<mailto:nicholas.crisp@health.gov.za>

082 375 3770

[redacted]

Sent: Monday, 02 May 2022 16:55

To: Aquina Thulare <Aquina.Thulare@health.gov.za<mailto:Aquina.Thulare@health.gov.za>>; Lufuno Makhoshi <Lufuno.Makhoshi@health.gov.za<mailto:Lufuno.Makhoshi@health.gov.za>>; Dimakatso Moreroa <dimakatso.moreroa@health.gov.za<mailto:dimakatso.moreroa@health.gov.za>>; Tsakani Ngobeni <tsakani.ngobeni@health.gov.za<mailto:tsakani.ngobeni@health.gov.za>>; Kgorohlo Moabelo <Kgorohlo.Moabelo@health.gov.za<mailto:Kgorohlo.Moabelo@health.gov.za>>; Aneliswa Cele <Aneliswa.Cele@health.gov.za<mailto:Aneliswa.Cele@health.gov.za>>; Funeka FP. Bongweni <Funeka.Bongweni@health.gov.za<mailto:Funeka.Bongweni@health.gov.za>>; Nicholas N. Crisp <Nicholas.Crisp@health.gov.za<mailto:Nicholas.Crisp@health.gov.za>>; Sandile S. Buthelezi <Sandile.Buthelezi@health.gov.za<mailto:Sandile.Buthelezi@health.gov.za>>; Kgorohlo Moabelo <Kgorohlo.Moabelo@health.gov.za<mailto:Kgorohlo.Moabelo@health.gov.za>>

[redacted]

Subject: Further version of Health Regulations

[redacted]

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[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

health
Department:
Health
REPUBLIC OF SOUTH AFRICA

NDP 2030

MINISTERIAL ADVISORY COMMITTEE ON COVID-19
MITIGATING COVID-19 IN SOUTH AFRICA: GOING FORWARD
POSITION PAPER
8 February 2022

Paper compiled on behalf of the MAC on COVID-19 by the following Technical Working Group members:
Dr T Balfour, Prof S Abdool Karim, Prof M Davies, Mr A Gray, Prof P Jordan, Prof M Mokgatle,
Dr R Morewane, Prof M Moshabela, Prof H Moultrie, Dr J Nel, Prof A Nyembezi, Dr Y Pillay, Prof J Pulliam,
Prof H Rees and Prof S Silal.

Introduction

The World Health Organization declared COVID-19 a pandemic in March 2020 and governments instituted various responses in the form of extraordinary emergency measures and lockdowns in a bid to contain the pandemic.

Over the past two years much has changed about the pandemic. More is now known about the evolution of the virus and the effectiveness of the containment measures, and vaccines and new therapeutics have been game-changers. In addition, seroprevalence studies indicate that a high proportion[1,2] of the South African population has been infected. There is thus a need to review protocols adopted thus far and to shift to managing COVID-19 as an endemic disease.

This paper was developed by the Technical Working Group on Mitigating COVID-19 Going Forward, and endorsed by the Ministerial Advisory Committee (MAC) on COVID-19, and makes proposals on the following:
(a) When the State of Disaster can be lifted and what should replace the regulations issued in terms of the Disaster Management Act.
(b) What indicators should be used to alert the country and health system to further COVID-19 outbreaks, and the need to re-issue a state of disaster or other enhanced responses.
(c) How the management of COVID-19 in the health sector can be integrated into existing programmes.

The Changing COVID-19 Landscape in South Africa

At the time of submission of this position paper, South Africa had experienced four full waves of SARS-CoV-2 transmission. The second, third, and fourth waves were driven by the emergence of Beta, Delta, and Omicron variants, respectively. Each of these variants has been successively more transmissible than the previous,[3,4] and thus able to spread despite high levels of population immunity from prior waves and, more recently, vaccination. The Omicron variant not only appears to be more transmissible than previous variants but also demonstrates immune evasion, with higher levels of reinfections and vaccine breakthrough infections than seen with earlier variants.[5,6]

The response to COVID-19 waves has also changed over time. Strict lockdowns were implemented during the first wave in an attempt to contain spread of the virus, with people confined to their place of residence except to perform essential services or obtain essential goods and services, including medical care. However, these dramatic measures were insufficient to prevent community transmission and had serious socio-economic consequences.[7] Responses to subsequent waves were focused on mitigation measures – intended to prevent overwhelming the health system – rather than containment. The country remained on Alert Level 1 (the lowest alert level) throughout the fourth wave. Nevertheless, certain policies more appropriately directed toward containment efforts,[8] including contact tracing and border testing for incoming travellers, have remained in place throughout the pandemic to date.

During the peaks of the first three waves, health services, especially hospital services came under extreme pressure.[9] There were insufficient ICU and high care beds in particular, and in a few instances shortages of oxygen. Health workers (many of whom were infected and some demised) were under extreme pressure.[10] Furthermore, there was a shortage of trained and qualified ICU staff.[11] There is also significant evidence that during the responses to the COVID-19 pandemic (especially lockdowns related to Levels 4-5), routine health services were severely disrupted.[12] However, this impact varied by health district, depending on the number of infections that were experienced as well as the redeployment of staff, which in some instances resulted in primary healthcare clinics being shut.

The fourth wave has highlighted several key features of the changing COVID-19 landscape in South Africa. The most important of these is the substantial population-level immunity that has been built up through a combination of prior infection and vaccination. The PHIRST-C community cohort study found that by the end of August 2021, 62% of individuals had experienced at least 1 SARS-CoV-2 infection (57% at the rural site and 68% at the urban site).[1] A survey conducted in Gauteng at the start of the fourth wave found an overall seroprevalence of 73%.[2] The large numbers of infections during the fourth wave, and evidence of high levels of community prevalence in some settings, suggests that the overall attack rate for previous SARS-CoV-2 infection in South Africa is extremely high. Furthermore, as of mid-January 2022, approximately 40% of the adult population has been fully vaccinated and booster doses are widely available. Vaccine coverage is higher among high-risk age groups (60% in individuals age 60 and above).

Since the start of the fourth wave, substantial evidence has accumulated that, despite Omicron's ability to infect those with some form of immunity, this immunity is strongly protective against severe disease outcomes including hospitalisation and death.[13,14,15] Mounting evidence, primarily from outside the South African context, also suggests that Omicron may be inherently less severe than prior variants; however, this effect is relatively small and the variant causes substantial levels of severe disease and deaths in unvaccinated individuals without a prior infection. Both hospitalisations and excess deaths were substantially lower in the fourth wave compared to the previous three waves.[16,17]

Beyond the fourth wave, it is necessary to consider health policy changes to the management of COVID-19. At this point in time, it is clear that the virus will not be eliminated from South Africa. Although it is impossible to know the future trajectory of the virus or precisely predict the emergence of new variants, surges of SARS-CoV-2 transmission are likely to put substantially less pressure on the health system moving forward. Over the next few years, we are likely to reach an endemic state similar to influenza and seasonal endemic human

coronaviruses, which continue to result in seasonal illness and death at levels that are tolerated without requiring lockdowns, masks, and social distancing. New medicines and vaccines for the prevention and treatment of COVID-19 will become available as new evidence emerges.

While the economic cost of restrictions such as curfews and limited gatherings were warranted given the public health crisis caused by the pandemic, the economic damage and large-scale job losses suffered since March 2020 (when lockdowns were first imposed) cannot be ignored in 2022, with an official unemployment rate of 34.9% and an expanded unemployment rate now above 44%. South Africa's fiscal position has also deteriorated dramatically relative to pre-COVID projections, with the debt-to-GDP ratio of 70% and debt-servicing costs expected to consume more than 15% of the national budget by financial year 2023/24.[18]

As COVID-19 continues to pose a health risk into 2022 and beyond, there is a need to consider responses that are integrated into the health system, that are not detrimental to other health needs, and which aim to minimise the extraordinary costs to the macroeconomy.

Rationale for Moving from Containment To Mitigation

At the start of the COVID-19 pandemic, in the absence of vaccines, effective drugs or widespread immune protection from prior infection, countries (including South Africa) implemented policy responses reliant on non-pharmaceutical measures (NPIs) later named public health and social measures (PHSM), to address the pandemic. Epidemiologically, these policy responses can be considered as either "containment" or "mitigation" strategies.[19] Differences in the rationale, objectives and policy implications of these strategies are outlined in Box 1 below.

However, as has been the case in South Africa, containment and mitigation strategies are often implemented concurrently. This results in confusion around their purpose and applicability at different epidemic stages. Containment strategies, which are not sustainable and only effective at the start of an outbreak when the number of infected people is small, have been inappropriately retained despite substantial socio-economic harm.[20] In addition, containment strategies such as testing to attempt to identify all cases for the purpose of case and contact tracing, have diverted health resources away from non-COVID-19 services and contributed to a substantial non-COVID-19 disease burden, which has worsened through successive COVID-19 waves. Of note, key WHO principles for implementing PHSM aimed at reducing SARS-CoV-2 transmission include:[21]

- Adoption of measures with the highest level of acceptability and feasibility and proven effectiveness – and which minimize the negative consequences on health and wellbeing of all members of society and the economy
- Decisions to apply PHSMs must be weighed against the wider impact of the measures on health and well-being

Furthermore, there is increasing realization that the premises/assumptions on which containment efforts are based do not hold:

- Substantial transmission of SARS-CoV-2 occurs from asymptomatic or pre-symptomatic cases[22]
- Inability of testing in South Africa to rapidly identify the vast majority of cases with a diagnosed fraction of under 10% of cases (calculated from seroprevalence studies and excess deaths)
- Inability to rapidly identify and quarantine all contacts of a case

- Emergence of variants with increased transmissibility
- Socio-economic circumstances that render quarantine, isolation, and effective social distancing unfeasible ,

The threat of a COVID-19 surge resulting in overwhelmed health services has been substantially reduced by widespread access to vaccines which are effective at preventing severe disease and death, high seroprevalence from prior infection which affords similar protection, growing experience of rapidly increasing health service capacity during previous COVID-19 waves and the emergence of new therapeutic options.

In this context, we propose a deliberate shift to an evidence-based mitigation approach[23] as COVID-19 moves towards endemicity. It is envisaged that this shift will reduce socio-economic harms and shift resources currently used for ineffective containment measures to those that will provide the greatest mitigation benefit, including reducing the burden of disease that has resulted from neglected non-COVID-19 services, especially mental illness.

Box 1: Rationale, objectives and policy implications of containment and mitigation strategies for COVID-19

CONTAINMENT

Assumptions:

- Disease not yet widely spread through population
- Cases (& contacts) easily detected, 'sealed off' from uninfected population very rapidly (≤24 hours after infectiousness starts), and doing this prevents transmission
- Population able and willing to social distance, and this is sustainable and affordable to society

Policy objectives:

- STOP transmission in the general population

Policy implications:

- Large-scale testing
- Case and contact tracing
- Quarantine and isolation
- Strict and sustained public health and social measures to prevent transmission e.g. limited gathering size, work from home

MITIGATION

Assumptions:

- Disease widely spread through population
- Cases and contacts not easily or timeously detected
- Sustained social distancing measures not possible in many settings, not sustainable or affordable

Policy objectives:

- Protect the vulnerable
- Reduce transmission at a cost that is affordable and sustainable to society

Policy implications:

- Vaccination
- Case management of vulnerable
- Indoor mask-wearing and 'seek fresh air'
- Titrate hospital capacity
- Measures to reduce non-COVID-19 health service burden (curfews, alcohol sales restrictions) may be needed only if health service platform capacity is threatened

Recommended changes to existing public health and social measures (PHSM)

The following table sets out a number of proposed changes to existing interventions in the light of the new approach that emphasizes mitigation rather than containment.

Proposed Intervention	Rationale
Stop contact tracing and quarantine, including testing of close contacts	• See separate advisories on contact tracing, quarantining and reducing duration of isolation
Stop temperature, symptom screening and reporting of temperature and symptom screening	• Department of Labour regulations require employers to screen employees for symptoms and signs of COVID-19 when they report for work.[24] Temperature screening using low quality thermometers to measure skin temperature is of limited value as environmental factors influence readings and skin temperature is a poor proxy for core body temperature.[23] • A high proportion of cases are asymptomatic (84% in a local study) and are able to transmit SARS-CoV-2.[24] • Fever and symptoms do not differentiate between COVID-19 and other illnesses. • The human resource cost of assigning a staff member to measure temperatures, conduct symptom screening and fulfil reporting requirements is not immaterial.
Stop all decontamination and fogging of premises	• The updated Department of Health guidance on cleaning and decontamination of workplaces in the context of COVID-19 (August 2021) states that there is no need to "deep-clean" or implement any other form of cleaning in areas unoccupied for more than 3 days".[25] • However, the guidance note also indicates that if an identified COVID-19 case "spent a considerable amount of time in the workplace, touched, and handled many objects ….then more comprehensive manual surface cleaning would be warranted". • The guidance note could be misinterpreted as suggesting that closing premises for 3 days could be justified or that decontamination and/or fogging is warranted. • A systematic review concluded that the lack of positive viral cultures suggests that the risk of transmission of SARS-CoV-2 through fomites is low.[26] • The expenditure by provincial departments of health on surface decontamination and fogging has been enormous and is not justified.
Stop mandating the provision of hand sanitiser, and rather promote frequent hand-washing rather than mandating the use and provision of hand sanitisers promote the use of hand sanitiser where access to hand washing in facilities is poor.	• Department of Labour regulations require employers to provide hand sanitiser for use by employees and members of the public.[24] The US CDC recommends that people regularly wash their hands with soap and water as it is more effective than hand sanitisers at removing certain kinds of germs, like *Cryptosporidium*, norovirus, and *Clostridium difficile*. • The efficacy of hand sanitisation in reducing transmission of SARS-CoV-2 is unclear. A pre-COVID-19 systematic review of hand hygiene interventions to reduce community transmission of influenza and acute respiratory tract infection concluded that the impact of hand hygiene interventions were variable but likely to be beneficial in some contexts.[27]
Remove SARS-CoV-2 test requirements for cross-border travellers	• There is a MAC on COVID-19 Advisory on travel, including cross border travel from neighbouring states. • Travellers with SARS-CoV-2 entering South Africa are unlikely to significantly alter the epidemic trajectory unless it results in introduction of a new variant. • However, as the recent international spread of Omicron has clearly shown, travel restrictions and pre-travel testing do not contain spread of variants, possibly delaying the spread by a few days if at all.

	• Requiring SARS-CoV-2 tests in order to travel likely reduces non-essential travel and damages the hospitality industry which is highly dependent on tourists
Stop the imposition of outdoor mask mandates, but promote wearing of masks outdoors when in larger gatherings, if people are at risk of severe disease or when people have respiratory symptoms.	• The risk of SARS-CoV-2 transmission is far higher indoors than outdoors with outdoor settings likely contributing less than 1% of infections.[28] • US CDC guidance indicates that "in general you do not need to wear masks outdoors",[29] but provides messaging consistent with a harm reduction approach, recommending that individuals should consider wearing a mask when in large outdoor gatherings or if they are at high risk for severe COVID-19 disease or if people have respiratory symptoms. Nonetheless, more research and guidance on wearing of masks indoors is needed.

Integration of COVID-19 into existing health services

As South Africa exits the fourth wave, and noting the impact of COVID-19 and responses to the pandemic on routine health services, there is a growing need to rethink how the national responses to COVID-19 can be mainstreamed/integrated into routine health services while learning lessons from previous responses to COVID-19.

COVID-19 vaccination should cease to be provided only as a vertical programme. Mass vaccination has reached an inflection point where there will be very limited additional vaccinations secured through this route. Vaccination will continue within specific groups, especially vulnerable individuals, and certain sectors (for example tourism and other recovering economic sectors). Within the health sector, vaccination should be integrated into primary health care services as this will optimise resource utilisation. Some provinces, for example KwaZulu-Natal and Western Cape, have already integrated COVID-19 vaccination into primary health care clinics – lessons from these provinces should be scaled to other provinces. This includes integration of vaccination programmes into chronic care services, antenatal services and HIV programmes, as well as other primary healthcare services.

COVID-19 has highlighted the need for good **infection control** practices. The use of masks by the general population has become routine. The provision of N95 masks for use by healthcare workers should be sustained in health facilities to support infection prevention and control. Isolation and quarantine are likely to be required in future epidemics, and all provinces should continue to maintain epidemic preparedness that include isolation and quarantine facilities that can easily be mobilised when required.

Significant investments have been made by provinces and partners in strengthening oxygen supply and management. This investment should also be used to strengthen access to oxygen in paediatric wards and ensure that the electronic dashboards are utilised by all facilities.

Monitoring and surveillance improved because of COVID-19 and these improvements should be extended to include other critical diseases. COVID-19 should be reported in the context of other diseases such as influenza and TB which are also airborne. The regular reporting of COVID-19 cases and deaths should be extended to these other programmes. The Western Cape already has a public-facing dashboard that reports on tuberculosis. This integration will ensure that all diseases receive adequate attention. Monitoring and surveillance needs to be improved, properly resourced, and located within an effective national public health institute. Consideration should be given to integrating sentinel surveillance for COVID-19 into

existing systems for respiratory conditions. Progress towards the implementation of the National Public Health Institute of South Africa (NAPHISA) Act should be prioritised.

The DATCOV systems showed how data from the public and private hospitals can be integrated and lessons from the deployment of DATCOV should be used to strengthen data collection from both sectors. Additionally, the EVDS that registered people for COVID-19 vaccination can be used for other vaccination programmes. To manage admissions, bed bureaus were used by some provinces – this can be strengthened for use especially for emergency admissions for example.

Current investments in wastewater surveillance should be strengthened as these serve as an early warning system. Genomic surveillance should also be supported for detection of new variants and their characteristics.

Self-testing for COVID-19 has been enabled in a number of countries. If COVID-19 evolved as expected, it will become a disease associated with low levels of transmission, possibly with seasonal increases, but with low mortality due to high levels of immunity and vaccination. At this point, which may be reached within six to twelve months, the need for routine testing for SARS-CoV-2 in symptomatic mild COVID-19 cases will need to be reviewed. COVID-19 may then be diagnosed early and treated with antivirals. Self-testing may be important in enabling early diagnosis and differentiation from other acute respiratory illnesses.

Legislative considerations

The current imposition of a range of PHSM relies on the Disaster Management Act (Act 57 of 2002). Disasters may be declared at local, provincial or national levels (as per section 23 of the Act). A national state of disaster is time-limited (initially for three months) but can be extended on a monthly basis. In the case of national disasters, which are primarily the responsibility of the national executive, the responsible Minister is enabled to issue regulations, broadly aimed at preventing escalation of the disaster, alleviating, containing and minimising its effects. However, the powers assigned to the Minister may only be exercised in order to assist and protect the public, provide relief, protect property, prevent or combat disruption, or otherwise deal with the "destructive and other effects of the disaster." Importantly, the responsible Minister (at this time, the Minister of Co-operative Governance and Traditional Affairs) may suspend the operation of any regulations, either nationally or in specific provinces, metropolitan areas or districts, and may also reintroduce their operation as needed.

A more challenging question concerns the ability of the Minister of Health to intervene, when the state of disaster is no longer in place, in order to enable an appropriate response to an ongoing threat from SARS-CoV-2. The Minister of Health would need to rely on the National Health Act (Act 61 of 2003), which requires that "within the limits of available resources", the Minister "endeavour to protect, promote, improve and maintain the health of the population". Limited powers are provided in terms of treating a patient without consent, which can be done if "failure to treat the user, or group of people which includes the user, will result in a serious risk to public health". Whether the Minister of Health can restrict the rights of the general public, in anticipation of their being at risk of exposure to disease, needs to be considered in terms of the Constitution. Section 36 of the Constitution (Act 108 of 1996) states that rights may only be limited "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". The following issues need to be taken into account: the nature of the right being limited, the importance of the purpose of the limitation, the nature and extent of the limitation, and the relation between the

limitation and its purpose. Critically, the limitation must represent a less restrictive means to achieve the stated purpose.

COVID-19 has been declared a category 1 notifiable medical condition, requiring reporting within 24 hours.[30] The National Health Act enables the Minister of Health to make regulations regarding "notifiable medical conditions". No additional detail is provided in the Act, but existing regulations deal with the management of suspected and confirmed cases, and measures to enable "control of the spread of notifiable medical conditions".[31] The current regulations are narrowly focused on cases and contacts, rather than on the general population.

It remains unclear, and untested in a court of law, whether the Minister of Health could rely on the National Health Act to impose such restrictions as are currently in force in terms of the Disaster Management Act. This includes the imposition of curfews, restrictions on gatherings (such as limits on capacity, or absolute limits), mandatory wearing of face masks in public and mandatory screening. Restrictions on travel, or the sale and transport of alcoholic beverages, would likely require collaborative action with other Ministries, relying on other legislation. Other interventions, such as workplace vaccine mandates, have relied on other legislation, such as the Occupational Health and Safety Act (Act 85 of 1993).

The International Health Regulation Act (Act 28 of 1974) predates the current International Health Regulations (2005). There are limited Regulations issued in terms of the 1974 Act, most recently in 2003. The World Health Assembly Special Session held in November 2021 committed to the development of a Pandemic Treaty, as well as the strengthening of the IHR (2005).

Summary Recommendations

Based on the above considerations, the following summary recommendations are offered:

1. **Public Health and Social Measures (PHSM)**
   It is recommended that the following PHSM be stopped:
   - Contact tracing, quarantine and testing of close contacts.
   - Temperature and symptom screening.
   - Decontamination and fogging of premises.
   - Mandatory provision of hand sanitiser
   - Mandatory wearing of masks outdoors.

   The following practices are to be promoted:
   - Hand washing and sanitising where soap and water are not available.
   - Wearing of masks in outdoor areas, especially in crowded areas, if people are at risk of severe disease or when people have respiratory symptoms.
   - Evidence-based programmes to engage with vaccine hesitancy

   The use of masks indoors needs further research and guidance. Indoor mask mandates should not be imposed indefinitely and criteria for the removal of indoor mask mandates should be clearly defined.

2. **Integration of COVID-19 into existing health services**
   The following steps are recommended to integrate COVID-19 into other health services:
   - Integration of COVID-19 vaccination into primary health care services.

- Risk-based use of N95 masks by health care workers.
- Epidemic preparedness plans to include easy mobilisation of isolation and quarantine facilities.
- Optimal supply of oxygen to be achieved, including for paediatrics.
- COVID-19 monitoring, surveillance and reporting to be integrated with TB and influenza reporting. Common dashboards to be made available to HCWs and the public.
- Strengthen DATCOV and utilise for general referral purposes.
- Continue with wastewater surveillance and genomic sequencing.
- Inclusion of COVID-19 into existing sentinel surveillance for respiratory conditions.
- Progress towards the implementation of the National Public Health Institute of South Africa (NAPHISA) Act should be prioritised.

3. Disaster Regulations

The Department of Health is currently revising existing regulations issued in terms of the National Health Act. However, any attempt to rely on the existing National Health Act to issue regulations that potentially restrict the rights of the population may be vulnerable to challenge in the courts. The flexibility currently exists to not only extend the declaration of a national state of disaster as needed, but also to limit the application of regulations issued in terms of the Disaster Management Act as needed.

In the medium-term, consideration should be given to strengthening the capacity of the Minister of Health, either through amendment to the International Health Regulation Act or the National Health Act, to more precisely enable the development of effective regulations to deal with emerging epidemic and pandemic threats. These amendments will be informed by global progress in relation to the Pandemic Treaty and/or the strengthening of the IHR (2005).

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2030 NDP

MINUTES OF THE NATIONAL HEALTH COUNCIL CONSULTATIVE MEETING HELD ON 21 FEBRUARY 2022

1. OPENING AND WELCOME

1.1 The honorable Minister, Dr J Phaahla Formally opened the meeting and welcomed all the MECS, all the officials from provinces as well as from the National Department of Health who have made the effort to participate on call despite the short notice.

1.2 He also acknowledged participation of the Deputy Minister Dr SM Dhlomo as well as that of Councillor Ramaila on behalf of the South Africa Local Government Association (SALGA).

2. INTRODUCTORY REMARKS BY THE CHAIRPERSON

2.1 The Chairperson mentioned that the reason for calling a consultative meeting was informed by the fact that the country was on the third year of COVID-19 endemic.

2.2 On 05 of March 2022, it will exactly be 24 months since the first case of COVID-19 was confirmed, and a few weeks after that there was a lockdown under the Disaster Management Act, which will also be 24 months since the declaration of national disaster to control the COVID-19 pandemic.

2.3 Since then, a lot has changed and there has been a bit understanding of the pandemic since then we have come to know a little bit more understand the pandemic better and vaccination has been introduced of which just over a year the first vaccination was done in Khayelitsha district hospital.

2.4 A total of about 31 million vaccine doses have been administered, with a total population of just under 19 million people, and there is still much to be done.

2.5 The country is now at the tail end of the fourth wave, which has become complicated because it was thought that it would go at the same speed as it came in, but it is not going as quickly as it came in.

2.6 The scientists are now talking about sub variants called BA.2 as well as BA.1 which are doing rounds and complicating the exit of the fourth wave. The infection rate is however at the low level.

2.7 Many things have changed over time, including the level of restrictions, which have progressed from a hard lockdown adjusted risk approach of Level 4 to Level 1 with very few restrictions, however there are significant restrictions, particularly in relation to gatherings, masks, and maintaining social distance.

2.8 Alert Level 1 has also been significantly adjusted, resulting in the ability to hold election campaigns for local government after the Constitutional Court ruled that the elections should go ahead.

2.9 Various role-players and stakeholders are putting a lot of pressure on the national government to end the state of disaster.

2.10 There was a discussion even within the National Coronavirus Council (NCCC) about the possibility of using other measures towards the end of October 2020 to consider exiting the state of disaster.

2.11 The President, for example, has stated unequivocally that the health department, in collaboration with other departments, must find other ways to assist the country in taking the necessary precautions while also allowing more activity and exiting the state of disaster as there is a view that it is not good for economic and social activities.

2.12 The last NCCC instructions were that the health fraternity should find means in terms of the national health regulations, within the National Health Act, as well as all other departments that are relevant to their respective departments legislation in order to help to exit the Disaster Management Act and also to use other means to help with any mitigating interventions.

2.13 In light of the foregoing, the health department has been working on the legal framework for the Health Regulations, and when it was examined in 2020, it was discovered that the national health regulations would fall far short of what was still required at the time. so

2.14 With all of the experience, particularly with the nature of the fourth wave, this task has been assigned to examine what is possible, and the view is that health regulations will take the lead, and then it can be indicated where other departments are required in terms of other mitigating interventions that are still required.

2.15 The team was given the task of examining the status quo and determining what is feasible under health regulations, after which they could begin working on areas where restrictions could be reduced.

ACTION REQUIRED

1. **The Health Regulations team was supposed to give a presentation, and NHC was supposed to point out areas that should be tabled as proposals for actual changes at NCCC.**

2. **A date for the ordinary National Health Council meeting will be set and communicated to members, and only one item will be discussed at the consultative meeting.**

3. **A proposal that the only item to be discussed be adopted if there are no any late urgent issues that cannot be postponed to be tabled for consideration by the special NHC.**

4. PRESENTATION OF THE DRAFT HEALTH REGULATIONS

4.1 The Director-General, Dr S.S.S Buthelezi, welcomed the Minister's (National Health Council Chairperson's) introductory remarks and indicated that the presentation had been recirculated because two more slides dealing with restrictions and commenting on how they are dealt with in the new proposed amendments had been added.

4.2 With the Chairperson's permission, the D-G invited Adv. L Makhoshi and the team (Dr A Thulare and Mr R Morewane) he has been working with on the Draft Regulations to walk the meeting through the draft Regulations, and the following was **NOTED:**

4.2.1 The Department of Health is currently dealing with four sets of regulations.

4.2.2 There are four sets of regulations that must complement each other in order to deal with Covid-19 and other related or similar pandemics or diseases that are notifiable so that there is no need to return to the national disaster.

4.2.3 The first, and most important, are the regulations governing the surveillance and control of notifiable medical conditions. It is supported by regulations relating to public health measures at Ports of Entry, where people enter and exit the country.

4.2.4 It is also supported by regulations relating to the management of human remains, and the last set of regulation is regulations relating to environmental.

4.2.5 The first regulation, which has been provided for in Regulation 15 of the 2017 regulations, deals with the refusal of medical examination profile access and treatment.

4.2.6 This is the regulation that was taken into the disasters regulations to make sure that it is the countries that able to deal with COVID-19 of which the reason was that the existing regulation 15 required the HOD to approach the High Court to have a quarantine or to have someone isolated and, therefore, however; it was not to be done because it would have required the HOD to approach the High Court for a quarantine or to have someone isolated.

4.2.7 There has been engagement with the State Law advisors on this regulation

4.2.8 While the preliminary view is that these may be unconstitutional, they were engaged and subsequently promised that they would engage with them and that they would be able to work up something that would allow the country to deal with a pandemic without resorting to issues of the HODs going to the High Court.

4.2.9 In the meantime, the state Law Advisors have given the department permission to publish the original proposal, which requires a magistrate's warrant to enable the parenting and isolation of those who might refuse.

4.2.10 NHC should note that there is also a section that deals specifically with person isolation or quarantine, and these regulations were amended to provide for isolation during pandemics, including symptomatic and asymptomatic people, as well as self-isolation and self-quarantine.

4.2.11 These regulations are also made for any future emergencies and not only for COVID -19.

4.2.12 There is provision that allows the Minister to publish without regulations but it will be difficult for the department to justify that as the State of National disaster has been for a period of 2 years.

RECOMMENDATION that:

These regulations are published for 30 days for public comments.

5. COMMENTS

While this framework is important, the pressure in terms of how to move forward with it requires some kind of common kind of sufficient consensus and NHC made comments on the draft, which among others, included the following:

5.1 In terms of the issue of masks there were proposals from the Ministerial Advisory Committee, and they have made the advisory which was also considered that the wearing of masks for indoor gatherings should be retained, but outdoors there should be no need for wearing of masks.

5.2 Issues of quarantine and isolation should also be covered in the regulations. Covid-19 vaccination should be encouraged in order not to put a strain to the health facilities due to a high rate of infection.

6. CONCLUDING REMARKS

6.1 The chairperson thanked members for the responses and committed to do as much as possible to represent the sentiments of NHC at the NCCC meeting.

6.2 NHC will have to ensure that what has been achieved is not lost and scale up the vaccination, especially of the young people in order to be able to reach the 70% quota of vaccinated people.

7. MEETING ADJOURNMENT

The chairperson thanked the meeting for participation and fruitful contributions made and declared the meeting closed at 18h00.

2. PARTICIPANTS ON THE CALL

NAME	TITLE/DESIGNATION/ORGANISATION	2022.02.21
DR. M J PHAAHLA, MP	MINISTER OF HEALTH AND CHAIRPERSON	Y
DR S DHLOMO	DEPUTY MINISTER OF HEALTH	Y
DR SSS BUTHELEZI	DIRECTOR-GENERAL	Y
DR. Z PININI	ACTING DDG: HIV AND AIDS AND TB, MATERNAL, NEONATAL, CHILD AND WOMEN'S HEALTH	Y
MR. A VENTER	ACTING CHIEF FINANCIAL OFFICER	Y
DR. N CRISP	DDG: NHI	Y
MS. V M RENNIE	HEAD: CORPORATE SERVICES	Y
MR R MOREWANE	ACTNG DDG: PRIMARY HEALTH CARE SERVICES	Y
DR. N MAKHANYA	ACTING DDG : HOSPITALS, TERTIARY HEALTH SERVICES AND HR DEVELOPMENT AND CHIEF NURSING OFFICER	Y
EASTERN CAPE		
MS N METH	MEC FOR HEALTH	APOLOGY
DR. R WAGNER	HEALTH OF HEALTH	Y
FREE STATE		
MS M TSIU	MEC FOR HEALTH	Y
MR M MAHLATSI	ACTINGHEAD OF HEALTH	Y
GAUTENG PROVINCE		
DR N MOKGETHI	MEC FOR HEALTH	Y
DR. S ZUNGU	ACTING HEAD OF HEALTH	Y
KWAZULU-NATAL PROVINCE		
MS N SIMELANE-ZULU	MEC FOR HEALTH	APOLOGY
DR. S TSHABALALA	HEAD OF HEALTH	Y
LIMPOPO PROVINCE		
DR P. RAMATHUBA	MEC FOR HEALTH	Y
DR. FT MHLONGO	HEAD OF HEALTH	Y
MPUMALANGA PROVINCE		
MS SJ MANZINI	MEC FOR HEALTH	APOLOGY
MS D MDLULI	ACTING HEAD OF HEALTH	Y
NORTHERN CAPE PROVINCE		

NAME	TITLE/DESIGNATION/ORGANISATION	2022.02.21
MR. M LEKWENE	MEC FOR HEALTH	Y
MR R STRYDOM	ACTING HEAD OF HEALTH	Y
NORTH WEST		
MR. M SAMBATHA	MEC: FOR HEALTH	APOLOGY
MR. O MONGALE	HEAD OF HEALTH	Y
WESTERN CAPE PROVINCE		
DR. N MBOMBO	MEC FOR HEALTH	Y
DR. K CLOETE	HEAD OF HEALTH	Y
SOUTH AFRICAN MILITARY HEALTH SERVICES		
MAJ. GEN SEDIBE	M SIMELANE	**APOLOGY**
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION		
CLLR S. RAMAILA	S A LOCAL GOVERNMENT ASSOCIATION	Y
MS. N MAKANDA	S A LOCAL GOVERNMENT ASSOCIATION	Y
PRESIDENCY		
MR. T MASILELA	DEPARTMENT OF PERFORMANCE MONITORING AND EVALUATION	Y
DR K SIZIBA	CHIEF OF STAFF: MINISTRY OF HEALTH	Y
MR. J KGATLA	PARLIAMENTARY OFFICER	APOLOGY
MR. Z ZONDI	HEAD: OFFICE OF THE DEPUTY MINISTER	Y
ADV. M T NGAKE	ACTING CHIEF DIRECTOR: LEGAL SERVICES	Y
SECRETARIAT SERVICES		
MS. S VILANE	SUPPORT SERVICES	Y
MR. M SONKWALA	SUPPORT SERVICES	Y
INVITEES		
MS KRISHNA VALLABHJEE		Y

PROPOSED AMENDMENTS TO HEALTH REGULATIONS TO DEAL WITH COVID-19 AND OTHER NOTIFIABLE MEDICAL CONDITIONS OUTSIDE THE NATIONAL STATE OF DISASTER (NSOD)







SPECIAL NHC MEETING

ADV LUFUNO MAKHOSHI

21 February 2022

health

Department:
Health
REPUBLIC OF SOUTH AFRICA

2030 NDP

"SFA10"

INTRODUCTION



The National Department of Health is in the process of amending the Health Regulations in terms of the National Health Act of 2003 in order to address COVID-19 and other notifiable medical conditions outside the National State of Disaster.

The basis of these amendments is the current National State of Disaster Regulations and the Health Directives.

The following are the set of Regulations that are being amended/drafted:

- Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions;
- Regulations Relating to Public Health Measures in Points of Entry;
- Regulations Relating to the Management of Human Remains; and
- Regulations Relating to Environmental Health.

REGULATIONS RELATING TO THE SURVEILLANCE AND THE CONTROL OF NOTIFIABLE MEDICAL CONDITIONS



Refusal of medical examination, prophylaxis, treatment, isolation and quarantine:- This Regulation is amended to provide for a warrant being issued by a competent Court, on application by an enforcement officer for the medical examination instead of having the HoD to make a High Court Application. The existing Regulation 15 was not geared for pandemic situation hence the amendment by addition. However, the State Law Adviser had advised that this requirement for the warrant may be unconstitutional. We requested the State Law Adviser assist with the proposal that the Regulations must be able to empower people at the local area such as the Managers of Health Establishments to approach the local Magistrate for an order authorising such detention.

Isolation or quarantine of persons:- This Regulation is amended to provide for isolation or quarantine of persons during pandemic. These include isolation of a symptomatic and also an asymptomatic person.

Designation of quarantine facilities:- The National Department of Health, provincial departments of health, the Department of Public Works and Infrastructure and municipalities must collaboratively allocate and designate quarantine facilities to cater for those that may not be able to self-isolate or self-quarantine.

REGULATIONS RELATING TO THE SURVEILLANCE AND THE CONTROL OF NOTIFIABLE MEDICAL CONDITIONS CONT...



Criteria for self - quarantine and self - Isolation:- This is to provide for the criteria for self-isolation or self-quarantine so that there is compliance with the rules to prevent the spread of COVID-19.

Contact Tracing:- The amendments will also deal with Contact Tracing as one of the most critical control measure. The State Law Advisor have advised that some of this Regulation will be in contravention with the Protection of Personal Information Act, 2013 (Act No. 4 of 2013). However, the Information Regulator in terms of the POPIA must be approached for exemption from the provisions of POPIA to address the concerns raised by the State Law Adviser.

General measures to contain the spread of notifiable medical condition:- The measures to control the spread of any Notifiable Medical Condition or outbreak **will be determined by the Minister of Health through government notice.** The dedicated control measures as outlined by the NMC National guidelines are attached as annexures.

REGULATIONS RELATING TO THE SURVEILLANCE AND THE CONTROL OF NOTIFIABLE MEDICAL CONDITIONS CONT...



Persons exiting the Republic: The amendments deal with the requirements for persons who are exiting the Republic to deal with notifiable medical condition that has the potential of spreading beyond the borders of the republic and based on the epidemiological situation.

Persons entering the Republic: The amendments deal with the requirements for persons who are entering the Republic to deal with notifiable medical condition that has the potential of spreading within the borders of the republic and based on the epidemiological situation.

Quarantine of international travel aircraft and vessels crew: The amendments deal with the containment measures for international travel aircraft and vessel crew entering the Republic.

Cross Border Truck Operators: The amendments deal with the containment measures that must be adhered to with regard to cross border truck operators.

REGULATIONS RELATING TO THE SURVEILLANCE AND THE CONTROL OF NOTIFIABLE MEDICAL CONDITIONS CONT...



Control Measures for Public places: Government departments, municipalities and private entities responsible for public places must-

- ensure that public hygiene measures are implemented in all public places as described in the National Public Hygiene Strategy, 2020;
- ensure that public places are cleaned and disinfected;
- provide for hand hygiene; and
- enable the practice of physical distancing.

Attendance of funerals: This provides for the containment measures that must be adhered to when attending a funeral. Night vigils and after-funeral gathering may be restricted must wear a face mask and must adhere to all health protocols and social distancing measures.

REGULATIONS RELATING TO THE SURVEILLANCE AND THE CONTROL OF NOTIFIABLE MEDICAL CONDITIONS CONT...



Gatherings: This provides for the containment measures when attending a gathering during an epidemic or a pandemic. These include the wearing of a face mask, adhering to all health protocols and maintaining social distance.

Controlled visits by members of the public: This provides for containment of the spread of notifiable medical conditions in health establishment. In this regard, when members of the public visit health establishments must be subjected to strict adherence to health protocols.

Compliance officers: This provides for all industries, businesses and entities, both in the private and public sector, to designate a compliance officer who must oversee the implementation of the plan containing measures to ensure that the workplace meets the standards of health protocols relating to notifiable medical conditions.

REGULATIONS RELATING TO THE SURVEILLANCE AND THE CONTROL OF NOTIFIABLE MEDICAL CONDITIONS CONT...



Sharing Advice: In order to contain the spread of notifiable medical conditions which notifiable medical conditions may be spread, and guided by the scientific evidence of the risk of transmission of such notifiable medical conditions advice may be shared amongst the relevant Cabinet members with regard to the following:

- Curfew;
- Gatherings;
- Sport activities;
- Operations of economic sector;
- Lockdown of the country or locality;
- Public transportation;
- Religious and cultural practices;
- Sale, dispensing and consumption of alcohol; or
- Schools opening and closure.

REGULATIONS RELATING TO PUBLIC HEALTH MEASURES IN POINTS OF ENTRY



Arrival of Conveyances:- In this regard, the draft provides for General provisions for incoming conveyances, affected conveyances, Ground and Air Medical Conveyances, Medical evacuation and Conveyance in transit. These have been dealt with the Health Ministerial Directions.

Requirements for Travelers:- This Regulation provides for Ship Sanitation Certificates, Health measures relating to travellers, Requirements for Yellow Fever, and Additional health measures during a public health emergency.

Vector Control:- This Regulation provides for vector control requirements for conveyances and vector control requirements at the Point of Entry.

Requirements for Baggage and Containers:- This Regulation provides for containers and container Loading Areas and Cargo and Baggage.

REGULATIONS RELATING TO PUBLIC HEALTH MEASURES IN POINTS OF ENTRY CONT...



General Matters: This Regulation provides for the following requirements:

- Departure from the Republic;
- Quarantine and Isolation;
- Certificates to be issued by the Competent Authority;
- Prevention of Public Health Nuisance;
- Charges for Health Measures regarding travellers;
- Charges for Baggage, Cargo, Containers, Conveyances, Goods and Postal parcels, Charges for vessels in respect of other services; and
- Re-application of Health Measures.

REGULATIONS RELATING TO THE MANAGEMENT OF HUMAN REMAINS



Handling of COVID -19 mortal remains: General:- This Regulation provides for the handling of COVID -19 mortal remains.

Handling of COVID -19 mortal remains in mortuaries or at funeral undertakers:- This Regulation provides for handling of COVID -19 mortal remains in mortuaries or at funeral undertakers including private undertakers, for final burial or cremation.

Measures when a person passes on at home:- This Regulation provides for the measures to be complied with when a person dies at home of COVID -19, the person or persons attending to the mortal remains must not, at any stage, handle the mortal remains.

REGULATIONS RELATING TO THE MANAGEMENT OF HUMAN REMAINS CONT...



Conveyance of COVID -19 mortal remains:- This Regulation provides for the conveyance of mortal remains of a COVID -19 patient.

Hygiene requirements for mortuary premises: COVID019 remains:- This Regulation provides for the Hygiene requirements for mortuary premises.

Disposal of COVID -19 mortal remains:- This Regulation provides for the disposal of COVID -19 mortal remains either through burial (land or sea) or cremation.

REGULATIONS RELATING TO ENVIRONMENTAL HEALTH



Powers of Environmental Health Practitioner(s):- This Regulation provides for the Environmental Health inspections, Environmental health investigations, Abatement of a public health nuisance or hazard, Rectification of certain conditions and the Procedure in respect of conditions requiring immediate remedying.

Compliance of Owners/ Operators/ Managers/ Persons in Charge:- This Regulation provides for the prohibition on causing public health nuisance or hazard by Owners/ Operators/ Managers/ Persons in Charge of premises.

Environmental Pollution Control:- This Regulation provides for the prohibition of dumping and littering. It further provides for the removal of waste, Noise Pollution, Air Pollution, Pollution of water and Prohibition against the release of hazardous waste.

REGULATIONS RELATING TO ENVIRONMENTAL HEALTH CONT...



Premises:- This Regulation provides for the regulation of **overcrowding in Premises** and the Norms and Standards for Environmental Health.

Sanitation:- This Regulation provides for the hygiene requirements and maintenance of sanitation facilities and drainage systems and the provision of Sanitation at Public Gatherings.

Processes already followed



- The above Regulations have been subjected to the following processes:

  - Presented to the Legal and Regulatory Measures Workstream (LRMWS) of the NATJOINTS. All four draft Regulations have already been presented to the LRMWS.

  - Sent to the Office of the State Law Adviser (OCSLA) for legal opinion. All four draft Regulations have already been sent to OCSLA for legal opinions. Legal opinions on all four draft Regulations have been provided by OCSLA.

  - Presentation to the Tech NHC: All four draft Regulations have been presented to the Tech NHC as a set as they complement each other.

Processes to be followed



- **Presentation to the NHC**: All four draft Regulations must be dealt with as a set as they complement each other.
- **Publication for public comments**: Once approved by the NHC, they will be published for public comments. In terms of section 90 (4) (a) of the National Health Act of 2003, *"the Minister **must** publish all regulations proposed to be made under this Act in the Gazette **for comment at least three months before the date contemplated for their commencement"**.* This means that the Regulations cannot come into operation **within three months** from that date of publication for public comments unless the provisions of section 90 (4) (c) have been invoked. Unfortunately, it will be very difficult to invoke this section. These draft Regulations will attract much public interest and as such the public must be given the sufficient opportunity to comment.
- In light of the urgency for the promulgation of Health Regulations to deal with Covid-19 outside the NSoD, the Regulations will be published for at least **30 days for public comments.**

Challenges



- If the State Law Adviser insist on the requirement for the High Court Application by the HoD that was not geared for the pandemic such as Covid-19 but for individual isolated cases, the Regulations will not enable the Republic to control the spread of the relevant notifiable medical condition. In this regard, the Disaster Management Act may have to be invoked to deal with the disaster.

THANK YOU



ngiyathokoza!

ro livhuwa!

dankie!

ke a leboga!

enkosi!

thank you!

ndo livhuwa!

inkomu!

ke a leboha!

ngiyabonga!

siyabonga!

health

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Processes to be followed



- **Presentation to the NHC**: All four draft Regulations must be dealt with as a set as they complement each other.
- **Publication for public comments**: Once approved by the NHC, they will be published for public comments. In terms of section 90 (4) (a) of the National Health Act of 2003, *"the Minister **must** publish all regulations proposed to be made under this Act in the Gazette **for comment at least three months before the date contemplated for their commencement"***. This means that the Regulations cannot come into operation **within three months** from that date of publication for public comments unless the provisions of section 90 (4) (c) have been invoked. Unfortunately, it will be very difficult to invoke this section. These draft Regulations will attract much public interest and as such the public must be given the sufficient opportunity to comment.
- In light of the urgency for the promulgation of Health Regulations to deal with Covid-19 outside the NSoD, the Regulations will be published for at least **30 days for public comments.**

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REPUBLIC OF SOUTH AFRICA

DAILY REPORT FOR NDOH AMENDMENT OF HEALTH REGULATIONS SUB TASK TEAM

DATE: 19 APRIL 2022

Number	Item/ Action	Progress Report
1.	Officials reporting on duty	Of the 68 officials allocated to assist with the processing of comments, only **52** officials reported for duty. Of the above mentioned 52: Security Officers: 2 Cleaners: 1 ICT: 3
2.	Processing of Comments	**Total number of comments moved to online tool:** The team will not be reporting on specific number on today's report. A presentation was made indicating that 41,000 comments have been processed with 94% of the comments not specific to any of the regulations, 5,5% on notifiable medical conditions, 0.2% on Human remains, 0.1% on environmental health and 0.9% on port health. The presentation will be finalized to capture all areas highlighted by the comments as areas for consideration.

"SFA11"

3.	Progress and Expected Completion	The team has drafted a project plan based on the directive to finalise the whole process 72 hours after the closing date of commenting. It must be reported that based on the daily report of the 17th April 2022 it became clear that the expected time to finish the project based on the available staff, resources, network coverage and speed, etc, the project can be completed on the 14th May 2022 unless the following issues are attended to Urgently. There are 223 000 comments left as of 17th April 2022, the team was able to do 15 000 for the day, if this pace is maintained it would take up to the 14th as indicated above and this is not an option as the task must be finalized by the 27th April 2022. a) Network coverage should be improved, Urgent and immediate actions are required to ensure that the team is not held up by intermittent network coverage. This will ensure that officials continue to repot to Dr AB Xuma building and can report on time and leave as planned unlike if an alternative venue would be sought. This is the best available option to improve the operations if it can be speeded up. b) Option 2 would be to source an alternative venue with good network coverage and within the CBD where a conference Centre can be hired to cater for 80 people and 3 additional rooms for side operations for the technical team, data analysis team and meetings

		to be held without disturbances to the bigger group. The second option will also deal with the extension of catering as the comment period has been extended so should the logistical arrangements for catering. c) An additional of at least 20 officials with computers will need to be mobilized Urgently to assist the team to still finalise the task within the allocated period. Assistance is therefore requested to source additional staff to beef up the team.
4.	Support Staff	Two additional official reported on duty, one from support services and one from environmental health.
5.	Other Activities	▪ Technical team started working on the SEIAS document for the four regulations and managed to get to the end of 2. ▪ The technical team requested support from monitoring and evaluation unit to assist with a portion in the SEIAS document which requires input from the unit. The M&E unit should be allocated to the technical team to provide support.
6.	Capturing of Substantive Comments	▪ The team started capturing substantive comments from the hard copies received.
7.	Number of comments received on the online and WhatsApp platform for the additional	No update available

	period of extension from 14 April 2022	
8.	ICT Support	▪ Assisted with general support ▪ Assisted with capturing data ▪ Assisted with analysing data ▪ Connection of computers undertaken. ▪ Two router provided 20th April 2022, will monitor how they work
9.	Transport Provision	All 8 rental vehicles been returned on the 19th April 2022. The rental cars will be required again on the 23rd to 24th April 2022.
10.	Challenges experienced	None
11.	Incidents	▪ Temperature in the board rooms was too low and uncomfortable to work in.
12.	The operational Centre closed at 16h00	The team started working beyond 16H00 hours to push the workload. 27 officials worked overtime of two hours.

health

Department:
Health
REPUBLIC OF SOUTH AFRICA

DAILY REPORT FOR NDOH AMENDMENT OF HEALTH REGULATIONS SUB TASK TEAM

DATE: 25 APRIL 2022

Number	Item/ Action	Progress Report
1.	Officials reporting on duty	Of the 91 officials allocated to assist with the processing of comments, only **50** officials reported for duty. Of the above mentioned **50**: Security Officers: 2 ICT: 3 **NHLS** Support Staff: 13 reported for duty. One official from the operational centre had to go and take part in the PMDS session. **Absent**: 18 **Sick Leave**: 5 **Study Leave**: 2 **Back in Office**: 4 **Total:** 28
2.	Processing of Comments	**Total number of comments moved to online tool:**

"SFA12"

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The data management team have managed to merge 73completed files out of 93 files of all the exported files. The team is continuing to merge files that are not complete that officials are still busy processing to quantify what has been done so far. 320,342 comments have been exported to the comment tool as of 25 April 2022.
The team was informed that there were still files to be exported from individual e mails.
The team cannot estimate the finish period, the plan is aligned to the 72 hours after closure of commenting. The team has planned to finalise everything by the 27th April 2022. The team envisage to remain in operation until the final report is prepared, this could go until the 29th April 2022.

</td></tr>
<tr><td>3.</td><td>Resources/ Logistical Arrangements</td><td>None</td></tr>
<tr><td>4.</td><td>Number of comments received on the online and WhatsApp platform for the additional period of extension from 14 April 2022</td><td>All comments from the online and WhatsApp platform have been received by the technical team for processing.
<table>
<tr><th>Regulation</th><th>Online</th><th>WhatsApp</th><th>Totals</th></tr>
<tr><td>NMC</td><td>437</td><td>460</td><td>897</td></tr>
<tr><td>PH</td><td>41</td><td>185</td><td>226</td></tr>
<tr><td>HR</td><td>19</td><td>103</td><td>122</td></tr>
<tr><td>EH</td><td>43</td><td>195</td><td>238</td></tr>
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		Totals	**540**	**943**	**1483**
5.	Other Activities	▪ ***Feedback:*** *Port Health and Notifiable Medical Conditions SEIAS communicated to legal for further inputs.* ▪ ***A communication plan*** *is also required to be prepared; this will require support from the communications unit.* ▪ ***The M&E unit had a meeting with the technical team to provide clarity on the template to be filled.***			
6.	ICT Support	▪ Assisted with general support ▪ Added more data to all four routers.			
7.	Challenges experienced	▪ Approval of overtime deviation, pending, **50** officials reported for work until 16H00.			
8.	Incidents	None			

9. Substantive Comments Report (Cumulative Stats)

Notifiable Med Conditions	22/004/2022	23/04/2022	24/04/2022	25/04/2022	26/04/2022	27/04/2022	Sub Total
Comments Received	24	44	96	17			181
Comments Accepted and Incorporated	0	0	0	0			0
Comments Rejected	4	26	92	3			125
Deferred for Consideration by Technical Team	20	17	4	14			55
Points of Entry							
Comments Received	19	10	19	9			57
Comments Accepted and Incorporated	7	1	5	5			18
Comments Rejected	8	4	2	4			18
Deferred for Consideration by Technical Team	4	5	12	0			21

DAILY REPORT FOR NDOH AMENDMENT OF HEALTH REGULATIONS SUB TASK TEAM

Management of Human Remains							
Comments Received	0	0	30	47			**77**
Comments Accepted and Incorporated	0	0	0	26			**26**
Comments Rejected	0	0	24	12			**36**
Deferred for Consideration by Technical Team	0	0	6	9			**15**
Environmental Health							
Comments Received	33	16	4	0			**53**
Comments Accepted and Incorporated	12	2	0	0			**14**
Comments Rejected	12	6	4	0			**22**
Deferred for Consideration by Technical Team	9	8	0	0			**17**
Criteria	**Notifiable Med Conditions**	**Points of Entry**	**Management of Human Remains**	**Environmental Health**			
Comments Received	**181**	**57**	**77**	**53**			
Comments Accepted and Incorporated	**0**	**18**	**26**	**14**			
Comments Rejected	**125**	**18**	**36**	**22**			
Deferred for Consideration by Technical Team	**55**	**21**	**15**	**17**			

10. The operational Centre closed at 16h00
11. 20 officials worked overtime today.

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REPUBLIC OF SOUTH AFRICA

DAILY REPORT FOR NDOH AMENDMENT OF HEALTH REGULATIONS SUB TASK TEAM

DATE: 02 MAY 2022

Number	Item/ Action	Progress Report
1.	Officials reporting on duty	Of the 91 officials allocated to assist with the processing of comments, only **54** officials reported for duty. Of the above mentioned **54**: Security Officers: 2 ICT: 3 **NHLS** Support Staff: 0 reported for duty, the request for support was up to the 29th April 2022. A submission for an extension has been prepared for DGs approval to continue with the support until the 20th May 2022. **Absent: 23** **Sick Leave**: 4 **Annual Leave**: 1 **Family Responsibility:** 0 **Study Leave**: 0 **Back in Office**: 0

"SFA13"

		Total: 25
2.	Processing of Comments	▪ The data management team have managed to merge **97** completed files out of **107** files of all the exported files. The team is continuing to merge files that are not complete that officials are still busy processing to quantify what has been done so far. **334,274** comments have been exported to the comment tool as of 02 May 2022. The total number of processed comments is **198, 188 (59%** of the exported emails). ▪ ***The team is of the view that the comments may be finalized if they are allowed to continue processing as planned until the 20th May 2022.***
3.	Projection of Completion of the Project	The team will continue to work until the 20th May 2022 excluding the weekend of the 8 to 9 may 2022. The team has worked out an overtime schedule which will run from the 1, 2 May 2022 for weekend and holidays, then from 3 to 11 May 2022 for two hours daily during working days, this will ensure that the team does not exceed the 30% allocation for the month. This will ensure that all submitted and exported comments are processed.
4.	Other Activities	▪ *The team developed two documents, one on proposed completion of processing all available comments and one on guiding the publication of regulations for further comments for a period that will still be specified.*
5.	ICT Support	▪ Assisted with processing of comments ▪ Assisted with general support ▪ Exporting and cleaning mailboxes for the officials who were receiving comment by e mail and the auto reply system completed

		▪ Verification of 130 000 emails from Ms Furumele' s inbox completed. Final verification to be done.
6.	Proposal for Noting	▪ The team identified that Communications unit should form part of the team to be able to communicate continuously about the developments in the legislative process. ▪ The department is requested to consider dealing with the current process as a project and other future similar activities. ▪ Preliminary analysis report on the operations of the technical team prepared.
7.	SEIAS Update	▪ The team worked on the four regulations template on M&E. A request was made with M&E unit to meet and clarify outstanding areas of the template, response pending.
8.	Challenges experienced	▪ None
9.	Incidents	None

10. Substantive Comments Report (Cumulative Stats)

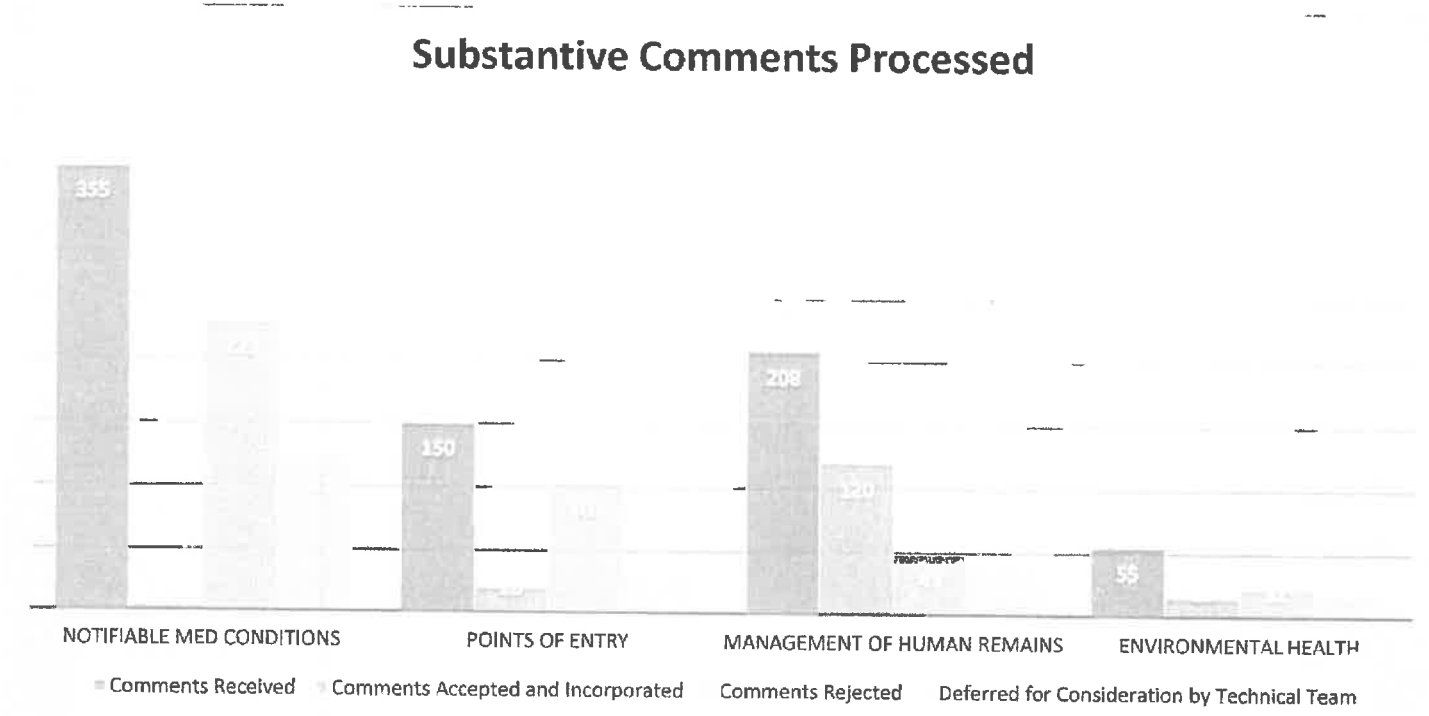
- No comments were exported for Port Health hence there was a zero report.

Criteria	Notifiable Med Conditions	Points of Entry	Management of Human Remains	Environmental Health
Comments Received	355	150	208	55
Comments Accepted and Incorporated	4	20	120	15

DAILY REPORT FOR NDOH AMENDMENT OF HEALTH REGULATIONS SUB TASK TEAM

Comments Rejected	229	103	49	22
Deferred for Consideration by Technical Team	121	27	37	18

11. Graphical representation



12. The operational Centre closed at 16h00

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2030 NDP

MINUTES OF THE SPECIAL NATIONAL HEALTH COUNCIL CONSULTATIVE MEETING HELD ON 03 MAY 2022

1. OPENING AND WELCOME

The NHC Chairperson, honourable Minister J. Phaahla welcomed all participants on the call and declared the meeting opened.

He further regretted the convening of the special meeting within short notice and indicated that it will not take long as the purpose thereof was to finalize the amended Health Regulations relating to the surveillance and the control of notifiable medical conditions.

2. MEETING PROCEEDINGS

There being a quorum for the meeting to proceed, the Chairperson requested the task team members responsible for the process of amending the regulations to take the meeting (NHC) through the key issues relative to the Regulations to be amended before they can be promulgated.

3. KEY ISSUES PRESENTED AMENDMENTS

The following were presented for consideration by NHC as per the draft copy of Regulations that was circulated before the meeting:

- Wearing of face masks to contain the spread of COVID-19
- Gatherings to contain the spread of COVID-19
- Persons entering the country to contain the spread of COVID-19

4. The meeting welcomed the contents of the amendments to the regulations and was further advised that they will be referred to regulations relating to the surveillance and

the control of notifiable medical conditions and that they will come into operation on publication in the Gazette.

5. CONCLUDING REMARKS AND MEETING ADJOURNMENT

There being no further comments from the meeting, the Chairperson, thanked all the participants on the call and adjourned the meeting at 18h30.

2. PARTICIPANTS ON THE CALL

NAME	TITLE/DESIGNATION/ORGANISATION	2022.05.03
DR. M J PHAAHLA, MP	MINISTER OF HEALTH AND CHAIRPERSON	Y
DR S DHLOMO	DEPUTY MINISTER OF HEALTH	Y
DR SSS BUTHELEZI	DIRECTOR-GENERAL	Y
DR. Z PININI	ACTING DDG: HIV AND AIDS AND TB, MATERNAL, NEONATAL, CHILD AND WOMEN'S HEALTH	Y
MR. A VENTER	ACTING CHIEF FINANCIAL OFFICER	Y
DR. N CRISP	DDG: NHI	Y
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DR. N MAKHANYA	ACTING DDG : HOSPITALS, TERTIARY HEALTH SERVICES AND HR DEVELOPMENT AND CHIEF NURSING OFFICER	Y
EASTERN CAPE		
MS N METH	MEC FOR HEALTH	Y
DR. R WAGNER	HEALTH OF HEALTH	Y
FREE STATE		
MS M TSIU	MEC FOR HEALTH	Y
MR M MAHLATSI	ACTINGHEAD OF HEALTH	Y
GAUTENG PROVINCE		
DR N MOKGETHI	MEC FOR HEALTH	Y
DR. S ZUNGU	ACTING HEAD OF HEALTH	Y
KWAZULU-NATAL PROVINCE		
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DR K SIZIBA	CHIEF OF STAFF: MINISTRY OF HEALTH	Y
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MR. Z ZONDI	HEAD: OFFICE OF THE DEPUTY MINISTER	Y
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INVITEES		
MS KRISHNA VALLABHJEE		Y

health
Department:
Health
REPUBLIC OF SOUTH AFRICA

Date:	15 February 2022		
To:	**Dr MJ Phaahla, MP** **Honourable Minister of Health**	From:	**Ministerial Advisory Committee (MAC) on COVID-19**

REVISED COVID-19 SCREENING REQUIREMENTS AT BORDERS AND PORTS OF ENTRY

Problem Statement and Task to Committee

- The MAC on COVID-19 was requested to review the current COVID-19 screening requirements for land, air and sea ports of entry (with reference to the advisory on *Screening Requirements at Borders and Ports of Entry (Land, Sea and Air)*, dated 15th October 2021).

Background/ Current Information

- COVID-19 incidence has declined in all nine provinces, and the fourth wave of the pandemic in South Africa has been declared over. Together with regional reductions in case numbers, this suggests that a change in the current COVID-19 screening requirements at the borders is warranted. Concern has been expressed by the MAC on COVID-19 about the excessive resources allocated to testing strategies in asymptomatic and mild disease, contact tracing, and screening requirements at ports of entry. These resources should rather be redirected to reaching the desired vaccination target, maximizing the infrastructure and personnel available for enhanced vaccination service delivery models.

- Current regulations gazetted on 15 December 2020[1] require that a person entering the Republic must:
  - Be subjected to screening on arrival at the point of entry and must present a completed traveller health questionnaire to a port health official; and
  - Provide to the port health official a valid negative COVID-19 Polymerase Chain Reaction (PCR) test result, performed not more than 72 hours before date of departure from the country of origin; or
  - If not in possession of a valid negative COVID-19 PCR test result, be subjected to antigen testing at the point of entry.

- Those who test positive on arrival may be subjected to isolation at an approved facility at their own cost.

- It is further noted that the applicable regulations covering quarantine and isolation have recently been amended.[2] All mention of quarantine has been removed, and the period of

[1] Disaster Management Act, 2002: Amendment of Regulations issued in terms of section 27(2). Government Gazette No 44004, 15 December 2020
[2] Disaster Management Act, 2002: Amendment of Regulations issued in terms of section 27(2). Government Gazette No 45855 1 February 2022

isolation for symptomatic cases reduced to 7 days. No isolation is required for asymptomatic cases.

- The MAC on COVID-19 Advisory on *Screening Process for Land Border Crossings During the Festive Season* dated 30th December 2020, made the following recommendations, among others:
    - To discontinue COVID-19 testing requirements for land-border entry into South Africa.
    - To implement a "travel bubble" with selected neighbouring countries (Botswana, Eswatini, Lesotho, Mozambique, Namibia, Zimbabwe).

- These recommendations were, however, contingent on certain criteria being met by the selected countries (e.g. local transmission remaining below a specified threshold). Travellers from any country that was not part of the proposed "travel bubble" would need to provide proof of a negative PCR test or undergo antigen testing on arrival at their own cost.

- The MAC on COVID-19 advisory on *COVID-19 Screening Requirements at Borders and Ports of Entry (Land, Sea and Air)* dated 15th October 2021 reiterated this recommendation but stratified the ports of entry strategy to differentiate the travelers by risk of point of origin. This approach was not adopted by the Department of Health nor Department of Home Affairs due to concerns raised about the validity of vaccine passports and recognition of vaccine types, and ongoing concern about occupational health exposure to the essential personnel working at border crossings.

- The National Health Laboratory Service (NHLS) and private laboratories have raised concerns about capacity constraints and the cost implications of providing antigen testing at ports of entry. During a peak in incidence, the positivity rates for travelers rises to approx. 5%. The in-bound traveler numbers do not contribute to the overall incidence of COVID-19 inside South Africa, and the result of the test is only used to provide isolation guidance, which guidance has recently been modified. The NHLS has recommended that testing at all borders ceases.

- In addition, it has been pointed out that a PCR test is prohibitively expensive in some countries, making it unaffordable to many travelers, with a significant impact on economic and tourist travel.

- Vaccines still have limited availability in neighboring countries, with vaccine coverage varying from 14% to 47% (fully vaccinated). To enable comparative data between countries the total population vaccination coverage rates for selected Southern African Countries is shown below[3]:

Country	Vaccinated	Fully Vaccinated	Additional Doses	Per 100 people	Total Doses
Botswana	52%	47%		49	1128095
Eswatini	32%	29%		40	462652
Mozambique	35%	30%		65	19788759
Namibia	17%	14%		31	773702
South Africa	33%	28%	1%	51	29812348
Zimbabwe	29%	23%		52	7564190

[3] Ref: Tracking Coronavirus Vaccination Around the World. https://www.nytimes.com/interactive/2021/world/covid-vaccinations-tracker.html accessed on 31st January 2022.

Evidence Review

- With the advent of the COVID-19 pandemic and the approach to containment of a novel highly transmissible respiratory infection, countries imposed travel restrictions and requirements as a way of excluding travellers that were infected with COVID-19. According to the United Nations World Tourism Organisation, international tourist arrivals declined by about 1 billion or 74% between January and December 2020. In the first quarter of 2021, the United Nations World Tourism Organisation (UNWTO) World Tourism Barometer shows a decline of 88%.[4]

- Despite these measures, transmission of COVID-19 variants has not been prevented, with global distribution of the Delta and Omicron variants in particular demonstrated worldwide. Fourth/Fifth waves have been recorded in France, the Middle East, and several African countries.[5] World Health Organisation (WHO) and country policy is shifting towards an endemic COVID-19 response, with health care mitigation and increasing economic activity with open international movement.

- A recent meta-analysis based on both modelling and observational studies[6] noted that "the certainty of the evidence for most travel-related control measures and outcomes is very low". Nonetheless, the authors concluded that, "Broadly, (during an early containment phase) travel restrictions may limit the spread of disease across national borders. Symptom/exposure-based screening measures at borders on their own are likely not effective; PCR testing at borders as a screening measure likely detects more cases than symptom/exposure-based screening at borders, although if performed only upon arrival this will likely also miss a meaningful proportion of cases. Quarantine is likely to largely avoid further transmission from travellers. Combining quarantine with PCR testing at borders will likely improve effectiveness." In addition, the authors noted that any estimates of effectiveness would be dependent on a combination of factors such as the "levels of community transmission, travel volumes and duration, other public health measures in place, and the exact specification and timing of the measure".

- A personal communication report suggests that pre-travel testing performed in a South African private laboratory showed an overall PCR test positivity rate of 3.3% in the period October 2020-October 2021. Fluctuations in the PCR test positivity rate mimicked the waves of the pandemic, with a peak of 7.1% in January 2021 (second-wave) and 6.22% in July 2021 (third-wave). The data for January 2022 demonstrates a positivity rate of 5.2% amongst travellers.

- Vaccines against COVID-19 have been added to the existing public health and social measures (PHSM) as a way of managing the pandemic. Vaccines reduce the risk of severe disease, hospitalisation and death. Research also shows that vaccines reduce transmission of the virus to some extent.[7]

- With high rates of vaccination coverage in most of South Africa's trade partner countries outside Africa, international travel is opening up as vaccination is seen to reduce the risk of infection. Additional requirements have been applied in some countries for those that are not vaccinated.

[4] UNCTAD, 2021. *Global economy could lose over $4 trillion due to COVID-19 impact on tourism.* https://unctad.org/news/global-economy-could-lose-over-4-trillion-due-covid-19-impact-tourism

[5] Africa CDC, 2021. Outbreak Brief 87: Coronavirus Disease 2019 (Covid-19 Pandemic). (https://africacdc.org/download/outbreak-brief-87-coronavirus-disease-2019-covid-19-pandemic/

[6] Burns, Movsisyan et al, 2021. *International travel-related control measures to contain the COVID-19 pandemic: a rapid review.* Cochrane Database Syst Rev. 2021 Mar 25;3(3):CD013717. https://pubmed.ncbi.nlm.nih.gov/33763851/

[7] CDC, 2021. Science Brief: COVID-19 Vaccines and Vaccination, 15 September 2021. https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html

Several countries now categorise travel requirements according to vaccination status. Persons who are vaccinated are no longer required to provide viral tests while unvaccinated travellers must provide proof of a negative COVID-19 viral test (nucleic acid or antigen detection) prior to departure and may be required to isolate. Various permutations for further categorization of countries exist where countries are categorized as high-risk or having variants of concern. [8]

- South Africa and its neighbours are currently in inter-wave period of transmission of the virus, although daily infection rates remain high, the overall rate is stable or declining. At present, most European countries and the US are experiencing higher rates of transmission. Vaccination rates in European countries and the US are high, while southern Africa still has significantly lower vaccination rates.

- Recent changes to regulations (Gazette 45855 of 1 February 2022) have removed the need for quarantine in the event of close contact with a COVID-19 positive patient. Isolation for asymptomatic COVID-19 positive individuals is no longer required. Isolation for symptomatic COVID-19 positive persons is required for 8 days.

- All the above developments and evidence necessitate a review of the current COVID-19 screening requirements for land, air and sea ports of entry.

Recommendations

The risk of presentation of a case of COVID-19 and the contribution to the overall incidence of the disease in South Africa remains very low. With the prevalence of COVID-19 in South Africa, high exposure and vaccine related immunity, the risk of transmission to a South African resident is at very low levels. The documented incidence of COVID-19 is higher in South Africa than in neighbouring countries with South Africa contributing the most to the number of cases in the region.

As the region moves towards recognizing COVID-19 as endemic, with a view to a mitigation strategy to address the health risk of the infection, the MAC on COVID-19 therefore recommends that entry requirements for all international travelers to South Africa be reduced and even removed, opening the country to increased incoming travel, for economic or tourism purposes.

For entry into South Africa by air or sea (except from a neighbouring country), the following requirements should apply:

- A completed Traveler Health Questionnaire at all border entry points according to Port Health data requirements; symptom screening is not recommended for travelers to prevent the transmission of COVID-19, but may remain in place to recognize other emerging infectious diseases.
- Unvaccinated travelers in South African border and ports should be offered vaccinations in South Africa and where possible at the border. This vaccination program should be offered at no cost to the traveler, and can be used to enhance the vaccination numbers in the region amongst the highly mobile population.

For land borders with neighbouring countries (Botswana, Eswatini, Lesotho, Mozambique, Namibia, and Zimbabwe), only the following requirements should apply:

- A completed Traveler Health Questionnaire at all border entry points according to Port Health data requirements. Symptom screening is not recommended for travelers to prevent

[8] Covid-19 and EU Travel Restrictions, 2021. https://www.schengenvisainfo.com/news/covid-19/

transmission of COVID-19, but may remain in place to recognize other emerging infectious diseases.

- Unvaccinated travelers arriving at South African ports of entry should be offered vaccinations in South Africa, and where possible at the border. This vaccination program should be offered at no cost to the traveler and can be used to enhance the vaccination numbers in the region amongst the highly mobile population.

If Port Health Authorities wish to continue testing for COVID-19 against this advice, it is recommended that both PCR and Antigen Test results performed by an accredited laboratory, either 72 hours before travel or on arrival, be considered as valid.

The use of the COVID-19 Alert Application should be discontinued as there is very little uptake and movement data available to enable any reliance on the application.

Current symptom screening measures should continue at all ports of entry, with public health interventions to reduce transmission continued. The recommendation may change to align with the advice provided on gathering and masking recommendations in future.

Rationale for Recommendations

1. As many countries enter the mitigation phase of the pandemic with a shift towards an endemic COVID-19 response, are adopting measures to ensure a return to normal life and economic activities. This can be achieved through continuing with current PHSMs and increasing vaccination rates. As quarantine and isolation regulations have changed, the response to a traveler with a COVID-19 positive test has changed, with no action required. This makes the testing requirement an unnecessary burden on the health system, traveler and economic activity.

2. The World Health Organization (WHO) recommends that Member States consider a risk-based approach to the facilitation of international travel by lifting measures, such as testing and/or quarantine requirements, to individual travellers who:
   - were fully vaccinated, at least two weeks prior to travelling, with COVID-19 vaccines listed by WHO for emergency use or approved by a stringent regulatory authority; or
   - have had previous SARS-CoV-2 infection as confirmed by PCR within the 6 months prior to travelling and are no longer infectious as per WHO criteria for releasing COVID-19 patients from isolation.
   - If testing and/or quarantine requirements are lifted for travellers who meet the above-mentioned criteria, individuals who are unvaccinated or do not have proof of past infection should be offered alternatives, such the use of negative PCR tests, or antigen tests.[9]

3. The WHO further recommends that Member States not treat international travelers as a priority group for SARS-CoV-2 testing. In resource limited contexts, diverting testing resources from settings where testing can have a higher public health impact should be avoided.

4. Over the course of the pandemic, possibly due to more testing capacity in South Africa than surrounding nations, it appears that the impact of neighbouring countries on the South African epidemic is minimal, yet the economic impact of travel restrictions is significant.

[9] WHO, 2020. *Considerations for implementing a risk-based approach to international travel in the context of COVID-19. Interim guidance 16 December 2020.* Available on https://www.who.int/publications/i/item/WHO-2019-nCoV-Risk-based-international-travel-2020.1.

5. Testing measures instituted are not cost effective or affordable, neither for the National Health Laboratory Service/ Department of Health nor for travelers entering South Africa. This has impacted negatively on tourism, business travel, and economic activity in the region. Workers and small business owners such as taxis crossing the border cannot afford the cost of testing for each border crossing. Instances of travelers fraudulently crossing the border without valid PCR tests have the potential to increase the opportunities for bribery and corruption.

Thank you for consideration of this advisory.

Kind regards

PROF KOLEKA MLISANA **PROF MARIAN JACOBS**
CO-CHAIRPERSONS: MINISTERIAL ADVISORY COMMITTEE ON COVID-19
DATE:
CC:

- **Dr SSS Buthelezi (Director-General: Health)**
- **Dr N Crisp (Deputy Director-General: National Health Insurance)**

Disclaimer: As stipulated in its Terms of Reference, the MAC on COVID-19 is an advisory Committee to the Minister of Health and does not have any delegated powers to act on behalf of, or to commit, the Minister or Government to any actions. Recommendations offered by the MAC on COVID-19 constitute evidence-informed advice only and do not represent final decisions of the Minister of Health or government.

health
Department:
Health
REPUBLIC OF SOUTH AFRICA

Date:	16 February 2022		
To:	**Dr MJ Phaahla, MP** **Honourable Minister of Health**	From:	**Ministerial Advisory Committee (MAC) on COVID-19**

RESTRICTIONS ON GATHERINGS

Problem Statement and Task to Committee

Whether restrictions on indoor and/or outdoor gatherings can be amended or relaxed, given the current state of the pandemic.

Background/Current Information

- Currently, the regulations for adjusted alert level 1 (as updated on 30th December 2021) restrict gatherings to no more than 1000 people indoors and no more than 2000 people outdoors, provided a distance of 1.5 metres between people can be sustained. Where this is not possible, venues are permitted to fill to no greater than 50% of their maximum capacity. Furthermore, everyone attending a gathering is required to wear a mask.
- The current regulations apply to all gatherings, including religious gatherings, restaurants, bars, shebeens, taverns, conferences, exhibitions, gyms, and other entertainment facilities, amongst others.

Evidence review

- The evidence and rationale for moving towards a "mitigation" strategy rather than a "containment" strategy have been outlined in recent communication from the MAC ("Mitigating COVID-19 in South Africa: Going Forward Position Paper", 8th Feb 2022).
- The MAC position paper highlighted the principles for implementing public health and social measures (PHSMs) which have been advanced by the World Health Organization (WHO):
    - That, measures with the highest level of acceptability and feasibility and proven effectiveness, and which minimize the negative consequences on health and wellbeing of all members of society and the economy, should be adopted.
    - That the decisions to apply PHSMs must be weighed against the wider impact of these measures on health and well-being.
- The risk of SARS-CoV-2 transmission is much lower outdoors than indoors, owing primarily to better ventilation. It has been estimated that only ~1% of SARS-CoV-2 transmissions occur outdoors.[1]

Recommendations

- **That the current restrictions applicable to outdoor gatherings be lifted.**
    - In accordance with the previous MAC on COVID-19 position paper, the wearing of masks outdoors and physical distancing should no longer be mandatory. Good ventilation continues to be recommended where possible.

- **That the current restrictions on the number of persons allowed at indoor gatherings, the minimum physical distancing, and hence the 50% capacity rule, be lifted.**
    - In accordance with the previous MAC on COVID-19 position paper, the wearing of masks indoors should be retained initially, but be re-assessed at regular intervals. On a monthly basis, the need for mandatory mask-wearing at indoor gatherings should be assessed in relation to the COVID-19 caseload, and the extent to which any changes in caseload are attributable to the relaxation of the above restrictions. The ultimate aim should be lifting of indoor mask mandates.
    - Regardless of any decision on mandatory mask-wearing at indoor gatherings, high-risk individuals, such as the elderly, those who are immunocompromised, those with comorbid conditions and those with whom they have close contact (e.g. caregivers), should be encouraged to wear quality masks (preferably surgical masks rather than cloth masks) in such venues, particularly if the COVID-19 caseload in the area is high.
- If a new wave of COVID-19 infections leads to, or is expected to lead to, high rates of severe disease or death, then consideration can be given to reinstituting limits on gatherings, particularly indoor gatherings.
- Communication of this relaxation of the current Alert Level 1 restrictions needs to emphasize vaccination as being even more important at this stage in the pandemic response. Vaccination (including booster doses) remains a critical mitigation tool. High levels of vaccination coverage, particularly in vulnerable groups, contribute to the rationale for lifting restrictions such as those on gatherings.

Rationale for recommendations

- COVID-19 is expected to persist globally for years, possibly indefinitely. Costly, large-scale containment efforts are therefore inappropriate, and policies should be aimed at mitigation. While it is inevitable that easing restrictions on outdoor and indoor gatherings will allow for greater transmission of the virus,[2,3] the focus should now be on preventing severe disease ("mitigation") by promoting vaccination and focusing protective measures on high-risk individuals, rather than trying to prevent infections *per se* ("containment").
- South Africa now has a high degree of population immunity to SARS-CoV-2, which can be expected to offer strong protection against severe disease and death, as was seen in the recent Omicron wave.[4,5] SARS-CoV-2 seroprevalence exceeded 70% prior to the Omicron wave, and is expected to be even higher now. The virulence of future variants of SARS-CoV-2 and the degree to which prior immunity will confer protection from severe disease and death are uncertain however, and restrictions on gatherings may be reinstated in the future if necessary to reduce rates of hospitalisations and death attributable to COVID.
- The WHO paper on PHSMs (*see above*) states that "measures should have the highest level of acceptability and feasibility". Noting that many people are now choosing not to wear masks outside and that this is unlikely to significantly increase spread, removing this measure may in addition promote the wellbeing and goodwill of citizens.
- Reducing unnecessary restrictions will allow society to return to normal functioning to the greatest possible degree, and is expected to have significant economic and social benefits.

Process for implementation

- Regulation 69, related to "Gatherings", amended by Government Notice No. R1659 (Government Gazette No. 45715, 30 December 2021) will need to be amended in order to give effect to the changes recommended above.
- In particular, attention needs to be paid to the specific restrictions currently imposed on faith-based or religious gatherings, social, political and cultural gatherings, workplace gatherings, accommodation facilities, restaurants, bars, shebeens and taverns, conferencing, exhibition, dining, gym, fitness centre, casino and entertainment facilities.

Thank you for consideration of this advisory.

Kind regards

PROF KOLEKA MLISANA **PROF MARIAN JACOBS**
CO-CHAIRPERSONS: MINISTERIAL ADVISORY COMMITTEE ON COVID-19
DATE:
CC:

- **Dr SSS Buthelezi (Director-General: Health)**
- **Dr N Crisp (Deputy Director-General: National Health Insurance)**

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POLITICS



Call for urgent PCC meeting on COVID-19 restrictions – Alan Winde

Alan Winde |
02 June 2022
WCape Premier wants to table latest data in support of complete removal of remaining restrictions

Premier Alan Winde calls for urgent President's Coordinating Council to discuss COVID-19 restrictions

2 June 2022

I have written to President Cyril Ramaphosa to request an urgent meeting of the President's Coordinating Council (PCC) so that we can table our latest data in support of the complete removal of the remaining COVID-19 restrictions.

The Western Cape's data shows clearly that there has been a continued decoupling between COVID-19 infections on the one hand, and COVID-19 related hospitalisations and deaths on the other. A robust measure for COVID-19 pressure on the health platform is oxygen usage, and that has remained low.

Indeed, while there was an increase in COVID-19 infections, the Western Cape remained solidly in the first tier of our trigger system, with hospitalisations, deaths and oxygen usage all remaining low.

What is even more striking is that this is currently the case even though we have already peaked during the latest COVID-19 resurgence, and all indications are that we are starting to see a decrease in COVID-19 infections. We will be unpacking this further during our next digital press conference next week Tuesday.

At the same time, we continue to see record-high unemployment in South Africa, negatively impacted by continued load-shedding and the rising cost of living. The major fuel price increases this week are a serious warning to us all.

Why is our country's shocking unemployment rate not being viewed with the same urgency that we showed when confronting COVID-19 this time two years ago? It should be treated as the major crisis that it is, and prompt immediate action.

It is for this reason, based on clear data in support of this call, that I call for the lifting of all remaining COVID-19 restrictions, and for this to be done as soon as possible. It is time to completely pass the baton to the citizens of our country who should be entrusted with the responsibility to stay safe if they are at risk.

This in particular means removing the requirement for mask-wearing, and any limitation on gathering, indoors or outdoors. The economy must be allowed to operate, unfettered.

This is what our health data is showing us:

There has been a decrease in daily cases over the last week, with 804 new cases each day based on the 7-day moving average. Most provinces are showing decreasing trends in case numbers.

Cases for the province have decreased by 24% week-on-week.

The PCR proportion of positive tests is approximately 31%, which is 10% lower than two weeks ago, but still higher than before the recent resurgence.

Hospital admissions are also decreasing from a high of 64 new admissions daily two weeks ago to around 52 new admissions.

While deaths in the Western Cape have increased slightly, the absolute number of deaths remains low. The high infection rate, decreasing number of hospitalisations and the low number of deaths indicates that there is a decoupling in this regard.

Despite passing a peak, our:

336-bed Brackengate Hospital of Hope has 31 patients admitted;

66-bed Sonstraal Hospital has 2 patients admitted; and

40 bed-ward at Harry Comay has 0 patients.

We can further re-activate the 200-bed Mitchells Plain Hospital of Hope, the 60-bed Freesia Ward and the 30-bed Ward 99, which has not been necessary due to the low demand.

The Western Cape Government has a robust tier-warning system which enables it to respond to increased demand and activate resources such as beds healthcare workers and oxygen so that they are readily available when needed. We also continue to roll out vaccines, which together with prior infection, have resulted in significant protection in our communities.

The Provincial Minister of Health and Wellness, Dr Nomafrench Mbombo, added: "While we did enter a resurgence, cases are showing a decline which points to us having instead mitigated a severe fifth wave. This is encouraging because it shows that existing immunity and vaccinations are helping to decouple infections, hospitalisations and deaths – showing us that we can safely begin to reopen the economy and move forward. I encourage those of you who have not yet done so to get vaccinated and/or get boosted!"

Speaking on the need to do away with existing COVID-19 related restrictions, the Provincial Minister of Finance and Economic Opportunities, Mireille Wenger, said: "It's time that we fully open up our economy which means allowing events to go back to business-as-usual, and focusing on th responsibility of the individual."

"While the recent Quarterly Labour Force Survey paints a slightly more positive picture for our provincial economy, with 35 000 jobs created quarter on-quarter, we cannot support restrictions which serve only to undermine the economy. We need to claw back the jobs lost during the pandemic by making it easier for the private sector to create jobs; we need to attract investment, and we need to remove trade barriers," added Minister Wenger.

Issued by Western Cape Provincial Government, 2 June 2022

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Premier Alan Winde calls for urgent President's Coordinating Council to discuss COVID-19 restrictions

2 Jun 2022

Premier Winde calls for urgent PCC meeting so that remaining COVID-19 restrictions can be removed entirely

I have written to President Cyril Ramaphosa to request an urgent meeting of the President's Coordinating Council (PCC) so that we can table our latest data in support of the complete removal of the remaining COVID-19 restrictions.

The Western Cape's data shows clearly that there has been a continued decoupling between COVID-19 infections on the one hand, and COVID-19 related hospitalisations and deaths on the other. A robust measure for COVID-19 pressure on the health platform is oxygen usage, and that has remained low.

Indeed, while there was an increase in COVID-19 infections, the Western Cape remained solidly in the first tier of our trigger system, with hospitalisations, deaths and oxygen usage all remaining low.

What is even more striking is that this is currently the case even though we have already peaked during the latest COVID-19 resurgence, and all indications are that we are starting to see a decrease in COVID-19 infections. We will be unpacking this further during our next digital press conference next week Tuesday.

At the same time, we continue to see record-high unemployment in South Africa, negatively impacted by continued load-shedding and the rising cost of living. The major fuel price increases this week are a serious warning to us all.

Why is our country's shocking unemployment rate not being viewed with the same urgency that we showed when confronting COVID-19 this time two years ago? It should be treated as the major crisis that it is, and prompt immediate action.

It is for this reason, based on clear data in support of this call, that I call for the lifting of all remaining COVID-19 restrictions, and for this to be done as soon as possible. It is time to completely pass the baton to the citizens of our country who should be entrusted with the responsibility to stay safe if they are at risk.

This in particular means removing the requirement for mask-wearing, and any limitation on gathering, indoors or outdoors. The economy must be allowed to operate, unfettered.

This is what our health data is showing us:

- There has been a decrease in daily cases over the last week, with 804 new cases each day based on the 7-day moving average. Most provinces are showing decreasing trends in case numbers.
- Cases for the province have decreased by 24% week-on-week.
- The PCR proportion of positive tests is approximately 31%, which is 10% lower than two weeks ago, but still higher than before the recent resurgence.
- Hospital admissions are also decreasing from a high of 64 new admissions daily two weeks ago to around 52 new admissions.

- While deaths in the Western Cape have increased slightly, the absolute number of deaths remains low. The high infection rate, decreasing number of hospitalisations and the low number of deaths indicates that there is a decoupling in this regard.

Despite passing a peak, our:

- 336-bed Brackengate Hospital of Hope has 31 patients admitted;
- 66-bed Sonstraal Hospital has 2 patients admitted; and
- 40 bed-ward at Harry Comay has 0 patients.

We can further re-activate the 200-bed Mitchells Plain Hospital of Hope, the 60-bed Freesia Ward and the 30-bed Ward 99, which has not been necessary due to the low demand.

The Western Cape Government has a robust tier-warning system which enables it to respond to increased demand and activate resources such as beds, healthcare workers and oxygen so that they are readily available when needed. We also continue to roll out vaccines, which together with prior infection, have resulted in significant protection in our communities.

The Provincial Minister of Health and Wellness, Dr Nomafrench Mbombo, added: "While we did enter a resurgence, cases are showing a decline which points to us having instead mitigated a severe fifth wave. This is encouraging because it shows that existing immunity and vaccinations are helping to decouple infections, hospitalisations and deaths – showing us that we can safely begin to reopen the economy and move forward. I encourage those of you who have not yet done so to get vaccinated and/or get boosted!"

Speaking on the need to do away with existing COVID-19 related restrictions, the Provincial Minister of Finance and Economic Opportunities, Mireille Wenger, said: "It's time that we fully open up our economy which means allowing events to go back to business-as-usual, and focusing on the responsibility of the individual."

"While the recent Quarterly Labour Force Survey paints a slightly more positive picture for our provincial economy, with 35 000 jobs created quarter-on-quarter, we cannot support restrictions which serve only to undermine the economy. We need to claw back the jobs lost during the pandemic by making it easier for the private sector to create jobs; we need to attract investment, and we need to remove trade barriers," added Minister Wenger.

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