Extract from legal opinion obtained for

Sakeliga NPC

regarding legality of regulations, compliance, and other matters relating to the State of Disaster.

Opinion by
Adv Pat Ellis PC and Adv Ben Bester.

LEGAL OPINION

TO: KRIEK WASSENAAR & VENTER INC

IN RE: NATIONAL STATE OF DISASTER

DATE: 27 MARCH 2020

16.6 Taking this into account, a direction (i) which purports to direct "what must be done" (instead of directing "how something must be done") or (ii) which is not authorised under an empowering provision is invalid and may be set aside.

16.7 One such seemingly unlawful direction, for example, is contained in a media release issued by the Department of Trade and Industry on 25 March 2020 which announced that all businesses that are to render essential services under the Emergency Regulations are to seek approval/certification from the Department of Trade and Industry (via its website at www.bizportal.gov.za).

16.8 This media statement (which seems to parade as a direction) not only instructs "what must be done" (rather than "how something is to be done") but is also unauthorised. The media release is, in fact, contrary to the empowering provisions of the Emergency Regulations which provides in regulation 11B that business need not cease operations if the businesses (i) is involved in the manufacturing, supply or provision of an essential good or service, alternatively, (ii) where the business operations are provided from outside the Republic or can be provided remotely by a person from their normal place of residence.

16.9 The empowering provision requires no certification and/or registration of the aforementioned businesses and, as such, the direction is invalid and should to be set aside.

16.10 Despite this apparent invalidity, impugned administrative actions cannot simply be ignored. This is because of the *Oudekraal* principle which has been explained by the Constitutional Court in the following terms:

> "*The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality. As Khampepe J stated in Welkom, "[t]he rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process." For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid*" (footnotes omitted and own emphasis added).[9]

16.11 In light hereof, notwithstanding a direction's probable invalidity, it would not be prudent to simply ignore the direction.

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9 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6 at par 103.

16.12 The preferred course of action would be, firstly, to obtain confirmation from the relevant department as to whether a specific statement and/or action is indeed a “direction” for purposes of the Emergency Regulations and, if so, urge the Department to retract them, failing which an application should be considered to have them set aside.