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Litigation during the lock-down

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Pending litigation during lockdown

On the evening of 30 March 2020, President Cyril Ramaphosa addressed the Nation, four days into the nationwide lock-down. The President described the lock-down as "*an extreme measure*" that has "*caused great disruption to all our lives and caused upheaval in our economy*". At the time of his address, the President stated that approximately 740,000 people had been infected worldwide, with 1,326 confirmed COVID-19 cases in South Africa.

Included in the disruption and upheaval referred to by the President, is the uncertainty regarding when and how Courts may be approached during the lock-down for relief, and what effect the lock-down has on pending litigation. This article is a summary of the directions in place in relation to:

- access to courts by litigants and practitioners during the lock-down;
- the launch of urgent matters during the lock-down;
- pending litigation during the lock-down (*dies non* and enrolment); and
- the issuing of new civil cases during the lock-down.

The directions referred to below are the directions in place at the time of when this article was last updated (7 April 2020). We expect that there are likely to be further directions issued and/or amendments to existing directions throughout the course of the lock-down.

It was stipulated in the lock-down Regulations gazetted on 25 March 2020 ("the lock-down Regulations"), that services related to the essential functioning of Courts, judicial officers, the Master of the High Court, Sheriffs and legal practitioners form part of the essential services contemplated in the lock-down Regulations.

On 31 March 2020, the Minister of Justice and Correctional Services published Directions ("the replacement Directions") in terms of Regulation 10 of the Regulations under the Disaster Management Act 57 of 2002 to address, prevent and combat the spread of COVID-19 in, *inter alia*, all Courts. The replacement Directions withdrew and replaced the directions ("the first Directions") that had been previously gazetted on 26 March 2020.

In terms of the replacement Directions, only matters that are *'urgent and essential'* will be dealt with by Courts during the state of disaster declared by the President on 15 March 2020.

It is extremely important to note that the replacement Directions **do not** suspend the time periods prescribed by the Rules of Court (which the first Directions did). The only exception to this may be in the Kwa-Zulu Natal Division, which is dealt with below. This is important, because it means that parties involved in existing civil litigation will be required to comply with all time periods prescribed in the Rules of Court and/or any statute to file Court process which periods fall throughout the state of disaster. It is therefore critical that litigants and their legal teams ensure that pleadings, notices and/or affidavits are timeously delivered.

Whilst the replacement Directions may seem onerous under the current circumstances, we see this as a period of opportunity. In the usual course of business, employees key to assisting in litigation do not always have adequate capacity to devote to cases

outside of their day-to-day duties, functions and responsibilities. The lock-down period presents an opportunity to progress preparation for upcoming matters whilst having *additional* time to consider strategic approaches to be taken.

Access to courts by litigants and practitioners

Paragraph 2(a) of the replacement Directions stipulates that only persons with a "*material interest in a case*" will be permitted to enter Courts. Entry into Courts and Court precincts is permitted only in respect of urgent and essential matters.

In the context of civil cases, such urgent or essential matters are defined in the replacement Directions to be matters "*...which if not enrolled during the state of disaster, will lead to substantial injustice*".

Although the replacement Directions provide for travel permits to be issued to legal practitioners to travel to Courts, such permits will not be issued unless that legal practitioner is appearing in a matter enrolled for hearing that is classified as 'urgent and essential' in terms of the replacement Directions.

It should be expected that travel permits will only be issued in extreme cases where urgent and essential matters cannot be heard via teleconference, videoconference or other electronic means.

The replacement Directions do not make provision for specific travel permits to be issued to persons who are required to appear in Court (ie other than legal practitioners). It would therefore be advisable for persons who are required to physically appear in Court to travel with sufficient identification, as well as confirmation from the Registrar or clerk of the relevant Court that the matter is on the Court Roll for that particular day, and that the matter is urgent or essential in nature. The aforesaid confirmation should also state that the person travelling to Court is required to be present at the hearing.

Urgent matters during the lock-down

It is unlikely that matters involving commercial urgency will be regarded as urgent or essential. Where it is anticipated that urgent relief will be required immediately following the end of the lock-down period, we consider it advisable to prepare now for urgent matters because Courts will inevitably be overburdened when the lock-down comes to an end.

On 24 March 2020, the Chief Justice delegated his authority in terms of section 8(3) of the Superior Courts Act 10 of 2013 to all Heads of Court in both the Superior Courts and Magistrates/Lower Courts in order for such courts to issue directives that will enable access to Courts in relation to any urgent matter, bail applications, maintenance matters, domestic violence matters and matters involving children.

The Chief Justice's directives made it clear however that Courts were required to stay open so as to enable members of the public to bring a challenge to the constitutionality and rationality of the COVID-19 measures implemented by Government.

As at the time of preparing this article, one such challenge has already been dismissed by the Constitutional Court of South Africa. On the eve of the lock-down, the Hola Bon Renaissance Foundation ("HBR") sought direct access to the Constitutional Court to challenge the constitutionality of the lock-down Regulations, on the alleged basis that COVID 19 does not pose a threat to South Africans (because, it was alleged, *inter alia,* that Africans would "*self-heal*" from the virus), the President was ill informed, and had overreacted in imposing the regulations. HBR alleged further that the lock-down violated the public's rights, *inter alia*, to human dignity, freedom of trade, freedom of movement and access to healthcare.

The Constitutional Court handed down a short order on 30 March 2020, finding that the requirements for direct access to the Constitutional Court were not addressed by the HBR and that the application had no reasonable prospect of success. The application was accordingly dismissed.

As stated above, the replacement Directions stipulate that civil cases not identified as urgent and/or essential are precluded from being placed on the Court Roll for the duration of the period of lock-down. It is not clear whether following the lock-down, matters can once again be enrolled whilst the state of disaster is still extant; or if a matter is still required to be urgent and essential in order to be enrolled. It seems that the reference to the "*period of lock-down*" in Regulation 5(a) of the replacement Directions was intended to be a reference to the "*State of Disaster*".

Although paragraph 2 of the replacement Directions makes provisions for certain persons to access Courts for urgent and essential matters, paragraph 5(a) of the replacement Directions provides Heads of Court with the discretion to authorise the hearing of matters by way of teleconference, videoconference or other means which dispense with the necessity to be physically present in a courtroom.

Service of process is regulated by paragraph 5(c) of the replacement Directions, and is similarly limited to matters that are urgent and essential.
This includes the service of:

- court orders relating to COVID 19;
- domestic violence protection orders;
- protection from harassment orders;
- process relating to claims prescribing;
- urgent Court process relating to Court hearings scheduled during the period of lock-down; and
- urgent court process in family law matters as determined in the replacement Directions.

Paragraph 5(d) of the replacement Directions stipulates that all other service of process by Sheriffs, **including evictions**, are not essential.

Subsequent to the first Directions having been gazetted, a number of directives have been issued by certain of the High Court Divisions around South Africa to regulate the functioning of the Courts during the lock-down period. The directives issued by the High Courts should now be read together with the replacement Directions. The common thread in all such directives appears to be that:

- only urgent motion matters relating to COVID-19, bail applications, urgent maintenance, domestic violence and cases involving children will be heard during the lock-down; and
- Courts will assess the urgency of each matter as to whether it is capable of awaiting the end of the lock-down, or if there will be substantial injustice if the matter is not enrolled during the lock-down period.

The manner of enrolling urgent and essential matters will differ from division to division. For example, in the Gauteng Division, papers are required to be electronically uploaded to Caselines after the necessary arrangements have been made with the Urgent Registrar.

Of interest, is that the Judge President of the Gauteng Division directed on 25 March 2020 ("the Gauteng Directive"), *inter alia*, that the Urgent Court shall operate in the same manner in which urgent after hours applications are dealt with. The enrolment of any such matter found not to warrant a hearing during the lock-down may, at the discretion of the Judge presiding over the matter, result in punitive costs being awarded and the legal representatives being interdicted from receiving any fees for work relating to the matter.

Pending litigation

Dies non

The ordinary time periods imposed by the Rules of Court and/or any Statute to file Court process and/or deliver any documents within stipulated periods, continue to apply.

On 2 April 2020 the Judge President of the Gauteng Division issued a supplementary directive ("the Supplementary Gauteng Directive") stating it was not within his authority, as a Head of Court, to declare the national lock-down as a period of *dies non,* and accordingly litigants "*may*" comply with their obligations stipulated by statute or the rules of Court relating to such time periods. In the context of the Supplementary Gauteng Directive, we assume that the reference to the word "*may*" was intended to be a reference to the word "*must*".

The Supplementary Gauteng Directive now makes provision for service of all process via email, and the filing thereafter by either uploading the relevant Court process to the Caselines platform (if the matter has already been registered on Caselines), or by email to the Court email addresses provided in the Supplementary Gauteng Directive. The Supplementary Gauteng Directive

makes provision for condonation to be sought where effective service could not be achieved as a consequence of the strictures imposed by the national lock-down.

The Supplementary Gauteng Directive is inconsistent however with the approach adopted by the Kwa-Zulu Natal Division. In this regard, the practice directive that was issued by the Judge President in that Division on 26 March 2020 ("the KZN Directive") stated that the period 27 March 2020 to 17 April 2020 is to be regarded as *dies non* for purposes of Rules of Court and any directives for the filing of pleadings, affidavits or notices. Given what the Judge President in the Gauteng Division has said *vis-à-vis* the power to declare the national lock-down period to be *dies non*, we expect that the KZN Directive is likely to be amended in due course.

Enrolment

Matters that had previously been enrolled for hearing during the lock-down period will be allocated new Court dates by the civil Registrar or clerk of the Court (paragraph 5(b) of the replacement Directions). It would be advisable to consider the practice directives issued by each of the High Courts as the specific procedures may differ from division to division.

Although the first Directions had provided that application return dates falling within the lock-down period would be extended "*up to one month after the end of the lock-down*", the current Directions are now silent on return dates. It appears however that paragraph 5(a) must be read to include a reference to applications with pre-existing return dates, and that such return dates will be re-allocated by the relevant Registrar or clerk in terms of paragraph 5(b) of the replacement Directions. Again, the specific procedures for the reallocation of return dates may differ from division to division.

Issuing new civil cases during the lock-down

For the same reasons set out above, it remains advisable to continue to prepare for matters to be issued as soon as the lock-down period comes to an end. There will be extreme pressure on the Courts not only to re-enrol matters that had been postponed during the lock-down, but also to issue new matters and allocate hearing dates in due course.

The common thread contained in the various directives issued across the High Court Divisions is that the issuing of all new summonses and launching of all new applications, other than urgent and essential matters, is prohibited until the end of the lock-down period.

In the Gauteng Division, provision has been made for the electronic transmission of summonses to the Courts **in respect of claims prescribing during the lock-down period**. The Gauteng Directive provides that such process may be transmitted via email for the attention of Court staff after the lock-down period. The Gauteng Directive stipulates that the date of transmission of the email to the Court shall be regarded as the date that the process was issued.

The Judge President of the Western Cape Division has similarly published a supplementary directive ("the Western Cape Supplementary Directive") stipulating that the issuing of applications and summonses will be permitted in matters where the debt forming the subject matter of the claim will prescribe during the lock-down period, "*or there is a reasonable apprehension that the debt will prescribe*". The Western Cape Supplementary Directive does not make the process for the issuing of such applications and summonses clear, however, this will presumably be done electronically after arrangements have been made with the Chief Registrar.

It is important to note, however, that prescription is not interrupted by the issuing of a summons, but rather by the subsequent service of that summons. Accordingly, it will still be necessary for a summons to be served by a sheriff during the lock-down period (i.e. prior to the date of prescription of the relevant claim). Surprisingly, no provision has been made for electronic service during the lock-down.

The Western Cape Directive has also made clear that the service of summonses and applications **other than in respect of prescribing claims** should be suspended until after the lock-down.

To achieve service of a summons, we suggest that a copy of email transmission to the Court be attached to the summons (which would not yet have been allocated a case number) and request urgent service by the Sheriff in accordance with paragraph 5(c) of the replacement Directions.

Although the directives in the other High Divisions do not appear to make specific provision for claims prescribing, one must assume that it will be possible to make arrangements with the Court on the basis that failure to serve summons in a matter where a claim is prescribing will "*lead to substantial injustice*".

Exclusion (General Discretion)

Paragraph 12 of the replacement Directions provides judicial officers with a discretion to deviate from the replacement Directions where it is in the interest of justice to do so. It should be expected, however, that this general discretion will only be exercised in extreme cases.

Useful Links to Regulations and Directions of and concerning litigation during the lock-down

- *Delegation of Authority issued by Chief Justice Mogoeng Mogoeng issued in terms of section 8(3) of the Superior Courts Act 10 of 2013* dated 24 March 2020
- GNR 657 No.43148 dated 25 March 2020 – *Amendment of Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002* (declaration of lock-down)
- Directive of the Judge President of the High Court, Kwa-Zulu Natal Division dated 25 March 2020
- Directive of the Judge President of the High Court, Mpumalanga Division dated 25 March 2020 – *Shutdown announced by the President of the Country and Directive*
- *GNR 489 No.43167* dated 26 March 2020 – *Directions issued in terms of Regulation 10 of the Regulations under the Disaster Management Act, 2002* (the first Direction)
- Directive of the Judge President of the High Court, Free State Division (Bloemfontein) dated 26 March 2020
- GNR 440 No. 43191 dated 31 March 2020 – *Directions issued in terms of Regulation 10 of the Regulations under the Disaster Management Act of 2002* (the replacement Direction)
- Directive of the Judge President of the Gauteng Division dated 2 April 2020 – *Supplementary Directive (dies non) in re Special Arrangements to address COVID-19 Implications for all Litigation in the Pretoria and Johannesburg High Courts*
- Directive of the Judge President of the Western Cape Division dated 6 April 2020

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