

EMPLOYMENT

Moving towards the end of the lockdown – keeping it consistent and clear

28 April 2020 4 min read

by Bradley Workman-Davies, Director

The last big news from Government in relation to the National Lockdown, as outlined in the President's last address to the Nation on 23 April 2020, was the phased opening of the economy in five lockdown stages. South Africa is presently still at stage 5, the most restrictive on economic activity, personal movement and other basic activities that may pose a risk to the increase of the spread of the COVID-19 virus. 1 May 2020 will see the commencement of stage four containment measures, which will see a relaxation of some of these restrictions, and as further stages are introduced, the gradual easing back into pre-lockdown levels of activity.

Although there is a fair degree of detail on what relaxations will be allowed at the various stages of the framework, the regulations which will see these stages become a lawful structure within which businesses can operate have yet to be released, and the devil in the expected detail of these regulations has yet to be analysed and put into action.

What is interesting to note is that the new strategic framework contemplates that the various Ministries which oversee the various sectors of South Africa's economy, such as the Departments of Health, Mineral Resources, and Education, would have a greater say in defining the parameters for the return to normalcy in their various sectors. This enabling provision is admittedly already contained in the current regulations – Regulation 10(8) of the Disaster Management Act's Essential Services Regulations allows for various Ministers to issue and vary directions within his/her mandate. This entitlement has been utilised by the Department of Higher Education and Training in a Directive Issued (No. R468 / GG43237) on 17 April 2020, which provides that *"Information and communication technology devices (such as desktops, laptops, modems and other devices) for education purposes"* are an essential service, but has otherwise not been taken up on a widespread basis, and the definition of what constitutes an essential service has largely been left up to the Department of Co-operative Governance and Traditional Affairs (COGTA), which issued the original Disaster Management regulations and each of the subsequent amendments to these regulations.

When the new regulations come out and as Ministers release directions for their sectors, what is hoped for is that the various sectors receive clarity and certainty as to the scope of their allowed economic activities, as to date there has been a large degree of uncertainty and lack of clarity on what is meant by the essential services regulations, and large scope for debate in this regard. When the consequences for non-compliance are potential criminal prosecution, a clear view as to what is allowed is critical.

On the other hand, whereas COGTA has thus far directed the process, if authority to determine what is allowed is now devolved to the various Departments, there is additional scope for inconsistencies of approach, which may lead to further disparities and confusion between the various sectors. A co-ordinated effort is also critical. These enabling provisions must also be utilised correctly if any measures are to be put in place for a various sector, these must be promulgated lawfully, under the auspices of the framework and the Disaster Management Act. Setting the rules by Ministerial diktat is neither legal nor helpful.

Also on the wish list for the new regulations is direction in regard to the health and safety measures which an employer may need to put in place, when it commences operations at the various levels of the easing of the lockdown. At present, there are no legal obligations in either the Essential Services Regulations, the Occupational Health and Safety Act, or the National Health Act, which would require any specific type of personal protective equipment or other prophylactic measures to be adopted, in the circumstances of the COVID-19 pandemic. At most, an employer or business owner would need to ensure that there is a healthy and safe environment for employees and customers. This lack of clarity has seen enforcement officers insisting on the application of measures which are not required by law, and a subjective element of what is expected has been introduced into the enforcement process. As mentioned above, where criminal prosecution becomes a consequence, clarity is paramount. If thermal monitoring of employees, provisions of masks (and the type of mask to be provided), gloves and sanitisation protocols becomes required, this should be clearly enacted so that an employer can easily determine for itself what it must do, and so that enforcement can easily determine whether an employer is compliant.

The framework regulations, when they are introduced, will no doubt be scrutinised by business and legal professionals. Their success will depend on the clarity with which they can be applied.



Bradley Workman-Davies

Director

[View Profile](#)