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Operations of financial services business on COVID-19 alert level 4

1 May 2020 *7 min read*

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With effect from 1 May 2020, government has introduced a five-stage lockdown process. Financial Services businesses will be allowed to reopen subject to certain restrictions.

1. **Background**

The Disaster Management Act[1] (the "**DMA**") is a piece of legislation designed to integrate and coordinate the various branches of government both in preparation for, and in response to national disasters.

On 15 March 2020, the Minister of Cooperative Governance and Traditional Affairs, Nkosazana Dlamini Zuma (the "**Minister**") declared a National State of Disaster[2] in relation to the COVID-19 pandemic. This triggered the Minister's right, after consultation with the relevant Minister, to make regulations or issue directions concerning certain matters specific in the DMA which are designed to facilitate a coordinated and integrated response to the disaster. Three days later, on 18 March 2020, the first set of regulations was published announcing what became known as the 21-day lockdown. That initial lockdown was extended to 30 April and during the lockdown period, the regulations have been amended numerous times.[3]

On 29 April 2020, the Minister again exercised her right[4] to make regulations (the "**Regulations**"). All prior regulations are repealed by the latest set of Regulations.

2. **Introduction of alert levels**

2.1 One of the major innovations of the Regulations is the introduction of five Alert Levels. The Regulations deal separately with the "determination" of Alert Levels and the "declaration" of which Alert Levels apply. It would seem that this distinction is between the determination of what restrictions apply on each Alert Level and the declaration of which Alert Level currently applies.

2.1.1 The new Regulations refers to "'Alert Level 1' as determined by Cabinet", which implies that the *determination* of the levels will be made by Cabinet, in accordance with criteria to guide the determination that will be issued by the Minister of Health. There is some controversy as to whether or not the determination of Alert Level 4 has in fact been made by Cabinet or by a subset of Cabinet known as the National Command Centre but for the purposes of this note, we assume that Alert Level 4, which is an Annexure to the Regulations has been determined by Cabinet. Only Alert Level 4 has been legislated to date.

2.1.2 The Minister, in consultation with the Minister of Health and in consultation with Cabinet can *declare*:

2.1.2.1 which of the Alert Levels apply; and
2.1.2.2 the extent to which they apply at a national, provincial, metropolitan or district level.

2.2 The Minister has determined that Alert Level 4 will apply throughout the country until a different Alert Level is declared.[5]

3. **Restrictions applicable to financial services businesses**

3.1 Staffing

3.1.1 People remain confined to their places of residence as they were previously.[6] In fact, the imposition of a curfew from 20h00 to 5h00 and the indefinite nature of the lockdown means that the lockdown has in fact been intensified. Movement of persons is allowed in certain circumstances including where they are performing an essential or permitted services.

3.2 Essential vs permitted financial services

3.2.1 Essential financial services are defined as *including* the following services necessary to maintain the functioning of a financial system[7], including the insurance environment, the savings and investment environment and fund administration. There is also a reference to "additional services designated in terms of regulation 11B(4A)(c)(i)" which is a reference to a prior regulation that has been repealed by the Regulations. Such services are only deemed to be essential if the operation of a place of business or entity is necessary to continue to perform those services. This means that only financial services that must be provided from a fixed location will fall within the definition of essential services.

3.2.2 Permitted financial and business services (i.e. services that are not essential but are nevertheless allowed on Alert Level 4) include chauffeur services, car sales[8], rental of motor vehicles, call centres for local and international markets[9]. A broad category of "other professional services" is also listed under permitted services. However, these professional services may only operate where work-from-home is not "possible" and only to support other Alert Level 4 services.

3.2.3 The number of staff who will therefore be allowed to leave their homes to attend work is therefore very limited in the context of most financial services providers.

4. **Operational requirements**

Financial services providers that do operate on Alert Level 4 must comply with a number of operational requirements set out in the Regulations including the following.

4.1 Development of a return plan

The business must develop a plan ("**Return Plan**") for the phased return of employees to the workplace. This plan must be in place before employees return. For small business,[10] the Return Plan can be basic and there is no guidance on what the Return Plan must contain. For medium and large businesses,[11] the Return Plan must include:

4.1.1 the details of the COVID-19 compliance officer;
4.1.2 health protocols that have been put in place;
4.1.3 the date the business will open and opening hours;
4.1.4 timetable for the phased return to work;
4.1.5 steps taken to get the workplace COVID-19 ready;
4.1.6 which employees are permitted to work including:

4.1.6.1 a list of staff who can work from home;
4.1.6.2 a list of staff who are 60 years or older who must stay at home;
4.1.6.3 a list of staff with comorbidities who must stay at home;

4.1.7 arrangements for staff relating to sanitary and social distancing measures, screening facilities, attendance records, work areas, public areas, canteens and bathrooms, testing facilities and staff rotational arrangements;[12] and

4.1.8 arrangements for customers and members of the public.

Designate a COVID-19 compliance officer who will oversee implementation of the Return Plan and adherence to the standards of hygiene and health protocols relating to COVID-19 at the workplace.

4.2 Phased return
The business must phase in the return of employees to work to manage the return of employees from other provinces, metropolitan and district areas.

4.3 Health protocols
The business must develop measures to ensure that the workplace meets the standard of health protocols, adequate space for employees and social distancing.

5. **Interface with the Joint FSCA/PA Directive**

5.1 On 9 April 2020, the Financial Services Conduct Authority (the "**FSCA**") and the South African Reserve Bank's Prudential Authority (collectively referred to as the "**Authorities**") issued a joint directive (the "**Joint Directive**") that all financial institutions take precautionary measures when performing essential financial services. This Joint Directive is the subject of a separate Werksmans note. [13] That directive will continue to apply.

5.2 The Joint Directive applies to financial institutions providing essential services. In our view, it would not apply in the context of permitted services.

5.3 It is likely, however, that the FSCA will issue directives covering financial services providing permitted services and that these will draw on the Joint Directive.

6. **Commencement and duration**

The Regulations are effective as of 1 May 2020 and will remain effective indefinitely until such time as another declaration is made. The declaration of a State of National Disaster expires on 15 June 2020 but may be renewed month-by-month thereafter.

7. **Breach of the regulations**

Breach of the Regulations results in the commission of a criminal offence and on conviction, a person may be imprisoned for a period not exceeding 6 months and/or to payment of a fine.

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[1] Act 57 of 2002.

[2] In terms of Section 27(1) of the DMA.

[3] Including on 25 March, 26 March, 2 April, 16 April and 20 April 2020.

[4] Section 27(2) of the Disaster Management Act applies once a state of disaster has been declared.

[5] Regulation 15(1).

[6] Exercise is allowed within a 5km radius of the residence from 06h00-21h00 every day.

[7] As defined in section 1(1) of the Financial Sector Regulation Act 9 of 2017.

[8] Subject to specific directions.

[9] Subject to directions already issued.

[10] There is no definition of "small business" in the Regulations.

[11] Which are also not defined.

[12] See Annexure E to the Regulations.

[13] See Financial Services Sector Update 5 sent on 17 April 2020.

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