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

13 April 2022

DIRECTOR-GENERAL: DEPARTMENT OF HEALTH
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Room 4111
Pretoria
Per email: Tsakani.furumele@health.gov.za

THE MINISTER OF HEALTH
Civitas Building
Cnr Thabo Sehume & Struben Streets
Pretoria
Per email: minister@health.gov.za
MajaP@health.gov.za
DG@health.gov.za

Dear Minister Phaahla and Dr Sandile Buthelezi,

RE: AFRIFORUM // THE MINISTER OF HEALTH – WRITTEN REPRESENTATIONS ON THE FOUR SETS OF REGULATIONS PROPOSED UNDER THE NATIONAL HEALTH ACT AND THE INTERNATIONAL HEALTH REGULATIONS ACT

1. We confirm that we act on behalf of the AfriForum NPC (hereafter “our client”). Our client is a registered non-profit company and civil rights organisations with more than 300 000 members. Our client is a staunch advocate of the rule of law and the protection of the constitutional rights enshrined in our Constitutional to build a better, free and prosperous South Africa.

2. We refer to the four sets of new proposed regulations in terms of the National Health Act 61 of 2003 and the International Health Regulations Act 28 of 1974 which were published by the Minister of Health, Dr MJ Phaahla ("the Minister") on 15 March 2022 (the four sets of regulations are collectively referred to as "the health regulations"). Publication took place pursuant to a notice published in the Government Gazette No 46048 of 15 March 2022, inviting public commentary on the health regulations for a period of 30 days thereafter.

3. This correspondence is directed to you as the member of cabinet responsible for the publishing and issuing of the above-mentioned proposed regulations.

4. Pursuant to the above-mentioned invitation to make representations on the proposed health regulations, kindly see attached our client's written comment (Attached as **Annexure A**). These comments are submitted under the reservation of rights.

5. In summary our client submits that:

   5.1. **Firstly**, the public participation process embarked on by the Minister of Health is unsatisfactory and unlawful. Should the Minister decide to rush through the proposed regulations, notwithstanding the flawed public participation process, the regulations will be unlawful and invalid; and

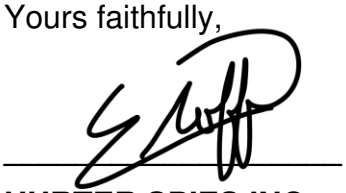
   5.2. **Secondly**, all four of the proposed regulations are *ultra vires* of the empowering provisions of the legislation in terms of which they are proposed for adoption, and are therefore unlawful; and,

   5.3. **Thirdly**, a considerable number of the proposed regulations cannot withstand constitutional scrutiny because they are irrational, impermissibly vague, flout separation of powers principles, and unjustifiably infringe various rights in the Bill of Rights.

6. Moreover, the purpose of this letter is to voice our client's concern regarding the proposed health regulations. Our client is of the firm view should these proposed health regulations be made and adopted that they will undoubtedly be unlawful and ripe to be set aside and reviewed. This cover letter therefore also serves to briefly summarise the submissions made in the written comment and to warn that our client will not hesitate to seek appropriate relief, including urgent relief, should the proposed health regulations be adopted.

7. We look forward to hearing from you.

Yours faithfully,



HURTER SPIES INC.

Per. Daniël Eloff
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AfriForum

WRITTEN REPRESENTATIONS ON THE FOUR SETS OF REGULATIONS PROPOSED UNDER THE NATIONAL HEALTH ACT AND THE INTERNATIONAL HEALTH REGULATIONS ACT

TABLE OF CONTENTS

I. INTRODUCTION

1. On 15 March 2022, the Minister of Health, Dr MJ Phaahla MP, gave notice of his intention to make four sets of regulations:

   1.1. First, regulations relating to proposed amendments of the surveillance and the control of notifiable medical conditions under sections 90(1)(j)(k) and (w) of the National Health Act 61 of 2003 (**"the surveillance regulations");**

   1.2. Second, regulations relating to public health measures in ports of entry under section 3(2) of the International Health Regulations 28 of 1974 (**"the ports of entry regulations**");

   1.3. Third, regulations relating to the management of human remains under section 68(1)(b) read with section 90(4)(a) of the National Health Act (**"the human remains regulations**"); and,

   1.4. Fourth, regulations relating to environmental health under section 90(1)(a), (n) and (w) of the National Health Act ("**the environmental health regulations"**).

2. The Minister's notice issued in Government Gazette No 46048 of 15 March 2022, affords interested parties 30 days to make submissions on the proposed regulations.

3. AfriForum is a not–for–profit company and civil rights organisation with more than 300 000 members across South Africa. It objects to the Minister's proposed regulations for three broad reasons:

3.1. One: the public participation process embarked on by the Minister of Health is unsatisfactory and unlawful. Should the Minister decide to rush through the proposed regulations, notwithstanding the flawed public participation process, the regulations will be unlawful and invalid;

3.2. Two: all four of the proposed regulations are *ultra vires* of the empowering provisions of the legislation in terms of which they are proposed for adoption, and are therefore unlawful; and,

3.3. Three: a considerable number of the proposed regulations cannot withstand constitutional scrutiny because they are irrational, impermissibly vague, flout separation of powers principles, and unjustifiably infringe various rights in the Bill of Rights.

4. These submissions are structured according to each of AfriForum's three objections: **PART II** explains why the public participation process is unlawful and invalid; **PART III** explains why the proposed regulations are *ultra vires* the provisions of the empowering legislation; and **PART IV** deals with why the regulations are made for an ulterior and impermissible purpose, and are unlawful; and **Part V** deals with why various regulations do not withstand constitutional scrutiny.

5. It is not possible for AfriForum to address the constitutionality of each of the proposed regulations. This is because the Minister has limited the period for submissions to 30 days, notwithstanding the detail of the proposed regulations, and the fact that it spans more than 150 pages.

6. The principles set out in Part V of these submissions, are to be considered and applied by the Minister in respect of all of the regulations.

II. THE PUBLIC PARTICIPATION PROCESS IS UNLAWFUL

7. The public participation process embarked on by the Minister is unlawful for two reasons:

7.1. First, the period for public comments and representations is inadequate and unreasonable. The Minister has not provided any factual justification for the truncated period of 30 days, bearing in mind the content, range and detail of the proposed regulations as well as the far – reaching consequences of the regulations.

7.2. Secondly, it is not possible for the public to meaningfully comment on the proposed regulations without the Minister identifying the exact provision under which each regulation is made. The Minister relies broadly on a series of enabling provisions to make the regulations. And in doing so, the public is unable to scrutinise the precise source of power for the proposed regulations.

A. THE PERIOD FOR PUBLIC PARTICIPATION IS UNREASONABLE AND UNFAIR

8. The making of subordinate legislation constitutes administrative action.[1] It is disciplined by the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and section 33 of the Constitution. The process adopted by the Minister for the making of the proposed regulations must be lawful, reasonable and procedurally fair.

9. Section 3(2)(b)(ii) of PAJA provides that in order to give effect to a fair administrative process, the Minister must ensure that there is a reasonable opportunity to make representations.

10. The context in which the regulations are made is important. The reasonableness and fairness of the period for public participation depends on a range of factors including (a) the nature and importance of the regulations and the intensity of its impact on the public;[2] and (b) the factual basis for the Minister's assessment of the appropriate period and method for public participation.[3]

11. The principles of consultation are to be properly respected in the legislative process. In *Doctors for Life,* Sachs J (concurring) remarked that:

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[1] *Esau v Minister of Cooperative Governance and Traditional Affairs and Others* 2021 (3) SA 593 (SCA) at [79] ("*Esau"*).
[2] *Doctors for Life v Speaker of the National Assembly and Other* 2006 (|12) BCLR 1399 (CC) at [69] ("*Doctors for Life"*); *Merafong Demarcation Forum and Others v President of the Republic of South Africa* 2008 (10) BCLR 968 (CC) at [27] ("*Merafong"*).
[3] *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC) at [68] ("*Matatiele II"*).

"*All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion.*[4]

12. And in *Matatiele II,* the Constitutional Court held:

> *" The nature and degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effects of their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say. In addition, in evaluating the reasonableness of the conduct of the provincial legislatures, the Court will have regard to what the legislatures themselves considering to be appropriate in fulfilling the obligations to facilitate public participation in light of the content, important and urgency of the legislation*.[5]

13. Although these remarks by the Constitutional Court concern legislation, it finds equal application to the procedure for regulation–making.[6] And it is important to stress that a failure properly to respect process rights in regulation-making under the National Health Act is a reviewable irregularity. For example, in *HASA v Minister of Health*,[7] the High Court set aside regulations under the National Health Act precisely because the Department showed disdain for the procedural rights of stakeholders. The Court held, in summary, that:

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[4] *Doctors for Life* at [235].
[5] *Matatiele II* at [68].
[6] See *Esau* at [96].
[7] *Hospital Association of South Africa Ltd v Minister of Health and Another* [2011] 1 All SA 47 (GNP).

*"[154]… The correspondence reveals a **consistent failure** on the part of the Director-General **to engage meaningfully with, or to listen to submissions from, or thereafter, to provide reasons and rational responses to the proposals** submitted by and on behalf of HASA. The process of interaction on the part of the Director-General could best be **described as one of disdain for and disregard of the rights** of HASA. [155] This conduct on the part of the Director-General, and his subsequent publication of an RPL in the face of these attempts by HASA to be heard, **tainted the process** and the subsequent publication of an RPL **with procedural unfairness** such that the **entire process and the resultant publication falls to be reviewed and set aside**."*

14. The Minister has issued four separate sets of proposed regulations. These regulations are undoubtably far-reaching:

14.1. The surveillance regulations intrude into every aspect of day–to–day living for South Africans by imposing limitations on gatherings and funerals, mandatory medical examinations, forced periods of isolation, and the imposition of offences and penalties for the failure to comply with the proposed regulations.

14.2. The ports of entry regulations are more detailed than the legislation in terms of which they are published (the International Health Regulations Act). They establish duties and functions which only Parliament, in the exercise of its plenary legislative powers may authorise, such as regulating ports of entry, imposing obligations on various persons and office – bearers such as the Director–General of Health, and the imposition of criminal sanctions by way of subordinate legislation.

14.3. The human remains regulations are detailed and technical. They regulate the transportation of human remains, the storage of human remains, the manner in which funerals take place, and the viewing of

human remains, and the disposal of human remains. Like the other regulations, the human remain regulations impose criminal sanctions through subordinate legislation; and,

14.4. The environmental health regulations are technical in nature and detailed with far reaching impacts. They govern noise pollution, air pollution, water pollution, and various aspects of sanitation.

15. There can be no doubt that each of the four proposed regulations, on their own, carry far–reaching consequences for members of the public. But the regulations are not only far–reaching on the public generally, they also seriously impact, and intrude, on the structure and competence of the various branches of government.

16. Some of the regulations intrude into Parliament's exclusive legislative domain, and other regulations affect the competencies of municipalities to regulate various matters within their legislative competence such as noise pollution, public nuisance, cleansing, cemeteries, funeral parlours and crematoria.[8]

17. The Minister has determined that 30 days is sufficient to comment on all of these regulations that are wide–ranging, detailed, and deeply impactful. Yet the Minister provides no justification for this truncated period.

[8] Each of these items fall within a municipality's competence in terms of Schedule 5(B) of the Constitution.

18. South Africa now operates outside a state of exception. There is no public health emergency that requires an immediate government response or which justifies the severe curtailment of the public's rights to make proper inputs on four sets of detailed regulations – each of which alone would have justified at least 30 or more days for comment. The Minister of Cooperative Governance and Traditional Affairs has determined that South Africa is no longer in a state of national disaster.

19. There is no objective basis for the truncated 30–day period. It is telling that the Minister has not sought to explain why he determined 30 days as the appropriate period for public comment in light of the nature, detail, and implications of each of the proposed regulations.

20. Crucially, the regulations are not grounded in any factual social, economic or environmental events that trigger both (a) a need for the regulations; and (b) urgency in the adoption of the regulations. It is wholly unclear on what factual basis the necessity of the proposed regulations arises.

21. For these reasons, the 30–day period for public comment is unreasonable and unfair.

22. The Minister requires South Africans to consider four separate proposed regulations, involving hundreds of regulatory provisions, spanning hundreds of pages, with far reaching consequences that affect every aspect of daily life, in the period of one month. The public would need to be provided with a far more

reasonable period for comment (at least 120 days – being 30 days per set of regulations) in order to ensure meaningful public participation in response to the Regulations in a manner that comports with the Constitution's consultation requirements as underlined repeatedly by the Constitutional Court.

23. If the Minister wished to justify such a short period for comment, then the Minister would have had to indicate the factual basis that grounds the necessity of the proposed regulations, as well as the factual basis for the urgency of the proposed regulations. The Minister failed to do so.

24. Self–evidently, the process he has adopted for public participation is unreasonable, unfair and unlawful. And for this reason alone, it would be unlawful for the Minister to adopt the proposed regulations.

25. AfriForum thus makes these submissions under extreme pressure and under protest. The filing of these submissions, as best as has been possible in the circumstances, should not be construed as an admission that the 30-day period is accepted as reasonable. It is reiterated at least 120 days would be reasonable and appropriate in the circumstances.

B. IT IS NOT POSSIBLE TO MEANINGFULLY COMMENT ON THE PROPOSED REGULATIONS

26. As already indicated, it not possible to meaningfully comment on the proposed regulations because of the time–constraints imposed by the Minister, and the absence of any factual basis that grounds the necessity of the regulations.

27. But there is a further reason why it is not possible to meaningfully comment on the regulations. All of the proposed regulations are sought to be made on an unclear legal basis.

28. The surveillance regulations, for example, contain several regulations that relate to various matters such as gatherings, air travel, entry into and exist from the country, forced isolation and forced medical examination. The Minister does not indicate which specific provision of the National Health Act authorises the making of such regulations.

29. And so, it is impossible to scrutinise the exact source of power relied on by the Minister for any particular regulation.

30. The Minister, in broad and general terms, proclaims that the regulations are made under section 90(1)(j)(k) and (w) of the National Health Act. It is not possible for *all* of the proposed regulations to be made under *all* of the empowering regulation–making provisions at the same time.

31. The Minister is required to indicate whether a particular regulation is made under section 90(1)(j) or (k) or (w), or some other empowering provision.

31.1. Paragraph (j) concerns regulations relating to communicable diseases;

31.2. Paragraph (k) concerns regulations relating to notifiable medical conditions; and,

31.3. Paragraph (w) is broad and general. It permits the Minister to make regulations on "*any other matter which it is necessary or expedient to prescribe in order to implement or administer this Act."*

32. The surveillance regulations do not indicate which regulations are made under the catch–all empowering provision of section 90(1)(w), and those regulations made under section 90(1)(j) and (k).

33. Similarly, in respect of the ports of entry regulations, the Minister does not disclose whether the proposed regulations are sought to be made under a specific paragraph of section 3(2) of the International Health Regulations. Instead, the Minister simply proclaims that the proposed regulations are sought to be made under section 3(2) without indicating the exact provision relied on.

34. The public can only meaningfully comment on the lawfulness of the proposed regulations, if the Minister provides clear guidance as to the source of the power he relied on to make the proposed regulations. The Minister has not done so.

III. THE REGULATIONS ARE *ULTRA VIRES* THE EMPOWERING PROVISIONS

35. The proposed regulations are not authorised by the empowering legislative provisions relied on by the Minister. That is not only because the Minister has failed to identify which empowering provision (of the three he has listed) he has relied on to make any of the particular sets of regulations. It is also because the Minister has misunderstood the scope and ambit of the regulatory content permitted by the empowering provisions.

36. Sections 90(1)(j) and (k) of the National Health Act, for example, do not permit the Minister to make broad regulations, regulating matters from gatherings to funerals, merely because he is permitted to make regulations concerning "*communicable diseases"* or "*notifiable medical conditions".*

37. The content of the Minister's power to make regulations concerning communicable diseases or notifiable medical conditions must be understood and interpreted with reference to the National Health Act as a whole, where the words "*communicable diseases"* and "*notifiable medical conditions"* are used in a specific and narrowly tailored manner.

38. If the empowering provisions relied on by the Minister permit broad regulation making, even in respect of matters merely incidental to "*communicable diseases"* and "*notifiable medical conditions",* then the empowering provisions are unconstitutional and invalid because they fail to satisfy the requirement that

there must be discernible standards in the original legislation, where a discretion exists in the making of subordinate legislation.

39. If the Minister's interpretation of section 90 of the National Health Act is correct, it would mean that Parliament has been permitted to delegate extraordinary powers to the Minister – without any clear or discernible standards for the exercise of that power – that affects almost every aspect of the lives of South Africans.

40. The impact of this discretion on the rights in the Bill of Rights is considerable: it affects the right to, *inter alia,* dignity, freedom and security of the person, privacy, freedom of movement, the right to assemble, freedom of belief and opinion and the right to enjoy one's culture and religion.

41. This type of overly expansive delegation is impermissible in comparative experience and in South Africa.

42. For example, in the United States, a delegation of congressional legislative functions will be constitutionally permissible only in circumstances where Congress lays down, by legislative acts, an intelligible principle to which the person or body authorised to act is directed to conform. Congress must clearly delineate the general policy and the boundaries of the delegated authority. The delegation must not be so broad or vague that the authority to whom the power is delegated makes law rather than acting within the framework of law made by Congress.

43. Thus, in *Panama Refining Co v Ryan*[9] the United States Supreme Court struck down as unconstitutional a law which gave the President wide powers to regulate trade in petroleum products. It was found that the delegating legislation did not establish any criteria to govern the President; nor did it require the President to make any finding before taking action.[10]

44. The Supreme Court held that this was an unconstitutional delegation of legislative power since it contained no definition of the circumstances in which transportation should be allowed or prohibited. "*The Congress left the matter to the President without standard or rule, to be dealt with as he pleased*."[11]

45. Similarly, in *Schechter v United States*[12] the United States Supreme Court held that the delegation of legislative power in that case failed to provide standards to channel the delegate in the exercise of his power. Cardozo J made the fundamental point in blunt terms:

> "*This is delegation running riot. No such plenitude of power is susceptible of transfer.*"[13]

[9] 293 US 388 (1935).

[10] At page 54.

[11] At 458.

[12] 79 L Ed 1570 (1935).

[13] At 1592, emphasis added.

46. Of course, the South African Constitutional Court has stressed the same principle. Parliament may not delegate law-making powers in terms which are so vague that they do not in any meaningful sense fetter the administrative body in the exercise of its delegated powers. The jurisprudence of the Constitutional Court (discussed below) indicates that Parliament must furnish adequate guidelines in order to indicate how officials are required to exercise their discretionary powers.

47. Even prior to the Constitution, the courts have held that when Parliament delegates subordinate law–making power to a Minister, it must do so with clear and discernible standards.

48. In *Natal Organic Industries (Pty) Ltd v Union Government,* Feetham JP remarked, in respect of a delegation without discernible standards that "*the effect of the regulation is to make the Commissioner the legislator on the particular point with which the regulation seeks to deal, and such delegation of authority is not a good delegation"*.[14]

49. In *Executive Council: Western Cape 1999,* the Constitutional Court affirmed the principle that the delegation of power must be accompanied by discernible standards within which that power is exercised. It held that when law-making

[14] *Natal Organic Industries (Pty) Ltd v Union Government 1935* NPD 701 at 715. See also *Arenstein v Durban Corporation* 1952 (1) SA 279 (A) at 297; *R v Seedat* 1957 (1) SA 27 at 41-3, and *R v Wessels* 1959 (3) SA 263 (C) at 267.

authority is delegated "*Parliament must provide safeguards against the abuse of delegated power.*[15]

50. And in *Dawood,* the Constitutional Court held:

> "*We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed.* ***It is for the legislature to ensure that, when necessary, guidance is provided as to when the limitation of rights will be justifiable****. It is therefore not ordinarily sufficient for the legislature to merely say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights.* ***Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance****. Where necessary such guidance must be given.* ***Guidance could be provided either in legislation itself, or where appropriate by a legislative requirement that delegated legislation be properly enacted by a competent authority****.*[16]
>
> *…*
>
> ***Affording the executive a power to regulate such matters is not sufficient. The legislature must take steps where he limitation of rights is at risk to ensure that appropriate guidance is given****".*[17] (emphasis added).[18]

51. But sections 90(1)(j) and (k) of the National Health Act, read contextually[19] impose constraints on the Minister's regulation making powers, and may be interpreted in a manner that avoids constitutional harm.[20] This is so for two broad reasons.

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[15] *Executive Council, Province of the Western Cape v Minister for Provincial Affairs; Executive Council KwaZulu-Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC) (*Executive Council Western Cape, 1999*)
[16] *Dawood v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at [54] ("*Dawood"*).
[17] *Dawood* at [54] ft 74.
[18] And see too *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para [34].
[19] *Natal Joint Municipal Pension Fund v Endumeni* 2012 (4) SA 593 (SCA) at [18 – 21].
[20] *Investigating Directorate, In Re Hyundai v Smit* 2001 (1) SA 545 (CC).

52. First, the purpose of the National Health Act is to regulate healthcare across the various spheres of government: national, provincial and municipal. The Act does not have as its purpose, the objective of responding to a sudden or immediate public health emergency:

52.1. The objectives of the Act are to: (a) establish a national health system that encompasses both public and private health services; (b) setting out the rights and duties of health care providers and (c) provide healthcare services in order to realise the right to healthcare in terms of section 27 of the Constitution.

52.2. The Act is divided into 10 Chapters. Chapters 3, 4, and 5 regulate healthcare at the three levels of government. Chapter 6 deals with the standard of healthcare services at healthcare establishments, including private healthcare establishments. Chapters 8 and 9 regulate the handling of blood and blood products at health establishments, and national health research and information, respectively. Chapter 10 establishes the office of health standards compliance and chapter 11 deals with the Minister's powers to make regulations.

53. The National Health Act makes plain in its preamble, these obligations are imposed in view of the State's obligations to ensure the progressive realisation of health care services. The National Health Act preamble states that:

- the State must, in compliance with section 7 (2) of the Constitution, respect, protect, promote and fulfil the rights enshrined in the Bill of Rights, which is a cornerstone of democracy in South Africa;
- in terms of section 27 (2) of the Constitution the State must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right of the people of South Africa to have access to health care services, including reproductive health care;
- section 27 (3) of the Constitution provides that no one may be refused emergency medical treatment;
- And, in terms of section 28 (1) *(c)* of the Constitution, every child has the right to basic health care services".

54. The Act thus provides a framework, which the State (through the Minister of Health) may utilise to ensure proper regulation of the private health care sector, and co-ordination with the public sector, in the interests of ensuring the progressive realisation of the right of access to health care services.

55. So, it is clear that the Act is concerned with regulating healthcare services. It is not aimed at regulating public health emergencies.

56. Secondly, where the Act uses the words "*communicable diseases",* it does so in the context of the provision of healthcare services across the spheres of government.

57. Section 21 of the Act, for example, requires the Director–General to equip healthcare service providers so that they are able to effectively respond to communicable diseases. Section 25(2) of the Act requires the same of the Head of Department for Health in each province.

58. What the Act does not do, is allow the Minister of Health to make broad regulations unrelated to healthcare services because of the existence of a communicable disease.

59. Section 90(1)(j) therefore empowers the Minister to make regulations which equip and capacitate healthcare facilities so that they are able to respond to communicable diseases. It is not an open-sesame power which permits the Minister, under the guise of the State's response to a public health emergency, to limit gatherings, regulate travel into and out of the country, and impose mandatory self–isolation measures.

60. These considerations apply with equal force to the remainder of the regulations where the Minister seeks to rely on the seemingly broad categories under section 90 of the National Health Act, for his regulation–making power.

61. Read contextually and purposively, it is evident that these powers must be exercised with the overall objectives of the Act in mind: that is, to regulate healthcare services. They are not powers that can be arrogated by the Minister for purposes of making regulations that restrict the rights of millions of South Africans in a very different context of public health emergencies or disasters.

IV. THE REGULATIONS ARE MADE FOR AN ULTERIOR PURPOSE

62. It is clear that the regulations are ill – suited, and misaligned, to the empowering legislation in terms of which they are sought to be made.

63. The clear mischief of the regulations, is to address a public health emergency. For the last two years, the government has sought to address a public health emergency through the provisions of the Disaster Management Act 57 of 2002 (**DMA**). From month – to – month, for the last two years, the Minister of Cooperative Governance and Traditional Affairs has extended the state of national disaster.

64. On 4 April 2022, the President announced that the state of national disaster will come to an end. However, it appears that the executive seeks to hold on to the powers that it may exercise during exceptional circumstances, such as a state of national disaster.

65. The government is of course free to regulate public health emergencies on the basis of exceptional legislation such as the DMA or the State of Emergency Act 64 of 1997 (read together with section 37 of the Constitution), provided it can justify the necessity of an exceptional response and meet the requirements of that legislation.

66. But what the government may not do, is seek to hold on to those extraordinary powers during an unexceptional state of affairs, by creating regulations that accord with the powers that may be exercised during a state of national disaster.

67. Should there be a need for a legislated response to a public health emergency that does not rise to the level of a state of national disaster or emergency. Parliament is free to enact legislation to respond to that state of affairs.

68. And in doing so, Parliament may carefully calibrate the powers of the executive; the manner in which those powers are to be exercised; and the concomitant oversight functions to be exercised by Parliament over the executive.

69. In enacting such legislation, the ordinary rules concerning public participation will apply, and citizens will be afforded an opportunity to share their views on the contents of the proposed legislation. Civil society groups, businesses, and various institutions may comment on the proposed laws that, quite clearly, will affect every aspect of day – to – day life in South Africa.

70. Parliament will debate the proposed legislation and scrutinise its contents with particular regard to the separation of powers, its duty to hold the executive to account, and compliance with the country's fundamental law, the Constitution and its Bill of Rights.

71. All of these processes are essential to the democratic project. It ensures that the rules that govern South Africans are made with careful consideration and appreciation of the foundational constitutional values of openness, transparency, accountability, the separation of powers, the rule of law, and a democratic society founded on human rights.

72. There are clear constitutional benefits to the ordinary legislative process. It facilitates sensible, considered and measured legislation. This is fundamental generally, but it is all the more important where there are severe intrusions into the rights in the Bill of Rights.

73. As already demonstrated above (and expanded on below), the regulations are clearly not designed to stand as subordinate legislation. They do not seek to put into practical operation, the provisions of either the National Health Act or the International Health Regulations Act. Far from complementing the legislation, the regulations stand alone, distinct from the enabling legislation, and they attempt to provide to the Minister vast powers by sleight of executive law-making, rather than law-making in the engine room of our country's democracy: Parliament.

74. The choice by the Minister to adopt the regulations is revealing. It appears that the Minister seeks to circumvent the ordinary democratic process for the making of legislation. This is not permissible.

75. The Constitution forecloses the Minister from adopting subordinate legislation so that: (a) he may by–pass the ordinary democratic law–making process; and (b) to preserve the exceptional powers that arise during an exceptional state of affairs such as a state of national disaster.

76. By making the proposed regulations, the Minister seeks to evade the scrutiny of legislation that follows in the ordinary law–making process. The Constitution recognises that the substantive and procedural place for such law–making is Parliament. The Minister may not seek to circumvent that process.

V. THE REGULATIONS ARE UNCONSTITUTIONAL AND INVALID

77. As indicated above, AfriForum will not address each of the specific provisions of the regulations proposed by the Minister. It simply has not had the time to perform the exercise properly, given the unreasonably short comment period. With the benefit of further time, AfriForum reserves the rights to do so, and wishes to be given that opportunity given the concerns that it has already identified. In the short time available AfriForum highlights that there are material deficiencies in the regulations. This chapter of the submissions deals with three unconstitutional aspects of the regulations: (a) the unlawfulness of the criminal sanctions imposed by the regulations; (b) the irrationality and vagueness of the regulations; and (c) the infringement of various rights in the Bill of Rights.

A. THE CRIMINAL SANCTIONS ARE UNLAWFUL

78. It is impermissible for a criminal sanction to be imposed by way of subordinate legislation. The creation of criminal offences is a plenary legislative function, that may only be exercised by Parliament.

79. All of the regulations contain provisions making it an offence not to comply with the proposed regulations. Contravention of the regulations may result in various terms of imprisonment from two years to ten years.

80. Because the creation of a criminal offence has the effect of depriving an individual of their liberty, it is Parliament – and not a Member of the Executive – that decides whether certain conduct is so egregious that it demands an individual be withdrawn from society, and deprived of their liberty.

81. It is an established principle of our law that Parliament is exclusively vested with the power to create crimes. Professors Burchell and Milton express the view that "*penal laws should be made by the **democratically chosen representatives** of the people and not by **autocrats or appointed officials**".*[21]

82. In *Smit v Minister of Justice*, the High Court declared section 63 of the Drugs Act unconstitutional because it permitted the Minister of Justice to create new criminal offences by amending the prohibited substances on the Schedules to

[21] *Burchell and Milton Principles of Criminal Law* 2005 at 97.

the Drugs Act 140 of 1992.[22] The Court held that the creation of a criminal offence is a plenary legislative function that may only be exercised by Parliament, the elected representatives of the people.[23] The Constitutional Court upheld the High Court's declaration of invalidity.[24]

83. Prior to the Constitution, the courts have similarly found that the creation of criminal offences by way of regulations is impermissible.

84. In *Rex v Magano and Madumo*, Kruse J held, in relation to the executive creation of criminal penalties, that "*the exercise of legislative functions by the State President is contrary to the spirit, scope and objects of Law 4 of 1885*".[25] And in *Rex v De Beer*, the Court held that:

> *"the power to create new offences, in conflict with the common law, must be expressed in clear terms or must be a necessary and irresistible inference from the words of the enabling statute. Furthermore, a power to frame rules and regulations for certain purposes does not… include the right of the framer to punish by means of fine or imprisonment a non-observance of such rules".*[26]

85. As a general rule, compliance with subordinate legislative is achieved by the imposition of non–penal administrative fines, and not criminal sanctions. For these reasons, the proposed regulations may not create criminal offences. It is

[22] *Smit v Minister of Justice* 2021 (3) BCLR 219 (CC) at [15].
[23] *Smit* at [15].
[24] *Smit* at [91].
[25] *Rex v Magano and Madumo* 1924 TPD 129
[26] *Rex v De Beer* 1930 TPD 329 at 332.

Parliament, in the exercise of its plenary legislative powers, that creates new criminal offences.

B. THE REGULATIONS ARE VAGUE AND IRRATIONAL

86. The Regulations are unconstitutional and unlawful because they are intolerably vague and provide insufficient guidance to the Minister, and the public who are affected thereby.

87. The Constitutional Court has confirmed in numerous cases that impermissibly vague legislation and legislation that provides insufficient guidance is unconstitutional and unlawful. In summary:

87.1. In *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) at para 47, the Court held that "*It is an important principle of the rule of law that rules be stated in a clear and accessible manner*."

87.2. Similarly, in *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) at para 102, the Court pointed out that the "*need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct according to the law*."

87.3. This was again emphasised more recently by the Court in the *Davies Street* matter, where it observed that "*uncertainty and unpredictability*"

are "*at variance with the rule of law, a linchpin of the Constitution*" (*Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* 2022 (1) BCLR 46 (CC) para 118).

87.4. In *South African Liquor Traders*, the Constitutional Court considered the constitutionality of the definition of "*shebeen*" in section 1 of the Gauteng Liquor Act 2 of 2003. The Applicants argued that the definition was void for vagueness on the grounds that it did not stipulate a period within which the specified quantity of beer bottles were to be sold and accordingly it could not be used to identify a shebeen with any precision at all. In upholding the unconstitutionality of the definition on the ground of vagueness, the Court held that: "*The absence of a stipulated period from the definition renders the definition vague. Furthermore, there is nothing in the rest of the Act which assists in any way in providing meaning to the definition. Its meaning cannot therefore be ascertained with any precision. It is simply not clear which unlicensed liquor traders will fall within the definition and which without*." (*South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC) para 26)

87.5. In *Dawood*, referred to above, the Court was faced with legislation whereby Parliament had conferred an administrative discretion on functionaries without providing any guidelines regarding the circumstances in which the discretion should be issued. The Court held

that this was constitutionally impermissible since "*no attempt has been made by the legislature to give guidance to decision-makers in relation to their power*" (para 55).

87.6. The same point was emphasised by the Court in *Janse van Rensburg NO v Minster of Trade and Industry* 2001 1 SA 29 (CC), where it held that "*the constitutional obligation on the Legislature to promote, protect and fulfil the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised*." (para 25)

87.7. This principle was reiterated in *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC), where the Court held that: "*the delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision*." (para 34)

88. For the reasons given below, the Regulations fall foul of each and every statement that the Constitutional Court has made about vagueness and the rule of law. The Regulations will accordingly be open to constitutional challenge for this reason alone.

89. There are three notable features of the regulations: compliance with a considerable number of the regulations are contingent on (a) "*national department guidelines"* ; (b) the existence of a "*pandemic or epidemic";* and (c) scientific evidence of the risk of transmission.

90. Individuals who are symptomatic or asymptomatic are required to isolate in accordance with "*national department guidelines".* The regulations do not prescribe how these guidelines are made, and the manner in which they are made. Similarly, the regulations do not prescribe when a pandemic comes about, who declares a pandemic, and what factors influence a declaration of a pandemic. The same considerations apply to an epidemic.

91. The regulations permit the Minister to determine, without any constraint or guidance, which illnesses are a "*notifiable medical condition".* And as a result, the Minister may limit the rights of individuals in the exercise of his unbounded discretion as to what constitutes a "*notifiable medical condition".*

92. Moreover, rights may not be limited by executive fiat or discretion – they may only be limited by a law of general application under section 36 of the

Constitution, and as confirmed by the Constitutional Court in *Hoffmann v SAA*[27] when considering whether a discriminatory policy could be justified: "The third enquiry, namely whether this violation was justified, does not arise. We are not dealing here with a law of general application." (para 41). That finding of the Court was based on its earlier decision in *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC) at para 23: "*In the absence of a disqualifying legislative provision, it was not possible for respondents to seek to justify the threatened infringement of prisoners' rights in terms of section 36 of the Constitution as there was no law of general application upon which they could rely to do so*."

93. Regulation 16B of the surveillance regulations imposes various requirements on persons exiting the country. It only applies if a listed notifiable medical condition "*has been declared a public health emergency of international concern and has the potential of spreading beyond the borders of the Republic and based on the epidemiological situation"*.

94. Regulation 16B then imposes a number of requirements on persons leaving South Africa including: (a) possession of a vaccination certificate or a negative PCR test of not more than 72 hours; (b) compliance with the requirements of the country of destination; (c) mandatory screening; (d) mandatory medical examinations for those who are found to have elevated temperature or

[27] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) (28 September 2000)

symptoms; and (e) mandatory isolation for those who have tested positive with a notifiable medical condition.

95. But regulation 16B does not:

95.1. Define what a "*public health emergency"* is; or who declares a public health emergency and; when such emergency is *of international concern and has the potential of spreading beyond the borders of the republic*"

95.2. There is no definition or explanation in the regulations regarding what is meant by "*screening".*

95.3. There is no indication as to who assesses the "*epidemiological situation".*

96. Concerningly, there is no period prescribed for the "*mandatory isolation",* and it appears that this matter will be left entirely to the discretion of those responsible for the "*national department guidelines".* As already indicated, there are no constraints imposed on how the "*national department guidelines"* are made.

97. Regulation 16C is more drastic than regulation 16B. It applies to persons entering the country, and the application of the regulation does not depend on whether there is "*an international public health emergency".*

98. Regulation 16C will apply generally, and imposes the following restrictions on entering the country: vaccine certificates or a negative PCR test result of at least 72 hours during the Covid–19 pandemic; mandatory screening;

mandatory isolation for a period left entirely to the discretion of the "*national department guidelines";* mandatory medical examinations for those who display symptoms of a notifiable medical condition.

99. Regulation 16C permits the Director–General to exempt persons from quarantine when such exemption has been applied for, but does not contain the factors to be considered by the Director–General when deciding to grant an exemption, and the grounds on which an exemption will be granted.

100. Regulation 16C is impermissibly vague for the same reasons set out above regarding regulation 16B. It does not define "*screening", "*Covid – 19 pandemic", *departmental guidelines,"* and the kind of symptoms that will trigger compulsory medical examinations.

101. Regulation 16F is unlawful for the same reasons identified in respect of regulations 16B and 16C. Regulation 16F requires all persons travelling within South Africa to be subjected to "*screening"*, whatever that may mean. It applies generally, and is not linked to the existence of a "*pandemic"* or "*epidemic"* or other medical emergency.

102. Regulations 16A(1) and 16H(2) requires social distancing and the mandatory wearing of masks generally, and even where there is no "*pandemic"* or "*epidemic".*

103. Regulation 16J regulates gatherings. It provides that during a pandemic or epidemic, individuals must wear face masks, regardless of the cause of the pandemic or epidemic. This is self–evidently irrational. Not only is there no attempted definition of pandemic or epidemic, but the necessity of a face mask depends on the cause of the undefined pandemic or epidemic. It would be futile to compel persons to wear a face mask, where a pandemic arises from a non–communicable disease. This regulation is self–evidently irrational. Absent a properly defined and declared public health emergency, there is no need or lawful basis to impose, through subordinate legislation, a duty to social distance and wear masks.

104. Regulation 16 of the Environmental Health Regulations provides that "*no person may allow overcrowding on any premises that creates conditions which may cause an environmental health nuisance or endanger public health".* But there is no definition as to what constitutes overcrowding.

105. In the time available AfriForum has identified these as examples of vagueness and unworkability. There are likely to be many more instances of unconstitutionality, which underlines the need for more time for submissions by the public, and a proper legislative process (rather than a rushed effort at executive law-making) to ensure that the laws resulting are constitutionally-compliant, rational, and clearly defined.

106. Quite clearly these examples of vagueness and irrationality flout the well–established principles of certainty, clarity and predictability required in

legislation. The Constitutional Court has held that these principles are integral to the rule of law. The proposed regulations undermine these foundational principles of constitutional law.

C. THE REGULATIONS INFRINGE A NUMBER OF RIGHTS IN THE BILL OF RIGHTS AND ARE UNCONSTITUTIONAL

107. It appears that the purpose of the regulations is to extend the powers enjoyed during a state of exception (such as a state of disaster or emergency), where there is no state of exception.

108. In terms of regulation 15B – D, individuals may be forced to isolate for unknown periods of time, as determined by "*national department guidelines"*. This unjustifiably infringes the right to freedom and security of the person, freedom of movement, and the right to dignity. As indicated earlier, rights may only be limited by laws of general application – passed properly by the legislature – and may not be infringed by "guidelines" drafted by a committee of non-elected departmental officials who have no law-making credentials, experience or power.

109. Those suspected of being infected with a notifiable medical condition are compelled to (a) undergo a medical examination; (b) provide any bodily sample required; and (c) undergo treatment, regardless of their personal views about the treatment (see surveillance regulation 15A(c)(i – iii)). This regulation

violates the rights to bodily integrity, freedom and security of the person, dignity and freedom of belief and opinion.

110. Regulation 15H of the Surveillance Regulations infringes the right to privacy. The regulation establishes a Notifiable Medical Conditions Contact Tracing Database. Every person suspected to have come into contact with another person who is suspected to have a notifiable medical condition must be listed on the database. There is no definition as to what constitutes "contact" for purposes of listing persons on the database.

111. Regulation 15H requires the database to include "*any information considered necessary for contact tracing".* This is self–evidently broad, and may include personal information, which would infringe the individual's right to privacy.

112. Concerningly, regulation 15H(5) permits the Director–General to disclose private and confidential information if it is "*necessary for the purpose of addressing, preventing or combatting the spread of"* a listed notifiable medical condition.

113. Regulations 16B, 16C and 16F unjustifiably limit the freedom of movement of persons entering, leaving or travelling within South Africa. As already explained above, these regulations are irrational and serve no legitimate purpose.

114. The Environmental Health Regulations empower "*environmental health practitioners"* (EHP's) considerable powers of search and seizure. An EHP

may: (a) question and demand information from an owner or occupier of a premises; (b) examine, open, test or photograph any process or substance found or suspected to be detrimental to health; (c) inspect or copy and document, book or record; and (d) remove such records for purposes of copying; and, (e) confiscate hazardous health materials.

115. Alarmingly, such rights violations are permitted under the EHP by private persons exercising public power. The regulations define an EHP as a person registered in terms of section 34 of the Health Professions Act 56 of 1974. Accordingly, the Environmental Health Regulations permit private individuals to conduct search and seizure operations – a power that is anathema to our constitutional order.

116. The Environmental Health Regulations is at odds with the general principle against warrantless searches and seizures. In *Gaertner v Minister of Finance*[28] the Constitutional Court declared provisions of the Customs and Exercise Act unconstitutional because it permitted warrantless searches and seizures. Paragraph [66] of the judgment is apposite to the powers of EHPs:

> "*The breadth of the impugned provisions is crucial to the question of the extent of the limitation. As demonstrated above, the limitations are overbroad. The provisions allow searches that are not only warrantless, there is no limit as to (a) the time when the searches may be conducted, (b) the types of premises that may be searched, and (c) the scope of the search. Instead, SARS officials are given far – reaching powers (breaking in and breaking floors) that may be exercised anywhere, at whatever time and in relation to whomsoever, with no need for the existence of a reasonable suspicion, irrespective of the type of search".*[29]

[28] *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC).
[29] *Gaertner* at [66]

117. There is no necessity for these far–reaching regulations. If the government seeks to overcome a public health emergency, it is empowered by legislation to do so on a temporary basis, either by the Disaster Management Act 57 of 2002 or the State of Emergency Act 64 of 1997.

118. Parliament is entitled to adopt legislation specifically designed to respond to a public health emergency. And in so doing, it may define the powers of the executive when it responds to a public health emergency, and the manner in which Parliament is required to oversee the exercise of power by the executive

119. For all of these reasons, AfriForum is of the view that the regulations will not survive constitutional scrutiny. Many of the regulations are irrational, impermissibly vague, and unjustifiably limit the rights in the Bill of Rights.

VI. CONCLUSION

120. Parts II and III of these submissions explain why it would be unlawful for the Minister to adopt the proposed regulations as a whole.

121. Part II explains why the public participation process is unreasonable and unfair. The truncated 30-day period is unreasonable bearing in mind the content of the regulations; and their far–reaching implications. Additionally, it is not possible for there to be meaningful representations on the regulations, in light of the

Minister's failure to identify the exact source of power for each of the proposed regulations.

122. Part III explains why the proposed regulations are *ultra vires* the empowering provisions relied on by the Minister. Properly interpreted, the scope of the Minister's regulation–making powers is considerably narrower and prohibits the making of the proposed regulations.

123. Part IV explains why the Minister has sought to make the proposed regulations for an ulterior and impermissible purpose; that is, to circumvent the democratic law – making process through an arrogation of executive law-making that is not only rushed but has resulted in multiple examples of vague regulations and others that permit rights violations in violation of established Constitutional Court jurisprudence.

124. Part V explains the impact of this rushed process: that is that various regulations are irrational, impermissibly vague and unjustifiably limit several rights in the Bill of Rights.

125. For all the reasons above, AfriForum is of the view that it would be unlawful for the Minister to adopt the proposed regulations. To the extent that the Minister persists with the current Regulations, AfriForum reserves its rights to augment this submission with the benefit of further time, and reiterates its request for the Minister to extend the 30-day period for submissions to 120 days.