

**TO : CHEMICALS AND ALLIED INDUSTRIES ASSOCIATION**

**FROM : CLIFFE DEKKER HOFMEYR INC - PER J FERIS, J CASSETTE AND I ABDULLAH**

**SUBJECT : REGULATORY ADVICE ON THE RESTRICTIONS IMPOSES ON THE TRANSPORTATION OF ESSENTIAL SERVICES BY PUBLIC TRANSPORT FOR PERSONNEL MOVING BETWEEN PROVINCES AND MUNICIPALITIES**

**DATE : 27 MARCH 2020**

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Dear Deidre,

## 1 Introduction

1.1 We have been requested to opine on whether interprovincial travel (or even inter-municipal) of persons performing essential services travelling to work and from work for the purposes of rendering those services is prohibited under the Amended Regulations promulgated on 25 March 2020, by the Minister of Cooperative Governance and Traditional Affairs ("**the Minister**"),<sup>1</sup> read with the Directions issued by the Minister of Transport.<sup>2</sup>

## 2 The Regulatory Framework

2.1 In order to have reached our current state, there would have had to have been a Classification of a national disaster by the Head of the National Disaster Management Centre, followed by a Declaration of a state of natural disaster by the Minister. Both events occurred on 15 March 2020. The Declaration by the Minister is a catalyst for the publishing of Regulations under the Disaster Management Act, No 57 of 2002. The first set of Regulations were promulgated on 18 March 2020, but those Regulations underwent significant amendment on account of government's revised stance on Covid19.

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<sup>1</sup> Disaster Management Act (57/2002): Regulations made in terms of Section 27(2) by the Minister of Cooperative Governance and Traditional Affairs published under *Government Gazette* No. 43148, 25 March 2020 ("**the Amended Regulations**").

<sup>2</sup> Directions issued in terms of Regulation 10(8) of the Regulations made under Section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002): Measures to prevent and combat the spread of Covid19 in the Public Transport Services published under *Government Gazette* No. 43157, 26 March 2020 ("**the Directions**").

- 2.2 One of the key features of the Amended Regulations is the confinement of "every person to his or her place of residence" unless inter alia, for the purpose of performing an essential service or receiving/ obtaining an essential service or good.
- 2.3 The Amended Regulations also provide for a general prohibition of all commuter transport services – including taxi services and private motor vehicles – except bus services, taxi services, e-hailing services and private motor vehicles that are utilised for "*purposes of rendering essential services . . . Provided that such vehicle carries no more than 50% of the licenced capacity*".<sup>3</sup>
- 2.4 In support of the purpose of confinement the Amended Regulations also prohibit movement between provinces<sup>4</sup> and movement between metropolitan and district areas.<sup>5</sup>
- 2.5 This ban on inter – provincial travel is mirrored in the Directions issued by the Minister which provide flesh to the Regulations. Pertinent to this opinion is Direction 6 that states:
- "Prohibition of service of certain public transport during lockdown*
- (1) *All long distance and inter-provincial services are prohibited for the duration of the lockdown;*
- (2) *Transportation of passengers by buses is prohibited except when the bus is used for purposes of ferrying [sic] passengers rendering essential services.*
- (3) *Public transport that shall be permitted to ferry essential services workers will operate from 5h00 to 9H00 and again from 16H00 to 20H00."*
- 2.6 The question is whether the prohibition on movement between provinces /metropolitan / district areas stipulated in Amended Regulation 11B and the prohibition of long distance / inter-provincial travel in Directive 6 apply to essential workers travelling to and from work in order to carry out essential services.

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<sup>3</sup> Regulation 11C of the Amended Regulations.

<sup>4</sup> Amended Regulation 11B(iii)

<sup>5</sup> Amended Regulation 11 (B) (iv)

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### 3 Discussion

- 3.1 It is clear from the Amended Regulations that the intention of the Regulations is to prohibit all movement, with the exception of movement directly related to essential goods and services.<sup>6</sup> Put differently the intention is to prohibit unnecessary / non-essential movement and travel so as to limit the spread of Covid19 as much as possible while ensuring that essential functions continue.
- 3.2 In our view the prohibition of inter- provincial, long distance and inter- municipal / cross district travel must be interpreted with this broader intention in mind. To view the prohibition against long distance and inter-provincial / inter - municipal transportation as being absolute in the sense of prohibiting such movement / transportation even in the instance of essential workers traveling to and from work to render essential services, would do damage to the very purpose of ensuring that the supply of essential goods and services remains uninterrupted and indeed could have the effect of undermining the very delivery of essential services.
- 3.3 Furthermore, such a literal interpretation ignores the fact that many if not all of the people who render essential services are from previously disadvantaged backgrounds who are perpetual victims of apartheid spatial planning and as a result are located in areas far from the work hubs in which t they earn a living . Therefore, in our view the prohibition against long distance and inter-provincial / municipal movement / transport services must be read not to apply to the instance of the movement/ transport of essential workers travelling to and from their place of work in order to render essential services.
- 3.4 Accordingly our view is that the Amended Regulations and Directives must be interpreted not to prohibit inter provincial / inter municipal travel and should be applied by the law enforcement authorities accordingly.
- 3.5 Notably the Amended Regulations go on to further provide that "*where a person rendering essential services is unable to travel to and from his or her place of employment, the employer must make the necessary transport arrangements . . . Provided that no more than of the licensed capacity of the vehicle ...is exceeded and all directions in respect of hygienic conditions and the limitation of exposure to persons with COVID 19 are adhered to.*".
- 3.6 We suggest that to the extent that essential workers face a difficulty employers should provide their own transport arrangements for their essential workers.

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<sup>6</sup> In so far as movement on public roads is concerned there is no difference ie no vehicle may move except in so far as the movement relates to essential goods and services.

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- 3.7 Our preliminary view is that as the Directive 6 currently reads such transport would still constitute public transport which would have to adhere to the time restrictions set out therein i.e namely being limited to travel between the hours of 5h00 to 9h00 and again from 16h00 to 20h00.
- 3.8 In the event that this is unduly restrictive in the instance of shift workers, affected stakeholders would be advised to make urgent representations to Minister who has the power to vary his Directives "*as the circumstances require.*" <sup>7</sup>

#### **4 Conclusion**

- 4.1 In our view upon a proper interpretation of the Amended Regulations and Directions the prohibition of long distance and inter-provincial/ municipal transportation stipulated therein does not apply to long distance and inter-provincial /municipal transportation of essential service workers who are required to so travel in order to get to and from their place of work to render essential services.

Kind Regards

Cliffe Dekker Hofmeyr Inc

J Feris, J Cassette and I Abdullah

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<sup>7</sup>Amended Regulation 11B(7).