

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 23563/22

In the matter between:

SOLIDARITY TRADE UNION

Applicant

and

MINISTER OF HEALTH

First respondent

NATIONAL HEALTH COUNCIL

Second respondent

DIRECTOR-GENERAL, DEPARTMENT OF HEALTH

Third respondent

NATIONAL DEPARTMENT OF HEALTH

Fourth respondent

FILING NOTICE

DOCUMENT : APPLICANT'S SUPPLEMENTARY AFFIDAVIT

DATE ENROLLED : TO BE ALLOCATED

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AND TO: **THE STATE ATTORNEY – PRETORIA**
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SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

DIRK JOHANNES HERMANN

hereby state on oath that:



DEPONENT IDENTITY, KNOWLEDGE AND AUTHORITY

1. I am an adult male with full legal capacity and the deponent to the founding affidavit and I depose to this supplementary affidavit in the same capacity.
2. I am duly authorised to depose to this affidavit on behalf of Solidarity by virtue of my position. The facts contained in this affidavit are to the best of my knowledge both true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge and in the public domain.
3. In this affidavit, I rely on certain legal submissions on the basis of the advice received from the Solidarity's legal representatives. I accept that the legal submissions do not constitute evidence, but it is necessary to set them out herein, in order to provide a proper context for the relief that Solidarity seeks. I am advised that full legal argument in respect of these matters will be advanced at the hearing of this application.

PRODUCTION OF THE RECORD

4. In the notice of motion, Solidarity called upon the provide the record of the decision to publish the Regulations Relating to the Surveillance and Control of Notifiable Medical Conditions: Amendment 2022 in Government Gazette 46319 on 4 May 2022 (Amended Regulations). Solidarity also reserved for itself the right to supplement the review grounds upon receipt of the record, in accordance with Rule 53 of the Uniform Rules of Court.

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5. Initially, Solidarity called for production of the record by 17 May 2022. However, in correspondence with Solidarity's legal representatives it was indicated that it would not be possible to have the record ready by that date, and indication was given that it would be filed by 24 May 2022. A copy of the letter of 17 May 2022 is attached hereto as annexure **SA1**.

6. On 19 May 2022, the State Attorney wrote to the office of the Deputy Judge President to seek a case management meeting *inter alia* to arrange timelines for the further exchange of papers. A copy of the letter is attached as annexure **SA2**. On 23 May 2022 the office of the Acting Judge President confirmed that a case management meeting would be held on 25 May 2022 at 15h00.

7. On 24 May 2022, the offices of the private law firm engaged by the Minister of Health (the Minister) to compile the record wrote to Solidarity's attorneys, providing a link to a record that could be accessed virtually. The letter indicated that the record excluded privileged documents, and it was highlighted that the Minister placed reliance on the knowledge and experience of the Department of Health (Health Department) in coming to his decision. A copy of the letter is attached hereto as annexure **SA3**. It was accompanied by an index to the record, attached hereto as annexure **SA4**.

8. The case management meeting was then conducted on 25 May 2022, as envisaged.



9. On 26 May 2022, Solidarity's attorneys received another letter from the private firm that had compiled the record. The letter indicated that "*due to an IT error the email comments folder in the Rule 53 record that was uploaded ... included privileged correspondence between our client and his counsel as well as irrelevant confidential emails that should not form part of the record*". Accordingly, the email folder was removed. This was so ensure that an appropriate assessment could be made. We were requested to ignore the privileged correspondence if we had already accessed it. A copy of the letter is attached hereto as annexure **SA5**.

10. On 27 May 2022, the office of the Acting Judge President issued a directive confirming that Solidarity's application, together with the other applications concerning the same subject-matter, was set down as a special motion on 25 to 27 July 2022. The direction was issued that the supplementary affidavit was to be filed by no later than 3 June 2022. Dates for the filing of further papers, heads of argument, a joint practice note and chronology of events were also provided for. A copy of the letter is attached hereto as annexure **SA6**.

11. On 30 May 2022, the private attorneys attending to production of the record. The letter asserted that, in fact, the emails initially contained in the record had not been considered in the decision-making process; rather, what had been considered, were summaries contained in spreadsheets. The spreadsheets remained part of the record, but it was explained that it was not practical to provide the emails as part of the record. Nor, so stated the letter, was this required in terms of Rule 53. The indication was given that the email folders

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would not be uploaded. A copy of the letter is attached hereto as annexure **SA7**.

12. On 31 May 2022, Solidarity's attorneys indicated that Solidarity was assessing its position. They raised an issue with the fact that the record had not been paginated, and requested a paginated bundle. In light of the delays in production of the record, they also sought agreement that the supplementary affidavit only be filed on 8 June 2022. A copy of the letter is attached hereto as annexure **SA8**.

13. Also on 31 May 2022, Solidarity's attorneys received an email indicating the removal of yet further items from the record, together with a revised index. A copy of the email is attached as annexure **SA9** and the index is attached as annexure **SA10**. Attached to a further email of that days was the index of privileged documents not included in the record, attached hereto as annexure **SA11**.

14. On 1 June 2022, the private attorneys acting for the respondents in the production of the record wrote to all parties in the related matters. They indicated that the record had been uploaded to CaseLines in the matter where Liberty Fighters Network is the applicant, and to which all parties had been given access. They proposed a new timetable, starting with an amendment that would allow the filing of the supplementary affidavit on 8 June 2022. In the absence of objection to the proposed timetable, they undertook to inform the Acting Judge President of the changes. A copy of the email is attached as annexure **SA12**.



15. On 2 June 2022, the respondents provided the index to the record as uploaded to CaseLines. A copy of the index is attached hereto as annexure **SA13**.

THIS AFFIDAVIT

16. Solidarity is exercising its right to supplement under Rule 53 of the Uniform Rules. This affidavit constitutes the supplementation.
17. Before dealing with the supplemented and amplified grounds, I provide a summary of relevant matters ascertained from the record.

ANALYSIS OF THE RECORD

Advice Received From The Ministerial Advisory Committee

18. The record reflects numerous inputs that the Health Minister received from the Ministerial Advisory Committee (MAC), on the following issues:
- 18.1. Advisory screening at Borders and Ports of Entry¹;
- 18.2. Mandatory vaccination²;
- 18.3. Response to the identification of a new variant Omicron³;

¹ CL 020-1

² CL 020-07

³ CL 020-21



- 18.4. Mitigating Covid-19 “Going Forward” Position paper⁴;
 - 18.5. Restrictions on Gatherings⁵;
 - 18.6. Monitoring Covid-19 between acute outbreaks and deciding on appropriate and timely responses⁶;
19. A position paper⁷ of 8 February 2022, on mitigating Covid-19 and “going forward”, developed by the Technical Working Group on Mitigating Covid-19 Going Forward, was endorsed by the MAC in which they made proposals on the following issues:
- 19.1. When the State of Disaster can be lifted and what should replace the regulations issued in terms of the Disaster Management Act;
 - 19.2. What indicators should be used to alert the country and health system to further COVID-19 outbreaks, and the need to re-issue a state of disaster or other enhanced responses; and
 - 19.3. How the management of COVID-19 in the health sector can be integrated into existing programmes.

⁴ CL 020--27

⁵ CL 020-45

⁶ CL 020-48

⁷ CL 020-27



20. The report confirmed, amongst other, the following on the changing COVID-19 landscape in South Africa:

20.1. *“The drastic measures implemented [to limit the spread of the virus] were insufficient to prevent community transmission”;*

20.2. *“The fourth wave has highlighted several key features of the changing Covid-19 landscape in South Africa. The most important of these is the substantial population-level immunity that has been built up through a combination of prior infection and vaccination. The PHIRST-C community cohort study found that by the end of August 2021, 62% of individuals had experienced at least 1 SARS-CoV infection. A survey conducted in Gauteng at the start of the fourth wave found an overall seroprevalence of 73%”;*

20.3. *“Since the start of the fourth wave, substantial evidence has accumulated that, despite Omicron’s ability to infect those with some form of immunity, this immunity is strongly protective against severe disease outcomes including hospitalisation and death”;*

20.4. *“Beyond the fourth wave, it is necessary to consider health policy changes to the management of COVID-19. At this point in time, it is clear that the virus will not be eliminated from South Africa. Although it is impossible to know the future trajectory of the virus or precisely predict the emergence of new variants, surges of SARS-CoV-2*

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transmission are likely to put substantially less pressure on the health system moving forward.”

21. In dealing with the rationale for moving from containment to mitigation it was stated that:

“At the start of the COVID-19 pandemic, in the absence of vaccines, effective drugs or widespread immune protection from prior infection, countries (including South Africa) implemented policy responses reliant on non-pharmaceutical measures (NPIs) later named public health and social measures (PHSM), to address the pandemic. Epidemiologically, these policy responses can be considered as either “containment” or “mitigation” strategies. Differences in the rationale, objectives and policy implications of these strategies are outlined in Box 1 below.

However, as has been the case in South Africa, containment and mitigation strategies are often implemented concurrently. This results in confusion around their purpose and applicability at different epidemic stages. Containment strategies, which are not sustainable and only effective at the start of an outbreak when the number of infected people is small, have been inappropriately retained despite substantial socio-economic harm. In addition, containment strategies such as testing to attempt to identify all cases for the purpose of case and contact tracing, have diverted health resources away from non-COVID-19 services and contributed to a substantial non-COVID-19 disease burden, which has worsened through successive COVID-19 waves.



Of note, key WHO principles for implementing PHSM aimed at reducing SARSCoV-2 transmission include:

- *Adoption of measures with the highest level of acceptability and feasibility and proven effectiveness – and which minimize the negative consequences on health and wellbeing of all members of society and the economy*
- *Decisions to apply PHSMs must be weighed against the wider impact of the measures on health and well-being*

Furthermore, there is increasing realization that the premises/assumptions on which containment efforts are based do not hold:

- *Substantial transmission of SARS-CoV-2 occurs from asymptomatic or presymptomatic cases.*
- *Inability of testing in South Africa to rapidly identify the vast majority of cases with a diagnosed fraction of under 10% of cases (calculated from seroprevalence studies and excess deaths)*
- *Inability to rapidly identify and quarantine all contacts of a case.*
- *Emergence of variants with increased transmissibility*



- *Socio-economic circumstances that render quarantine, isolation, and effective social distancing unfeasible.*

The threat of a COVID-19 surge resulting in overwhelmed health services has been substantially reduced by widespread access to vaccines which are effective at preventing severe disease and death, high seroprevalence from prior infection which affords similar protection, growing experience of rapidly increasing health service capacity during previous COVID-19 waves and the emergence of new therapeutic options. In this context, we propose a deliberate shift to an evidence-based mitigation approach as COVID-19 moves towards endemicity. It is envisaged that this shift will reduce socioeconomic harms and shift resources currently used for ineffective containment measures to those that will provide the greatest mitigation benefit, including reducing the burden of disease that has resulted from neglected non-COVID-19 services, especially mental illness.”

22. The MAC then recommended a number of changes, and motivated each, to existing public health and social measures (PHSM), including the following:
 - 22.1. Stop contact tracing and quarantine, including testing of close contacts;
 - 22.2. Stop temperature, symptom screening and reporting of temperature and symptom screening;
 - 22.3. Stop all decontamination and fogging of premises;



22.4. Remove SARS-CoV-2 test requirements for cross-border travellers.

The motivation for the aforementioned being that:

- *There is a MAC on COVID-19 Advisory on travel, including cross border travel from neighbouring states.*
- *Travellers with SARS-CoV-2 entering South Africa are unlikely to significantly alter the epidemic trajectory unless it results in introduction of a new variant.*
- *However, as the recent international spread of Omicron has clearly shown, travel restrictions and pre-travel testing do not contain spread of variants, possibly delaying the spread by a few days if at all.*
- *Requiring SARS-CoV-2 tests in order to travel likely reduces non-essential travel and damages the hospitality industry which is highly dependent on tourists.”*

22.5. Stop the imposition of outdoor mask mandates, but promote wearing of masks outdoors when in larger gatherings, if people are at risk of severe disease or when people have respiratory symptoms. The motivation for the aforementioned being that:



- *The risk of SARS-CoV-2 transmission is far higher indoors than outdoors with outdoor settings likely contributing less than 1% of infections.*
- *US CDC guidance indicates that “in general you do not need to wear masks outdoors”, but provides messaging consistent with a harm reduction approach, recommending that individuals should consider wearing a mask when in large outdoor gatherings or if they are at high risk for severe COVID-19 disease or if people have respiratory symptoms. Nonetheless, more research and guidance on wearing of masks indoors is needed.*

23. In addressing the integration of COVID-19 into existing health services the MAC commented, amongst other that:

“Self-testing for COVID-19 has been enabled in a number of countries. If COVID-19 evolved as expected, it will become a disease associated with low levels of transmission, possibly with seasonal increases, but with low mortality due to high levels of immunity and vaccination. At this point, which may be reached within six to twelve months, the need for routine testing for SARS-CoV-2 in symptomatic mild COVID-19 cases will need to be reviewed. COVID-19 may then be diagnosed early and treated with antivirals. Self-testing may be important in enabling early diagnosis and differentiation from other acute respiratory illnesses.”

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24. In respect of legislative consideration the MAC commented, amongst other, as follows:

“A more challenging question concerns the ability of the Minister of Health to intervene, when the state of disaster is no longer in place, in order to enable an appropriate response to an ongoing threat from SARS-CoV-2. The Minister of Health would need to rely on the National Health Act (Act 61 of 2003), which requires that “within the limits of available resources”, the Minister “endeavour to protect, promote, improve and maintain the health of the population”. Limited powers are provided in terms of treating a patient without consent, which can be done if “failure to treat the user, or group of people which includes the user, will result in a serious risk to public health”. Whether the Minister of Health can restrict the rights of the general public, in anticipation of their being at risk of exposure to disease, needs to be considered in terms of the Constitution. Section 36 of the Constitution (Act 108 of 1996) states that rights may only be limited “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. The following issues need to be taken into account: the nature of the right being limited, the importance of the purpose of the limitation, the nature and extent of the limitation, and the relation between the limitation and its purpose. Critically, the limitation must represent a less restrictive means to achieve the stated purpose.”

25. The MAC concluded that it *“remains unclear, and untested in a court of law, whether the Minister of Health could rely on the National Health Act to impose*



such restrictions as are currently in force in terms of the Disaster Management Act”.

26. I wish to point out further that in respect of indoor mask mandates the MAC specifically stated that:

“The use of masks indoors needs further research and guidance. Indoor mask mandates should not be imposed indefinitely and criteria for the removal of indoor mask mandates should be clearly defined”

27. On 15 February 2022 the MAC provided the Minister with a *“revised Covid-19 screening requirements at borders and ports of entry”* report⁸ in which they made the following recommendations:

“The risk of presentation of a case of COVID-19 and the contribution to the overall incidence of the disease in South Africa remains very low. With the prevalence of COVID-19 in South Africa, high exposure and vaccine related immunity, the risk of transmission to a South African resident is at very low levels. The documented incidence of COVID-19 is higher in South Africa than in neighbouring countries with South Africa contributing the most to the number of cases in the region. As the region moves towards recognizing COVID-19 as endemic, with a view to a mitigation strategy to address the health risk of the infection, the MAC on COVID-19 therefore recommends that entry requirements for all international travelers to South Africa be reduced

⁸ CL 020-39



and even removed, opening the country to increased incoming travel, for economic or tourism purposes.

For entry into South Africa by air or sea (except from a neighbouring country), the following requirements should apply:

- A completed Traveler Health Questionnaire at all border entry points according to Port Health data requirements; symptom screening is not recommended for travelers to prevent the transmission of COVID-19, but may remain in place to recognize other emerging infectious diseases.*

- Unvaccinated travelers in South African border and ports should be offered vaccinations in South Africa and where possible at the border. This vaccination program should be offered at no cost to the traveler, and can be used to enhance the vaccination numbers in the region amongst the highly mobile population.*

For land borders with neighbouring countries (Botswana, Eswatini, Lesotho, Mozambique, Namibia, and Zimbabwe), only the following requirements should apply:

- A completed Traveler Health Questionnaire at all border entry points according to Port Health data requirements. Symptom screening is not recommended for travelers to prevent transmission of COVID-19, but may remain in place to recognize other emerging infectious diseases.*

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- *Unvaccinated travelers arriving at South African ports of entry should be offered vaccinations in South Africa, and where possible at the border. This vaccination program should be offered at no cost to the traveler and can be used to enhance the vaccination numbers in the region amongst the highly mobile population.*

28. On 16 February 2022 the MAC provided comment⁹ on whether restrictions on indoor and/or outdoor gatherings could be amended or relaxed, given the then current state of the pandemic. In reviewing the evidence the MAC confirmed that:

- “□ *The evidence and rationale for moving towards a “mitigation” strategy rather than a “containment” strategy have been outlined in recent communication from the MAC (“Mitigating COVID-19 in South Africa: Going Forward Position Paper”, 8th Feb 2022).*
- *The MAC position paper highlighted the principles for implementing public health and social measures (PHSMs) which have been advanced by the World Health Organization (WHO):*
 - o *That, measures with the highest level of acceptability and feasibility and proven effectiveness, and which minimize the negative consequences on health and wellbeing of all members of society and the economy, should be adopted.*

⁹ CL 020-45



- o *That the decisions to apply PHSMs must be weighed against the wider impact of these measures on health and well-being.*
 - *The risk of SARS-CoV-2 transmission is much lower outdoors than indoors, owing primarily to better ventilation. It has been estimated that only ~1% of SARS-CoV-2 transmissions occur outdoors.”*
29. The MAC accordingly recommended that the restrictions applicable to outdoor gatherings be lifted and so also the restrictions on the number of persons allowed at indoor gatherings, the minimum physical distancing and the 50% capacity rule.
30. In respect of the requirement to wear a mask indoors the MAC stated that:
- “o *In accordance with the previous MAC on COVID-19 position paper, the wearing of masks indoors should be retained initially, but be re-assessed at regular intervals. On a monthly basis, the need for mandatory mask-wearing at indoor gatherings should be assessed in relation to the COVID-19 caseload, and the extent to which any changes in caseload are attributable to the relaxation of the above restrictions. The ultimate aim should be lifting of indoor mask mandates.*
 - o *Regardless of any decision on mandatory mask-wearing at indoor gatherings, high-risk individuals, such as the elderly, those who are immunocompromised, those with comorbid conditions and those with whom they have close contact (e.g. caregivers), should be encouraged*



to wear quality masks (preferably surgical masks rather than cloth masks) in such venues, particularly if the COVID-19 caseload in the area is high.”

31. On 25 April 2022 the MAC provided¹⁰ feedback to the Minister on “*monitoring Covid-19 between acute outbreaks and deciding on appropriate and timely responses*”. I wish to point out that this was subsequent to the the proposed Regulations being published for comment and the National State of Disaster being lifted. In its findings the MAC confirmed that:

“Although the possibility of a new variant of SARS-CoV-2 with increased transmissibility, immune escape characteristics, and/or increased virulence, cannot be discounted entirely, future planning needs to be based on the most likely scenarios. COVID-19 is most likely to become endemic, with periodic acute outbreaks. A mitigation approach is therefore needed, with the ability to pivot to a more interventional stance if needed. In the mitigation phase of the epidemic, the primary focus needs to be on identifying an acute outbreak of COVID-19 that is of national importance. An acute outbreak of this nature may be defined as “widespread transmission of SARS-CoV-2, causing a high burden of severe disease, hospitalisation or death, including amongst those with prior infection or vaccination.” Although a high caseload may be associated with a high number of cases of severe disease, recent experience with the Omicron variant has shown that this is not inevitable. Given the high levels of population immunity to COVID-19 in South Africa – a consequence

¹⁰ CL 020-48



of both vaccination and past infections – a future acute outbreak may not necessarily be associated with a high burden of severe disease. Although a high caseload should prompt some public health actions (e.g. focusing on health systems preparedness), it is the early evidence of an increased burden of severe disease that should trigger immediate action. In keeping with a “mitigation” approach, it is critical to have a clear plan of action for the period between acute outbreaks, in order that future outbreaks can be detected and responded to in the shortest time possible, and that a response can be tailored to the likely national importance of the outbreak. The capacity to mount an even more rigorous response, if warranted, must also be ensured in the longer term.”

32. In commenting on what mitigation strategies are recommended if a high burden of severe disease is thought to be likely, the MAC stated that:

“A rising caseload alone (as evidenced by total cases, percentage positivity, rising wastewater viral burden, or falling cycle threshold values) does NOT warrant further action in and of itself. However, more intensive restrictions and enhanced mitigation efforts can be justified if a high burden of severe disease is shown to be likely.”

33. The MAC proposed a number of measures to be implemented should it be deemed likely that the integrity of the healthcare system is under threat including:



“7. Efficient public communication about mask wearing, avoidance of large gatherings, and ventilation and spacing in indoor venues. The focus should primarily be on high risk individuals, with recommendations being favoured over mandates – e.g. high risk individuals to consider a mask in public (preferably a surgical or N95 mask), and to avoid large public gatherings and public transport if possible. If the severity of the acute outbreak is thought sufficient to justify additional measures, the above advice can be extended to all members of the public, and/or be made mandatory.”

34. In commenting on whether the actions listed can be implemented without declaring a national state of disaster the MAC stated:

“Draft Regulations issued in terms of the National Health Act and International Health Regulations Act are currently awaiting public comment. Where possible, restrictions and responses should be enabled without the declaration of a state of disaster. However, that option of reinstatement remains available, if needed. A state of disaster can also be declared at a district or provincial, rather than a national level, although this introduces new complexities. Restrictions on the sale of alcoholic beverages and significant restrictions on business and educational activities, or mandatory interventions at a population-wide level require intergovernmental action and co-ordination, and would seem to warrant invocation of the Disaster Management Act. Any restrictions in citizen’s rights need to pass the test posed by section 36 of the Constitution”



National Health Council “consultative” meetings

35. In the founding affidavit Solidarity raised questions concerning the required consultation with the NHC. Solidarity persists with the review ground based on the absence of consultation with the NHC.

36. Included in the record are minutes of two alleged NHC consultative meetings ostensibly held on 21 February 2022¹¹ and 3 May 2022.¹²

37. Of course, at the time of the 21 February 2022 meeting, the Amended Regulations were not yet to hand. At that point, the consultation concerned the more comprehensive regulations proposed at the time, and which now remain subject to comment from the public. Be that as it may, the minutes of the 21 February 2022 meeting reflect, amongst other, that:

37.1. The meeting was held via teleconference and on short notice;

37.2. Under the heading “*Action required*” it is stated that:

“The Health Regulations team was supposed to give a presentation, and NHC was supposed to point out areas that should be tabled as proposals for actual changes at NCCC.”

¹¹ CL 020-956

¹² CL 020-986

37.3. Adv L Makhoshi went through the draft regulations and noted the following:

4.2.1 *The Department of Health is currently dealing with four sets of regulations.*

4.2.2 *There are four sets of regulations that must complement each other in order to deal with Covid-19 and other related or similar pandemics or diseases that are notifiable so that there is no need to return to the national disaster.*

4.2.3 *The first, and most important, are the regulations governing the surveillance and control of notifiable medical conditions. It is supported by regulations relating to public health measures at Ports of Entry, where people enter and exit the country.*

4.2.4 *It is also supported by regulations relating to the management of human remains, and the last set of regulation is regulations relating to environmental.*

4.2.5 *The first regulation, which has been provided for in Regulation 15 of the 2017 regulations, deals with the refusal of medical examination profile access and treatment.*

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- 4.2.6 *This is the regulation that was taken into the disasters regulations to make sure that it is the countries that able to deal with COVID-19 of which the reason was that the existing regulation 15 required the HOD to approach the High Court to have a quarantine or to have someone isolated and, therefore, however; it was not to be done because it would have required the HOD to approach the High Court for a quarantine or to have someone isolated.*
- 4.2.7 *There has been engagement with the State Law advisors on this regulation*
- 4.2.8 *While the preliminary view is that these may be unconstitutional, they were engaged and subsequently promised that they would engage with them and that they would be able to work up something that would allow the country to deal with a pandemic without resorting to issues of the HODs going to the High Court.*
- 4.2.9 *In the meantime, the state Law Advisors have given the department permission to publish the original proposal, which requires a magistrate's warrant to enable the parenting and isolation of those who might refuse.*
- 4.2.10 *NHC should note that there is also a section that deals specifically with person isolation or quarantine, and these*



regulations were amended to provide for isolation during pandemics, including symptomatic and asymptomatic people, as well as self-isolation and self-quarantine.

4.2.11 *These regulations are also made for any future emergencies and not only for COVID -19.*

4.2.12 *There is provision that allows the Minister to publish without regulations but it will be difficult for the department to justify that as the State of National disaster has been for a period of 2 years.*

37.4. It was then recommended that the regulations as envisaged be published for 30 days of public comment.

37.5. Under the “*comments*” section the following is stated:

“While this framework is important, the pressure in terms of how to move forward with it requires some kind of common kind of sufficient consensus and NHC made comments on the draft, which among others, included the following:

5.1 *In terms of the issue of masks there were proposals from the Ministerial Advisory Committee, and they have made the advisory which was also considered that the wearing of masks for indoor*

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gatherings should be retained, but outdoors there should be no need for wearing of masks.

5.2 Issues of quarantine and isolation should also be covered in the regulations. Covid-19 vaccination should be encouraged in order not to put a strain to the health facilities due to a high rate of infection.”

38. The presentation¹³ of Adv Lufuno Makhoshi included, amongst other, the following:

38.1. Refusal of medical examination, prophylaxis, treatment, isolation and quarantine;

“This Regulation is amended to provide for a warrant being issued by a competent Court, on application by an enforcement officer for the medical examination instead of having the HoD to make a High Court Application. The existing Regulation 15 was not geared for pandemic situation hence the amendment by addition. However, the State Law Adviser had advised that this requirement for the warrant may be unconstitutional. We requested the State Law Adviser assist with the proposal that the Regulations must be able to empower people at the local area such as the Managers of Health Establishments to approach the local Magistrate for an order authorising such detention.”

¹³ CL 020-963



38.2. General measures to contain the spread of notifiable medical condition;

“The measures to control the spread of any Notifiable Medical Condition or outbreak will be determined by the Minister of Health through government notice. The dedicated control measures as outlined by the NMC National guidelines are attached as annexures.”

38.3. Control Measures for Public places:

“Government departments, municipalities and private entities responsible for public places must-

- *ensure that public hygiene measures are implemented in all public places as described in the National Public Hygiene Strategy, 2020;*
- *ensure that public places are cleaned and disinfected;*
- *provide for hand hygiene; and*
- *enable the practice of physical distancing.”*

38.4. Attendance of funerals:

“This provides for the containment measures that must be adhered to when attending a funeral. Night vigils and after-funeral gathering may

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be restricted must wear a face mask and must adhere to all health protocols and social distancing measures.”

38.5. **Gatherings:**

“This provides for the containment measures when attending a gathering during an epidemic or a pandemic. These include the wearing of a face mask, adhering to all health protocols and maintaining social distance.”

39. In dealing with the process which is to be followed the presentation indicated the following:

39.1. **“Presentation to the NHC:** *All four draft Regulations must be dealt with as a set as they complement each other”.*

39.2. **“Publication for public comments:** *Once approved by the NHC, they will be published for public comments. In terms of section 90 (4) (a) of the National Health Act of 2003, “the Minister must publish all regulations proposed to be made under this Act in the Gazette for comment at least three months before the date contemplated for their commencement”. This means that the Regulations cannot come into operation within three months from that date of publication for public comments unless the provisions of section 90 (4) (c) have been invoked. Unfortunately, it will be very difficult to invoke this section.*



These draft Regulations will attract much public interest and as such the public must be given the sufficient opportunity to comment.

39.3. *"In light of the urgency for the promulgation of Health Regulations to deal with Covid-19 outside the NSoD, the Regulations will be published for at least 30 days for public comments."*

40. From the documentation it is evident that:

40.1. There was in fact no consultation but simply a "*presentation*" of what the Health Minister sought to publish;

40.2. The presentation was clearly rushed and incapable of achieving any consensus;

40.3. No medical or scientific evidence was presented to justify the intended Regulations, not even the MAC reports as highlighted above;

40.4. The NHC was not informed of the fact that the MAC had in fact made contradictory proposals to those outlined in the then proposed regulations;

40.5. There was no consensus on the then proposed regulations and there is no evidence that they were "*approved*" by the NHC; and



- 40.6. The Health Minister took a deliberate decision not to comply with the statutory imposed time periods for public comment and although being aware of the fact that 'the Regulations cannot come into operation within three months from that date of publication for public'. The decision was taken to publish the proposed regulations only for a period of 30 days for public comment. Noticeably the Health Minister specifically rejected reliance on section 90(4)(c) of the NHA.
41. The minutes of the 3rd of May 2022 "*consultative meeting*", a day before the Amended Regulations were published, reflect the following:
- 41.1. The meeting was once again convened on short notice;
- 41.2. The Health Minister made it clear from the time the meeting commenced that "*it will not take long as the purpose thereof was to finalize the amended Health Regulations relating to the surveillance and the control of notifiable medical conditions.*" ;
- 41.3. The following were presented for consideration by NHC as per the draft copy of Amended Regulations, which was allegedly circulated before the meeting (although it is not clear whether in fact the Amended regulations as ultimately published had been placed before the NHC):
- 41.3.1. Wearing of face masks to contain the spread of COVID-19;



41.3.2. Gatherings to contain the spread of COVID-19:

41.3.3. Persons entering the country to contain the spread of COVID-19

41.4. Noticeably it was recorded under item 4 that:

"The meeting welcomed the contents of the amendments to the regulations and was further advised that they will be referred to regulations relating to the surveillance and the control of notifiable medical conditions and that they will come into operation on publication in the Gazette."

41.5. There were no comments from the meeting.

42. Evident from the aforementioned is that there were no deliberations or a consensus-seeking process in respect of;

42.1. The radical departure from the originally proposed regulations and the justification for such departure;

42.2. What medical or scientific evidence supported or justified the Amended Regulations;

42.3. What justified the amendment of Table 2 of Annexure A to the 2017 Regulations by the insertion of the Coronavirus disease (COVID-19);

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- 42.4. How and on what legal basis could the Minister acquire for himself the right to determine and indicate when the measures are no longer necessary or to determine that the measures are once again necessary; and
- 42.5. No mention was made of the public participation and the comments or inputs received from the public in respect of the broader set of regulations that had previously served before the NHC.

Processing of public comments

43. The daily reports for the NDOH¹⁴ on the processing of public comments on the Regulations confirms that on 3 of May2022,¹⁵ being the day the prior to the Amended Regulations being published:
- 43.1. That support for the processing of the comments was requested until 20 May 2022;
- 43.2. 334 274 comments had been exported to the “*comments tool*” as of 3 May 2022;
- 43.3. The total number of processed comments was 214 967, constituting 64% of the exported emails; and

¹⁴ CL 020-2461;-020-2554

¹⁵ CL 020-2468



- 43.4. The team expressed the view that the comments may be finalized if they are allowed to continue processing as planned until the 20 May 2022.
44. Evident from the reports is that an extraordinary amount of comments were rejected, without clear reasons being provided therefore. Further to this the comments were either “*accepted and incorporated*” or “*deferred for consideration by Technical team*”. The reality is that these comments were never considered by the Health Minister. At the time the Amended Regulations were published on 64% of the comments were “*processed*”, whatever that may mean.
45. The record reflects absolutely nothing which can suggest that the public comments were in fact considered by the NHC or the Health Minister prior to the Amended Regulations being issued.

GROUNDS FOR REVIEW

46. In light of the foregoing, Solidarity supplements its review grounds as follows.

***Mandatory and material procedure or condition prescribed not complied with;
Procedure unfair***

47. This review ground is based on three considerations:



- 47.1. First, the Health Minister did not consult in the manner required by the NHA prior to publishing the Amended Regulations;
- 47.2. Second, the Health Minister disregarded the mandatory 3 month period for public comment; and
- 47.3. Third, the Health Minister disregarded public comments received by that stage, which comments were in fact not even fully “processed” at the time the Amended Regulations were issued.
48. As I have already indicated, nothing in the minutes of the meetings, and the one presentation which accompanied same, can constitute or pass as a consensus-seeking process. The process was nothing other than a “*rubber-stamping*” exercise to create the ruse of legitimacy.
49. Section 23 of the NHA sets out the functions of the NHC and states that the NHC must advise the Health Minister on, amongst other, the following;
- “(1)(a) *policy concerning any matter that will protect, promote, improve and maintain the health of the population, including-....*
- (ix) *epidemiological surveillance and monitoring of national and provisional trends with regard to major diseases and risk factors for disease”.*

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50. Clearly in “*consulting*” with the Health Minister the NHC did not provide any “*advice*”. Indeed, it appears that the process worked in the opposite direction. The NHC was simply informed of the intended regulations, without any reason, motivation or justification being provided. If regard is had to the minutes, it is clear that there was in fact no proper provision of relevant information and consideration thereof.
51. Moreover, in terms of subsection 23(3) of the NHA, the NHC must strive to reach its decisions by consensus, but where a decision cannot be reached by consensus, the decision of the majority of the members is the decision of the NHC.
52. There is no evidence of any “*decision*” being taken as required by the NHA. The NHC was simply informed of the Amended Regulations, and on the version of the Health Minister, this did not take long. The Amended Regulations were simply pushed through by way of a sham process that bears no resemblance to what the process is supposed to entail.
53. In deciding to simply publish the initially proposed regulations for public comment for a period of 30 days the Health Minister clearly understood and knew that the NHA required a comment period of 3 months. The decision to ignore the aforementioned mandatory period was deliberate. As I pointed out in the founding affidavit, and as is apparent from the minutes, the Health Minister did no rely on the provisions of section 90(4)(c) of the NHA in publishing the initially proposed regulations, because he knew and understood that the provision could not appropriately be relied on in the circumstances.



54. Of course, by the time the Health Minister published the Amended Regulations, the public comments had not even been fully processed. No mention or reference is made of the comments in any of the alleged “consultations”. Public participation is an important element of democracy and of responsive government. The failure by the Health Minister to consider these comments clearly confirms that he failed to apply his mind and disregarded relevant facts, being concerns and comments of the people of South Africa who stood to be affected by the Amended Regulations.
55. It is for the above same reason that the action taken was procedurally unfair within the contemplation of section 6(2)(d) of Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Irrelevant considerations taken into account, relevant considerations not considered, decision arbitrary, serving ulterior purpose

56. The Minister and the NHC failed to have regard to the reports of the MAC, which clearly, and with reference to scientific evidence, indicated that there is no justification for (i) the wearing a face masks in public outdoor areas, (ii) the limitation on gatherings or the unconditional wearing of face masks in indoor places, and (iii) the testing and screening of individuals entering the country.
57. The Minister and the NHC failed to have regard to the recommendations of the MAC, as set out above, in its totality. It was simply ignored.



58. If regard is had to the reports of the MAC, the Amended Regulations cannot be justified and there exists no scientific or other factor which the Health Minister considered to disregard the reports of the MAC.
59. The MAC confirmed that *“given the high levels of population immunity to COVID-19 in South Africa – a consequence of both vaccination and past infections – a future acute outbreak may not necessarily be associated with a high burden of severe disease.”*

Moreover, as regards Amended Regulation 16C, the 15 January MAC advice explained that the National Health Laboratory Service (NHLS) and private laboratories raised concerns about capacity constraints and the cost implications of providing antigen testing at ports of entry. Given low incidence in positivity rates (5%) even in peak times, it was said that those who travel into South Africa do not contribute to the overall incidence of COVID-19 inside South Africa. The MAC recorded that the NHLS had recommended that all testing at borders ceases, and made the recommendation that entry requirements for all international travellers be reduced or removed, thereby opening the country to increased incoming travel, for economic and tourism purposes.

60. There is no evidence in the record that the Health Minister had any rational and substantive reason to decline to follow this recommendation.
61. On the evidence relied upon it is submitted that the publication of the Amended Regulations were clearly arbitrary, in that there was no justification therefore.



62. The relevant consideration of the MAC which the Minister and the NHC failed to have regard to can be summarised as follows:

62.1. The drastic measures implemented to limit the spread of the virus were insufficient to prevent community transmission, yet the same measures were implemented once more;

62.2. The substantial population-level of immunity that has been build up through a combination of prior infection and vaccination;

62.3. The immunity is strongly protective against severe diseases outcome including hospitalisation and death;

62.4. That the virus will not be eliminated from South Africa and that the transmission are likely to put substantially less pressure on the health system moving forward;

62.5. Containment strategies, which are not sustainable and only effective at the start of an outbreak when the number of infected people is small, have been inappropriately retained despite substantial socio-economic harm;

62.6. The key WHO principles for implementing PHSM aimed at reducing SARSCoV-2 transmission which include:

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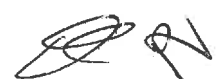
- 62.6.1. Adoption of measures with the highest level of acceptability and feasibility and proven effectiveness – and which minimize the negative consequences on health and wellbeing of all members of society and the economy
- 62.6.2. Decisions to apply PHSMs must be weighed against the wider impact of the measures on health and well-being
- 62.7. That the threat of a COVID-19 surge resulting in overwhelmed health services has been substantially reduced by widespread access to vaccines which are effective at preventing severe disease and death, high seroprevalence from prior infection which affords similar protection, growing experience of rapidly increasing health service capacity during previous COVID-19 waves and the emergence of new therapeutic options.
- 62.8. That COVID-19 is expected to evolve and become a disease associated with low levels of transmission, possibly with seasonal increases, but with low mortality due to high levels of immunity and vaccination, within the next six to twelve months (August 2022/February 2023)
- 62.9. That the use of masks indoors needs further research and guidance. Indoor mask mandates should not be imposed indefinitely and criteria for the removal of indoor mask mandates should be clearly defined.



- 62.10. With the prevalence of COVID-19 in South Africa, high exposure and vaccine related immunity, the risk of transmission to a South African resident is at very low levels.
63. Failure to have regard to these relevant consideration renders the decision of the Health Minister unreasonable and irrational.
64. It further leads to an ultimate conclusion that the Amended Regulations were published for an ulterior purpose or motive and so simply to retain the draconic limitations imposed under the National State of Disaster.
65. This is starkly illustrated in respect of Amended Regulation 16B(9). There is no evidence in the record that reveals the substantive reason for the provision in Amended Regulation 16B(9) that only “*registered basic education institutions*” be excluded from the Amended Regulation 16B provisions on gatherings. So, for example, it is not explained why universities and other higher education institutions were not treated in the same way.

The action itself contravenes a law or is not authorised by the empowering provision

66. In the minutes of the 21 February 2022 meeting the Health Minister acknowledged that “(t)here is provision that allows the Minister to publish without regulations but it will be difficult for the department to justify that as the State of National disaster has been for a period of 2 years”. And yet, the Health Minister in the present case published the Amended Regulations that were



never opened for public comment. At best for the Health Minister he could rely on the comment period for the previously proposed, and much wider proposed regulations. Solidarity does not accept that the comment period in respect of those regulations can be relied on to make good the failure to publish the Amended Regulations without inviting comment. And, of course, he was not in a position to have considered in any meaningful way the comments that had been received. As the record reveals, not all of the comments had even been “processed”. Further, in the correspondence concerning the production of the record it was asserted that the various emails containing comments had not been considered by the Health Minister.

67. Over and above that, the NHA does not authorise and or empower the Health Minister to declare any medical condition a “*notifiable medical condition*”. It also does not appear from the NHA that the Health Minister enjoys the power to issue regulations in terms of section 90 of the NHA in respect of those entering the country. Yet, this was not even considered by the NHC nor any reasons given by the Health Minister for including these provisions in the Amended Regulations.
68. The NHA does not authorise the Health Minister to acquire for himself the power to simply declare certain measures applicable or binding or when same is not. Clearly the Health Minister knew that it would be difficult to justify such conduct, however instead of obtaining legal advice on the issue he simply proceeded with conduct which he already knew would be unlawful.



69. Subsection 90(3) states the Health Minister may, in any regulation made under the NHA:
- (a) designate as authoritative any methodology, procedure, practice or standard that is recognised as authoritative by internationally recognised health bodies within the relevant profession; and*
 - (b) require any person or body to comply with the designated methodology, procedure, practice or standard.*
70. As a minimum, what is required in terms of the NHA is that when the Health Minister publishes regulations in which he requires any person or body to comply with a procedure, practice or standard, such procedure, practice or standard must be recognised as authoritative by internationally recognised health bodies. No such evidence is to be found in the record. In fact the contrary holds true if regard is had to the recommendations of the MAC.
71. The minutes of the NHC meetings confirm that the Minister knew he was not authorised in terms of the NHA to simply publish binding limitations, with self-imposed time period for public comment but yet he persisted in so doing.
72. The decision to publish the Amended Regulations, even if it could be argued to be authorised by the NHA (which is denied), is clearly so unreasonable that no reasonable person could have so exercised the power.



Concluding Remarks

73. What remains absent from the record, notwithstanding the recommendations of the MAC, is any evidence to suggest that the wearing of face masks produce any result, specifically in respect of indoor events.
74. Whilst the recommendations and the “*the way forward*” as suggested by the MAC is supported by scientific evidence, the decision of the Health Minister is clearly not. There is nothing in the record which can remotely suggest that the Health Minister relied on sound medical evidence or as recommended by the WHO adopted measures with the highest level of acceptability and feasibility and proven effectiveness.

CONCLUSION

75. In the circumstances, Solidarity persists in seeking relief. It does so on the basis of the grounds set out in the founding affidavit and herein, read with the record produced.

WHEREFORE the applicant prays for relief in the terms as set out in the notice of motion attached hereto

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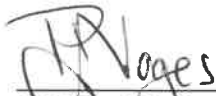
DEPONENT

I CERTIFY the Deponent has acknowledged that he knows and understands the contents of the foregoing Affidavit and that he has no objection to taking the prescribed oath and that he considers the oath to be binding on his conscience, and that accordingly the requirements have been complied with as set out in Reg. No. 1258 of Government Gazette No. 3619, 21 July 1972, as amended, which affidavit was signed and sworn to before me at Pretoria on this the 8 day of ~~MAY~~ June 2022.

PV

8 June

BEFORE ME:



COMMISSIONER OF OATHS

CAPACITY : JOHANNA PETRONELLA VOGES
AREA : COMMISSIONER OF OATHS - KOMMISSARIS VAN EDE
ADDRESS : ATTORNEY OF THE HIGH COURT OF SOUTH AFRICA
54 UNIONLAAN
KLOOFSIG
CENTURION





Office of the State Attorney "SA1" Pretoria

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086 507 7007

DOCEX: 298

17 MAY 2022

ENQ: N QONGQO
EMAIL: naqongqo@justice.gov.za

MY REF: 1649/2022/Z22
YOUR REF: MR SWART/MRCLAASSEN/fb/cws0611
D ELOFF MAT4730

LIBERTY FIGHTERS NETWORK & REYNO DAWID DE BEER

By email: reyno@libertyfighters.co.za

SERFONTEIN VILJOEN & SWART

By Email: jd@svslaw.co.za

HURTER SPIES INCORPORATED

By E-mail: eloff@hurterspies.co.za
johann@hurterspies.co.za
ck@hurterspies.co.za

Dear all

There have been three matters launched in relation to the lawfulness of the Regulations enacted under the National Health Act, 2003. They are:

- The application by Liberty Fighters Network and Mr De Beer under case no 2022/24917;
- The application launched by Afriforum and Dear SA under case number 25226/22
- The application by Solidarity Trade Union under case number 25363/22.

We have proposed to the applicants in the first matter – and they have agreed in principle – that:

- The three matters be heard together before a Full Bench; and
- The Deputy Judge President be requested to allocate 14 June 2022 (the present set down of the Solidarity matter) in this regard.

Please would you each please confirm whether this is in order so that we may write to the Deputy Judge President to make the necessary request in this regard. If you do not agree, please indicate the reasons therefore. We would ideally wish to write to the Deputy Judge President tomorrow if possible.

Our client is currently preparing the Rule 53 record in order to file it in all three applications. It will simply not be possible to have the record filed today and our client intends to file it by Tuesday 24 May 2022.

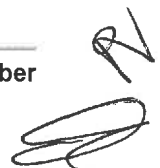
We welcome your suggestions on a timetable for the further filing of papers on this basis.

This letter is written with prejudice and will be placed before a court should the need arise.

Yours faithfully

N QONGQO

N QONGQO(signed)
FOR STATE ATTORNEY PRETORIA





"SA2"

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Pretoria**

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19 MAY 2022

Enquires: **MS N. QONGQO/N MHLUBULA**
Email: Nqongqo@justice.gov.za
NMhlubula@justice.gov.za

My Ref: 1649/2022/Z22
Your Ref: UNKNOWN

Office of the Deputy Judge President
Pretoria High Court

BY HAND DELIVERY

Dear Honourable Deputy Judge President Ledwaba

**Liberty Fighters Network and Another v Minister of Health, case no
24917/22**

Afriforum and Another v Minister of Health, case number 25226/22

Solidarity Trade Union v Minister of Health, case number 25363/22.

We act for the Minister of Health and write to you concerning a number of pending matters that have been launched in this Court concerning the validity of the regulations enacted under the National Health Act, 2003, to deal with Covid19.

Thus far three applications have been launched:

- An application by Liberty Fighters Network and Mr De Beer under case no 24917/22;

- An application launched by Afriforum and Dear SA under case number 25226/22; and
- An application by Solidarity Trade Union under case number 25363/22.

In addition, one party (Action SA) has written seeking admission as an amicus curiae and it appears that at least one other party (Sakeliga) will be launching its own application.

The parties to the three existing applications have agreed that:

- The three matters should be heard together over a period of two or three days; and
- The parties should jointly request that the matters be heard by a Full Bench.

The parties have also agreed to propose, subject of course to your direction, that the matters be heard during the week of 20-24 June 2022.

While the parties have had various engagements on the timetables for the filing of papers and heads of argument to facilitate this, final agreement has not yet been reached on this score. In addition, it would be most helpful for purposes of finalizing these questions if clarity could be obtained on whether it will indeed be possible for a two or three day hearing before a full bench during the week of 20-24 June 2022.

Could we therefore kindly request that a case management meeting is convened by your office to determine the dates for the hearing of these matters and a timetable for the filing of heads of argument and papers?

We have copied on this email the attorneys for the applicants in each of the pending matters and the attorneys for the prospective amicus curiae.

Regards,





N. QONGQO P.P.
FOR: STATE ATTORNEY (PRETORIA)

Cc: LIBERTY FIGHTERS NETWORK & REYNO DAWID DE BEER
By email: reyno@libertyfighters.co.za

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Your ref: DJ ELOFF/MAT4730

P.J. WASSENAAR/QB09052

MR SWART/MR CLAASSEN/fb/CWS0611

Our ref: WRTC0001

24 May 2022

TO: HURTER SPIES INCORPORATED
Attorneys for the Applicants (Case no.25226/22)
Email: eloff@hurterspies.co.za;
iohann@hurterspies.co.za;
ck@hurterspies.co.za;

AND TO: LIBERTY FIGHTERS NETWORK
REYNO DAWID DE BEER
First & Second Applicants (Case no. 24917/22)
Email: reyno@libertyfighters.co.za
debeerreyno@gmail.co.za;

AND TO: KRIEK WASSENAAR & VENTER INC
Attorneys for the Applicant (Case no. 27477/22)
Email: peter@kriekprok.co.za

AND TO: SERFONTEIN VILJOEN & SWART
Attorneys for the Applicant (Case no.25363/22)
Email: jd@svslaw.co.za
niekie@svslaw.co.za
franlie@svslaw.co.za

Dear Sirs

RE: THE RULE 53 RECORD IN CASE NOS. 25226/22, 24917/22, 25363/22 & 27477/22

We have been appointed by the Minister of Health to assist the State Attorney in compiling the Rule 53 record in respect of the above applications challenging the amendments to the Regulations relating to the Surveillance and the Control of Notifiable Medical Conditions published on 4 May 2022.

In this regard, please note that a copy of the record can be accessed and downloaded at the following link: [Rule 53 Record](#).

We are certain that you will agree that, given the mammoth size of the record and the nature of the applications which your clients have brought, it would be impractical and unhelpful to upload the entire record to Caselines. Instead, the most practical solution is for each applicant to access the record at the above links and then to upload to Caselines whatever portion they wish to have available. We note that this is consistent with Rule 53(3) and the decision of the Court in *Venmop 275 (Pty) Ltd and Another v Cleverland Projects (Pty) and Another* 2016 (1) SA 78 (GJ) at paras 17 to 19.

We draw your attention to two further aspects:

- First, the record excludes legally privileged documents.
- Second, the nature of the decision-making process involved in drafting and enacting regulations such as those presently at issue is significantly different from the nature of a decision-making process in respect of an ordinary decision which might be subject to judicial review. In drafting and enacting the regulations presently at issue, the Minister drew on the Department's own knowledge and expertise, which in turn has regard to ongoing developments and information regarding Covid-19 which is in the public domain, including (without limitation) the information that can be accessed on the websites of the World Health Organisation.

Should you encounter any issues in accessing the record, please feel free to direct your enquiries to the following email addresses: liezl@bchc.co.za , jeannette@bchc.co.za, and keagan@bchc.co.za .

Lastly, please have regard to the guide to opening .pst type files (such as those found in the record of comments) which can be accessed at <https://support.microsoft.com/en-us/office/open-and-close-outlook-data-files-pst-381b776d-7511-45a0-953a-0935c79d24f2> .

Yours sincerely



Liezi-Mari Mouton

Bradley Conradie Halton Cheadle

CC: THE REGISTRAR

High Court

PRETORIA

Per Caselines

"SA4"

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Nos.:25226/22

24917/22

25363/22

27477/22

In the application of:

AFRIFORUM NPC

First Applicant

DEAR SA NPC

Second Applicant

And

THE MINISTER OF HEALTH

First Respondent

THE DIRECTOR – GENERAL:

Second Respondent

NATIONAL DEPARTMENT OF HEALTH

And in the application of:

LIBERTY FIGHTERS NETWORK

First Applicant

REYNO DAWID DE BEER

Second Applicant

And

MINISTER OF HEALTH

Respondent

And in the application of:

SOLIDARITY TRADE UNION

Applicant

And

MINISTER OF HEALTH

First Respondent

NATIONAL HEALTH COUNCIL

Second Respondent

**DIRECTOR-GENERAL,
DEPARTMENT OF HEALTH**

Third Respondent

NATIONAL DEPARTMENT OF HEALTH

Fourth Respondent

And in the application of:

SAKELIGA NPC

Applicant

And

MINISTER OF HEALTH

First Respondent

**DIRECTOR GENERAL: DEPARTMENT OF
HEALTH**

Second Respondent

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

Third Respondent

**THE PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA**

Fourth Respondent

INDEX TO RULE 53 RECORD

Item	Date	Description
BUNDLE A: MAC ADVISORIES		
1.	15 October 2021	MAC Advisory Screening at Borders and Ports of Entry
2.	24 November 2021	MAC Advisory Background document on COVID-19 and Mandatory Vaccinations
3.	3 December 2021	MAC Advisory Response to New Variant

Item	Date	Description
4.	8 February 2022	MAC Advisory Mitigating Covid-19 Going Forward Position Paper
5.	15 February 2022	MAC Advisory Revised Screening at Borders and Ports of Entry
6.	16 February 2022	MAC Advisory Restrictions on Gatherings
7.	25 April 2022	MAC Advisory Interwave Period
BUNDLE B: NICD DAILY UPDATES		
1.	1-31 December 2021	NICD Daily updates – December 2021
2.	1 – 31 January 2022	NICD Daily updates – January 2022
3.	1-28 February 2022	NICD Daily updates – February 2022
4.	1-31 March 2022	NICD Daily updates – March 2022
5.	1-30 April 2022	NICD Daily updates – April 2022
6.	1-3 May 2022	NICD Daily Updates – May 2022
BUNDLE C: CAPRISA PRESENTATIONS		

Item	Date	Description
1.	6 April 2022	Update on COVID-19 in South Africa
2.	13 April 2022	Update on COVID-19 in South Africa
3.	24 April 2022	Update on COVID-19 in South Africa
4.	1 May 2022	Update on COVID-19 in South Africa
BUNDLE D: NHC MEETINGS		
1.	21 February 2022	NHC Consultative Meeting
1.1.	21 February 2022	Minutes of NHC Meeting
1.2.	21 February 2022	Presentation re proposed amendments
2.	3 May 2022	Special NHC Consultative Meeting
2.1.	3 May 2022	Draft regulations tabled at 3 May 2022 NHC meeting
2.2.	3 May 2022	Minutes of NHC Meeting
BUNDLE E: REPORTS AND PRESENTATIONS MADE TO THE MINISTER		
1.	1 – 31 March 2022	Daily Minister's Reports
2.	1 – 31 March 2022	Minister's Report Presentations
3.	1 – 30 April 2022	Daily Minister's Reports
4.	1 – 30 April 2022	Minister's Report Presentations



5.	1 – 4 May 2022	Daily Minister's Reports
6.	1 – 4 May 2022	Minister's Report Presentations
BUNDLE F: PORTS OF ENTRY		
1.		Notice with rationale for implementation
1.1.	2020	Amendment to South African Directions re ports of entry
1.2.	2009	Amendments to South African Health Professions Act Regulations re professions
1.3.	2005	WHO Advisory on International Health Regulations – Third Edition
1.4.	2009	WHO introduction on implementation of International Health Regulations
1.5.	2003	Supplementary Regulations to International Health Regulations Act re ports of entry
1.6.	2015	Indian Aircraft – Draft Rules
1.7.	2020	South African Development Community (SADC) Guidelines on Cross-Border Transport during Covid-19
1.8.	6 February 2020	EU Interim Advice re Points of Entry

1.9.	20 February 2020	EU Interim Advice re Points of Entry
1.10.	14 March 2020	Border Security Control Measures
1.11.	Undated	Harmonized Sub-Regional Essential IPC services at Points of Entry
1.12.	23 June 2020	SADC Guidelines on Harmonisation and Facilitation of Cross Border Transport
1.13.	16 November 2020	Draft: Tripartite Guidelines for Safe Cross Border Movement of Persons and Personal Goods during the COVID-19 Pandemic
1.14.	10 May 2020	WHO: Surveillance strategies for COVID-19 human infection
1.15.	16 December 2020	WHO: COVID-19 diagnostic testing in the context of international travel
BUNDLE G: COMMENTS		
1.	March-April 2022	Comment spreadsheets
1.1.		Afriforum email comments spreadsheets
1.2.		Dear SA email comments spreadsheets
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1.5.		Microsoft Online Form input spreadsheet
1.6.		WhatsApp comments spreadsheet
2.	12 April 2022 - 4 May 2022	Daily reports re NDOH comment processing
3.		ICT Technical report re allegedly deleted emails
3.1.	22 April 2022	Technical Report re allegedly deleted emails
3.2.	3 May 2022	Technical Report re allegedly deleted emails
3.3.	15 March 2022	Annexure A - Amended Government Gazette no.46045 on the Draft Health Regulations
3.4.	15 March 2022	Annexure A - Amended Government Gazette no.46048 on the Draft Health Regulations
3.5.	21 April 2022	Annexure B - Recovering Deleted Emails Process Map
3.6.	Undated	Annexure C - Graph showing all emails received from published email accounts
3.7.	1 Mar 2022 - 21 April 2022	Internal email pairing log
3.8.	March 2022 – 20 April 2022	Annexure E – Audit log - Ms Funeka Bongweni's email account

3.9.	19 April 2022 – 21 April 2022	Annexure E - Audit log - Mr Daniel Nkuna's email account
3.10.	1 March 2022 – 21 April 2022	Annexure E - Audit log - Mr. Murdock Ramathuba's email account
3.11.	18 March 2022 – 20 April 2022	Annexure E - Audit log - Ms Tsakani Furumele's email account
4.		Summary of Comments
4.1.		Responses prepared to the comments received
4.2.		Substantive comments processing for regulations
RECORD OF COMMENTS		
1.	Email comments	
2.	Microsoft Online Platform Comments	
3.	Whatsapp comments	
4.	Hand-delivered comments	

Dated at **Cape Town** on this **24th** day of **May 2022**.

8  

PP

Wnanta

**ATTORNEY FOR RESPONDENT
STATE ATTORNEY PRETORIA**

Salu Building
316 Thabo Sehume Street
Cnr Thabo Sehume (Andries) and
Francis Baard (Schoeman) Streets
Private bag x91

PRETORIA,

0001

Ref:0491/2022/z22

Tel:(012) 309 1578

Fax:(012) 309 1649/50

086 507 7007

E-mail: nagonggo@justice.gov.za

Enq: Ms N Qongqo

TO: THE REGISTRAR
High Court
PRETORIA

AND TO: HURTER SPIES INCORPORATED

Attorneys for the Applicant (Case no.25226/22)

Second Floor, Block A

Loftus Park

416 Kirkness Street

Arcadia

PRETORIA

Tel: 012 941 9239

Fax: 012 644 1997

Email: eloff@hurterspies.co.za;

lohann@hurterspies.co.za;

9
Q N

ck@hurterspies.co.za;

REF: DJ ELOFF/MAT4730

AND TO: **REYNO DAWID DE BEER**

First & Second Applicants (Case no. 24917/22)

PRETORIA

Tel: 012 023 1976

Email: reyno@libertyfighters.co.za

debeerreyno@gmail.co.za;

AND TO: **KRIEK WASSENAAR & VENTER INC**

Attorneys for the Applicant (27477/22)

Third Floor, HB Forum Building

13 Stamvrug Street

Val-De-Grace

PRETORIA

Postnet Suite 11

Private Bag X025

Lynwood Ridge

Tel: 012 756 7566

Fax: 086 596 8799

Email: peter@kriekprok.co.za

REF: P.J. WASSENAAR/QB09052

AND TO: **SERFONTEIN VILJOEN & SWART**

Attorneys for the Applicant (Case no.25363/22)

165 Alexander Street

Brooklyn

PRETORIA

Tel: (012) 362 2556

Fax: 086 6872271 / 086 471 8090

Email: jd@svslaw.co.za / niekie@svslaw.co.za /

franlie@svslaw.co.za

Ref: MR SWART/MR CLAASSEN/fb/CWS0611

Your ref: DJ ELOFF/MAT4730

P.J. WASSENAAR/QB09052

MR SWART/MR CLAASSEN/fb/CWS0611

Our ref: WRTC0001

26 May 2022

TO: HURTER SPIES INCORPORATED
Attorneys for the Applicants (Case no.25226/22)
Email: eloff@hurterspies.co.za;
johann@hurterspies.co.za;
ck@hurterspies.co.za;

AND TO: LIBERTY FIGHTERS NETWORK
REYNO DAWID DE BEER
First & Second Applicants (Case no. 24917/22)
Email: reyno@libertyfighters.co.za
debeerreyno@gmail.co.za;

AND TO: KRIEK WASSENAAR & VENTER INC
Attorneys for the Applicant (Case no. 27477/22)
Email: peter@kriekprok.co.za

AND TO: SERFONTEIN VILJOEN & SWART
Attorneys for the Applicant (Case no.25363/22)
Email: id@svslaw.co.za
niekie@svslaw.co.za
franlie@svslaw.co.za

Dear Sirs

RE: THE RULE 53 RECORD IN CASE NOS. 25226/22, 24917/22, 25363/22 & 27477/22

It has come to our attention that due to an IT error the email comments folder in the Rule 53 record that was uploaded in respect of the above applications included privileged correspondence between our client and its counsel as well as irrelevant confidential emails that should not form part of the record.

Only the emails folder in the comments folder in the uploaded Rule 53 record has therefore been removed temporarily in order for us to assess which emails should be excluded before the folder can be re-uploaded. The folders containing the comment spreadsheets, daily reports re NDOH comment processing, ICT Technical Report re allegedly deleted emails and the summary of comments have not been removed.

We will revert to you by the end of today with our progress and an estimation of when we expect to be able to re-upload the email comments folder.

We trust that if you have already downloaded the email comments folder containing the privileged and irrelevant correspondence, you will ignore and delete those emails.

Yours sincerely



PP

Halton Cheadle

Bradley Conradie Halton Cheadle

On behalf of the State Attorney



"SA6"



**OFFICE OF THE DEPUTY JUDGE PRESIDENT A P LEDWABA
HIGH COURT OF SOUTH AFRICA, GAUTENG PROVINCIAL DIVISION, PRETORIA**

Gauteng High Court Building, Cnr. Madiba (Vermeulen) & Paul Kruger Str, Room 7.15, Seventh Floor
Tel. (012) 315 - 7571 - E-mail: AnNieuwoudt@judiciary.org.za

27 MAY 2022

TO: OFFICE OF THE STATE ATTORNEY PRETORIA
Tel: (012) 309 - 1578
Email: NaQonggo@justice.gov.za / NMhlubula@justice.gov.za
Your Ref: 1649/2022/Z22
Our Ref: 24917/2022/DJP LEDWABA/AN
25226/2022/DJP LEDWABA/AN
25363/2022/DJP LEDWABA/AN

TO: LIBERTY FIGHTERS NETWORK & REYNO DAWID DE BEER
Email: reyno@libertyfighters.co.za
Our Ref: 24917/2022/DJP LEDWABA/AN
25226/2022/DJP LEDWABA/AN
25363/2022/DJP LEDWABA/AN

TO: HURTER SPIES INCORPORATED
Email: eloff@hurterspies.co.za
johann@hurterspies.co.za
ck@hurterspies.co.za
Our Ref: 24917/2022/DJP LEDWABA/AN
25226/2022/DJP LEDWABA/AN
25363/2022/DJP LEDWABA/AN

TO: **SERFONTEIN VILJOEN & SWART**
Email: jd@svslaw.co.za
Our Ref: 24917/2022/DJP LEDWABA/AN
25226/2022/DJP LEDWABA/AN
25363/2022/DJP LEDWABA/AN

TO: **SHACKLETON & MOHAPI**
Email: proprietor@shackletonlaw.co.za
Our Ref: 24917/2022/DJP LEDWABA/AN
25226/2022/DJP LEDWABA/AN
25363/2022/DJP LEDWABA/AN

Dear Madam/Sir

**RE: LIBERTY FIGHTERS NETWORK & ANOTHER / MINISTER OF HEALTH
CASE NO. 24917/2022**

and

**AFRIFORUM & ANOTHER / MINISTER OF HEALTH
CASE NO. 25226/2022**

and

**SOLIDARITY TRADE UNION / MINISTER OF HEALTH
CASE NO. 25363/2022**

1. The above matter as well as the case-management meeting held 25 May 2022 refers.
2. The matter is hereby set down as a special motion on **25 to 27 JULY 2022**. You are directed to file and upload unto CaseLines and send via email (AnNieuwoudt@judiciary.org.za) to my office a notice of set down with a copy of this letter attached to it **within 7 (seven) days** after receipt hereof, failing which the allocated date(s) of hearing will lapse and the date may be allocated to other litigants who applied for a special motion date.
3. You are directed to serve and file by uploading unto CaseLines:



- 3.1 The supplementary affidavit by no later than **3 JUNE 2022**.
 - 3.2 The answering affidavit by no later than **13 JUNE 2022**.
 - 3.3 The replying affidavit by no later than **20 JUNE 2022**.
 - 3.4 Applicants heads of argument by no later than **24 JUNE 2022**.
 - 3.5 Respondents heads of argument by no later than **4 JULY 2022**.
4. The parties should file and upload unto CaseLines and send via email (AnNieuwoudt@judiciary.org.za) to my office a **Joint Practice Note and Chronology of events** by no later than **8 JULY 2022** containing the following:
- Names of the parties and the case number
 - Names and telephone numbers of all counsel in the Motion
 - Nature of the Motion
 - Issues to be determined in the application
 - Relief sought at the hearing by the party on whose behalf counsel is appearing
 - An estimate of the probable duration of the application
 - Number of pages in the application and whether or not all papers need to be read and if not, which portion need not be read
5. In terms of the paragraph 22 of the directive of the Judge President dated 14 April 2020, only matters that have been uploaded on CaseLines shall be heard. All non-compliant matters shall automatically be removed from the roll.
6. In terms of the paragraph 5 to 13 of the directive of the Judge Presidents' Consolidated Directive dated 18 September 2020, Legal Practitioners must create those cases on the CaseLines system and thereafter invite Parties and/or their Legal Representatives to each created case they are involved in.



7. The Judge to whom a matter is allocated shall, not later than five Court days before the week in which the matter is set down, notify the Parties that he or she is seized with the matter and all further communication about the matter shall be directly, by email only to the email address stipulated by that Judge.
8. Should it, for any reason(s), transpire that this matter will not proceed on the given date, you are directed to inform the office of the Deputy Judge President via email to AnNieuwoudt@judiciary.org.za immediately.
9. None availability of counsel representing any of the parties shall simply not be allowed as a reason for the matter not to proceed on the date of hearing arranged with my office.
10. **Should the above directive not be complied with, the matter may not be allocated to a Judge and the allocated date(s) will be utilized for other deserving cases.**

Regards

ELECTRONICALLY GENERATED (NOT SIGNED)

**A LEDWABA
DEPUTY JUDGE PRESIDENT
NORTH GAUTENG HIGH COURT
CASE NUMBERS: 24917/2022/DJP LEDWABA/AN
25226/2022/DJP LEDWABA/AN
25363/2022/DJP LEDWABA/AN**



Your ref: DJ ELOFF/MAT4730

P.J. WASSENAAR/QB09052

MR SWART/MR CLAASSEN/fb/CWS0611

Our ref: WRTC0001

30 May 2022

TO: HURTER SPIES INCORPORATED
Attorneys for the Applicants (Case no.25226/22)
Email: eloff@hurterspies.co.za;
johann@hurterspies.co.za;
ck@hurterspies.co.za;

AND TO: LIBERTY FIGHTERS NETWORK
REYNO DAWID DE BEER
First & Second Applicants (Case no. 24917/22)
Email: reyno@libertyfighters.co.za
debeerreyno@gmail.co.za;

AND TO: KRIEK WASSENAAR & VENTER INC
Attorneys for the Applicant (Case no. 27477/22)
Email: peter@kriekprok.co.za

AND TO: SERFONTEIN VILJOEN & SWART
Attorneys for the Applicant (Case no.25363/22)
Email: id@svslaw.co.za
niekie@svslaw.co.za
franlie@svslaw.co.za

Dear Sirs

RE: THE RULE 53 RECORD IN CASE NOS. 25226/22, 24917/22, 25363/22 & 27477/22

The above matter and our letter dated 26 May 2022 refer.

We note that no party has taken issue with the proposition that the original email folders referred to inadvertently disclosed privileged materials and those folders should therefore be deleted and not be referred to. We thank you for that appropriate and constructive approach and are proceeding on the basis that it is agreed.

We apologise for not writing to you earlier regarding the email folders, but unfortunately assessing the email comments folder consisting of more than 400 000 emails in excess of 20 gigabytes of data has been a laborious and time-consuming process even with additional technical resources having been allocated to do so.

We draw your attention to the following facts, which will in due course be confirmed by our client's answering affidavit:

- Given the number of comments received via email, our client needed to find a practical way to share the comments between our client's various internal stakeholders in a workable format. This was inter alia because of the time it would have taken to upload the more than 400 000 emails and for the Minister and senior officials to read each and every email.
- Our client therefore used both a computer script and a manual process to extract the comments from the email. This was a laborious process over weeks with teams of officials working overtime to read and process the comments received and to compile further spreadsheets for consideration by the Minister and our client's senior officials. The comments that were received were therefore summarized in the spreadsheets, with the more substantial comments being copied and pasted verbatim into the spreadsheets.
- It is those spreadsheets (rather than the original emails themselves) which were then shared with the Minister and our client's senior officials for purposes of drafting of the Regulations and deciding what Regulations to enact.
- The spreadsheets were therefore uploaded into folder G as part of the Rule 53 record provided last week and have remained available to your clients.

That discharged (and continues to discharge) our client's obligations under Rule 53, as this is what was considered by the Minister and our client's senior officials in the drafting and enactment of the Regulations.

However, in addition, when the Rule 53 record was being prepared, our client attempted to upload the original emails concerned to make them available to your clients via the Rule 53 process.

- In its attempts to do so, our client attempted to sift out the comment emails from the other emails various mailboxes to which the emails were sent by conducting IT searches based on certain key words and then transferring those sections from the various mailboxes into a folder which was then shared via SharePoint.
- We now know that this process was not successful because it produced the difficulty we referred to in our letter of 26 May 2022, whereby the key word searches resulted in large privileged and irrelevant portions of the various mailboxes also being included.
- Unfortunately, it is now clear that (a) this does not relate to only a handful of emails which can easily be identified and deleted; and (b) trying to sift out the true comment emails would require our client to work through each of the mailboxes and to manually transfer more than 400 000 email comments into a folder.
- This would take a great deal of time and, as indicated, this process was already undertaken over weeks by a whole team of our client's officials when the relevant emails were summarized into the spreadsheets as and when they were received.
- It is therefore not practical or possible to provide the emails themselves, particularly given the expedited process for the litigation. Nor, with the benefit of hindsight, is this required by Rule 53.

In the circumstances, we wish to advise you that:

- (a) We and our client are comfortable that the documents originally disclosed in the folder called "Main Record" in the seven sub-folders (A to G) suffices as the Rule 53 record, particularly given that the spreadsheets referred to above are all included in sub-folder G;
- (b) Attempting to re-upload the emails themselves would in any event not be practical or possible; and
- (c) In all the circumstances, does not intend to re-upload the email folders concerned.

Your clients are of course at liberty to advance any arguments that they wish in relation to this issue. Should your clients seek to compel the email comments being re-uploaded or contend that some adverse inference should be drawn from them being removed, our client will resist this and will explain its position as set out above on affidavit.

Lastly, we confirm that all of the applicants in the four applications have now been given access to the other matters on Caselines.

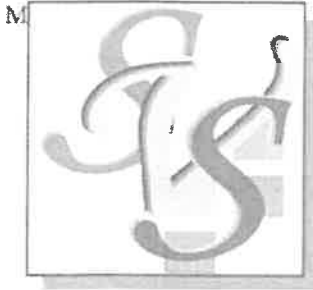
Yours sincerely


Liezl-Mari Mouton

Bradley Conradie Halton Cheadle
On behalf of the State Attorney



"SA8"



Serfontein Viljoen & Swart

Attorneys, Conveyancers & Notaries

165 Alexander Street, Brooklyn, Pretoria
PO Box 11512, Hatfield, 0028 • Docex 9 Brooklyn

E-mail: franlie@svslaw.co.za

Tel: (012) 362 2556 • Fax: (012) 362 2557

GPS Co-ordinates: S25 75'94.8" E028 24'05.2"

Deeds Lodgement No: 451

Also at: Bronkhorstspuit (013) 932 3034 & Cullinan / Rayton (012) 734 4894

Website: www.serfonteinviljoenandswart.co.za

Our ref : Mr. Claassen/Mr. Venter/fb/CS0611
Date : 31 May 2022

TO: THE STATE ATTORNEY – PRETORIA

BY EMAIL: NaQongqo@justice.gov.za

Dear Sir/Madam,

**IN RE: SOLIDARITY / MINISTER OF HEALTH & 3 OTHERS - CASE NUMBER:
25363/22**

1. We refer to the above matter and more specifically your correspondence dated 30 May 2022.
2. Firstly, there is no agreement in respect of the amendment to the record as alleged in your correspondence *supra*. We are currently considering our client's position in respect of the aforementioned and will revert soonest.

Partners: Stephanus Gabriël Serfontein Proc (SA) • Marthinus Jakobus Viljoen B Proc • Stephanus Petrus Swart Biur LLB • Lodewyk Serfontein BProc
Professional Assistant: Annette Johanna Louw LLB • Carel Nicolaas Venter LLB
Associates: Conrad Swart Bcom (Law) LLB Hdip (Insolvency)

3. Secondly, we note that the record is indexed, however not paginated which makes it difficult for finalise our supplementary affidavit. Kindly provide us with a paginated record aligned with the index.
4. Lastly, in light of the current dispute regarding the contents of the record, the late production of the amended record, and the fact that it has not been properly indexed or paginated, we request an indulgence to only file our client's supplementary affidavit by Wednesday 8 June 2022.
5. We await your urgent response.

Yours faithfully

SERFONTEIN, VILJOEN & SWART

Mr. JD Claassen

Email: jd@svslaw.co.za



CC: **HURTER SPIES INC**

EMAIL: eloff@hurterspies.co.za ; johann@hurterspies.co.za ; ck@hurterspies.co.za

CC: **LIBERTY FIGHTERS NETWORK**

EMAIL: reyno@libertyfighters.co.za ; debeerreyno@gmail.com

CC: **KRIEK WASSENAAR & VENTER INC**

EMAIL: peter@kriekprok.co.za

Partners: Stephanus Gabriël Serfontein Proc (SA) • Marthinus Jakobus Viljoen B Proc • Stephanus Petrus Swart Biur LLB • Lodewyk Serfontein BProc
Professional Assistant: Annette Johanna Louw LLB • Carel Nicolaas Venter LLB
Associates: Conrad Swart Bcom (Law) LLB Hdip (Insolvency)



"SA9"

From: Keagan Barkhuizen
To: eloff@hurterspies.co.za; johann@hurterspies.co.za; ck@hurterspies.co.za; franlie@svslaw.co.za; reyno@libertyfighters.co.za; peter@kriekprok.co.za; jd@svslaw.co.za; niekie@svslaw.co.za
Cc: NaQongqo@justice.gov.za; Halton Cheadle; Jeannette Vlok; Liezl-Mari Mouton
Subject: FW: THE RULE 53 RECORD IN CASE NOS. 25226/22, 24917/22, 25363/22 & 27477/22 (HIGH COURT, PRETORIA)
Date: Tuesday, 31 May 2022 12:36:47
Attachments: [image002.jpg](#)
[Rule 53 Record Index.pdf](#)
Importance: High

Dear Sirs

Our letter dated 30 May 2022 refers.

For the sake of clarity, please note that items 2 and 3 in the "Record of Comments" (Microsoft Online Platform Comments and Whatsapp comments) are a duplication of items 1.5 and 1.6 of Bundle G : Comments in the Main Record. We have proceeded to also remove these items 2 and 3 under Record of Comments from the Sharepoint. Item 4 of the Record of Comments (Hand-delivered comments) is then the only remaining item of the Record of Comments. We apologise for the duplication and oversight on our part.

A revised Index explaining the above is enclosed and will be uploaded on Caselines as well.

Kind Regards

Keagan Barkhuizen

Office +27 21 418 2196
Fax +27 21 418 2197
Email keagan@bchc.co.za
Web www.bchc.co.za

Confidentiality: This message is intended for the addressee only and contains privileged and confidential information. Should you not be the intended recipient kindly notify us immediately by return e-mail and delete the original message.
Please consider the environment before printing.

From: Keagan Barkhuizen
Sent: Monday, 30 May 2022 15:39
To: eloff@hurterspies.co.za; johann@hurterspies.co.za; ck@hurterspies.co.za; reyno@libertyfighters.co.za; debeerreyno@gmail.com; peter@kriekprok.co.za; jd@svslaw.co.za; niekie@svslaw.co.za; franlie@svslaw.co.za
Cc: NaQongqo@justice.gov.za; Halton Cheadle <halton@bchc.co.za>; Jeannette Vlok <jeannette@bchc.co.za>; Liezl-Mari Mouton <liezl@bchc.co.za>
Subject: THE RULE 53 RECORD IN CASE NOS. 25226/22, 24917/22, 25363/22 & 27477/22 (HIGH COURT, PRETORIA)
Importance: High

Dear Sirs

Please find the attached correspondence for your attention.

Kind Regards

Keagan Barkhuizen

Office +27 21 418 2196
Fax +27 21 418 2197
Email keagan@bchc.co.za
Web www.bchc.co.za

Confidentiality: This message is intended for the addressee only and contains privileged and confidential information. Should you not be the intended recipient kindly notify us immediately by return e-mail and delete the original message.
Please consider the environment before printing.

Q PV

"SA10"

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Nos.:25226/22

24917/22

25363/22

27477/22

In the application of:

AFRIFORUM NPC

First Applicant

DEAR SA NPC

Second Applicant

And

THE MINISTER OF HEALTH

First Respondent

THE DIRECTOR – GENERAL:

Second Respondent

NATIONAL DEPARTMENT OF HEALTH

And in the application of:

LIBERTY FIGHTERS NETWORK

First Applicant

REYNO DAWID DE BEER

Second Applicant

And

MINISTER OF HEALTH

Respondent

And in the application of:

SOLIDARITY TRADE UNION

Applicant

And

MINISTER OF HEALTH

First Respondent

NATIONAL HEALTH COUNCIL

Second Respondent

**DIRECTOR-GENERAL,
DEPARTMENT OF HEALTH**

Third Respondent

NATIONAL DEPARTMENT OF HEALTH

Fourth Respondent

And in the application of:

SAKELIGA NPC

Applicant

And

MINISTER OF HEALTH

First Respondent

**DIRECTOR GENERAL: DEPARTMENT OF
HEALTH**

Second Respondent

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

Third Respondent

**THE PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA**

Fourth Respondent

INDEX TO RULE 53 RECORD

Item	Date	Description
BUNDLE A: MAC ADVISORIES		
1.	15 October 2021	MAC Advisory Screening at Borders and Ports of Entry
2.	24 November 2021	MAC Advisory Background document on COVID-19 and Mandatory Vaccinations

Item	Date	Description
3.	3 December 2021	MAC Advisory Response to New Variant
4.	8 February 2022	MAC Advisory Mitigating Covid-19 Going Forward Position Paper
5.	15 February 2022	MAC Advisory Revised Screening at Borders and Ports of Entry
6.	16 February 2022	MAC Advisory Restrictions on Gatherings
7.	25 April 2022	MAC Advisory Interwave Period
BUNDLE B: NICD DAILY UPDATES		
1.	1-31 December 2021	NICD Daily updates – December 2021
2.	1 – 31 January 2022	NICD Daily updates – January 2022
3.	1-28 February 2022	NICD Daily updates – February 2022
4.	1-31 March 2022	NICD Daily updates – March 2022
5.	1-30 April 2022	NICD Daily updates – April 2022
6.	1-3 May 2022	NICD Daily Updates – May 2022

Item	Date	Description
BUNDLE C: CAPRISA PRESENTATIONS		
1.	6 April 2022	Update on COVID-19 in South Africa
2.	13 April 2022	Update on COVID-19 in South Africa
3.	24 April 2022	Update on COVID-19 in South Africa
4.	1 May 2022	Update on COVID-19 in South Africa
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1.	21 February 2022	NHC Consultative Meeting
1.1.	21 February 2022	Minutes of NHC Meeting
1.2.	21 February 2022	Presentation re proposed amendments
2.	3 May 2022	Special NHC Consultative Meeting
2.1.	3 May 2022	Draft regulations tabled at 3 May 2022 NHC meeting
2.2.	3 May 2022	Minutes of NHC Meeting
BUNDLE E: REPORTS AND PRESENTATIONS MADE TO THE MINISTER		
1.	1 – 31 March 2022	Daily Minister's Reports
2.	1 – 31 March 2022	Minister's Report Presentations
3.	1 – 30 April 2022	Daily Minister's Reports

4.	1 – 30 April 2022	Minister's Report Presentations
5.	1 – 4 May 2022	Daily Minister's Reports
6.	1 – 4 May 2022	Minister's Report Presentations
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1.1.	2020	Amendment to South African Directions re ports of entry
1.2.	2009	Amendments to South African Health Professions Act Regulations re professions
1.3.	2005	WHO Advisory on International Health Regulations – Third Edition
1.4.	2009	WHO introduction on implementation of International Health Regulations
1.5.	2003	Supplementary Regulations to International Health Regulations Act re ports of entry
1.6.	2015	Indian Aircraft – Draft Rules
1.7.	2020	South African Development Community (SADC) Guidelines on Cross-Border Transport during Covid-19

1.8.	6 February 2020	EU Interim Advice re Points of Entry
1.9.	20 February 2020	EU Interim Advice re Points of Entry
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3.6.	Undated	Annexure C - Graph showing all emails received from published email accounts
3.7.	1 Mar 2022 - 21 April 2022	Internal email pairing log

3.8.	March 2022 – 20 April 2022	Annexure E – Audit log - Ms Funeka Bongweni's email account
3.9.	19 April 2022 – 21 April 2022	Annexure E - Audit log - Mr Daniel Nkuna's email account
3.10.	1 March 2022 – 21 April 2022	Annexure E - Audit log - Mr. Murdock Ramathuba's email account
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4.		Summary of Comments
4.1.		Responses prepared to the comments received
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RECORD OF COMMENTS		
1.	Email comments - Removed	
2.	Microsoft Online Platform Comments - Removed, duplication from Bundle G: Comments, 1.5	
3.	Whatsapp comments – Removed, duplication from Bundle G: Comments 1.6	
4.	Hand-delivered comments	

Dated at Cape Town on this 31st day of May 2022.

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Ref: MR SWART/MR CLAASSEN/fb/CWS0611

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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

"SA11"

Case Nos.:25226/22

24917/22

25363/22

27477/22

In the application of:

AFRIFORUM NPC

First Applicant

DEAR SA NPC

Second Applicant

And

THE MINISTER OF HEALTH

First Respondent

THE DIRECTOR – GENERAL:

Second Respondent

NATIONAL DEPARTMENT OF HEALTH

And in the application of:

LIBERTY FIGHTERS NETWORK

First Applicant

REYNO DAWID DE BEER

Second Applicant

And

MINISTER OF HEALTH

Respondent

And in the application of:

SOLIDARITY TRADE UNION

Applicant



And

MINISTER OF HEALTH

First Respondent

NATIONAL HEALTH COUNCIL

Second Respondent

1  

**DIRECTOR-GENERAL,
DEPARTMENT OF HEALTH**

Third Respondent

NATIONAL DEPARTMENT OF HEALTH

Fourth Respondent

And in the application of:

SAKELIGA NPC

Applicant

And

MINISTER OF HEALTH

First Respondent

**DIRECTOR GENERAL: DEPARTMENT OF
HEALTH**

Second Respondent

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

Third Respondent

**THE PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA**

Fourth Respondent

INDEX TO PRIVILEGED DOCUMENTS NOT INCLUDED IN RECORD

Item	Description
1.	All emails, comments, memorandums, recordings of meetings, transcripts and documents containing legal advice exchanged with the State Law Advisors.
2.	All emails, comments, memorandums, recordings of meetings, transcripts and documents containing legal advice exchanged with the office of the State Attorney.

Item	Description
3.	All emails, comments, memorandums, recordings of meetings, transcripts and documents containing legal advice exchanged with Adv Steven Budlender SC.
4.	All emails, comments, memorandums, recordings of meetings, transcripts and documents containing legal advice exchanged with Adv Hasina Cassim.

Dated at Cape Town on this 31st day of May 2022.

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NQ

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Ref: MR SWART/MR CLAASSEN/fb/CWS0611

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"SA12"

From: [Keagan Barkhuizen](mailto:Keagan_Barkhuizen@bchc.co.za)
To: eloff@hurterspies.co.za; johann@hurterspies.co.za; ck@hurterspies.co.za; franlie@svslaw.co.za; reyno@libertyfighters.co.za; peter@kriekprok.co.za; jd@svslaw.co.za; niekie@svslaw.co.za
Cc: NaOngqo@justice.gov.za; Halton Cheadle; Jeannette Vlok; Liezl-Mari Mouton
Subject: FW: THE RULE 53 RECORD IN CASE NOS. 25226/22, 24917/22, 25363/22 & 27477/22 (HIGH COURT, PRETORIA)
Date: Wednesday, 01 June 2022 07:32:56
Attachments: [image002.jpg](#)
Importance: High

Dear Sirs

We refer to the above matter.

In response to the repeated requests from the applicants in the Liberty Fighters Network matter, we have uploaded the Rule 53 record onto Caselines in that matter under section 020. All parties have access to the Caselines file for that matter.

We suggest that all parties use the pagination from that version of the Rule 53 record going forward. This will avoid the risk of multiple versions of the Rule 53 record. Insofar as is necessary, we tender to do identical uploads onto the other three Caselines files over the next couple of days.

We trust you find the above in order.

In order to avoid any suggestion of prejudice, we hereby indicate that we will not object to the applicants filing their supplementary affidavits on Wednesday 8 June 2022, rather than Friday 3 June, provided that it is understood that the timelines will then be consequentially adjusted as follows:

- Supplementary founding affidavit to be delivered by 8 June 2022;
- Answering affidavits to be delivered by 16 June 2022;
- Replying affidavits by 23 June 2022;
- Applicants' heads of argument to be delivered by 30 June 2022;
- Respondent's heads of argument to be delivered by 7 July 2022; and
- Practice notes to be delivered by 11 July 2022.

If we do not hear from you by 17h00 on Wednesday 1 June, we will assume that this revised timetable is in order and will write to the DJP recording that this is the case by agreement.

In so far as some of the applicants may have taken issue with our client's decision not to include the actual email comments in the record, our client stands by the contents of its letter of 30 May 2022 and reserves its right to defend its decision in the appropriate forum, should it become necessary to do so. We also reserve the right to deal with the contents of the applicants' letters in this regard, at the appropriate time, should the need arise.

Kind Regards

Keagan Barkhuizen

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Fax +27 21 418 2197
Email keagan@bchc.co.za
Web www.bchc.co.za

Confidentiality: This message is intended for the addressee only and contains privileged and confidential information. Should you not be the intended recipient kindly notify us immediately by return e-mail and delete the original message.
Please consider the environment before printing.

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"SA13"

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Nos.:25226/22

24917/22

25363/22

27477/22

In the application of:

AFRIFORUM NPC

First Applicant

DEAR SA NPC

Second Applicant

And

THE MINISTER OF HEALTH

First Respondent

THE DIRECTOR – GENERAL:

Second Respondent

NATIONAL DEPARTMENT OF HEALTH

And in the application of:

LIBERTY FIGHTERS NETWORK

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REYNO DAWID DE BEER

Second Applicant

And

MINISTER OF HEALTH

Respondent

And in the application of:

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Fourth Respondent

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SAKELIGA NPC

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**THE PRESIDENT OF THE REPUBLIC OF SOUTH
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Fourth Respondent

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Dated at Cape Town on this 2nd day of June 2022.


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