

BUSINESS FOR SA: GUIDANCE NOTE

2 APRIL 2020

1. INTRODUCTION

- 1.1 Since Minister Nkosazana Dlamini-Zuma declared a national state of disaster on 15 March 2020, Business for SA (**BSA**) and its constituents have been working with business enterprises and government to support interventions required to flatten the COVID-19 (**C-19**) curve. Following extensive feedback from stakeholders and engagements with government, BSA releases this Guidance Note to promote clarity and compliance with the regulations and directions promulgated to regulate the national campaign against the C-19 disaster (the **lockdown laws**).
- 1.2 The implementation of the lockdown laws in the first week of the lockdown has not been without teething problems, and a degree of uncertainty about aspects of the lockdown laws remains. BSA is engaging with government on an ongoing basis in an effort to enhance clarity and resolve problems. BSA will periodically issue further guidance notes as the situation unfolds.
- 1.3 This guidance note does not purport to constitute detailed legal advice, which businesses are encouraged to procure if they are in any doubt as to their rights and obligations in the state of disaster.

2. THE GENERAL POSITION FOR BUSINESSES

- 2.1 The primary effect of the lockdown is a general closure of all businesses, retail shops and shopping malls and a mandatory order that “[a]ll businesses and other entities shall cease operations”, with limited listed exceptions.¹ In essence, those exceptions involve the supply of essential goods and the provision of essential services.
- 2.2 All spaces for public gatherings, including parks, beaches, privately-owned venues and restaurants, churches, mosques and temples must remain closed for the duration of the lockdown. Only persons rendering security or maintenance services are allowed to attend those places. As it stands, therefore, conducting what may otherwise be classified as an “essential service”, such as the sale of food, out of these listed spaces remains prohibited.²
- 2.3 Any continuation of business outside of the listed exceptions, set out below, is an offence punishable by a fine or imprisonment for a period not exceeding six months, or both.³
- 2.4 In the public interest, we recommend strict compliance with the lockdown laws. Economic loss and the potential consequences thereof do not render any product or service “essential” as envisaged in the lockdown laws. Losses suffered by businesses as a result of the lockdown are being mitigated, and may to some extent be compensated for, through government relief programmes and other mechanisms already announced such as interest rate cuts, tax relief, access to the surplus of the Unemployment Insurance Fund and financial assistance from the Solidarity Fund.

¹ Regulation 11B(1)(b) of the amended regulations issued in terms of section 27(2) of the Disaster Management Act, 2002.

² Regulation 11B(4) read with Annexure D.

³ Regulation 11G.

3. EXCEPTIONS

Remote working

- 3.1 All businesses are authorised to continue operating remotely where staff can do so by electronic means from their ordinary places of residence (or where operations are provided from outside of South Africa, if applicable).⁴
- 3.2 The head of an institution (typically the CEO or his / her delegate) may issue permits to individuals to allow them to attend the institution's offices to provide critical maintenance services or implement payroll systems where this cannot be conducted remotely. The details required for these permits are set out below. Critical maintenance services include, for example, the running of machines crucial for a business's operations where such machines would not be able to be restarted after 21 days.

Essential services

- 3.3 The lockdown laws allow businesses and individuals performing essential services to continue to operate in the lockdown period strictly for the purposes of performing those essential services.⁵
- 3.4 The essential services are listed in part B of annexure B of the Lockdown Regulations⁶ as well as in the designated essential services list published under section 213 of the Labour Relations Act, 1995.⁷ The services may be divided into two broad categories:
- 3.4.1 those required for the C-19 response; and
- 3.4.2 those necessary for human and animal life.
- 3.5 With this context in mind, the Regulations provide, for example, for the continued operation of financial services "only when the operation of a place of business or entity is necessary to continue to perform those services" and the services are "necessary to maintain the functioning of a financial system as defined in section 1(1) of the Financial Sector Regulation Act (**FSRA**)".⁸ The FSRA defines a "financial system" as "the system of institutions and markets through which financial products, financial instruments and financial services are provided and traded, and includes the operation of a market infrastructure and a payment system." The financial services listed include banks, pension fund administrators, medical schemes administrators, outsourced administrators and the "insurance environment". While the latter two services are particularly broadly worded, they are qualified by the general requirement that the service must be "necessary to maintain the functioning of a financial system" and that the service *has to be* performed from the service's place of business or operation. Financial institutions should remain open to the extent that it is necessary in the public interest to do so, and only individuals actually required to be present in the office should be authorised as such.

⁴ Regulation 11B(1)(b).

⁵ Regulation 11B(1)(b).

⁶ Available [here](#) at page 8, with amendments set out [here](#) at page 5 and [here](#) at pages 11-12.

⁷ Available [here](#).

⁸ Paragraph 3.1(a) of part B of annexure B to the Regulations.

- 3.6 Retail stores, shopping malls, grocery stores and wholesale produce markets (including spaza shops) may remain open only for the purpose of selling “essential goods” (referred to below). Informal food traders are also permitted to trade if authorised to do so by a municipal authority.⁹ However, open-air food markets are required to be shut.
- 3.7 No non-essential items may be sold, even if sold together with essential items.¹⁰ If a store remains open, the person in control of that store must ensure that customers keep a distance of at least one square metre from each other “and that all directions in respect of hygienic conditions and the exposure of persons to [C-19] are adhered to.”¹¹ No such directions have yet been issued. As a result, hygiene measures remain in the discretion of the person in control of the store but must be reasonable in the circumstances. Reasonable measures include frequent disinfecting of surfaces, limits on the number of people permitted to be in the store and compulsory hand sanitising on entry to the store. It is not necessary or helpful for customers to be required to wear masks. The World Health Organisation does not recommend wearing masks unless you suspect or know that you have already contracted C-19 or are a health-care provider working with individuals with C-19.¹²
- 3.8 BSA has requested clarification from government regarding various aspects of the listed essential services, and has recommended further amendments to aspects of the lockdown laws in that regard. We will issue further guidance in the event of amendments clarifying these aspects being promulgated.

Essential goods

- 3.9 Essential goods are listed in part A of annexure B to the Regulations in five broad categories:
- 3.9.1 food, including animal food, ancillary products and food packaging,
 - 3.9.2 cleaning and hygiene products,
 - 3.9.3 medical equipment,
 - 3.9.4 fuel, including coal and gas, and
 - 3.9.5 basic goods, including airtime, electricity and cash withdrawals.
- 3.10 While the first four categories are on the whole sufficiently detailed, the category of “basic goods” is open to interpretation. In the context of the other listed essential goods and the examples of “airtime, electricity and cash withdrawals”, we consider this would extend only to products vital for human or animal life or health, including goods necessary to facilitate the C-19 response. For the time being, and until such time as the meaning of the term “basic goods” is clarified, businesses would be well advised to adopt an interpretation of the term that restricts its meaning to goods similar to those listed in part A of annexure B.

⁹ Paragraph 5 of part B of annexure B to the Regulations.

¹⁰ Regulation 11B(1)(c) (the second listed – two paragraphs are erroneously listed as item (c) in this regulation).

¹¹ Regulation 11B(1)(c) (the first listed).

¹² See <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/when-and-how-to-use-masks>.

4. TRANSPORT

- 4.1 The Minister of Transport issued directions on 26 March 2020¹³ which limit the hours in which public transport is allowed to operate to between 05.00 and 10.00, and again from 16.00 to 20.00, and then only for the purpose of rendering essential services, obtaining essential goods or services, seeking medical attention, funeral services and receiving social grants and pensions.¹⁴ The directions also restrict the number of individuals allowed in vehicles.
- 4.2 The restricted hours of operation apply only to public transport and do not extend to individuals travelling on transport organised by businesses. They also do not apply to the transport of essential goods and services.
- 4.3 The directions require the drivers of public transport and marshalls, if any, to wear protective masks. Commuters utilising the transport are generally not required to wear masks or any other protective equipment. The directions envisaged allowing minibus and midibus taxis to operate at 100% capacity provided that all passengers wear masks.¹⁵ However, the latest amendments to the Regulations permit a maximum capacity of 70%. The directions must be read to comply with the Regulations.
- 4.4 Pursuant to the latest amendments to the lockdown laws, movement between provinces, and between metropolitan and district areas, is permitted for essential workers travelling to and from work, and the transportation of cargo from ports of entry to their intended destination is permitted subject to the cargo being disinfected.
- 4.5 We understand that elements of the lockdown laws relating to transport in particular have been misunderstood by some enforcement officers. We have requested urgent intervention by the relevant ministers.

5. ENFORCEMENT

- 5.1 The Department of Trade and Industry has opened a portal for companies to register their provision of essential goods or services.¹⁶ The portal is managed by the Companies and Intellectual Properties Commission and is intended to give comfort to essential service providers. However, the certificates are not legally required. They do not necessarily permit businesses to continue operating unless they actually provide essential services or supply essential goods, and conversely the absence of a certificate does not prevent anyone providing an essential product or service.
- 5.2 Individuals providing essential services, including the production, transport or sale of essential goods, are required to carry with them a form completed by the head of their institution (or a person

¹³ Government Notice 412 in Government Gazette 43157 as amended, read with the amended Regulations of 2 April 2020.

¹⁴ The [Directions](#) (as [amended](#)) also provide for grace periods for picking up and dropping off passengers as follows:

“(a) Minibuses and Midibuses Public Transport is permitted to proceed to a pickup point an hour before the operating times, which is from 05h00 to 10h00 without loading passengers; and

(b) Minibuses and Midibuses Public Transport is permitted to proceed to drop off points an hour after the drop off time of 10h00 which would be 11h00.

(c) Minibuses and Midibuses Public Transport is permitted to proceed to a pick-up point without loading passengers at 15h00 in order to start picking up at 16h00 to 20h00 to finish dropping off passengers at 21h00.”

¹⁵ Defined as surgical masks or N95 respiratory masks.

¹⁶ Available [here](#).

designated by him or her) substantially similar to Annexure C to the Regulations. A suggested template letter for essential service employees is available at the end of this note.

- 5.3 Individuals providing essential services are not required to wear face masks or other protective equipment unless their profession specifically requires it; for example, certain medical practitioners. Enforcement officers may not restrict operation of businesses as a result of essential service providers or individuals obtaining essential services or products not wearing masks.
- 5.4 Essential service providers may be stopped and screened for C-19 by enforcement officers, and should carry their permit letters and identification documents on them at all time.
- 5.5 The amended Regulations specify sections for which penalties are prescribed for non-compliance. These include the continued opening of businesses not providing essential goods or services, the sale of non-essential items together with essential items, and entry through a closed port.
- 5.6 Please note that, while the initial Regulations included a broad exclusion of liability for loss or damage arising out of any *bona fide* action or omission by an enforcement officer, this has been deleted by amendment.
- 5.7 There is also no limitation of the rights of persons arrested in the course of the lockdown. No-one may be detained without trial and everyone has the right to a legal representative, and to appear before a magistrate within 48 hours.

DRAFT TO BE INSERTED ONTO OFFICIAL COMPANY LETTERHEAD

CONFIRMATION OF EMPLOYMENT IN ESSENTIAL BUSINESS

[STAMP WITH OFFICIAL STAMP OF COMPANY, IF YOU HAVE THIS]

THE PERSON IN POSSESSION OF THIS LETTER SHALL HAVE HER/HIS IDENTITY DOCUMENT / PASSPORT / DRIVER'S LICENSE IN HER/HIS POSSESSION AND SHALL PRESENT IT TO ANY LAW ENFORCEMENT OFFICER UPON REQUEST.

[INSERT NAME OF EMPLOYER] CONDUCTS BUSINESS IN THE [INSERT NATURE OF INDUSTRY]. THE COMPANY IS AN ESSENTIAL BUSINESS AS DESIGNATED BY THE GOVERNMENT AND IS REQUIRED TO CONTINUE OPERATIONS DURING THE NATIONAL LOCKDOWN PERIOD IN TERMS OF THE REGULATIONS IN THAT THE BUSINESS OPERATES AS AN ESSENTIAL SERVICE CATEGORISED AS:

[INSERT TYPE OF ESSENTIAL SERVICE UNDER THE REGULATIONS TO THE NATIONAL DISASTER MANAGEMENT ACT]

THE EMPLOYEE, WHOSE DETAILS ARE SET OUT BELOW, IS EMPLOYED BY THE COMPANY, FULFILLS AN ESSENTIAL FUNCTION, AND IS REQUIRED TO TRAVEL TO AND FROM WORK DURING THE LOCK-DOWN PERIOD.

EMPLOYEE'S DETAILS:

FULL NAMES AND SURNAME: _____

ID NUMBER: _____

EMPLOYEE NUMBER: _____

WORK ADDRESS: _____

POSITION: _____

CONTACT DETAILS:

CELL NUMBER	TELEPHONE NUMBER (W)	TELEPHONE NUMBER (H)	EMAIL ADDRESS

COMPANY'S DETAILS:

NAME: _____

REGISTRATION NUMBER: _____

PHYSICAL ADDRESS _____

FULL NAMES AND SURNAME OF CONTACT PERSON: _____

CONTACT NUMBERS: (W) _____; (H) _____;
(M) _____

EMAIL ADDRESS: _____

THE COMPANY CONFIRMS THAT THE INFORMATION SET OUT ABOVE IS TRUE AND CORRECT.

FOR: [NAME OF COMPANY] DATE

NAME:

POSITION: HEAD OF THE INSTITUTION