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FREEDOM OF TRADE, OCCUPATION AND PROFESSION IN TIMES OF THE COVID-19 PANDEMIC IN SOUTH AFRICA

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I. Introduction

Coronavirus of 2019 (hereinafter Covid-19) is the designation that the World Health Organisation (hereinafter the WHO) assigned to the disease caused by the novel coronavirus SARS-CoV2. This virus, which is said to have originated in Wuhan (China) towards the latter part of 2019, has affected every facet of life throughout the world. The WHO declared the outbreak of Covid-19 a global pandemic on the 11th of March 2020. The first case of Covid-19 was confirmed in South Africa by the National Institute for Communicable Diseases on 5 March 2020. To curb the spread of the virus, South Africa, similarly to many other countries across the globe, declared a national state of disaster on 15 March 2020 and a national lockdown that commenced on 26 March 2020.

These measures were introduced after the total number of confirmed cases of Covid 19 increased from 61 to 402 cases in eight days. The national lockdown entailed, among others, that individuals would not leave their places of residence (except under certain limited circumstances such as seeking medical attention, purchasing food, medicine, and other similar supplies), interprovincial travel was banned, except in certain limited instances such as travel to attend a funeral; and the sale of alcohol and tobacco products was prohibited. The national lockdown, which is still in place albeit in a more relaxed form, was introduced by the *Disaster Management Act 57 of 2002*. These regulations limit some basic rights and freedoms (section 27(2) of the *Disaster Management Act*). It was inevitable that the restrictions imposed on persons (both natural and juristic) would result in some hardship.

To mitigate the potential negative impact of the restrictions, the government introduced a suite of Covid-19 relief measures. These are part of the R500 billion Covid-19 fiscal package comprising of the following interventions:

- Measures of income support: These measures consist of temporary tax relief which includes tax deferrals and postponements to the South African Revenue Service (e.g., employee tax).
- Credit guarantee scheme: This scheme provides private banks loans, guaranteed by the government, to qualifying businesses.
- Wage protection: This intervention consists of temporary employee/employer relief scheme benefit, funded by the unemployment insurance surplus funds, to employees and employers who have closed operations or part thereof due to Covid-19 (see *COVID-19 Temporary Relief Scheme, 2020* (Published under GenN 215 in GG 43161 of 26 March 2020 as amended by GenN 240 in GG 43216 of 8 April 2020, GN R486 in GG 43265 of 4 May 2020, GN R541 in GG 43330 of 15 May 2020, GN R595 in GG 43353 of 26 May 2020, GN R878 in GG 43611 of 13 August 2020, GN R968 in GG 43693 of 7 September 2020 and as corrected by GN R486 in GG 43265 of 4 May 2020).
- Main or direct budget funding: This measure comprises budget allocations to national, provincial, and local governments.

This chapter evaluates the freedom of trade, occupation, and profession in South Africa from a Covid-19 pandemic context. It does that by focusing on the pertinent provisions and rights contained in the *Constitution of the Republic of South Africa, 1996* (the Constitution) and relevant international and regional human rights instruments. It proceeds by discussing the interlinkage between (the freedom of trade, occupation, and profession and other pertinent fundamental) rights, limitation, enforcement, and interpretation of rights. This is followed by some final observations.

II. Pertinent Rights

1. National Perspective

During the apartheid period, South Africa was characterised by legislated unfair discriminatory policies and practices. Within the context of the theme of this chapter, these policies and practices comprised of job reservation (e.g., the *Bantu Building Workers Act 27 of 1951* made it illegal for Black Africans to perform skilled work in urban areas except in sections designated for black occupation), restricted movement of persons (e.g., *Group Areas Act 36 of 1966*, *Bantu Authorities Act of 1970* and *Native Labour (Settlement of Disputes) Act 26 of 1970*) and unequal access to trade, profession and occupation (see, for further reading, Hepple, 1963 and Ogura, 1996). This unequal treatment of persons according to, among others, race restricted access to certain trades, occupations and professions as well as the movement of persons. Thus, it is hardly surprising that the *Freedom Charter* (adopted at the Congress of the People at

Kliptown, Johannesburg, on 25 and 26 June 1955) provided that ‘[a]ll people shall have equal right to trade where they choose, to manufacture and to enter all trades, crafts and professions’ and ‘[a]ll shall be free to travel without restriction from countryside to town, from province to province, and from South Africa to abroad; pass laws, permits and all other laws restricting these freedoms shall be abolished.’

Democratic South Africa moved from a system of parliamentary sovereignty to constitutional supremacy (see, for further reading on the concept of constitutional supremacy, Limbach, 2001; Rosenberg, 1969 and Ver Loren van Themaat, 1954). The supremacy of the South African Constitution implies that the Constitution is ‘supreme law of the Republic [of South Africa]; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled’ (section 2 of the Constitution). South Africa is based on values such as ‘human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the constitution and the rule of law’ (section 1(a)-(c) of the Constitution). The post-apartheid Constitution has a Bill of Rights (Chapter 2 of the Constitution) that provides every citizen with the right to choose their trade, occupation or profession freely (section 22 of the Constitution). This right, as discussed in paragraph 4 below, is not set in concrete. It can be limited under the provisions of the Constitution (section 7(3) of the Constitution). The freedom of trade, occupation and profession could, even before the advent of Covid-19, be limited by, for instance, restraint of trade clauses and law and rules that regulates certain trades, professions and occupations (see, for example, Henkin, 1979).

The inclusion of section 22 in the Constitution is aimed at correcting the injustices of the past. As clearly articulated by the court in *JR 1013 Investments CC v The Minister of Safety and Security* 1997 JDR 0485 (E) (at 9-10):

‘We have a history of repression in the choice of a trade, occupation or profession. This resulted in a disadvantage to a large number of South Africans in earning their daily bread. In the pre-constitution era the implementation of the policies of apartheid directly and indirectly impacted upon the free choice of a trade, occupation or profession: unequal education, the prevention of free movement of people throughout the country, restrictions upon where and for how long they could reside in particular areas, the practice of making available structures to develop skills and training in the employment sphere to selected sections of the population only, and the statutory reservation of jobs for members of particular races, are examples of past unfairness which caused hardship. The result was that all citizens of the country did not have a free choice of trade, occupation and profession. Section 22 is designed to prevent a perpetuation of this state of affairs. Any lawful pursuit which qualifies as a trade, occupation or profession is now open to all in the sense that all are free to choose it. This is, of course, not to say that all may practise it. For that, any number of other considerations become relevant; not least, natural talent and ability, persistence and hard work, the acquisition of the necessary qualifications, skill, training or expertise, and satisfaction of the

requirements prescribed by any law regulating a particular trade, occupation or profession.’

The Constitutional Court, in *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC), explained the scope of section 22 as follows:

‘In broad terms this section has to be understood as both repudiating past exclusionary practices and affirming the entitlements appropriate for our new open and democratic society. Thus in the light of our history of job reservation, restrictions on employment imposed by the pass laws and the exclusion of women from many occupations, to mention just a few of the arbitrary laws and practices used to maintain privilege, it is understandable why this aspect of economic activity was singled out for constitutional protection. Yet the significance of the section goes further’ (at paragraph 58).

The rights contained in the Bill of Rights, including the freedom of trade, profession and occupation, bind both natural and juristic persons (section 8(2) of the Constitution). The State must respect, promote and fulfil the freedom of trade, profession and occupation (section 7(2) of the Constitution). It is important to note that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state (section 8(1) of the Constitution. See Bhana, 2013). This implies that all the Covid-19 rules and regulations and all other steps were taken by the executive and organs of state to deal with the pandemic are bound by the Bill of Rights. Therefore, they must be in line with the provisions of the Constitution. Otherwise, such rules and regulations, as well as the actions by the executive and the organs of state, maybe declared unconstitutional.

2. International Framework: Selected Instruments

After the end of the apartheid era, South Africa was readmitted to international organisations such as the United Nations (the UN), Africam Union (the AU) and the Southern African Development Community (the SADC). It is therefore bound by the hard and soft law of these organisations (see paragraph 6 below). The UN’s *International Covenant on Economic, Social and Cultural Rights* (adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force on 3 January 1976, following article 27) requires ‘the States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps to safeguard this right’ (article 6(1)).

The AU’s *African [Banjul] Charter on Human and Peoples’ Rights* (adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on 21 October 1986) provides that:

‘Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law. Every individual shall have the right to leave any country including his own and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality’ (article 12(1)-(2)).

It provides further that ‘every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work’ (article 15).

The SADC’s *Charter of Fundamental Social Rights in SADC* (2003) makes provision for employment and remuneration. It directs the Member States, including South Africa, to create an enabling environment so that every individual shall be free to choose and engage in an occupation or that person’s choice (article 14(a)).

III. Interlinkage between Rights

1. Equality

Every person in South Africa is equal before the law and has the right to equal protection and benefit of the law (section 9(1) of the Constitution). Equality in the context of the Constitution includes the full and equal enjoyment of all rights and freedoms. In its quest to address the Covid-19 challenges, the state may not unfairly discriminate directly or indirectly against anyone in South Africa based on any one or more grounds which include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth (section 9(2) of the Constitution).

2. Human Dignity

All persons in South Africa have “inherent dignity and the right to have their dignity respected and protected” (section 10 of the Constitution). Human dignity is interconnected with section 22 of the Constitution (Rautenbach, 2005: 855) for the following reasons that have been articulated by the Constitutional Court as follows:

‘Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One’s work is part of one’s identity and is constitutive of one’s dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole’ (*Affordable Medicines Trust and Others v Minister of Health and Another* at paragraph 59).

3. Life

The Constitution makes provision for every person the right to life (section 11 of the Constitution). Many persons provide for themselves and their families to stay by selling their labour potential and or trading in South Africa. Accordingly, there is a clear connection between the right to life and the freedom of trade, occupation and profession. The limitation of the aforementioned freedom due to the Covid-19 restriction does impact negatively of the right to life. It is therefore sensible that the state made provision for the social security measures (see, for example, paragraph 1 above) to support those who could not work or trade due to the lockdown. It should be mentioned that the Constitution makes provision for the right to health care, food, water and social security (section 27 of the Constitution). This right is subject to the availability of resources (section 27(2) of the Constitution). The state is required by the Constitution to take reasonable legislative and other measures to achieve the progressive realisation of the aforementioned rights (section 27(2) of the Constitution).

4. Freedom of Movement and Residence

Freedom of movement and residence is recognised as a fundamental right in the Bill of Rights of the Constitution (section 21 of the Constitution). The Constitution provides that every person with the right to freedom of movement (section 21(1) of the Constitution); right to leave the country (section 21(2) of the Constitution); right to enter, to remain in and to reside anywhere, in the country (section 21(3) of the Constitution) and the right to passport (section 21(4) of the Constitution). These rights are connected with the freedom of trade, occupation and profession for the reason that freedom of movement to and from work is a daily occurrence for many workers. In some instances, this movement is inter-provincial and across borders. Thus, the restrictions on movement limited the freedom of trade, occupation and profession of the affected workers in South Africa and neighbouring countries. Such workers include informal cross-border traders (see African Union, 2020) and migrant workers. Some migrant workers travelled to their countries of origin to escaped the looming lockdown when it was first introduced. As a result, many struggled to travel back to South Africa due to border closures. It must be pointed out that there are migrant workers who chose to remain in South Africa. The reasons for such a decision have been summarised as follows:

‘More than four-fifths (82%) of migrant respondents considered South Africa as their home, while 11% felt that the COVID-19 pandemic was global and that they would still be at risk, regardless of whether they moved. Five per cent of migrant respondents indicated that they were concerned that if they left South Africa they would be unable to re-enter South Africa, when they wanted to (Statistics South Africa, 2020: 7).

IV. Limitation of Rights

1. Limitation Clause

The freedom of trade, occupation or profession is, just like other rights enshrined in the Bill of Rights, is not absolute. It can be limited by section 36 of the Constitution, also known as the limitation clause (see, for further reading, Rautenbach, 2006: 857-861). This restriction can only be effected by ‘the law of general application to the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’ (section 36(1) of the Constitution). In limiting the freedom of trade, occupation or profession regard must be had to all the relevant factors which should include, ‘the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose’ (section 36(1)(a)-(e) of the Constitution).

2. Selected pertinent Covid-19 Restrictions

To curb the spread of the virus and, in the process, save lives (see, for example, Pittaway, 2020) several restrictions were imposed through a series of regulations. Several of the restrictions have a direct and or indirect impact on the freedom of trade, occupation or profession. These limitations include restrictions on the sale of liquor and tobacco products, prohibition of cross-border and interprovincial movement which negatively affected cross-border trade (see *Disaster Management Act: Directions: Once-off movement of persons and transportation of goods during Alert Level 4 Coronavirus COVID-19, 14 May 2020*) and other industries such as hospitality and tourism, and hours of permissible trade restricted due to curfews. In some respects, the freedom of trade, occupation or profession was limited in the sense that it could only be enjoyed with a relevant permit. For example, during the so-called hard lockdown when the movement was severely curtailed, the informal traders could only trade with a special written permit issued by the municipal authorities (see, for example, *Disaster Management Act: Directions to assist micro and small businesses trading during Coronavirus COVID-19 lockdown, 12 May 2020*).

V. Enforcement of Rights

1. Access to Courts

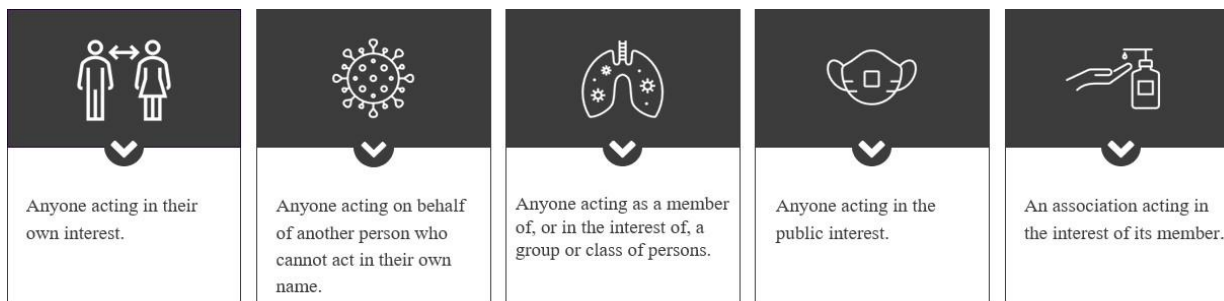
South Africa is founded on, among other values, the rule of law (section 1(c) of the Constitution. See *Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) paragraph 85 and *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC)). This value has been described by De Waal *et al* (2001) as ‘the value-neutral principle of

legality.’ Accordingly, every person in the country has ‘the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum’ (section 34 of the Constitution). The South African judicial system consists of the following courts: the Constitutional Court, the Supreme Court of Appeal, the High Court of South Africa, the Magistrates’ Court, and any other court established in terms of an Act Parliament (section 166 of the Constitution). The disputes that may need to be resolved include those arising from the law, rules and regulations aimed at dealing with the Covid-19 pandemic. It was refreshing to read that the Chief Justice of the Republic of South Africa, Mooeng Mogoeng, encourage members of the public to approach the courts of law to challenge the government decision in respect of the lockdown that infringes on the fundamental rights (The Citizen, 2020).

2. *Enforceability of the Freedom of Trade, Occupation and Profession*

The freedom of trade, occupation and profession is, just like other rights enshrined in the Bill of Rights, enforceable (section 38 of the Constitution). The following persons have the right to approach a competent court and allege that the freedom of trade, occupation and profession has been infringed (section 38(a)-(e) of the Constitution) by the Covid-19 rules and regulations:

Figure 1: Persons who may approach a competent court



3. *Pertinent Constitutional Institutions*

Apart from courts of law, persons who are of a view that their freedom of trade, occupation and profession have been infringed, may approach constitutional institutions such as the Public Protector, and the South African Human Rights Commission. The Public Protector has the power to:

‘...investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial action’ (section 182(1)(a)-(c) of the Constitution).

Furthermore, the Public Protector has additional powers and functions as stipulated by national legislation (section 182(2) of the Constitution). Distinct from the Public Protector, the South African Human Rights Commission has the power to:

‘promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in the Republic [of South Africa]’ (section 184(1)(a)-(c) of the Constitution).

4. Remedies

The courts can issue the following remedies when adjudication a matter concerning an alleged infringement of the freedom of trade, occupation or profession due to Covid-19 regulations:

- any order that is just and equitable,
- grant ‘appropriate relief’,
- orders of invalidity, or
- declaratory order (section 172 of the Constitution).

VI. Interpretation of Rights

When interpreting the freedom of trade, occupation and profession, the Constitution requires ‘a court, tribunal or forum to promote the values that underlie an open and democratic society based on human dignity, equality and freedom’ (section 39(1)(a) of the Constitution). In addition, it requires a court, tribunal or forum to consider international law (section 39(1)(b) of the Constitution). International law, in this context, includes binding and non-binding laws. A court is obliged to, when interpreting any Covid-19 (related) legislation, prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law (section 233 of the Constitution). In addition, customary international law is deemed to be law in South Africa unless it is inconsistent with the Constitutional or and Act of Parliament (section 232 of the Constitution). Furthermore, they have the discretion to consider foreign law (section 39(1)(c) of the Constitution).

VII. Concluding Summary

As shown in this chapter, the rights contained in the Bill of Rights are interconnected. Accordingly, the freedom of trade, occupation or profession is interlinked with other fundamental rights. These rights which must be taken into account, particularly from the Covid-19 perspective, include the right to equality, human dignity, life and freedom of movement and residence. However, these rights are not absolute. They can be limited under the Constitution. Furthermore, these rights are enforceable. This bodes well

with the rule of law principle. Therefore, the Covid-19 rules and regulations do not operate in a legal vacuum. This is essential given the negative impact of the Covid-19 pandemic and measures introduced to eliminate it on both natural and juristic persons.

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