

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

CASE NO: /2020

In the matter between: -

**FAIR-TRADE INDEPENDENT
TOBACCO ASSOCIATION**

Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

1st Respondent

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

2nd Respondent

NOTICE OF MOTION

KINDLY TAKE NOTICE that the above-named Applicant, the **FAIR-TRADE INDEPENDENT TOBACCO ASSOCIATION** intends to make application:

A. On **Tuesday 12 May 2020 at 10h00** or so soon thereafter as the matter may be called for an order(s) in the following terms:

1. That this part A of this application be enrolled, treated and determined as an urgent application in terms of uniform rule 6(12) of the uniform rules of this Honourable Court and that the usual forms and time limits and requirements for service as provided for in terms of such uniform rules of court be dispensed with and/or any that non-compliance with such rules be condoned and/or waived.

2. In respect of regulations published in the Government Gazette No. 43258 on 29 April 2020, declaring the following:

2.1. tobacco and cigarettes fall into the category of agro-processing in Annexure C and accordingly constitute permitted goods in terms of section 22, the export whereof is permitted,

2.2. regulation section 28 (read with Table 1, part C, item 9) permits the resumption of all manufacturing of tobacco and cigarettes subject to certain conditions.

3. A *rule nisi* be issued calling upon the First and Second Respondents to show cause, if any, on **26 May 2020** why an order should not be made in terms of part B below.

4. that the costs of part A be reserved for determination with the relief in part B.

5. Further and/or alternative relief.

6. by not later than 19 May 2020, the Respondents are to make available to the Applicant, the following information and records:

6.1 the minutes of the meeting of the National Command Council ("NCC") on COVID-19 wherein a vote was taken in respect of the promulgation of the Regulations published in Government Gazette No. 43148 on 25 March

6.2 . the minutes of the meeting of the NCC on COVID-19 giving rise to the announcement by the First Respondent to South Africa, in a live address on Thursday 23 April 2020, that the sale of cigarettes will be permitted under level 4 regulations;

6.3. the minutes of the meeting of the NCC on COVID-19 wherein a vote was taken in respect of the promulgation of regulation 27;

6.4. the record of decision referred to in part B para 2.2 below together with such reasons as they are in law entitled or may desire to make.

TAKE NOTICE FURTHER that the affidavit of **SINENHLANHLA NCHABELENG MNGUNI** annexed hereto, will be used in support of this application.

TAKE NOTICE FURTHER that if the Respondents intend opposing this application, they are required to:

(a) notify the Applicant's attorneys in writing of its intention to do so before **5pm Wednesday 6 May 2020**; and

(b) file their answering affidavit/s, if any, on or before **5pm Friday 8 May 2020**.

The Applicant will then file its replying affidavit by **5pm Sunday 10 May 2020**.

KINDLY TAKE NOTICE FURTHER that the Applicant has appointed **MORGAN LAW INC.** as its legal representatives, and that service of all legal process will be accepted by way of email.

B. on **26 May 2020 at 10h00** or so soon thereafter as the matter may be heard for an order in the following terms:

1. That part B of this application be enrolled, treated and determined as an urgent application in terms of uniform rule 6(12) of the uniform rules of this Honourable Court and that the usual forms and time limits and requirements for service as provided for in terms of such uniform rules of court be dispensed with and/or any that non-compliance with such rules be condoned and/or waived.
2. An order declaring:
 - 2.1 that cigarettes and tobacco products are "essential goods" in Annexure B (regulation 11A) of the Regulations published in Government Gazette No. 43148 on 25 March 2020; and
 - 2.2 section 27 of the Regulations published in Government Gazette No. 43258 on 29 April 2020 is invalid alternatively is reviewed and set aside;
 - 2.3 that the sale of tobacco products and cigarettes is lawful.

3. The First and Second Respondents are ordered to pay the costs of this application jointly and severally.
4. Such further and/or alternate relief as the above court may deem fit.

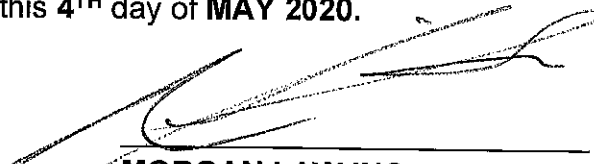
TAKE NOTICE FURTHER that the affidavits of **SINENHLANHLA NCHABELENG MNGUNI, SHEETHAL BEHARI, EBRAHIM AHMED ADAMJEE AND BEVERLEY-ANNE MACLEAN** annexed hereto, will be used in support of this application.

TAKE NOTICE FURTHER that if the Respondents intend on opposing this part B they shall:

- (a) By not later than 17h00 on 8 May 2020 deliver notice to the Applicant that they intend to oppose part B; and
- (b) By not later than 17h00 on 12 May 2020 deliver their answering affidavits.

KINDLY TAKE NOTICE FURTHER that the applicant has appointed **MORGAN LAW INC.** as its legal representatives, and that an agreement has been reached that service of all process be accepted at the e-mail address set out below.

DATED at **JOHANNESBURG** on this **4TH** day of **MAY 2020**.



MORGAN LAW INC.

Applicant's attorneys

Corner Oxford and Kirkby Roads

Bedfordview

2008

C/O Hamel Attorneys

329 Braam Pretorius Street

Magalieskruin Pretoria

Tel: 010 020 68 38

E-mail: ryan@morganlaw.co.za

Ref: R Merrifield/ag/FT001

TO:

**THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
PRETORIA**

AND TO:

THE OFFICE OF THE STATE ATTORNEY

First and Second Respondents' Attorney (Pretoria)

Salu Building

Ground Floor

316 Thabo Sehume and Francois Baard Street

Pretoria

Tel: 012 309 1507

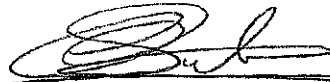
Email: **AWasserman@justice.gov.za**; and **aristabester@gmail.com**

CERTIFICATE

I, the undersigned,

ADV. ARNOLD SUBEL SC

certify that this matter is of such urgency that it must be heard during the period of level 4 lockdown, or during which restrictions are in place relating to the free movement of persons owing to measures to combat the covid-19 infection pandemic.

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Advocate A Subel SC

IN THE HIGH COURT OF SOUTH AFRICA
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**FAIR-TRADE INDEPENDENT
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Applicant

and

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1st Respondent

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

2nd Respondent

FOUNDING AFFIDAVIT

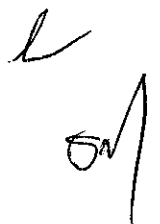
I, the undersigned,

SINENHLANHLA NCHABELENG MNGUNI

do hereby make oath and state as follows:

THE DEPONENT

1. I am an adult male attorney of this Honourable Court, and the Chairperson of the Fair-Trade Independent Tobacco Association, which is the Applicant herein. I am duly authorised to make this affidavit, which the Applicant's Directors have authorised me to bring on its behalf. In confirmation of these averments, I annex as **SM1** a resolution to this effect.
2. The averments made in this affidavit are to the best of my knowledge true and correct and, save where I say so or the context indicates otherwise, lie within my personal knowledge.



3. Due to the nature of this application it is necessary to place some, albeit limited reliance on hearsay evidence. I submit that this is justified in this case and that the sources referred to are reliable. The circumstances are such that this is unavoidable, and this Honourable Court is requested to permit its introduction.

THE PARTIES

4. The Applicant is the **Fair-Trade Independent Tobacco Association ("FITA")**, a voluntary association, with its principal place of business at 28 The Avenue, Orchards, Johannesburg, 2192 comprising 8 (EIGHT) South African tobacco manufacturers which have been actively trading for a number of years.
5. The First Respondent is the **President of the Republic of South Africa**, cited herein in his nominal capacity as the head of the Government of the Republic of South Africa.
6. The Second Respondent is the **Minister of Cooperative Governance and Traditional Affairs**, cited herein in a nominal capacity. The Second Respondent declared the national state of disaster in terms of the Disaster Management Act 57 of 2002 ("the Act"); purportedly promulgated regulations in terms of the Act that are the subject-matter of this application and, in terms of section 3 of the Act, is designated to administer the Act.

JURISDICTION

7. This Court has the requisite jurisdiction to adjudicate, determine and pronounce upon the relief sought in this application by virtue of the fact that the seat of government, and the headquarters of both respondents, are located in Pretoria.

INTRODUCTION AND OVERVIEW

8. In this application, FITA seeks *inter alia*:
 - 8.1. for the First and Second Respondents to account to it, and all South Africans by providing the requisite information and records



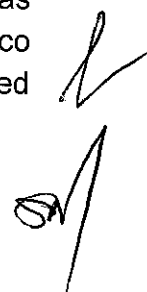
- underpinning the decision/s to prohibit the sale of cigarettes and tobacco; and
- 8.2. to uplift government's prohibition on the sale of cigarettes and tobacco products by striking down the relevant provision/s of the regulations, alternatively reviewing and setting aside:
- 8.2.1. the decision/s culminating in the prohibition on tobacco and cigarettes; and
- 8.2.2. the requisite provisions of regulations imposing, alternatively purporting to impose, a prohibition of cigarettes and tobacco products; as well as
- 8.3. Declaratory relief, in the following terms:
- 8.3.1. in terms of Section 22 of the level 4 regulations (more fully defined hereinunder), exports of permitted goods is allowed, alternatively the export of tobacco products and cigarettes is not prohibited under the regulations;
- 8.3.2. processed tobacco and cigarettes fall in the category of agro processing, listed in Annexure C of the stage 4 regulations; and
- 8.3.3. the provisions of regulation 28, read with Table 1, part C, item 9 to the stage 4 regulations, permit the resumption of all manufacturing subject to certain conditions.
9. The relief is sought in sequence and divided into parts A and B respectively. Both Parts A and B are sought on an urgent basis in terms of Uniform Rule 6(12).
10. In part A, the Applicant seeks the declaratory relief referred to in 8.3 above and the issuing of a *rule nisi* that the Respondents are to show cause, if any, on 26 May 2020, as to what informed their decisions:
- 10.1. to exclude the categorization of cigarettes and tobacco products as "essential goods" in the Annexure B (regulation 11A) of the regulations published in Government Gazette No. 43148 on 25 March 2020 (for ease of reference referred to as the "level 5 regulations").
- 10.2. to expressly include section 27 in the regulations published in Government Gazette No. 43258 (for ease of reference, these



regulations are referred to as the "level 4 regulations" and section 27 thereof is referred to as "regulation 27")'

- 10.3. and why an order should not be made declaring the prohibition in regulation 27 to be *ultra vires* and/or invalid and further that any prohibition on the sale of tobacco products and cigarettes under regulations promulgated under the Act is invalid.
11. In particular, but not being exhaustive of the information and records required, FITA seeks the following:
 - 11.1. the minutes of the meeting of the National Command Council ("NCC") on COVID-19 wherein a vote was taken in respect of the promulgation of the level 5 regulations;
 - 11.2. The minutes of the meeting of the NCC on COVID-19 giving rise to the unequivocal promise made by the First Respondent to South Africa, in a live address on Thursday 23 April 2020, that the sale of cigarettes will be permitted under level 4 regulations;
 - 11.3. the minutes of the meeting of the NCC on COVID-19 wherein a vote was taken in respect of the promulgation of regulation 27.
 12. In part B of the application, Applicant seeks:
 - 12.1. An order declaring that cigarettes and tobacco are "essential goods" in Annexure B (regulation 11A) of the level 5 regulations. Although the level 5 regulations have been repealed, such remain in force for purposes of any investigation, prosecution or any criminal or legal proceedings; and
 - 12.2. Declaring regulation 27 of the level 4 regulations to be invalid; alternatively
 - 12.3. The review and setting aside of decisions culminating in, and subsequent promulgation of:
 - 12.3.1. annexure B (regulation 11A) of the level 5 regulations insofar as the schedule excluded cigarettes and tobacco as "essential goods"; and
 - 12.3.2. section 27 of the level 4 regulations .
 13. As is more fully set out below, FITA has brought this application on an urgent basis in terms of Uniform Rule 6(12) *inter alia* on the basis that:

- 13.1. section 27 of the level 4 regulations directly affects the freedoms previously enjoyed under law by approximately 11 million cigarette smokers and tobacco users in South Africa;
 - 13.2. the sudden and clearly ill-considered ban on the sale of legal tobacco products seriously affects and impacts upon the health and welfare (both physical and psychological) of millions of citizens (with well-recognised dependencies), without regard for the far-reaching traumatic effects flowing from the withholding of these products. In this regard, an expert opinion on sudden nicotine withdrawal from Sheethal Behari, a clinical psychologist from the Psych Matters Centre in Johannesburg, together with her curriculum vitae ("CV") and a confirmatory affidavit from her confirming the contents of her opinion and CV, as well as a write up on the sole director of the Psych Matters Centre are annexed hereto marked **SM2**.
 - 13.3. the prohibition has an enormous negative commercial impact on the manufacturers and retailers of tobacco products and their right to pursue their businesses. In this regard, by way of example, a report from one of the Applicant members, Gold Leaf Tobacco (Pty) Ltd as well as a confirmatory affidavit as to the contents thereof from the author, Ebrahim Ahmed Adamjee, are annexed hereto marked **SM3**;
 - 13.4. the prohibition has well-recognised negative results in the form of increased illicit trade and significant losses of tax revenue; and
 - 13.5. regulation 27 of the level 4 regulations forms part of regulations which dramatically affect every South African, the respect for which is vital to progress the fight against COVID-19.
 - 13.6. Regulation 27 of the level 4 regulations is self-evidently irrational and ignores the very significant number of people who have tried to have their voices heard. The regulation is exacerbating the already particularly trying circumstances of millions of South African citizens who are already emotionally fragile and causing unnecessary increased stress for them.
 - 13.7. There has been a clear failure to balance the interests of citizens who are legally entitled to purchase cigarettes and tobacco products with measure that may responsibly and legitimately be taken to combat the pandemic.
14. The matter is of great public interest and the "uplifting of the ban" has garnered significant public support. In fact, a petition to "uplift the tobacco ban" has received the formal written support of some 482,441 (four hundred



and eighty two thousand four hundred and forty one) South Africans. A confirmatory affidavit deposed to by Beverley-Anne Maclean, the creator of the petition, confirming this is marked as Annexure **SM4**.

15. FITA is acutely aware, and acknowledges, that the Respondents and the South African Government as a whole, are tasked with the monumental duty to contain and limit the spread of COVID-19.
16. Many of the efforts are commendable and are appreciated. However, in the midst of a pandemic, we cannot allow for our constitutional prescripts to be violated in the manner in which they have. A loss of confidence in aspects of the Regulations, such as regulation 27 of the level 4 regulations, has the knock-on effect of a loss of confidence in the regulations as a whole.

REGULATIONS PURSUANT TO THE DECLARATION OF A STATE OF DISASTER

17. On 17 March 2020, the first regulations in terms of the Act were published in Government Gazette no. 43107 ("the initial regulations") purportedly in consultation between the Second Respondent and "the relevant cabinet ministers". It is unclear precisely which cabinet members were consulted and/or to what extent. Notably the initial regulations did not expressly prohibit, or purport to prohibit cigarettes or tobacco products.
18. As set out above, the level 5 regulations published on 25 March 2020 amended the initial regulations and did not contain an express prohibition on cigarettes or tobacco products. However, a trend emerged of Ministers making public pronouncements as to what constitutes "essential goods".
19. The Premier of the Western Cape, however, expressed that the sale of cigarettes in the province was lawful and not prohibited - on the basis that the level 5 regulations did not prohibit this.
20. On or about 20 April 2020, the Applicant's attorneys of record sent a letter informing the Respondents of the fact that the level 5 regulations do not contain any prohibition of the sale of cigarettes and tobacco. The correspondence is marked as Annexure **SM5**.
21. Thereafter, on 23 April 2020, the First Respondent announced to the country that the sale of cigarettes would be permitted from 1 May 2020.
22. On or about 26 April 2020, the Second Respondent sought representations from interested parties and stakeholders, which included the Applicant in relation to the level 4 regulations, that were then promulgated. The Applicant

submitted its representations under the misapprehension that the sale of cigarettes would be permitted from 1 May 2020, as the First Respondent had announced. The Applicant's representations are marked as Annexure **SM6**.

23. The level 4 regulations were promulgated on 29 April 2020 and included regulation 27, which is an express ban on the sale of cigarettes and tobacco products. The Applicant was both shocked and confused in circumstances in which the First Respondent had made a public promise to the contrary. Of particular concern too is that the Applicant was not afforded its right to a fair process or an opportunity to make submissions regarding the intended prohibition (in direct contradiction of the First Respondent's express undertaking to the nation) nor in regard to representations that may have been made by those apparently opposed to the "unbanning" of cigarettes and tobacco products.
24. In this affidavit, I will demonstrate that regulation 27 is *ultra vires* but in any event invalid and liable to be set aside. I will address the following points in turn:
- 24.1. the background to this application;
- 24.2. the applicable enabling legislation demonstrating that the Second Respondent has acted *ultra vires* the empowering provision;
- 24.3. the violation of the constitutionally-entrenched principle of legality;
- 24.4. the urgency of this application; and
- 24.5. conclusion.

BACKGROUND

25. On 15 March 2020, the Second Respondent declared a national state of disaster in terms the Act.
26. On 18 March 2020, acting in terms of s 27(2) of the Act, the Second Respondent promulgated the initial regulations.
27. The level 5 regulations do not contain an express provision prohibiting the sale of cigarettes or tobacco. The reason for this is that section 27(2), being the empowering provision for the regulations does not contain any basis to prohibit the sale of cigarettes or tobacco. This is to be contrasted with the power to suspend the sale of alcohol.

28. Despite this, several Ministers, among them the Second Respondent, and/or their spokespersons have publicly stated that the sale of cigarettes was prohibited during the level 5 lockdown. It is important to emphasise that in most cases; the pronouncements were made in response to direct queries about the sale of cigarettes. Yet, notwithstanding the substantial public interest in the matter, in none of those pronouncements was there a proper basis set out for the view expressed that in terms of the level 5 regulations the sale of cigarettes was prohibited.
29. By way of example:
- 29.1. on or about 25 March 2020 , the Trade and Industry Minister Ebrahim Patel told the media when he addressed them on the ambit of the regulations that cigarette sales would be prohibited during the lockdown as they could not be considered a basic good.
- 29.2. on or about 29 March 2020 national police spokesperson Brigadier Vish Naidoo, seemingly speaking on behalf of Minister of Police Bheki Cele, has been quoted as saying: "*In response to posts on various social media platforms, please be advised that cigarettes and tobacco are not essential items.*"; and
- 29.3. On or about 21 April 2020, the Second Respondent said at a government press conference: "*We maintain that alcohol and tobacco products are non-essential. These products would undermine our efforts to contain movement.*" (This so-called "reason" is particularly relevant in assessing the rationality of the prohibition. It clearly and illogically conflates the sale of cigarettes with "movement").
30. The Second Respondent served as Health Minister in President Nelson Mandela's cabinet from 1994 to 1999 and in that role, she spearheaded legislation that eventually banned smoking in public places, prohibited all forms of tobacco and advertising and promotion, and recommended penalties for transgressors.
31. The statements by Government Ministers (or their spokespersons), especially the Second Respondent, were widely reported on by the media and created an impression that the level 5 regulations prohibited the sale of cigarettes. There was no lawful basis for such a prohibition, in light of section 27(2) of the Act.



32. The regrettable consequence is that these ministerial comments, which as I point out hereunder, do not appear to be supported by a proper interpretation of the regulations that have been made, and re-made, had been incorrectly elevated to the status of the governing law in the eyes of cigarette distributors and the public at large.
33. A consideration of the pronouncements suggests cigarettes and tobacco products do not constitute "essential goods" and, accordingly, cannot be sold. If this is the basis for the prohibition, the Respondents are required to provide a proper explanation for the failure to categorize cigarettes and tobacco products as "essential goods". It is a notorious fact that cigarettes and tobacco products are addictive and that their users rely on nicotine. There appears to have been little regard paid to this condition which, in many instances requires professional assistance in order for the user to stop using tobacco products and cigarettes. I refer this Honourable Court in this regard to annexure SM2.
34. At no point in time did the Second Respondent amend the level 5 regulations to incorporate an express ban on the sale of cigarettes and tobacco products.
35. The inclusion of the express prohibition in regulation 27 was clearly an afterthought designed to "plaster over" the inadequacy of the level 5 regulations and to remove any doubt about the interpretation of those regulations. However, such incorporation, as set out below, is made *ultra vires* of the empowering provision, being section 27(2) of the Act.

APPLICABLE LEGISLATIVE FRAMEWORK

THE PROHIBITION IS ULTRA VIRES THE DISASTER MANAGEMENT ACT

36. Both the level 4 and level 5 regulations were promulgated in terms of section 27(2) of the Act. Section 27(2) provides:

"if a national state of disaster has been declared in terms of subsection (1), the Minister may, subject to subsection (3), and after consulting the responsible Cabinet member, make regulations or issue directions or authorise the issue of directions concerning –

- (a) the release of any available resources of the national government, including stores, equipment, vehicles and facilities;
 - (b) the release of personnel of a national organ of state for the rendering of emergency services;
 - (c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;
 - (d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;
 - (e) the regulation of traffic to, from or within the disaster-stricken or threatened area;
 - (f) the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;
 - (g) the control and occupancy of premises in the disaster-stricken or threatened area;
 - (h) the provision, control or use of temporary emergency accommodation;
 - (i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;
 - (j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;
 - (k) the dissemination of information required for dealing with the disaster;
 - (l) emergency procurement procedures;
 - (m) the facilitation of response and post-disaster recovery and rehabilitation;
 - (n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster; or
 - (o) steps to facilitate international assistance."
37. Section 27(2)(i) of the Act expressly authorises limitations being placed on the sale and transportation of alcohol. It is not surprising therefore that the level 5 regulations did not contain any provision prohibiting the sale of cigarettes or tobacco products.
38. The prohibition of the sale of cigarettes has now been gazetted in the level 4 regulations.

THE CONSTITUTIONALLY ENTRENCHED PRINCIPLE OF LEGALITY



39. The provisions of the Act, its delegated legislation and the implementation thereof must be consistent with section 1(c) of the Constitution, being the principle of legality.
40. Furthermore, the Minister authorised to issue the regulations, being the Second Respondent, is mandated to do so in a lawful, reasonable and in a procedurally fair manner, in terms section 33(1) of the Constitution.
41. Integral to a fair procedure, is the *audi alteram partem* principle. It is fundamental to constitutional procedural fairness.
42. In the public pronouncements to which I have referred above, the prohibition on the sale of cigarettes is often mentioned together with the prohibition on the sale of alcohol. Given the frequency with which the pronouncements have been made, and the confidence with which the alleged prohibition on dealing in cigarettes has been expressed regarding the level 5 regulations, it remains unclear as to what necessitated the express prohibition of the sale of cigarettes and tobacco products.
43. I submit with respect that the significant omission of a prohibition on the sale of cigarettes and tobacco products in the level 5 regulations was no accident as the makers of the regulations must clearly have been aware of the ambit of section 27(2) of the Act.
44. It is helpful to compare the position relating to the sale of alcohol with the sale of cigarettes. Section 27(2)(i) of the Act expressly authorises the Second Respondent to make regulations concerning the suspension or limiting of the sale, dispensing or transportation of alcohol beverages. Using that power, the Second Respondent amended the level 5 regulations to impose a prohibition on the sale and transport of alcohol. By contrast, no such amendment was forthcoming insofar as cigarettes or tobacco products were concerned.
45. No rational basis has been provided by the Second Respondent to demonstrate a link between the prohibition on the sale of cigarettes and tobacco products and steps being taken to prevent the spread the Covid-19 virus.
46. I submit that there is in fact no basis to contend that the prohibition on the sale of cigarettes and tobacco products is related to combatting the Covid-19 virus.
47. In the premises, the Second Respondent does not have the power to impose regulation 27, and has done so without a rational basis.




48. To the extent that the Second Respondent has the power to impose a prohibition on the sale of cigarettes, such power was exercised arbitrarily and without any proper and/or adequate basis to do so. In essence, based on the considerations set out hereunder, I submit that the imposition of such a prohibition is not connected to the purpose of any regulations that the Second Respondent is lawfully empowered to make, namely, stopping and/or limiting the spread of the Covid-19 virus.
49. None of the Ministers, most importantly the Minister of Health, Doctor Zwelini Mkhize, has demonstrated how a prohibition on the sale of cigarettes assists in preventing or reducing the spread of COVID-19.
50. Public comments have been limited to the ills of smoking, however have not been adequately linked to the fight against COVID-19. Any food or substance that is deleterious to health (eg sugar) would also fall into the category of what is harmful to health.
51. It is furthermore not without significance that, despite the fact that many jurisdictions have imposed "hard lockdowns" that involve restrictions on the movements of people, and perhaps limitations on commercial activities, none appear to have imposed a prohibition on the sale of cigarettes and tobacco products. In fact, internationally, China, South Korea and Taiwan are touted as successfully dealing with the spread of Covid-19. None of these jurisdictions banned the sale of cigarettes or tobacco.
52. FITA wrote to the Respondents asking if they have established bases upon which the level 5 regulations, properly interpreted, prohibit dealing in cigarettes. Such letter, is annexure **SM5** to this affidavit.
53. In the same letter, FITA pointed out that unless there were proper answers to certain issues it raised, the regulations were irrational and not properly related to the purpose for which they were required to be made. The issues that FITA raised were the following:
- 53.1. On what basis was it contended that the prohibition on the sale of cigarettes would assist in limiting or delaying the spread of Covid-19?
- 53.2. What is the specific source of the State's power to prohibit the sale of cigarettes?
- 53.3. Was consideration given to imposing limitations on the sale of cigarettes as opposed to imposing a total ban on their sale?

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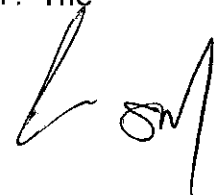
- 53.4. It is well known that cigarettes are currently distributed by persons who do not pay duty on them, unlike members of FITA who do pay the applicable duties. As a result, the prohibition on the sale of legitimate cigarettes will not achieve the stated purpose for which the regulations were made. Was account taken of the foregoing?
- 53.5. Was account taken of the fact that the fundamental rights of legitimate cigarette distributors were being violated?
- 53.6. If health was truly a factor, why was there not a prohibition on such non-essential, and unhealthy, goods such as junk food, chocolates, fizzy drinks and sweets. Health Minister Dr Zwelini Mkhize for instance has been quoted as saying that underlying illnesses including diabetes, hypertension and chronic renal disease have been the pattern for most of the deaths that had been seen. Many of these illnesses or conditions are associated with consumption of the items mentioned above, yet dealing in them has not been prohibited. Whilst none of the illnesses or conditions is smoking-related, inexplicably a prohibition has been imposed on the sale of cigarettes and tobacco products.
54. In response to SM5, FITA received an acknowledgment of receipt and an indication that a reply would follow. I annex the response as **SM7** hereto. However, in light of the urgency of the matter, FITA replied to say that if a substantive reply is not received by 22 April 2020, it would bring an urgent application. That reply is annexed as **SM8**. Although a further generic response, devoid of proper reasoning, was received from the State Attorney ostensibly in response to SM5 on 22 April 2020, which I annex hereto marked **SM9**, no substantive response has been received to date.
55. Notwithstanding that the regulations expressly impose restrictions on the number of passengers who may be transported in a minibus taxi, concessions are officially made, despite the fact that the new dispensation poses a clear and present danger or threat to the health and safety of both commuters and taxi drivers. Yet the concessions have been made because of a complaint that providing the services in accordance with the published section 5 regulations was not economically viable for taxi owners.
56. I submit that the matters that FITA has raised with the Respondents were not considered or if they were, they were not properly considered. As a result, aside from the regulations being unlawful and invalid, I submit that they are also irrational and/or arbitrary.

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57. Furthermore, the element of procedural fairness, fundamental to the principle of legality, has been disregarded by the Respondents. The First Respondent has created a legitimate expectation and, in doing so, denied the Applicant and the many South Africans who oppose the prohibition, the opportunity to make submissions. The importance of procedural fairness in the exercise of public power should not be underestimated even in difficult circumstances.
58. The imposition of the prohibition on the sale of cigarettes constitutes an ongoing violation of the constitutionally protected right of the Applicant's members to practise their trade.
59. The unlawful and invalid prohibition on the sale of cigarettes to members of the public unlawfully violates a freedom exercised by a sizeable proportion of the public, consisting of approximately 11 million South Africans. Existing laws enacted by due process allow South Africans to sell and purchase cigarettes and tobacco products.
60. At date of signing this affidavit, approximately half a million South Africans have signed a petition to support the "uplifting of the ban" on cigarettes and tobacco products.
61. These consumers' right to body and psychological integrity, which include the right to security in and control over their own bodies is being unjustifiably infringed. These are South African citizens who choose of their own volition to consume tobacco and tobacco products.
62. What remains inexplicable is the "about turn" on the First Respondent's promise and the Respondents' justification for the rights of millions of South Africans being infringed. Regulation 27 constitutes an ongoing unlawful infringement.
63. Additionally, apart from section 27(2)(i) of the Act, cigarettes and tobacco products cannot be placed in the same prohibited category as alcohol as, put plainly, cigarettes and tobacco products do not exacerbate behaviour. In any event, the only explanation given in relation to the sale of cigarettes is that it affects "movement" and more recently that cigarettes are harmful to health. Neither "reason" is rationally based.
64. As is clear from the earlier letters that FITA wrote to the Government, which are annexed to SM2, FITA had hoped that a non-confrontational approach would yield more positive results.



65. In addition, the lockdown was initially set to endure for only three weeks. It was then hoped that if the lockdown was extended, the regulations would be less stringent. On the contrary, and despite many other regulations being gradually relaxed, it appears that the Second Respondent's approach to the sale of cigarettes has become more rigid.
66. Despite what is set out herein, FITA embarked on a non-confrontational path. It was only when that did not bear fruit, that it was left with no option but to approach this Honourable Court.
67. On the evening of 21 April 2020, the First Respondent made it clear that the lockdown, despite the relaxation of many regulations, would be extended beyond the end of April 2020. Earlier that day, the Second Respondent had stated unequivocally that, as far as dealing in cigarettes is concerned, there would be no "let-up" in the Government's approach.
68. The differing positions adopted by the First and Second Respondents is of grave concern in circumstances in which government should be forming a united front in the fight against COVID-19.
69. The prohibition in the sale of cigarettes and tobacco products, the Second Respondent seemed to suggest, would continue to mirror the prohibition on the sale of alcohol. She thus made it clear that the distinguishing features I set out above, and which FITA has on various occasions brought to the attention of government (as seen from its items of correspondence annexed to this Affidavit), counted for nothing in her eyes.
70. There must clearly have been a basis for the President, in his 23 April 2020 address, to clearly and unequivocally state "The sale of cigarettes will be permitted". It is doubtful that the President would have given that undertaking without proper consultation and without a mandate.
71. Smokers took the word of the President and prepared for an uplifting of the ban. South Africans had a legitimate expectation that the ban on cigarettes would be lifted. Manufacturers and individual smokers were delighted by the announcement and began planning accordingly. This had the effect that there was no need to make representations regarding the sale and "unbanning" of cigarettes- after all this had been dealt with by the President in his announcement.
72. To make matters worse, no proper opportunity was then afforded to the industry or the public (i.e. after the undertaking was to be ignored) to make representations or to counter and address the views allegedly taken into account by the Second Respondent in promulgating regulation 27. The



Second Respondent is reported to have placed significant emphasis on approximately 2000 (two thousand) complaints received from members of the public pursuant to the First Respondent's address to the entire nation. This can hardly be a basis to promulgate regulation 27 having regard to s27(2) of the enabling Act!

73. On the evening of 29 April 2020, the Second Respondent announced that the level 4 regulations would prohibit the sale of cigarettes and tobacco products for "health reasons". She indicated that cigarettes, tobacco and related products - including "vaping" - would also not be allowed. "Health reasons" is not in law a basis for prohibiting the sale of tobacco and cigarettes under the regulations. The Act and regulations have a very specific ambit- not delineated by "health reasons".
74. The Second Respondent did not explain the consultative process giving rise to the conclusion. The basis for the about turn is shrouded in mystery. What is clear is that the Minister of Finance has publicly announced that he voiced his dissatisfaction with the prohibition on the sale of cigarettes. The article from Times Live expressing the said views of the Minister of Finance is marked as Annexure **SM10**.

URGENCY

75. Apart from the inherent urgency pertaining to the ongoing infringement of the freedoms afforded to South Africans by virtue of regulation 27, every single South African is affected by the regulations as a whole.
76. The absence of transparency underpinning regulation 27, as well as its perceived arbitrariness, undermines the purpose of the regulations, and undermines the fight against COVID -19. Every South African plays a part in the fight against COVID-19. It is fundamentally important that the respondents do not undermine their efforts by exercising public power in a manner which is *ultra vires* section 27(2) of the Act and contrary to the principle of legality.
77. If this application were to be heard in the ordinary course, the harm caused by the conduct of the respondents will not be averted in time. Despite the current crisis, the rule of law and respect for basic human rights must be preserved and the respondents must account to the public by conducting



their duties in a transparent, democratic and open manner, and do what is necessary to act in a manner which is lawful and rational. The duration of the Lockdown is unknown, it may last anywhere from one month to three months, perhaps longer. Regulation 27 is *ultra vires*, unreasonable, irrational and unlawful and the *status quo* sets a particularly dangerous precedent. The continued implementation of Regulation 27 poses a significant threat to the rule of law, which must be halted on an urgent basis. The further relief in paragraph 8.3 above will also be necessary as a matter of urgency in the event that confirmation is not received in the terms sought. The manufacturing and export activities are similarly of critical importance to the survival of the industry and any further delays in those activities will irreparably prejudice the manufacturers and exporters. On 1 May 2020 the applicant's attorneys addressed a letter to the Second Respondent in this regard, a copy of which is annexed hereto marked **SM11**, to which there has not as yet been a response.

78. The incalculable prejudice and harm that regulation 27 will continue to cause to people is particularly serious and the public interest requires that urgent attention be given to these excesses of power. Each passing day increases the already enormous harm (as detailed in, *inter alia*, annexures SM2 and SM3 to this affidavit) and for that reason this Honourable Court is requested to abridge the timelines prescribed by the Uniform Rules.
79. The particularly serious financial and other prejudicial consequences flowing from regulation 27 are well articulated in the report from Gold Leaf Tobacco (Pty) Ltd forming part of annexure SM3 to this affidavit. I respectfully request that this Honourable Court have regard to what is stated in this letter. As manufacturing and export of tobacco forms a substantial part of the businesses of the Applicant's members, these reasons equally pertain to the urgent declaratory relief sought as detailed in terms of paragraph 8.3 above.

FURTHER FACTS RELATED TO THE DECLARATORY RELIEF SOUGHT

80. The Applicant is of the view that its members may lawfully resume manufacturing and export of processed tobacco and cigarettes, as the level 4 regulations allow therefor.
81. However, given the tensions between the Applicant's members and government as a result of the "about turn" of government on the First Respondent's promise to the nation that the sale of cigarettes would be allowed, the Applicant's members have acted *ex abundanti cautela* and

have sought written confirmation in this regard, so as to avoid unnecessary controversy.

82. Accordingly, on or about 30 April 2020, one of the Applicant's members, Home of Cut Rag (Pty) Ltd, sought confirmation on this aspect from the South African Revenue Services ("SARS"). However, SARS stated that such confirmation would need to be sought from the Second Respondent, making the Applicant even more wary of obtaining confirmation on the issue.
83. The Applicant's attorneys of record then addressed correspondence to the Second Respondent on 1 May 2020 (annexure SM11 to this affidavit) requesting confirmation on the issue.
84. Paragraph 6 of annexure SM11 reads as follows:

"6. We are accordingly instructed to request that your client, confirm in writing by no later than 12h00 on Monday 4 May 2020, that our client's members may:

6.1 resume production, albeit subject to the conditions stipulated in the regulations; and

6.2 export processed tobacco and cigarettes. In this regard, our client confirms that it's members will comply with the provisions of the Customs and Excise Act 91 of 1964."

85. At the time of signing this affidavit, the Second Respondent has not provided the requested written confirmation. Due to the urgent need to sign this Affidavit and have the Application issued and served, the Applicant seeks the declaratory relief in this regard *ex abundanti cautela* on the conditional basis that the Second Respondent has either not responded to annexure SM10 to this affidavit or has not provided the requested confirmation at the time of hearing of Part A of this Application.

CONCLUSION

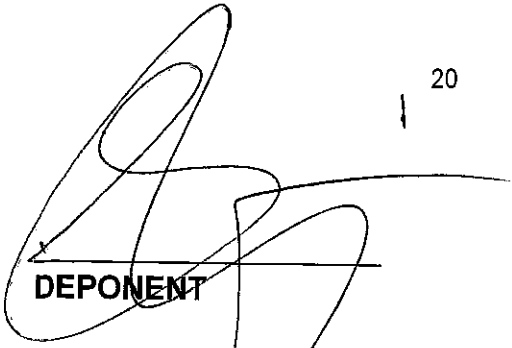
86. The "hard lockdown" has caused a massive disruption in the lives of South Africans, who have generally accepted the hardships that come with a lockdown on the basis that the sacrifices they have been required to make are founded on legitimate and rational bases and proper and legally compliant regulatory measures.



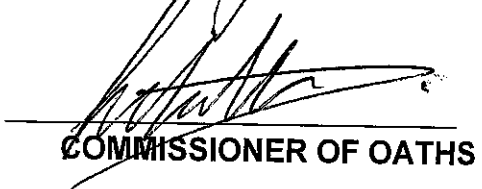
87. However, instead of acting within the extensive powers granted to them, Ministers and state officials have exceeded and, in some instances, abused their powers. The principle of proportionality, which is central to the exercise of public power, is often absent, as I submit is the case relating to the imposition of a prohibition on the sale of cigarettes and tobacco products.
88. The arbitrary and harsh manner in which public power is being exercised carries with it the risk of creating in an already stressed and economically vulnerable public, panic, resentment and disrespect towards those in power. Should they be permitted to continue on this dangerous course unchecked, all the good that the lockdown has achieved - *if* implemented lawfully and properly - will be lost, as will many, many lives.
89. The rule of law must be urgently protected. The repositories of power must be kept in check. It is for this reason that the Chief Justice has insisted on the doors of the Courts be kept open in these trying times. It is the responsibility of the Courts, employing proper principles, to ultimately interpret regulatory measures and determine whether such regulations are lawful and rational.
90. It is respectfully submitted that, unless this Court intervenes on an urgent basis, an important pillar of the principle of the separation of powers will continue to be violated.
91. In concluding, in support of the fact that this application is brought in the public interest, many of the concerns I have expressed have also been raised by:
- 91.1. several well-respected commentators;
- (I refer to two articles, one by Mandy Wiener and the other by Peter Bruce, who raise such concerns. I annex these as **SM12** and **SM13**.)
- 91.2. other manufacturers of cigarettes and tobacco products in South Africa; and
- 91.3. approximately half a million South African citizens in a petition alone.

WHEREFORE I humbly pray that this Honourable Court will grant an order as set out in the Notice of Motion.




DEPONENT

Signed and sworn to before me at Johannesburg on this the 3rd day of May 2020, the deponent having acknowledged that he knows and understands the contents of this affidavit, that has no objection to taking the prescribed oath and that he considers the said oath to be binding on his conscience.


COMMISSIONER OF OATHS



"SM1"

**RESOLUTION BY THE DIRECTORS OF THE FAIR-TRADE
INDEPENDENT TOBACCO ASSOCIATION REGISTRATION
NUMBER: 2012/215893/08 ("the Association"), ON THIS THE
15th DAY OF APRIL 2020**

RESOLVED:-

That Sinenhlanhla Nchabeleng Mnguni be, and hereby is, authorised to instruct and appoint attorneys as well as to depose to all affidavits and sign all other documents, as may be required, on behalf of the Association, in respect of all and any legal proceedings instituted by the Association against all and any members of cabinet and/or Government and/or the Presidency related to any aspect directly or indirectly flowing from, or related to, all and any regulations to the Disaster Management Act 57 of 2002 pursuant to the declaration of a National State of Disaster in terms thereof by the Minister of Cooperative Governance and Traditional Affairs on 15 March 2020.



DIRECTOR - SINEHLANHLA NCHABELENG MNGUNI

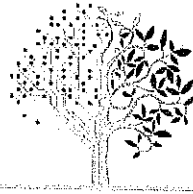


DIRECTOR - NERAN RAMADHIN





"SM2"



PSYCHMATTERS
FAMILY THERAPY CENTRE

Sheethal Behari
Clinical Psychologist

B.Soc.Sci (UND); BA (Hons); MA (Clin Psych) (UDW)

Practice Number: 0188182

HPCSA Number: PS 082325

3 May 2020

A psychological opinion on the impact of the sudden withdrawal of nicotine

The process of the ban of cigarettes:

When South Africa entered lockdown on 27 March 2020 smokers were abruptly told that they would not have access to cigarettes for the duration of the lockdown, which was initially set to end on 17 April 2020. Many prepared for the emotional and mental toll by taking measures that would ease their discomfort. They did this either by buying enough to last them through the lockdown, accepting that they would smoke less for three weeks, switching to other methods of nicotine ingestion (e.g. vaping, chewing nicotine gum etc.) During the length of the initial lockdown, smokers were hoping for the sale of cigarettes to be unbanned. When the duration of the lockdown increased, this hope heightened with pressure applied on the government to unban the sale of cigarettes. When President Cyril Ramaphosa addressed the nation on 23 April 2020 to announce lockdown level 4, he announced that the sale of cigarettes would be allowed. A few days later this ruling was reversed. The experience of these events in the manner they transpired has placed emotional and mental stress on smokers. The continual emotional burden of accepting, preparing, hoping, fighting and the psychological relief of being told cigarettes would be sold to have it overturned days later has created significant psychological distress for smokers. When there is a lack of information, which creates uncertainty, and the absence or loss of control over one's own nicotine use, an overall sense of alarm and trauma is induced.



The addiction:

Nicotine is a highly addictive chemical. Nicotine addiction is a complex process that involves many factors. The biological, psychological, behavioural and cultural dynamics intertwine to determine a smoker's addiction pattern. Psychologically there is evidence to suggest that the short-term effects of smoking reduces stress, alleviates anxiety and depression and brings about an overall calming effect for the smoker. These psychological effects are felt fairly quickly in the body and last for a short time before the individual requires another cigarette to re-experience this. Those addicted require a consistent supply to mitigate the negative psychological impact. Behaviourally, people become dependent on the actions associated with smoking, such as a cigarette after a meal, or when under stress or taking a short break from working. Taking away the cigarettes frustrates the smoker when still having to engage in the activities that are associated with smoking, further causing stress and anxiety. Those that use cigarettes as a coping mechanism to reduce stress and anxiety do not have a means to feel better.

Nicotine is a highly addictive chemical altering substance that cannot be stopped suddenly without experiencing withdrawal. Nicotine creates pleasant feelings in the mind and body. When you introduce nicotine to the body, the brain releases neurotransmitters such as dopamine which creates a brief feeling of contentment and pleasure. The sudden absence of which, creates psychological fallout such as depression and anxiety.

Stress and boredom can be triggers for smoking. The pandemic, lockdown and associated stressors are likely to increase these triggers at a time when cigarettes are not allowed thereby further increasing the negative psychological impact of feelings of anger, frustration, a sense of loss and sadness.

The withdrawal:

Withdrawal is the abnormal physical and psychological impact that follows the abrupt cessation of a drug that has the ability of producing physical and psychological dependence. Nicotine is an addictive chemical that when suddenly discontinued causes both physical and psychological withdrawal symptoms. The psychological symptoms can last for an extended period especially when quitting is not voluntary but seen as forced and the recommended methods to cope with withdrawal and quitting are currently not allowed.

Withdrawal symptoms include the craving to smoke, irritability, anger, frustration, insomnia, fatigue, inability to concentrate, increased anxiety and depression. To cope with the withdrawal symptoms psychologists would suggest techniques utilized in cognitive behavioural therapy or mindfulness. Techniques include identifying triggers (people, places, events that promote the behaviour) and avoiding them. These triggers could include the loved ones you reside with, work stressors, prolonged periods in a location without reprieve or discord at home. Techniques for engaging in new



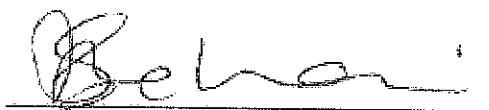
behaviours to help the individual cope (exercise, social support, keeping occupied with meaningful behaviour). The issue with these methods is that under lockdown most of this is either very limited or not possible at all. The smokers do not have a means to find psychological comfort.

The result of not being able to ease the psychological impact will have people turning to other maladaptive coping strategies that could include finding dangerous illegal means to obtain cigarettes, taking out their withdrawal symptoms of irritability, anger, frustration on significant others, finding ways to escape their environment, putting them and others at risk in the current pandemic.

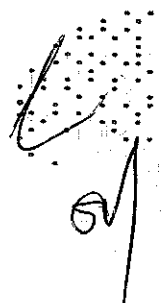
Psychological co-morbidity:

Many people with addictions have comorbid psychological diagnoses. Epidemiological and clinical studies have shown a positive correlation between smoking and anxiety as well as smoking and depression. Smokers presented with a range of anxiety disorders including generalized anxiety disorder, panic disorder, social phobias and agoraphobia. The interrelationships between smoking, anxiety disorders and depression are complex. The addiction and withdrawal can cause smokers to become anxious and depressed as highlighted above. Highlighted here is that pre-existing psychological disorders of anxiety and depression are present in smokers. Smoking cessation could lead to the re-emergence of pre-existing mental conditions. Therapy to address and manage the underlying condition is imperative before addressing cessation of nicotine. If cessation occurs prior to addressing the underlying diagnosis, the underlying diagnosis can be triggered. In lockdown people with underlying depression and anxiety can have their conditions triggered by the involuntary, abrupt termination of cigarettes.

The addiction to nicotine is a complex process that requires a multifaceted approach in understanding and addressing and its sudden, involuntary withdrawal creates an adverse psychological impact.



Sheethal Behari
Clinical psychologist



Curriculum Vitae

Sheethal Behari



PERSONAL DETAILS

Surname: Behari

First Name: Sheethal

Place of Birth: Durban

Date of Birth: 10 September 1978

Sex: Female

Nationality: South African

Home Language: English

Other Languages: Afrikaans, Hindi

Telephone: 082 409 4334

Criminal Offences: None

Occupation: Clinical Psychologist

Drivers Licence: Code 08 (light motor vehicle)

Health: Excellent

Interests: Reading, Swimming, Snorkelling, Dancing

A handwritten signature in black ink, appearing to be 'L. G. J.' or similar, located in the bottom right corner of the page.

EDUCATIONAL HISTORY

SECONDARY QUALIFICATIONS:

- Last School Attended: Dr. A.D. Lazarus Secondary School
- Highest Standard Passed: Standard 10 (Matric)
- Year(s): 1991 – 1996

TERTIARY QUALIFICATIONS:

1. INSTITUTE: University of Natal – Durban Campus
 - Year(s): 1997-1999
 - Degree: Bachelor of Social Science
 - Majors: Psychology
Anthropology
2. INSTITUTE: University of Durban-Westville
 - Year(s): 2000
 - Degree: BA (Hons)
3. INSTITUTE: University of Durban-Westville
 - Year(s): 2001 - 2002
 - Degree: Masters (Clinical Psychology)
 - Dissertation: Depression and Perceived Social Support in Chronic Renal Failure Patients Treated with Haemodialysis



SKILLS SUMMARY

17 year post qualification experience as a clinical psychologist and lecturer.

Assessment: Administration, scoring and interpretation of a vast range of psychological assessments, assessing intellectual level, competency level, personality, emotional and neuropsychological functioning.

Diagnosis and Treatment: Therapy of inpatients and outpatients presenting with a diverse range of psychiatric diagnoses, including but not limited to the following:

- Anxiety disorders,
- Mood disorders (e.g. Major depressive disorder, Bipolar mood disorder),
- Psychotic disorders,
- Substance-related disorders,
- Dementia and other cognitive disorders,
- Mental disorders due to a general medical condition,
- Sexual and gender identity disorders,
- Eating disorders,
- Personality disorders,
- Relational problems,
- Physical/sexual/emotional abuse,
- Bereavement,
- Occupational problems,
- Academic problems and
- Disorders first diagnosed in childhood and adolescence (e.g. mental retardation, learning disorders, attention deficit hyperactivity disorder, conduct disorder).

Therapy conducted in both individual and group settings.

Screening, treatment and appropriate referral of patients referred from the hospital's Employee Assistance Programme (EAP).

Management and co-ordination of the clinical psychological internship programme.

Neuropsychological assessment of clients involved in motor vehicle accidents, claiming from the Road Accident Fund.

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Evaluation and treatment of patients with spinal cord injuries due to MVA and disease at a tertiary orthopaedic hospital

Teaching of assessment and therapy at a master's level to clinical psychology interns. Teaching of psychological practice to undergraduate and postgraduate medical students.

Supervising and mentoring of clinical psychology interns, psychiatric registrars and clinical psychology masters' students.

2 year experience as a school psychologist at Crawford Preparatory, Benmore

8 year experience as a private practice practitioner

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WORK EXPERIENCE

Employer: Private Practice

Address: Psychmatters Therapy Centre
9 Park Street
Bedfordview

Position: Clinical Psychologist

Years: May 2014 - present

Description: Private practice

Address: Talk Therapy
Cnr Cedar Road & Stinkwood Place

Position: Clinical Psychologist

Years: January 2016 – present

Description: Private practice

Employer: ADvTech Group: Crawford Preparatory

Address: 11 Benmore Gardens
Benmore
Sandton

Position: Clinical Psychologist

Years: November 2011 – June 2014

Full/Part Time: Full Time

Description: School psychologist liaising with teachers and pupils from grades 00 to Grade 7
Informing management on school policies and procedures.

Employer: Private Practice (in conjuncture with Psychologist, Ms. Z. Khumalo)

Address: Suite 902 9th Floor
Medicentre
78 Lorne Street
Durban
4000

Position: Clinical Psychologist



Years: 2007 - 2011

Description: Administration of neuropsychological assessments and reports for clients involved in motor vehicle accidents, claiming from the Road Accident Fund.

Employer: KwaZulu Natal Department of Health & University of KwaZulu Natal

Location: King George V Hospital & Department of Behavioural Medicine

Address: King George V Hospital
67 R.D. Naidu Drive
Sydenham
Durban

Position: Clinical Psychologist, Lecturer and Internship Programme Co-ordinator

Years: June 2004 – November 2011

Full/Part Time: Full Time

Description: The Department of Behavioural Medicine is a department in the School of Public Health, at the University's Medical Faculty - the Nelson R Mandela School of Medicine. The role of the Department is to provide teaching and training to clinical psychology interns in the province of KwaZulu Natal and to medical students at both undergraduate and postgraduate levels.

King George V Hospital is a government based tertiary level facility specialising in psychiatric, thoracic, spinal orthopaedic and dental services. The hospital caters to all patients particularly those who cannot afford private health care. The psychiatric unit comprises of adult, child and adolescent inpatient (66 bed) and outpatient facilities. The patients present with a broad range of severe psychiatric/psychological disorders.

June 2004 – November 2011:

The assessment (cognitive, personality, emotional and neuropsychological assessments), diagnosis, treatment and referral of adult, adolescent and child patients (inpatients and outpatients) presenting with severe forms of psychopathology in both individual and group sessions.

Medically applied psychology – the assessment, diagnosis and treatment of patients diagnosed with orthopaedic difficulties, tuberculosis and HIV.



Lecturing and facilitating undergraduate and postgraduate medical students at the Nelson R. Mandela School of Medicine, University of KwaZulu Natal. I have lectured on the following topics:

- domestic violence
- communicating bad news
- communication skills
- introduction to psychotherapy
- psychological assessment
- anxiety disorders
- supportive psychotherapy
- trauma
- clinical interviewing
- issues in psychotherapy

January 2005 – December 2007:

Mentorship of intern clinical psychologists

Jan 2006 – April 2006; May 2010 – Oct 2010:

Acting Head of Hospital: All general management responsibilities e.g. daily operations of the department, attendance of management meetings, development and implementation of departmental policies and procedures and HR issues.

2006:

Neuropsychological assessments and reports for the Department of Education to inform medical boarding.

2008 – 2011:

Management of the Clinical Psychology Internship Programme offered by the department. Responsibilities include:

- formulation of policies,
- Application, selection, and placement processes,
- Teaching and facilitating intern clinical psychologists
- Orientation of the new interns
- Monthly intern support meetings
- Monthly case presentations

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- Management of the programme through the year

2009 – 2011:

Supervision of the clinical psychology interns and master's students employed at King George V Hospital focusing on their clinical cases, their clinical context and their careers

Supervision of psychiatric registrars

Employer: Skye Advanced Technologies

Employer Name: Dr David D. Fraser

Address: 14 Nuttall Gardens
Morningside,
Durban
4001

Position: Radio Planner

Years: June 1998 - 2001

Full/Part Time: Part-time while studying

Description: Created digital maps from paper scans for planning of telecommunication networks.

PUBLICATIONS

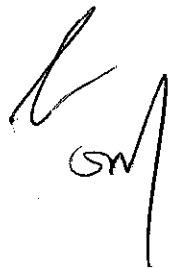
Naidu, T. and Behari, S. (2010) The parent-child-therapist alliance: A case study using a strategic approach. *Journal of Child and Adolescent Mental Health* 22, pp. 41-50.

MEDIA

Expert opinion provided for articles in *Fairlady*, *Child Magazine*, *Mental Health Matters* and *SABC News* and *The Link* (Talk Show)

CONFERENCES

2005 – Chaired: IASP International Association for Suicide Prevention – XXIII World Congress
2005 – Attended: South African Association for Child & Adolescent Psychiatry & Allied Professions (SA ACAPAP) Congress



2005 – Attended: 3rd National conference for the Schizophrenia Foundation of South Africa
2006 – Presented: Psychological Society of South Africa (PsySSA)
2010 – Attended: Autism Spectrum Disorders
2010 – Attended: Psychological Society of South Africa (PsySSA)
2012 – Attended: Child Development
2012 – Attended: Forensic and Ethics Workshop
2013 – Attended: Psychopharmacology
2013 – Attended: Psychological Society of South Africa (PsySSA)

PROFESSIONAL BOARD

Health Professional Counsel of South Africa (HPCSA)

REFERENCES

Mr. Gordon Ewen

Principal

Crawford Preparatory Sandton

+27 11 7847565

Prof. Basil J Pillay, PhD

Head, Department of Behavioural Medicine

Nelson R Mandela School of Medicine

+27 31 2604325

Dr. T. Naidu

Senior Clinical Psychologist/Head of Department/Lecturer

King George V Hospital

+27 31 2426182

Dr. David D. Fraser

CEO (Skye Advanced Technologies)

+27 31 3034252

david.fraser@skye.co.za



Joanna Kleovoulou is a registered clinical psychologist, workshop facilitator, speaker and supervisor. She is the Founder of **PsychMatters Centre®** in Johannesburg, a space of healing offered by a team of psychologists to assist all to live masterfully. She has a deep belief that every individual has a **profound purpose** and is passionate about **empowering** children and adults to dip into their fullness. Currently you can hear Joanna on **SAfm Radio** as the in-house psychologist.

Her areas of clinical interest include working with all age groups - children in play therapy, with adults, in individual and couples counselling - addressing trauma, bereavement/loss, coping with stress, lack of motivation, adjustment difficulties, stress, relationship difficulties, change, self-esteem and building resilience, as well as a range of psychiatric disorders – such as depression, anxiety, etc. She is an accredited **EMDR®** practitioner a therapeutic technique to process trauma and other conditions of the mind. She is passionate about assisting people with personal transformation. It is also a privilege for her to assist children and adolescents in developing the skills necessary for a happy and fulfilled life, and to help them recognise the light that shines within. Joanna has developed and presented many workshops:

- Living Masterfully: Manifesting your Full Potential
- Teen “Be a Living Legend” Workshop (13-18 yrs)
- Parenting Wisely – Simple Steps for Success
- Master the “Stork Talk” with your Child
- Confident Kids (8-13yrs)
- Dealing with Divorce
- Beat the Bullying
- The Power of Self-Care

Joanna completed her Master’s Degree at the University of the **Witwatersrand**. She also holds a honours degree in Business Management-Psychology and a B.A. in Communications (**UFS**). She is an affiliate member of the **South African Depression and Anxiety Support Group**, often representing the organisation in the media to psycho-educate and destigmatise mental illness. Joanna also **supervises** the **Bedfordview Victim Support Group Counsellors** of the Police Forum on a volunteer basis. She presents free post-partum depression talks at the **Bedfordview Baby Clinic** and her centre, PsychMatters, also provides a pro bono **support group** for the East Rand community. On a personal note Joanna is thankful to be a mother to her delightful daughter Natalia, and Godmother of five beautiful children, Joshua, Nikola, Sofia, Maria and Angelique. She loves spending time with family and friends, travelling with her husband Chris and daughter, and keeps her mind and body in balance with meditation, walking, yoga and gym.

She is touched by the quote, “Our deepest fear is not that we are inadequate. Our deepest fear is that we are powerful beyond measure. It is our light, not our darkness that most frightens us... Your playing small does not serve the world. There is nothing enlightened about shrinking so that other people won’t feel insecure around you. We are all meant to shine, as children do... And as we let our own light shine, we unconsciously give other people permission to do the same. As we are liberated from our own fear, our presence automatically liberates others.”

- by Marianne Williamson from *A Return To Love: Reflections on the Principles of A Course in Miracles*.



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

CASE NO: /2020

In the matter between: -

**FAIR-TRADE INDEPENDENT
TOBACCO ASSOCIATION**

Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

1st Respondent

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

2nd Respondent

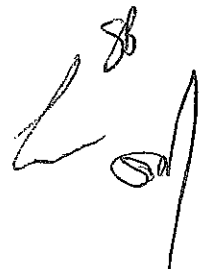
CONFIRMATORY AFFIDAVIT

I, the undersigned

SHEETHAL BEHARI

do hereby make oath and state that:

1. I am an adult female registered clinical psychologist, practising as such at 9 Park Street, Bedfordview.
2. Save where the context indicates otherwise, the contents contained herein fall within my personal knowledge and are, to the best of my knowledge and belief, both true and correct.



3. I have read the Affidavit of Sinenhlanhla Nchabeleng Mnguni used in support of this matter, together with the annexures thereto, and confirm the correctness of the contents thereof insofar as same relates to me. I confirm the contents of my curriculum vitae and expert opinion annexed to such affidavit.

Behan

DEPONENT

I CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT WHICH HAS BEEN SIGNED AND SWORN TO IN MY PRESENCE AT Johannesburg ON THIS 3rd DAY OF May 2020 AND THAT THE PROVISIONS OF THE REGULATIONS CONTAINED IN THE GOVERNMENT NOTICE R.1258 OF 21 JULY 1972 (AS AMENDED) HAVE BEEN COMPLIED WITH.

[Signature]
COMMISSIONER OF OATHS



[Signature]



**GOLD LEAF
TOBACCO**

"SM3"

30 April 2020

To: Whom it may concern

From: Ebrahim Adamjee (CEO Gold Leaf Tobacco)

Re: Report on ongoing tobacco prohibition and lockdown impact on Gold Leaf Tobacco and the related sector

We note with concern governments about-turn on the sale of tobacco products, imposing an ongoing prohibition on the sale of tobacco and tobacco related products under regulations for Level 4.

Gold Leaf Tobacco have abided by and adhered to government regulations, shutting down operations during the Level 5 lockdown period, commencing 26 March 2020 and its subsequent extension to 30 April 2020.

With the extension of the prohibition on sale of tobacco products we would like to highlight the following extremely serious concerns:

1. Loss to the fiscus

Over the period April and May 2019, Gold Leaf Tobacco made an excise declaration for the amount of R 437,391,640 (four hundred and thirty-seven million three hundred and ninety-one thousand six hundred and forty rand) and an additional c. R 60,339,000 (sixty million three hundred and thirty-nine thousand rand) in VAT (net basis).

Due to the lockdown prohibitions, no excise will be collected by the fiscus for April 2020 and an input VAT claim is intended to be submitted by Gold Leaf Tobacco for the period, the same is now expected for May 2020. This will translate to an estimated loss of R 456,819,600 (four hundred and fifty-six million eight hundred and nineteen thousand six hundred rand) in excise and c. R 62,415,000 (sixty-two million four

Address: 129 Hilton Road, Meadow View Business Estate, Linbro Park, Sandton, 2090
Postal: PO Box 545, Kelvin, 2054, Gauteng | Tel: +27 (11) 574 3600 | Fax: +27 (11) 574 3621 | Email: info@gltc.co.za | www.gltc.co.za
Company Reg no: 2001/007501/07 | Vat no: 4740193257 | Directors: E. Adamjee, S. Rudland (non-resident)

hundred and fifteen thousand rand) in net VAT to the fiscus for this two-month period per our budget/ forecasts prior to lockdown.

2. Operating losses

Gold Leaf Tobacco is incurring estimated losses equating to R801,000 per day (eight hundred and one thousand rand) in fixed overheads, the longer the prohibition continues the more difficult it becomes to honor our commitments to employees and related supply chain.

3. Maintenance

Fumigation and maintenance costs for unused and under-utilized equipment is expected to spiral, the longer the prohibition continues the higher the exponential impact on machinery and equipment maintenance as well as raw materials (e.g. beetle infestations in tobacco). This also has the potential of impacting other stock on our floor from having to be written off if a beetle infestation has to go undetected, which can run into hundreds of millions of rands in value.

4. Social responsibility impact

Gold Leaf Tobacco currently employs 354 employees directly and a chain of upstream and downstream manufacturers, transporters, suppliers, customers, retailers and their families are dependent on Gold Leaf Tobacco for their livelihoods.

The current status quo will likely result in Gold Leaf Tobacco having to enter a process of liquidation and/ or business rescue placing further strain on these individuals and their families as well as government.

5. Illicit trade impact

The current prohibition has fueled the demand for illicit tobacco products and resulted in a heavy premium being charged to consumers for cigarettes (we have heard some premium brands are now selling for in excess of a hundred rand per pack on the black market). While we



recognize the good intention of the command council to stop the spread of Covid-19, we draw your attention to the fact that the more expensive a product is, the more a consumer will be tempted to share such products, nullifying the intended intention.

In closing we would like to point out that we are a value sector cigarette producer with low margins facing a very uncertain future, and not a multi-national with multiple revenue streams and a war chest from abroad that enables such entities to weather the unprecedented events that COVID-19 has brought to our country.

Hence, the humble plea to reconsider the current position taken in relation to tobacco prohibition. **Jobs and livelihoods depend on it.**

Yours sincerely

Ebrahim Adamjee
Chief Executive Officer



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

CASE NO: /2020

In the matter between: -

**FAIR-TRADE INDEPENDENT
TOBACCO ASSOCIATION**

Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

1st Respondent

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

2nd Respondent

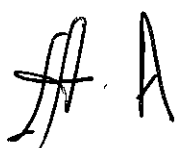
CONFIRMATORY AFFIDAVIT

I, the undersigned

EBRAHIM AHMED ADAMJEE

do hereby make oath and state that:

1. I am an adult male director of Gold Leaf Tobacco (Pty) Ltd, with registration number 2001/007501/07 and with its principal place of business at 129 Hilton Road, Meadowview Business Estate, Linbro Park.
2. Save where the context indicates otherwise, the contents contained herein fall within my personal knowledge and are, to the best of my knowledge and belief, both true and correct.

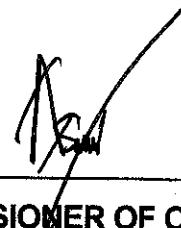


3. I have read the Affidavit of Sinenhlanhla Nchabeleng Mnguni used in support of this matter, together with the annexures thereto, and confirm the correctness of the contents thereof insofar as same relates to me and the company. I confirm that I am the author of the Gold Leaf Tobacco (Pty) Ltd report titled "ongoing prohibition and lockdown impact on Gold Leaf Tobacco and the related sector" dated 30 April 2020.



DEPONENT

I CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT WHICH HAS BEEN SIGNED AND SWORN TO IN MY PRESENCE AT JOHANNESBURG ON THIS 3rd DAY OF MAY 2020 AND THAT THE PROVISIONS OF THE REGULATIONS CONTAINED IN THE GOVERNMENT NOTICE R.1258 OF 21 JULY 1972 (AS AMENDED) HAVE BEEN COMPLIED WITH.



COMMISSIONER OF OATHS

I hereby certify that this is an exact reproduction of the original and that there is no indication that this original has been altered by an unauthorized person.

COMMISSIONER OF OATHS 3 / 05 / 20 20
DATE

Full name and surname: Ahmed Ismail
Designation: Attorney
Business Address: Shop No.3 Francis Raod, San Marco Centre
Area: Ladysmith 3370
Reference No: 9/1/16/2 DURBAN Date: 07/01/2010
Tel: 036 631 4978 Cell: 076 787 5809
ahmed@ahmedismailattorneys.com / www.ahmedismailattorneys.com

"SM4"

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

CASE NO: /2020

In the matter between: -

**FAIR-TRADE INDEPENDENT
TOBACCO ASSOCIATION**

Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

1st Respondent

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

2nd Respondent

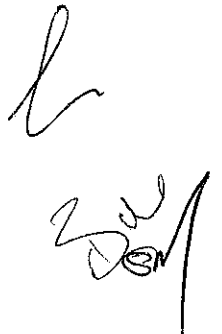
CONFIRMATORY AFFIDAVIT

I, the undersigned

BEVERLEY-ANNE MACLEAN

do hereby make oath and state that:

1. I am an adult female shop manager, with ID number 6310170008087 residing at 1193 Marabou Avene, Randpark Ridge.
2. Save where the context indicates otherwise, the contents contained herein fall within my personal knowledge and are, to the best of my knowledge and belief, both true and correct.



3. I have read the Affidavit of Sinenhlanhla Nchabeleng Mnguni used in support of this matter, together with the annexures thereto, and confirm the correctness of the contents thereof insofar as same relates to me.

4. I am at pains to point out to the Honourable Court that I am the creator of the petition in its original format only, a screenshot copy of which I annex hereto. As the document is a fluid online document, various comments and posts have been made on the platform on which the document is available for which I take absolutely no responsibility and which are not views necessarily shared by me.

Z. N. O. O. O. O. O.

DEPONENT

I CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT WHICH HAS BEEN SIGNED AND SWORN TO IN MY PRESENCE AT Johannesburg ON THIS 3rd DAY OF May 2020 AND THAT THE PROVISIONS OF THE REGULATIONS CONTAINED IN THE GOVERNMENT NOTICE R.1258 OF 21 JULY 1972 (AS AMENDED) HAVE BEEN COMPLIED WITH.

[Signature]

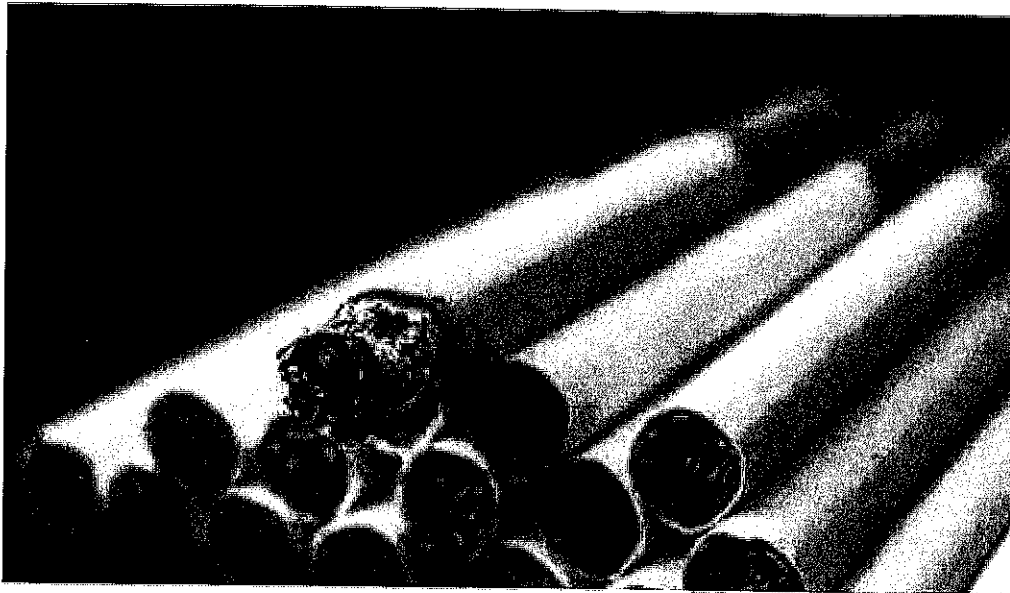
COMMISSIONER OF OATHS



SM

Lift the ban on cigarette sales in South Af...

482K supporters



Lift the ban on cigarette sales in South Africa

482,441 have signed. Let's get to 500,000!



Bernadette Jacobs signed 2 hours ago



Jackie Van Den Berg signed 2 hours ago



Bev Maclean started this petition to President Cyril Ramaphosa (South African President) and 2 others

Take the next step!

Handwritten signature and date: 2/11/20

Original Petition

We were given 1 days notice of the banning of cigarette sales during the lockdown, which is really unfair and spiteful.

Withdrawel of nicotine has serious effects on a lot of people and is especially elevated because of the stress and fear happening in our country.

It causes, amongst others, depression and anxiety and because we are in lockdown, most people will lash out and maybe even hurt loved ones unintentionally.

Uplifting the ban would, amongst other things save jobs, bring more money into the state coffers, stimulate the economy, and decrease the psychological impact on us South Africans of the lockdown period.

Please dont turn us into criminals, Mr President.

Take the next step!

h.
Zule
SM

"SM5"



MORGAN
LAW

Morgan Law Inc
Registration number 2017/343628
Ground floor
The Chambers
Cnr Kirkby and Oxford Road
Bedfordview
2008
Tel: +27 11 268 6603
grant@morganlaw.co.za

Your ref

Our ref
R MERRIFIELD/FT001

Date
20 April 2020

TO:

The Honourable President of the Republic

The Minister of Cooperative Government and Traditional Affairs

The Minister of Trade and Industry

The Minister of Health

The Minister of Police

The Minister of Justice

By email

Re: CONCERNS ABOUT THE ALLEGED PROHIBITION ON THE SALE OF CIGARETTES

1. We have been instructed by and act for and on behalf of the Fair-trade Independent Tobacco Association ("*FITA*"), an association which represents the majority of legitimate cigarette manufacturers in South Africa.
2. FITA is concerned that, as detailed hereunder, several state officials have publicly stated that the sale of cigarettes is prohibited under the lockdown that was imposed on the country from 27 March 2020.
3. That view has gained currency. As a result, even businesses that are permitted to trade during the lockdown period are afraid to sell cigarettes because they are afraid that they would be prosecuted

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Director: Grant Morgan (BCom LLB)
Litigation Department Head: Ryan Merrifield (LLB)
Business Consultant: Mike Morgan Consultant: Amit Ramlez Dayal (BCom LLB)

under the Regulations made in terms of the s 27(2) of the Disaster Management Act, No 57 of 2002 ("the Act").

4. FITA has written to some of you complaining about various matters arising on the alleged prohibition of the sale of cigarettes during the period of the lockdown. (For ease of reference, those letters are attached hereto, marked A, B and C)
5. The purpose of this letter is to bring to your attention that the purported prohibition of the sale of cigarettes is not sanctioned by the applicable statutory or regulatory measures. Having considered those measures, we are of the respectful view that the relevant measures, properly interpreted, as they must be, do not support the construction that has been placed on them by state officials.
6. In this connection, we are constrained to point out the following matters.
7. First, for the purposes of FITA's present complaint, s 27(2) of the Act expressly allows for the making of regulations or issuance of directions concerning the following: the suspension or limiting of the sale of alcoholic beverages in the disaster-stricken or threatened area; and steps that may *be necessary* to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster. [Our emphasis.] We stress that it is significant that, whilst the Act refers to alcohol, it makes no mention of cigarettes.
8. Second, s 27(3) goes on to state that the power to make regulations or issue directions may be exercised only to the extent that *it is necessary* for the purpose of, inter alia, dealing with the destructive and other effects of the disaster. [Our emphasis.]
9. Third, the Regulations, after they were expressly amended to do so, now prohibit the sale of alcohol during the lockdown. However, they also state that those retail stores that are permitted to operate may sell only "essential goods", which they list under the following five broad categories: food; cleaning and hygiene products; medical products; fuel; and *basic goods*, including airtime, electricity and the withdrawal of cash.
10. For the purposes of assessing the cogency of FITA's complaint, we stress the following. The Regulations that were originally made, on 18 March 2020, have been amended quite

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Litigation Department Head: Ryan Merrifield (LLB)
Business Consultant: Mike Morgan Consultant: Amit Ramiez Dayal (BCom LLB)

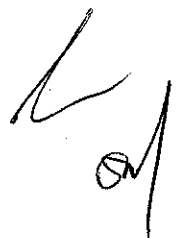


fundamentally, with some "prohibitions" being added and others that were assumed to exist being expressly lifted. In addition, notwithstanding that the Regulations were amended on at least two occasions, and the question of whether the sale of cigarettes was prohibited being expressly raised, no steps have been taken to expressly prohibit the sale of cigarettes.

11. Despite the foregoing, the following communications have been made by the state relating to the sale of cigarettes during the period of the lockdown. Trade and Industry Minister Ebrahim Patel has told the media when he addressed them on the ambit of the Regulations that cigarette sales would be prohibited during the lockdown. In addition, national police spokesperson Brigadier Vish Naidoo has been quoted as saying: "In response to posts on various social media platforms, please be advised that cigarettes and tobacco are *not* essential items." And, Health Minister Dr Zwelini Mkhize has stated that smokers and "dependent alcohol consumers" were at high risk of being infected with the coronavirus, and he encouraged smokers to quit.
12. The aforementioned various statements by government ministers have been widely reported on by the media and have created the belief in the public at large that there is a prohibition on the sale of cigarettes as this has been reported as law, which has caused *inter alia* distributors to be weary to sell cigarettes as they have accepted that there is a ban on same due to what has been widely reported. In other words, these ministerial comments, which are not supported by the regulations, due to the wide reporting thereon, have been falsely elevated to the status of law in the eyes of distributors and the public at large.
13. Insofar as these statements are concerned, we respectfully point out the following. At best, Minister Patel and Brigadier Naidoo were expressing their interpretations of the Regulations. These are not decisive. Dr Mkhize makes no mention of smokers spreading the virus.
14. What is of significance is that none of them has pointed out how why, if the sale of cigarettes was necessary, having regard to the purpose of the imposition of the lockdown, namely to slow the spread of the Covid-19 virus, it was not prohibited in the Regulations, even after they were amended twice.
15. We are respectfully of the view that the Regulations do not expressly prohibit the sale of cigarettes because they would be found to be unconstitutional, unlawful and invalid, as the

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Business Consultant: Mike Morgan Consultant: Amit Ramiez Dayal (BCom LLB)



prohibition is not necessary to achieve the purpose of the lockdown, namely to stop or delay the spread of the virus.

16. It is not without significance that, despite the fact that many jurisdictions have imposed restrictions on the movements of people, and perhaps limitations on commercial activities, to the best of our knowledge none has imposed a prohibition on the sale of cigarettes. In fact, internationally China, South Korea and Taiwan are touted as successfully dealing with the spread of Covid-19. This is despite the fact that residents there are known to be heavy smokers.
17. We also point out that, whilst the Act, which would have been passed only after a proper process involving interested parties and the public, the Regulations were hurriedly drafted with no involvement, not only from the public but also from affected parties such as FITA.
18. Based on the foregoing, we are constrained to point out that, properly interpreted, and despite what state officials have said, the Regulations do not prohibit the sale of cigarettes. However, given the public pronouncements made on behalf of the state, it must be assumed that it has at least one opinion on which those pronouncements were made.
19. Whether or not that is so, we respectfully request that you indicate on what bases you contend that the Regulations, properly interpreted, prohibit the sale of cigarettes.
20. We wish to point out that, even if it can be contended that the Regulations, properly construed, prohibit the sale of cigarettes, then they are invalid: they are irrational and not properly related to the purpose for which they were made.
21. Should you contend otherwise, we respectfully request you to furnish us with the following information:
 - 21.1. On what basis is it contended that the prohibition on the sale of cigarettes would assist in limiting or delaying the spread of Covid-19?;
 - 21.2. What is the specific source of the state's power to prohibit the sale of cigarettes;
 - 21.3. Was consideration given to imposing limitations on the sale of cigarettes as opposed to imposing a total ban on their sale?;

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- 21.4. It is well known that cigarettes are currently distributed by persons who do not pay duty on them, unlike members of FITA who do pay the applicable duties. As a result, the prohibition on the sale of legitimate cigarettes will not achieve the stated purpose for which the Regulations were made. Was account taken of the foregoing;
- 21.5. Was account taken of the fact that the fundamental rights of legitimate cigarette distributors were being violated?
- 21.6. If health was truly a factor, why was there not a prohibition on such non-essential, and unhealthy, goods such as junk food, chocolates, fizzy drinks and sweets. Health Minister Dr Zwelini Mkhize for instance has been quoted by the media as having stated that underlying illnesses including diabetes, hypertension and chronic renal disease had been the pattern for most of the deaths they had seen. None of these conditions are smoking-related.
22. FITA is of the view that the foregoing matters were not considered or if they were, they were not properly considered. As a result, aside from the Regulations being unlawful and invalid, FITA is of the view that they are also irrational and/or arbitrary to the extent that they excise cigarettes from the basic goods that retailers who are allowed to trade during the lockdown are permitted to sell. Should you however contend otherwise, FITA respectfully asks, as it is entitled to do in terms of the Constitution, for your reasons for imposing the prohibition.
23. You will appreciate that this is a matter of urgency: the livelihoods of FITA's members are at stake. In the circumstances, we respectfully request that you furnish your reasons, and the answers to the matters we have raised in the paragraph 21 and sub-paragraphs above by 12:00 noon on Tuesday, 21 April 2020.
24. Should we not receive the reasons FITA requests and the answers to the queries we have raised, we shall assume the following: you do not have reasons for imposing the prohibition; and in any case the allegations made by state officials that there is a prohibition on the sale of cigarettes is ill-founded.

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Litigation Department Head: Ryan Merrifield (LLB)
Business Consultant: Mike Morgan Consultant: Amit Ramiez Dayal (BCom LLB)

Handwritten signature and initials in the bottom right corner of the page.

25. In that case, you may accept that FITA will exercise its rights, including approaching a Court on an urgent basis or informing traders that the alleged prohibition on the sale of cigarettes is unlawful, invalid, irrational and illegitimate.
26. We trust however that that will not be necessary and that the reasons and answers will be furnished timeously.
27. All of our client's rights are reserved.

Yours faithfully

Kind regards

Ryan Merrifield

ryan@morganlaw.co.za

[Electronically transmitted and therefore not signed]

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Director: Grant Morgan (BCom LLB)
Litigation Department Head: Ryan Merrifield (LLB)
Business Consultant: Mike Morgan Consultant; Amit Ramiez Dayal (BCom LLB)



"A"

chair@fita.co.za

From: chair@fita.co.za
Sent: Sunday, 29 March 2020 5:13 PM
To: 'KMotlhabi@economic.gov.za'
Cc: 'NXulu@thedti.gov.za'; 'TMbana@thedti.gov.za'; 'SNtanzi@thedti.gov.za'; 'TSSkosana@thedti.gov.za'; 'EMsiza@thedti.gov.za'; 'monique@fita.co.za'; 'minreg@treasury.gov.za'
Subject: OPEN LETTER TO THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE DEPARTMENT OF TRADE AND INDUSTRY
Attachments: 29 MARCH 2020 LETTER TO DEPARTMENT OF TRADE AND INDUSTRY.pdf
Importance: High

Dear Honourable Minister

The above matter refers.

Kindly find attached hereto a letter for your urgent attention.

We trust the above to be in order.

Yours faithfully,

Sinen Mnguni
Chairman

📞 072 236 6730
✉ chair@fita.co.za
🌐 www.fita.co.za
📠 011 044 5355



fita
fair-trade independent
tobacco association

Address: 28 The Avenue, Orchards, Johannesburg, 2192

Disclaimer:

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fita

fair-trade independent
tobacco association

Date : 29 March 2020

To : THE DEPARTMENT OF TRADE AND INDUSTRY
Attention : MINISTER EBRAHIM PATEL
E-mail : KMotlhabi@economic.gov.za

Dear Honourable Minister

**OPEN LETTER TO THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA
AND THE DEPARTMENT OF TRADE AND INDUSTRY**

On Monday, 23 March 2020 when the President of the Republic of South Africa, Cyril Ramaphosa, announced a nationwide lockdown with effect from 00:00 on Friday, 27 March 2020 our organisation elected at the time to put our full support behind government's call for the said lockdown. Information surrounding the implementation of said lockdown was at the time very limited

The President in his aforementioned announcement further stated that in the course of that week, and prior to the lockdown, regulations would be published on what businesses could continue trading as they provided what was classified as essential goods and services. As a collective, and with the best interests of *inter alia* their employees and the citizens of the country in mind, our members jointly took a decision that they would shut down operations at their factories until such a time as and when government had deemed it safe for its citizens to resume normal life.

At the time of the aforementioned decision taken by our members it was not clear from government that *inter alia* the sale of cigarettes would be prohibited under the regulations. This has since come to fruition and led to the basis of the formulation of this letter to your respected office.

We agree fully with government that all steps necessary to ensure that the unnecessary movement of people is avoided should be taken. However, we have noted that the sale of cigarettes to the public at large while they are able to purchase other goods which have been labelled as essential has led to a number of issues manifesting which could have been possibly avoided had there been prior engagement between the state and industry stakeholders before the regulations were implemented.

It has now been brought to attention through a number of sources and the media that the illicit trade in cigarettes and tobacco products has not abated, and has in actual fact taken an upward trajectory. This is not surprising when considering the facts, and it now seems that, if anything, the regulations have led to the opportunistic criminals involved in the illicit trade taking advantage in order to supply a market which can at this stage be described as desperate.

The knock-on effect of this is that the sale of cigarettes is continuing and the profits obtained therefrom are lost to our economy, and further, our receiver is not collecting the taxes it ought to. These monies which are lost to our system are monies which our economy is in desperate need of at this stage, particularly in light of the lack of activity in our economy due to *inter alia* the government-imposed lockdown in order to avoid the further spread of the coronavirus.

Further, the banning of the sale of cigarettes and other products will lead to people becoming desperate and looking for methods to bypass the regulations in order to source the goods they require. We are already seeing evidence of this being reported by the media and we would therefore urge government to reconsider this aspect of the regulations in order to avoid *inter alia* a large-scale state of unlawfulness where citizens are contravening the lockdown regulations in order to acquire cigarettes.

A handwritten signature in black ink, consisting of a stylized 'L' shape followed by a vertical line and a small flourish at the bottom.

Authorising at least the sale of cigarettes at retail stores and filling stations would give the economy a much-needed boost and avoid a situation where our citizens, out of desperation, contravene the regulations of the lockdown *en masse*. This step by government could also see a large number of jobs along the tobacco industry value chain being saved as the various players along the chain are able to derive some form of income during these trying times.

We accordingly urge government to reconsider the nationwide prohibition of the sale of cigarettes for the reasons set out herein in above.

We are also willing to engage government on the above and provide invaluable input as industry stakeholders in order for the state to make a more informed decision in relation to matters that affect its citizens *vis-à-vis* the tobacco industry.

We trust the above to be in order and await your reply in connection thereto at your earliest convenience.

Yours faithfully,

Signed Electronically

Sinenhlanhla Mnguni

CHAIRPERSON: FAIR-TRADE INDEPENDENT TOBACCO ASSOCIATION



MEMBERS:

- Afroberg Tobacco Manufacturing (PTY) Ltd
- Amalgamated Tobacco Manufacturing (Pty) Ltd

- Home of Cut Rag (Pty) Ltd
- Best Tobacco Company (PTY) Ltd
- Carnilink (Pty) Limited

- Protobac (Pty) Ltd
- Folha Manufacturers (Pty) Limited
- Gold Leaf Tobacco Corporation (Pty) Ltd

FITA Chairperson • Sinenhlanhla Mnguni

"B"

chair@fita.co.za

From: chair@fita.co.za
Sent: Friday, 10 April 2020 9:28 AM
To: 'ekieswetter@sars.gov.za'
Cc: 'oocregistration@sars.gov.za'; 'Sister Mashinini'; 'Theo Colesky'; 'Anand Khelawon'; 'MandisaMB@cogta.gov.za'; 'Kumaren Moodley'; 'PamelaS@cogta.gov.za'; 'MathoM@cogta.gov.za'; 'CarolineM@cogta.gov.za'; 'ThobaniM@cogta.gov.za'; 'legadimal@cogta.gov.za'; 'monique@fita.co.za'; 'Noey'; 'ahmed@gltc.co.za'; 'chair@fita.co.za'; 'Patrick Moeng'
Subject: REQUEST FOR CONCESSIONS TO INTER ALIA RESUME PRODUCTION FOR EXPORT PURPOSES, CONDUCT MAINTENANCE AND, TO UNDERTAKE TO FUMIGATION
Attachments: 10 APRIL 2020 LETTER TO SARS COMMISSIONER.pdf

Importance: High

Tracking:	Recipient	Read
	'ekieswetter@sars.gov.za'	
	'oocregistration@sars.gov.za'	
	'Sister Mashinini'	
	'Theo Colesky'	
	'Anand Khelawon'	
	'MandisaMB@cogta.gov.za'	
	'Kumaren Moodley'	
	'PamelaS@cogta.gov.za'	
	'MathoM@cogta.gov.za'	
	'CarolineM@cogta.gov.za'	
	'ThobaniM@cogta.gov.za'	
	'legadimal@cogta.gov.za'	
	'monique@fita.co.za'	
	'Noey'	
	'ahmed@gltc.co.za'	
	'chair@fita.co.za'	
	'Patrick Moeng'	
	Ahmed Ismail	Read: 2020/04/10 9:35 AM
	Patrick Moeng	Read: 2020/04/10 11:26 AM
	Edward Kieswetter	Read: 2020/04/10 9:56 AM

Dear Commissioner

The above matter refers.

Kindly find attached hereto a letter for your **URGENT** attention.

We trust the above to be in order and await your reply in connection thereto at your earliest convenience.

Yours faithfully,



Sinen Mnguni

Chairman

📞 072 236 6730

✉️ chair@fita.co.za

🌐 www.fita.co.za

📠 011 044 5355



fita

fair-trade independent
tobacco association

Address: 28 The Avenue, Orchards, Johannesburg, 2192

Disclaimer:

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A handwritten signature in black ink, appearing to be 'Sinen Mnguni', located in the bottom right corner of the page.



fita
fair-trade independent
tobacco association

Date : 10 April 2020

To : **THE SOUTH AFRICAN REVENUE SERVICE**
Attention : **COMMISSIONER EDWARD KIESWETTER**
E-mail : **ekieswetter@sars.gov.za**

Dear Commissioner

REQUEST FOR CONCESSIONS TO INTER ALIA RESUME PRODUCTION FOR EXPORT PURPOSES, CONDUCT MAINTENANCE AND, TO UNDERTAKE TO FUMIGATION

The above matter refers.

We have been mandated by our members to address this correspondence to you, the purpose of which is to seek permission for our members to:

1. Resume production for export purposes;
2. Conduct maintenance of their plants and machinery; and
3. To undertake fumigation, the failure of which will result in all tobacco products stored at our members' premises being rendered unfit for use.

Our members in this regard will ensure that all staff members required for purposes of the above will adhere to whatever health and safety measures deemed fit in light of the pandemic we currently face. These measures will include but will not be limited to the screening and/or testing of staff members and, ensuring that all staff members are dressed in the appropriate protective wear at all times.

All of the above, we submit, do not in any way detract from the regulations presently in place. As you will no doubt be aware, concessions have recently been extended to

the wine industry for harvesting and production for export purposes. There is, we submit, no cogent reason for not extending a similar concession to our members.

Such concession, we accept, may well be subject to the imposition of conditions, which conditions our members will abide by provided that same are reasonable.

Our request in this regard must not be construed in any way as an acceptance by our members of the reasonableness and/or rationality of the existing regulations.

The failure to extend to our members the concession sought will have dire consequences, not only for our members, but for the industry as a whole, and most importantly for our fiscus.

The request is more pressing now following our President's address of yesterday evening, wherein he extended the lockdown period for a further period of 14 (fourteen) days.

Your urgent consideration of this matter will be appreciated.

We trust the above to be in order and await your reply in connection thereto at your earliest convenience.

Our rights are reserved *in toto*.

Yours faithfully,

Signed Electronically

Sinenhlanhla Mnguni

CHAIRPERSON: FAIR-TRADE INDEPENDENT TOBACCO ASSOCIATION



MEMBERS:

• Afroberg Tobacco Manufacturing (PTY) Ltd
• Amalgamated Tobacco Manufacturing (Pty) Ltd

• Home of Cut Rag (Pty) Ltd
• Best Tobacco Company (PTY) Ltd
• Carnilux (Pty) Limited

• Protobac (Pty) Ltd
• Folha Manufacturers (Pty) Limited
• Gold Leaf Tobacco Corporation (Pty) Ltd

FITA Chairperson - Sinenhlanhla Mnguni

"C"

chair@fita.co.za

From: chair@fita.co.za
Sent: Tuesday, 14 April 2020 8:18 PM
To: 'president@presidency.gov.za'
Cc: 'presidentrsa@presidency.gov.za'; 'malebo@presidency.gov.za';
'informationofficer@presidency.gov.za'; 'BonganiM@presidency.gov.za';
'nokukhanya@presidency.gov.za'; 'khusela@presidency.gov.za';
'Thamsanqa@presidency.gov.za'; 'Matshepo@presidency.gov.za';
'Matome@presidency.gov.za'; 'LeratoK@presidency.gov.za';
'Deputypresident@presidency.gov.za'; 'musi@dpme.gov.za'; 'glory@dpme.gov.za';
'Fikile@dpme.gov.za'; 'Phetole@dpme.gov.za'; 'Phumeza@presidency.gov.za';
'ekieswetter@sars.gov.za'; 'ministry@economic.gov.za'; 'minreg@treasury.gov.za';
'MandisaMB@cogta.gov.za'; 'chair@fita.co.za'; 'monique@fita.co.za'; 'Noey'
Subject: LETTER TO THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA IN RELATION
TO INTER ALIA THE PROHIBITION ON THE SALE OF CIGARETTES DURING THE
LOCKDOWN PERIOD
Attachments: 14 APRIL 2020 LETTER TO PRESIDENT.pdf
Importance: High

Dear Honourable President

The above matter refers.

Kindly find attached hereto a letter for your **URGENT** attention.

We trust the above to be in order and await your reply in connection thereto at your earliest convenience.

Yours faithfully,

Sinen Mnguni
Chairman

📞 072 236 6730
✉ chair@fita.co.za
🌐 www.fita.co.za
📠 011 044 5355



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fita

fair-trade independent
tobacco association

Date : 14 April 2020

To : **THE PRESIDENCY**
Attention : **PRESIDENT MATAMELA CYRIL RAMAPHOSA**
E-mail : **president@presidency.gov.za**

Dear Honourable President

**LETTER TO THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA IN
RELATION TO *INTER ALIA* THE PROHIBITION ON THE SALE OF CIGARETTES
DURING THE LOCKDOWN PERIOD**

The above matter refers.

We, the Fair-Trade Independent Tobacco Association ("*FITA*"), write to you in your capacity as Head of State and the Commander in Chief of the Republic of South Africa, in relation to the regulations pertaining to the Disaster Management Act, Act 57 of 2002 ("*the Act*") declaring a national state of disaster, published in Government Gazette No. 43096 on 15 March 2020, and issued in terms of section 27(2) of the Act, as follows:

1. By way of background, *FITA* is a duly registered juristic entity in South Africa and comprises of 8 local tobacco manufacturers who have been actively trading in the economy for a number of years. As a collective these manufacturers contribute billions towards the economy directly by way of profit-generation, employment and job creation, and indirectly by way of corporate and personal income tax, customs and excise duties, value-added tax, municipal taxes and other levies and taxes associated with operating businesses in South Africa;
2. *FITA* was established in 2012 with a spirit to encourage smaller manufacturers in the tobacco industry in South Africa to collaborate in respect of industry,

regulatory and legislative matters which are common to all and which, individually, there is little hope of making any significant difference. FITA is an independent non-profit company formed by South African cigarette manufacturers demanding a fair-trading environment;

3. The official members of FITA are:
 - 3.1. Afroberg Tobacco Manufacturing (Pty) Ltd;
 - 3.2. Amalgamated Tobacco Manufacturing (Pty) Ltd;
 - 3.3. Best Tobacco Company (Pty) Ltd;
 - 3.4. Carnilinx (Pty) Ltd;
 - 3.5. Folha Tobacco Manufacturers (Pty) Ltd;
 - 3.6. Gold Leaf Tobacco Corporation (Pty) Ltd;
 - 3.7. Home of Cut Rag CC; and
 - 3.8. Protobac (Pty) Ltd.

4. In addition to the aforesaid manufacturers, FITA also liaises with other independent tobacco manufacturers and/or local tobacco industry role players from time to time. For purposes of this letter the details of these entities are not relevant, save to state that they all have a vested interest in this matter;

5. Our members are all local manufacturers, and we submit that we represent the majority of manufacturers in the tobacco industry;

6. Collectively our members employ over 5000 skilled people countrywide through our value chain;

7. FITA, and by way of association its members, is a member of the South African Revenue Service ("SARS") Tobacco Industry Forum;



8. FITA, on behalf of its aforementioned listed members, is also a signatory to a tripartite joint statement with SARS and the now-defunct Tobacco Institute of Southern Africa ("TISA"), the goal of which was to combat the illicit trade in cigarette and tobacco products;
9. On Monday, 23 March 2020, you, in your capacity as President of the Republic of South Africa, announced a 21 (twenty-one) day nationwide lockdown with effect from 00:00 on Friday, 27 March 2020.
10. Information surrounding the implementation of said lockdown was at the time very limited. It was stated in your aforementioned announcement *inter alia* that in the course of that week, and prior to the lockdown coming into effect, regulations would be published on what businesses and/or services would continue operating during the lockdown period, as well as what goods could be sold during said period. These businesses and goods would be classified under the umbrellas of "essential goods" and "essential services".
11. As a collective, and with the best interests of *inter alia* their employees and the citizens of the country in mind, our members jointly took a decision at the time that they would shut down operations at their factories until such a time as and when government had made a pronouncement on whether cigarette manufacturers fell under essential services, or whether cigarettes fell under the umbrella of essential goods.
12. At the time of the aforementioned decision taken by our members it was not clear from government that *inter alia* the sale of cigarettes would be prohibited under the regulations. This has subsequently been confirmed by government via the public announcements of several ministers during the course of the lockdown period.

A handwritten signature in black ink, consisting of a stylized, cursive script that appears to be the initials 'LJ' followed by a vertical line.

13. Once clarity was obtained on this issue, and prior to writing directly to your office to consider our request as contained herein under, we wrote *inter alia* to the national departments of Trade and Industry, Co-operative Governance, and National Treasury to discuss the said regulations in as far as they relate to the tobacco industry, and offered our input and advice.
14. On 9 April 2020, a further announcement was made by your respected self, announcing the extension of the lockdown period to the end of April 2020. It was at this stage that our members felt the need to ramp up our efforts in engaging government on this issue, given the multiple effects the extension of the lockdown period posed for our members, the various role players along the tobacco industry value chain, the government, as well as the citizens of this country.
15. From the outset we wish to state that FITA and its members fully support all efforts by the state to implement whatever mechanisms considered prudent in the pursuit of compliance, national order, and ensuring the safety of its citizens.
16. We agree fully with government that all steps necessary to ensure that the unnecessary movement of people during this pandemic is avoided at all costs should be taken.
17. We have however noted that the prohibition on the sale of cigarettes to the public at large, while they are able to purchase other goods which have been labelled as essential, has led to a number of issues manifesting which we feel could have been possibly avoided had there been prior engagement between the state and industry stakeholders prior to the regulations governing the lockdown being implemented.

A handwritten signature in black ink, consisting of a large, stylized initial 'L' followed by a smaller, less distinct mark.

18. The damaging health effects of smoking are well established, but there is considerable short-term risk to the mental wellbeing of those who use tobacco as a coping mechanism should they abruptly stop smoking. It is common knowledge that nicotine withdrawal causes bad temper, frustration, agitation, anxiety and mood swings. This could present a number of issues which could potentially overburden our law enforcement agencies and criminal justice system at large given that people are expected to spend a large period of time together under the same roof without freedom of movement.
19. It has also been widely reported in the media and, it is now common cause that the illicit trade in cigarettes and tobacco products has not abated, and has in actual fact gone on an upward trajectory during the lockdown period. This is not at all surprising given how the issue was already a hot topic of discussion in mainstream media over the last few years, and government and industry had expended significant resources over the last few years in combatting this particular issue. It now seems that, if anything, the regulations have led to the opportunistic criminals involved in the illicit trade of *inter alia* cigarettes taking advantage of same in order to supply a market which can at this stage be described as desperate to access these goods.
20. The knock-on effect of this is that the sale of cigarettes is continuing and the profits obtained therefrom are lost to our economy, and further, our receiver is not collecting the taxes it ought to. These monies which are lost to our system are monies which our economy is, particularly at present, in desperate need of, particularly in light of the lack of activity in our economy due to the lockdown which has been correctly implemented in an attempt to avoid the further spread of the coronavirus.
21. The flourishing of the illicit trade will also undo all the aforementioned hard work done by government and industry in combatting this issue and potentially result in



the criminal syndicates behind it growing their resources and networks, making it difficult for the legitimate industry to play on equal ground once the prohibition on the sale of cigarettes and other tobacco products is lifted.

22. Further, the banning of the sale of cigarettes and other products will lead to people becoming desperate and looking for methods to bypass the regulations in order to source the goods they require. We are already seeing evidence of this being reported by the media and we would therefore urge government to reconsider this aspect of the regulations in order to avoid *inter alia* a large-scale state of unlawfulness where citizens are contravening the lockdown regulations in order to acquire cigarettes. Over the last few weeks there has been an exponential increase in incidents of break-ins and thefts from shops and storage facilities which stock "non-essential" goods such as cigarettes. This, we submit, not only vitiates government's intention of limiting the movement of the citizens of this country as much as possible, but also leads to citizens resorting to acts of criminality in order to source some of these banned "non-essential" goods. This again leads to *inter alia* our criminal justice system being overburdened with our law enforcement agencies' efforts being diverted away from combatting the coronavirus as per government's intentions.

23. The receiver of revenue of course does not benefit from these unlawful transactions. SARS collected just under R 13 billion in excise from the sale of cigarettes for the financial year 2018/19. That figure is sure to have gone up in 2019/20 with the bolstering of the enforcement units at SARS, which have increased compliance within the industry. This, together with the levying of excise on cigarette alternative products such as the heat not burn cigarette, was sure to have this figure increase substantially during the current financial year. Government is therefore losing, according to estimates, in the region R 1.5 billion a month on excise alone with the ban on the sale of cigarettes in place. When you factor in VAT, corporate income tax and other tax types the figure becomes



even greater. This at a time when we are already dealing with huge deficits in as far as our tax collections are concerned with the recent announcement that SARS collected R 66.2 billion less than estimated for the last financial year.

24. The long and short of it all is that the regulations have not stopped people from buying cigarettes during the lockdown period. People are sourcing cigarettes and other goods from these underground markets to the detriment of *inter alia* the fiscus. They are also in this regard acting contrary to government instructions that citizens are to avoid excessive movement as this leads to a higher possibility of spreading the aforementioned virus.

25. We are not advocating inaction or negligence. Reducing the rate of infection is a laudable goal. Our mere request is that government authorise, at a minimum, the distribution and sale of cigarettes at retail stores, spaza shops and filling stations. This would give the economy a much-needed boost and avoid a situation where our citizens, out of desperation, contravene the regulations of the lockdown *en masse* as highlighted herein above.

26. A step in this direction by government could potentially also see a large number of jobs along the tobacco industry value chain being retained as the various players along the chain are then able to derive some form of income during these trying times.

27. We are encouraged by the announcement that the National Command Council, the Presidency and other relevant parties are meeting again this week, and that the Presidency remains willing to engage with concrete, constructive proposals made by all sections of society, and that the discussions on economic measures this week will factor in the many submissions by various sectors.

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28. We accordingly urge government to reconsider the nationwide prohibition of the sale of cigarettes, particularly in light of the extension of the lockdown period, for the reasons as set out herein in above.
29. The current restrictions placed *vis-à-vis* the sale of cigarettes during the lockdown period cannot be endured for much longer by the various role players along the tobacco industry value chain without severe consequences for said players, including farm workers, factory workers, informal traders, and the many other ordinary South Africans who rely on the tobacco industry for a living. This will in all likelihood lead to job losses and/or loss of income for many in the aforementioned value chain.
30. We are further not in any way opposed to the imposition of any conditions by government in our request, which conditions our members will abide by provided that same are reasonable.
31. We trust that you will give our submissions the consideration they deserve without in any way detracting from the obvious challenges the country faces as a result of this pandemic.
32. As previously communicated to other government departments, we are also willing to engage government on the above and provide invaluable input as industry stakeholders in order for the state to make a more informed decision in relation to matters that affect its citizens *vis-à-vis* the tobacco industry.

We trust the above to be in order and await your reply in connection thereto at your earliest convenience.

Yours faithfully,

Signed Electronically

A handwritten signature in black ink, consisting of a stylized, cursive 'L' shape followed by a vertical line and a small flourish at the bottom.

Sinenhlanhla Mnguni

CHAIRPERSON: FAIR-TRADE INDEPENDENT TOBACCO ASSOCIATION



MEMBERS:

- Afroberg Tobacco Manufacturing (PTY) Ltd
- Amalgamated Tobacco Manufacturing (Pty) Ltd

- Home of Cut Rag (Pty) Ltd
- Best Tobacco Company (PTY) Ltd
- Carnilinx (Pty) Limited

- Protobac (Pty) Ltd
- Folha Manufacturers (Pty) Limited
- Gold Leaf Tobacco Corporation (Pty) Ltd

FITA Chairperson • Sinenhlanhla Mnguni

A handwritten signature in black ink, appearing to be 'S.M.', written in a cursive style.



fita
fair-trade independent
tobacco association
"SMG"

Date : 27 April 2020

To : **GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**

E-mail : lockdowncomments@cogta.gov.za

Dear Sir/Madam

REQUEST FOR COMMENTS: SCHEDULE OF SERVICES TO BE PHASED IN AS PER THE COVID-19 RISK ADJUSTED STRATEGY

The above matter refers.

We, the Fair-Trade Independent Tobacco Association ("*FITA*"), write to you with a view to bringing forward our submissions in relation to the draft framework for the Risk-Adjusted Strategy to bring different sectors of the economy under Level Four of the Lockdown back to work as announced by President Cyril Ramaphosa on 23 April 2020

1. By way of background, *FITA* is a duly registered juristic entity in South Africa and comprises of 8 local tobacco manufacturers who have been actively trading in the economy for a number of years. As a collective these manufacturers contribute billions towards the economy directly by way of profit-generation, employment and job creation, and indirectly by way of corporate and personal income tax, customs and excise duties, value-added tax, municipal taxes and other levies and taxes associated with operating businesses in South Africa;
2. *FITA* was established in 2012 with a spirit to encourage smaller manufacturers in the tobacco industry in South Africa to collaborate in respect of industry, regulatory and legislative matters which are common to all and which, individually, there is little hope of making any significant difference. *FITA* is an

independent non-profit company formed by South African cigarette manufacturers demanding a fair-trading environment;

3. The official members of FITA are:
 - 3.1. Afroberg Tobacco Manufacturing (Pty) Ltd;
 - 3.2. Amalgamated Tobacco Manufacturing (Pty) Ltd;
 - 3.3. Best Tobacco Company (Pty) Ltd;
 - 3.4. Carnilinx (Pty) Ltd;
 - 3.5. Folha Tobacco Manufacturers (Pty) Ltd;
 - 3.6. Gold Leaf Tobacco Corporation (Pty) Ltd;
 - 3.7. Home of Cut Rag CC; and
 - 3.8. Protobac (Pty) Ltd.

4. In addition to the aforesaid manufacturers, FITA also liaises with other independent tobacco manufacturers and/or local tobacco industry role players from time to time. For purposes of this letter the details of these entities are not relevant, save to state that they all have a vested interest in this matter;

5. Our members are all local manufacturers, and we submit that we represent the majority of manufacturers in the tobacco industry;

6. Collectively our members employ over 5000 skilled people countrywide through our value chain;

7. FITA, and by way of association its members, is a member of the South African Revenue Service ("SARS") Tobacco Industry Forum;

8. FITA, on behalf of its aforementioned listed members, is also a signatory to a tri-partite joint statement with SARS and the now-defunct Tobacco Institute of



Southern Africa ("*TISA*"), the goal of which was to combat the illicit trade in cigarette and tobacco products;

9. We firstly wish to thank President Cyril Ramaphosa, his members of cabinet and their staff, and all other South Africans who have ensured that, up until now, we have avoided the rapid spread of the coronavirus in our country. Their efforts have truly been exemplary during these trying times.
10. It goes without saying that our organisation and many other role players along the tobacco industry value chain welcome the announcement by the honourable President that stated amongst other things that the sale of cigarettes would be permitted during the next phase of the lockdown period commencing on 1 May 2020.
11. We are of the view that this, together with the tax relief extended to cigarette manufacturers and other industries announced by Minister Tito Mboweni yesterday, are steps in the right direction by government in mitigating the damaging effects of the lockdown period on economic sectors.
12. These steps are in line with what FITA had proposed to government throughout the current lockdown period in our attempts at engagement with them. They will also go a long way in ensuring that issues such as the illicit trade in cigarettes, which has grown exponentially during the lockdown period, are somewhat addressed, and that much needed funds make their way into the state's coffers.
13. From the outset we wish to state that FITA and its members fully support all efforts by the state to implement whatever mechanisms considered prudent in the pursuit of compliance, national order, and ensuring the safety of its citizens.

A handwritten signature in black ink, consisting of a stylized 'h' followed by a vertical line and a small circle at the bottom.

14. We agree fully with government that all steps necessary to ensure that the unnecessary movement of people during this pandemic is avoided at all costs should be taken.
15. We have however noted that the prohibition on the sale of cigarettes to the public at large, while they are able to purchase other goods which have been labelled as essential, has led to a number of issues manifesting which we feel could have been possibly avoided had there been prior engagement between the state and industry stakeholders prior to the regulations governing the lockdown being implemented.
16. The damaging health effects of smoking are well established, but there is considerable short-term risk to the mental wellbeing of those who use tobacco as a coping mechanism should they abruptly stop smoking. It is common knowledge that nicotine withdrawal causes bad temper, frustration, agitation, anxiety and mood swings. This could present a number of issues which could potentially overburden our law enforcement agencies and criminal justice system at large given that people are expected to spend a large period of time together under the same roof without freedom of movement. The *Daily Maverick* for instance reported on 24 April 2020 that sixty percent of lockdown arrests in the City of Cape Town were related to the selling alcohol and cigarettes.
17. It has also been widely reported in the media and, it is now common cause that the illicit trade in cigarettes and tobacco products has not abated, and has in actual fact gone on an upward trajectory during the lockdown period. This is not at all surprising given how the issue was already a hot topic of discussion in mainstream media over the last few years, and government and industry had expended significant resources over the last few years in combatting this particular issue. It now seems that, if anything, the regulations have led to the opportunistic criminals involved in the illicit trade of *inter alia* cigarettes taking



advantage of same in order to supply a market which can at this stage be described as desperate to access these goods.

18. The knock-on effect of this is that the sale of cigarettes is continuing and the profits obtained therefrom are lost to our economy, and further, our receiver is not collecting the taxes it ought to. These monies which are lost to our system are monies which our economy is, particularly at present, in desperate need of, particularly in light of the lack of activity in our economy due to the lockdown which has been correctly implemented in an attempt to avoid the further spread of the coronavirus.
19. The flourishing of the illicit trade will also undo all the aforementioned hard work done by government and industry in combatting this issue and potentially result in the criminal syndicates behind it growing their resources and networks, making it difficult for the legitimate industry to play on equal ground once the prohibition on the sale of cigarettes and other tobacco products is lifted.
20. On the 26th of April 2020 the *Sunday Times* published an article titled "SA's R37m Covid fence 'joke'". The article documented a stream of people illegally transporting groceries and cigarettes between South Africa and Zimbabwe this past week who laughed off South Africa's hastily constructed R 37 000 000.00 border fence as a "joke". The Sunday Times visited Beitbridge, where the border post between the two countries has been closed to nonessential traffic in a bid to contain the spread of the coronavirus. One individual when asked for comment stated that "This is not a fence," moments after crossing the Limpopo River into South Africa." He further stated that "This thing doesn't even take me five minutes to cut through. We make big holes so we can get suitcases with cigarettes through and small ones so we can get people and groceries through.". Soldiers who patrol the fence also admit they are fighting a losing battle trying to stem the flow of people across the border.



21. Further, a survey released by the Human Sciences Research Council (“HSRC”) found that one in 10 smokers had been able to access cigarettes during the national lockdown. The survey, which was carried out between 7 April and 14 April and had over 19 000 respondents, was set out to understand what South Africans know, and how they are reacting, to the Covid-19 emergency. It found that cigarettes were more accessible than alcohol during the lockdown, according to Priscilla Reddy, extraordinary professor at the HSRC, in a presentation of the findings on Sunday 26 April 2020. The survey found that a quarter of the people from informal settlements were able to buy cigarettes during the lockdown, which implied that illicit trade had continued in these areas despite South Africa being under lockdown since 27 March 2020, with the sale of tobacco products being prohibited.

22. All of the above is obviously of serious concern to the legitimate tobacco industry particularly in light of the historic battle the industry and government have fought with the illicit trade, and the fact that the illicit was able to flourish and grow its networks during the lockdown period where cigarette sales were prohibited.

23. Further, the banning of the sale of cigarettes and other products has led to people becoming desperate and looking for methods to bypass the regulations in order to source the goods they require. We saw evidence of this being reported by the media and we had consistently urged government to reconsider this aspect of the regulations in order to avoid *inter alia* a large-scale state of unlawfulness where citizens were contravening the lockdown regulations in order to acquire cigarettes. There was also an exponential increase in incidents of break-ins and thefts from shops and storage facilities which stock “non-essential” goods such as cigarettes during the lockdown period. This, we submit, not only vitiates government’s intention of limiting the movement of the citizens of this country as much as possible, but also leads to citizens resorting to acts of

A handwritten signature in black ink, consisting of a large, stylized initial 'L' followed by a vertical line and a small mark at the bottom.

criminality in order to source items such as cigarettes. This again leads to *inter alia* our criminal justice system being overburdened with our law enforcement agencies' efforts being diverted away from combatting the coronavirus as per government's intentions.

24. The receiver of revenue of course does not benefit from these unlawful transactions. SARS collected just under R 13 billion in excise from the sale of cigarettes for the financial year 2018/19. That figure is sure to have gone up in 2019/20 with the bolstering of the enforcement units at SARS, which have increased compliance within the industry. This, together with the levying of excise on cigarette alternative products such as the heat not burn cigarette, was sure to have this figure increase substantially during the current financial year. Government is therefore losing, according to estimates, in the region R 1.5 billion a month on excise alone with the ban on the sale of cigarettes in place. When you factor in VAT, corporate income tax and other tax types the figure becomes even greater. This at a time when we are already dealing with huge deficits in as far as our tax collections are concerned with the recent announcement that SARS collected R 66.2 billion less than estimated for the last financial year.

25. The long and short of it all is that the initial regulations did not stop people from buying cigarettes during the lockdown period. Citizens continued to source cigarettes and other goods from underground markets to the detriment of *inter alia* the fiscus. They also in this regard acted contrary to government instructions that citizens are to avoid excessive movement as this leads to a higher possibility of spreading the aforementioned virus.

26. A study this week on 483 patients at Pitié-Salpêtrière hospital in Paris, France found the infection rate for smokers among Covid-19 outpatients and inpatients was significantly lower than for non-smokers. Only 5.3 per cent of the Covid-19

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patients were smokers, while 25.4 per cent of the general population smoke regularly.

27. It is also not without significance that, despite the fact that many jurisdictions have imposed restrictions on the movements of people, and perhaps limitations on commercial activities, to the best of our knowledge none has imposed a prohibition on the sale of cigarettes. In fact, internationally China, South Korea and Taiwan are touted as successfully dealing with the spread of Covid-19. This is despite the fact that residents there are known to be heavy smokers

28. We are not advocating inaction or negligence. Reducing the rate of infection is a laudable goal. Our mere request is that government, as per the announcement by President Cyril Ramaphosa on 23 April 2020, authorise the distribution and sale of cigarettes at retail stores, spaza shops and filling stations. This will give the economy a much-needed boost and avoid a situation where our citizens, out of desperation, contravene the regulations of the lockdown *en masse* as highlighted herein above.

29. Placing further restrictions *vis-à-vis* the sale of cigarettes during the lockdown period would have dire consequences for the various role players along the tobacco industry value chain including farm workers, factory workers, informal traders, and the many other ordinary South Africans who rely on the tobacco industry for a living. This would in all likelihood lead to job losses and/or loss of income for many in the aforementioned value chain.

30. We trust that you will give our submissions the consideration they deserve without in any way detracting from the obvious challenges the country faces as a result of this pandemic.

A handwritten signature in black ink, consisting of a stylized, cursive name that appears to be 'SM' or similar, located in the bottom right corner of the page.

31. As previously communicated to other government departments, we are also willing to engage government on the above and provide invaluable input as industry stakeholders in order for the state to make a more informed decision in relation to matters that affect its citizens *vis-à-vis* the tobacco industry.

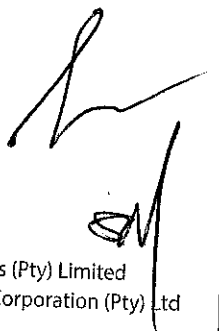
We trust the above to be in order and await your reply in connection thereto at your earliest convenience.

Yours faithfully,

Signed Electronically

Sinenhlanhla Mnguni

CHAIRPERSON: FAIR-TRADE INDEPENDENT TOBACCO ASSOCIATION



MEMBERS:

- Afroberg Tobacco Manufacturing (PTY) Ltd
- Amalgamated Tobacco Manufacturing (Pty) Ltd
- Home of Cut Rag (Pty) Ltd
- Best Tobacco Company (PTY) Ltd
- Carnilinx (Pty) Limited

- Protobac (Pty) Ltd
- Folha Manufacturers (Pty) Limited
- Gold Leaf Tobacco Corporation (Pty) Ltd

FITA Chairperson • Sinenhlanhla Mnguni

"SM7"



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(Cell): 082 809 7018
Direct Fax: 086 450 4256
Docex: 298

Enquires: A WASSERMAN
Email: AWasserman@justice.gov.za

My Ref: A Wasserman/Z71
Your Ref: R Merrifield/FT001

21 April 2020

TO: MORGAN LAW
CNR KIRKBY AND OXFORD ROAD
BEDFORDVIEW
BY EMAIL: ryan@morganlaw.co.za

Dear Sir

**IN RE: CONCERNS ABOUT THE ALLEGED PROHIBITION ON THE SALE OF
CIGARETTES**

We refer to your letter dated 20 April 2020 and confirm that we act on behalf of the Presidency.

We were unable to respond to your letter by 12:00 today as per your request in paragraph 23 of your letter.

A handwritten signature in black ink, followed by the initials "SM" written below it.

Our client is consulting all relevant parties involved and will revert in due course.

Yours Faithfully



A WASSERMAN

For: STATE ATTORNEY (PRETORIA)



"SM8"

Morgan Law Inc
Registration number 2017/343628
Ground floor
The Chambers
Cnr Kirkby and Oxford Road
Bedfordview
2008
Tel: +27 11 268 6603
grant@morganlaw.co.za



MORGAN
LAW

Your ref

Our ref
R MERRIFIELD/FT001

Date
21 April 2020

TO: THE OFFICE OF THE STATE ATTORNEY

By email: AWasserman@justice.gov.za;

Re: CONCERNS ABOUT THE ALLEGED PROHIBITION ON THE SALE OF CIGARETTES

1. Thank you for your letter dated 21 April 2020, the contents whereof have been noted.
2. We record that we have drafted an application, to seek relief alluded to in our correspondence dated 20 April 2020. Our client is, however, considering various options at this point in time as a result of various unknowns at the time of transmission hereof including, *inter alia*, the presidency's view on the extension of a lockdown period and/or the extent of the uncertainty relating thereto.
3. The founding affidavit in support of our client's document is therefore in the process of being finalised, should our client instruct us to launch same.
4. In the circumstances, our client remains adamant that it seeks answers to the questions posed to you in our correspondence dated 20 April 2020. We accordingly afford you an opportunity of appropriately reverting to us by no later than 12 noon tomorrow 22 April 2020.
5. In the event that the application is to be issued, kindly advise if you would be amenable to accepting service thereof on behalf of both the Presidency as well as the Minister for Cooperative Government and Traditional Affairs, via electronic mail.
6. We are amenable to accepting service of all processes via electronic mail.
7. All of our client's rights are reserved *in toto*.

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Director: Grant Morgan (BCom LLB)
Litigation Department Head: Ryan Merrifield (LLB)
Business Consultant: Mike Morgan Consultant: Amit Ramiez Dayal (BCom LLB)

Yours faithfully

Kind regards

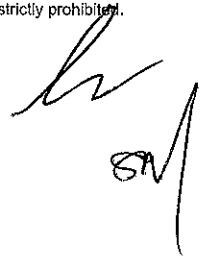
Ryan Merrifield

ryan@morganlaw.co.za

[Electronically transmitted and therefore not signed]

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Litigation Department Head: Ryan Merrifield (LLB)
Business Consultant: Mike Morgan Consultant: Amit Ramiez Dayal (BCom LLB)

Handwritten signature of Ryan Merrifield, consisting of a stylized 'R' and 'M' followed by a vertical line.

"SM9"



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Direct Fax: 086 450 4256
Docex: 298

Enquires: A WASSERMAN
Email: AWasserman@justice.gov.za

My Ref: A Wasserman/Z71
Your Ref: R Merrifield/FT001

22 April 2020

TO: MORGAN LAW
CNR KIRKBY AND OXFORD ROAD
BEDFORDVIEW
BY EMAIL: ryan@morganlaw.co.za

Dear Sir,

IN RE: CONCERNS ABOUT THE ALLEGED PROHIBITION ON THE SALE OF CIGARETTES

- 1 We act for the President of the Republic of South Africa.
- 2 We note that your letter was received by our offices at approximately 2pm on 20 April 2020. We further note from your letter that despite

A handwritten signature in black ink, appearing to be "R Merrifield", located at the bottom right of the page.

raising fairly substantive questions relating to the reasons for the prohibition on the sale of cigarettes during the lockdown, you afforded the Presidency and other government departments to whom your letter was written, less than 24 hours to respond.

- 3 Our offices wrote to you on 21 April 2020 indicating that our clients were unable to respond within the extremely short time period provided for in your initial letter, and that we required time to consult with each of the Ministers to whom your letter was addressed and would respond fully in due course.
- 4 We further note your letter in response sent at approximately 9pm last night (21 April 2020) requiring a substantive response by noon today, failing which you indicated that you intend to launch an urgent application.
- 5 We are concerned at the unreasonable and unfortunate manner in which you have chosen to engage with our clients in the extraordinary times in which South Africans find themselves.
- 6 In any event, as you may be aware, the President has announced that he intends addressing the nation tomorrow evening (23 April 2020) in relation to the easing of lockdown regulations. It would be inappropriate for your clients to approach a court in advance of this announcement.

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7 Your letter of 20 April 2020 asserts that in the absence of a response within this short time period, you would assume that Government does

"not have reasons for imposing the prohibition; and in any case that the allegations made by state officials that there is a prohibition on the sale of cigarettes is ill founded."

8 We deny that there is any basis in law for such a conclusion.

9 Notwithstanding the above, and without limiting the reasons and considerations taken into account in promulgating the lockdown regulations, we record as follows:

9.1 The COVID-19 pandemic presents an extraordinary situation, unlike any that the country has faced thus far. Extraordinary measures are required in order to combat the spread of the virus. It is for this reason that a state of national disaster was declared, and the restrictions under the lockdown regulations imposed.

9.2 As you will appreciate, an effective response to COVID-19 requires the consideration of myriad factors – including both economic and health considerations – in order to craft a response that best protects the people of the country.

9.3 The selling of cigarettes is prohibited under the regulations promulgated under the National Disaster Management Act 57 of 2002 on 25 March 2020 ("**the lockdown regulations**") specifically,



- 9.8 Limiting the movement of people and ensuring social distancing as far as practically possible during the lockdown period, are essential to achieving these outcomes. The prohibition on the sale of cigarettes achieves this.
- 10 In light of the extremely short time which you demand a response, we do not intend to address every allegation in your letter. Accordingly, our right to respond further in due course, including to provide further reasons, if needs be, is expressly reserved.
- 11 We further point out that should you, notwithstanding the content of this letter, proceed to launch an urgent application, we intend to oppose such application, place this correspondence before the Court and to seek a costs order against your clients.

Yours faithfully,



A WASSERMAN

For: STATE ATTORNEY (PRETORIA)



"SM10"

NEWS

I don't approve of the booze and cigarette bans, says Tito Mboweni

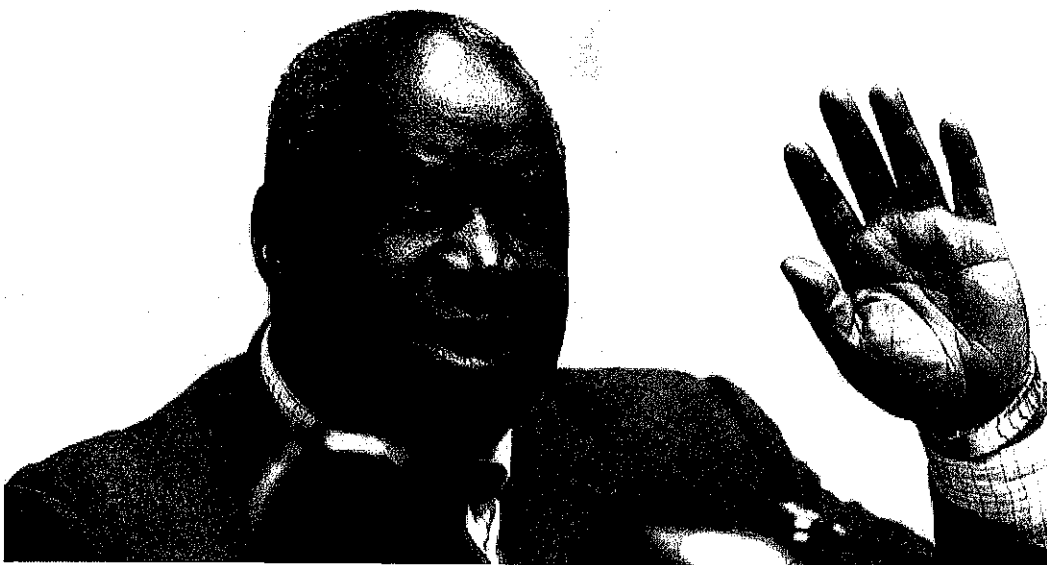
In one month, SA has lost R1,5bn in potential sin taxes, adds Sars boss, expressing concern about illicit trade

01 May 2020

Reading Time: 3 Minutes

Article Number: 3 / 21

Thabo Mokone



TOEING THE LINE Finance minister Tito Mboweni says he lost the debate on cigarettes and alcohol, and has to toe the line.

Image: Eca Alexander

I DON'T APPROVE OF THE BOOZE AND CIGARETTE BANS, SAYS TITO ...

government's decision to continue the ban on alcohol and

"SM"



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Tel: 010 020 6838
grant@morganlaw.co.za

Your ref	Our ref	Date
A Wasserman/Z71	RMERRIFIELD/FT001	1 May 2020

TO: THE OFFICE OF THE STATE ATTORNEY

By email awasserman@justice.gov.za; and
aristabester@gmail.com

RE: COMMENCEMENT OF MANUFACTURING AND EXPORT OF PROCESSED TOBACCO AND CIGARETTES

1. As you will be aware, we act for the Fair Trade Independent Tobacco Association ("FITA").
2. You will be further aware that we hold instructions, on behalf of our said client, to challenge the validity of the regulations purportedly issued in terms of Section 27(2) of the Disaster Management Act 57 of 2002 ("the regulations") and, in particular, Section 27 of the regulations, which prohibit the sale of tobacco, tobacco products, e cigarettes and related products.

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Director: Grant Morgan (BCom LLB)
Litigation Department Head: Ryan Merrifield (LLB)
Business Consultant: Mike Morgan Consultant: Amit Ramiez Dayal (BCom LLB)

3. Further matters which our client has instructed us to address and obtain clarity on are:

3.1 whether in terms of the regulations it's members may resume manufacturing; and

3.2 whether in terms of the regulations it's members may export processed tobacco and cigarettes.

4. It is our considered view that there is nothing in the regulations which prohibit the aforesaid. In this regard, we are satisfied that:

4.1 in terms of Section 22 of the regulations, exports of permitted goods is allowed;

4.2 processed tobacco and cigarettes fall in the category of agro processing, listed in Annexure C of the regulations; and

4.3 the provisions of regulation 28, read with Table 1, part c, item 9 to the said regulations, permit the resumption of all manufacturing subject to certain conditions.

5. A member of our client had sought directions from the South African Revenue Service ("SARS"), with regard to it being permitted to resume processing of tobacco for export purposes. It was advised by SARS that directions should be sought from the Honourable Minister of Cooperative Governance and Traditional Affairs ("your client").

6. We are accordingly instructed to request that your client, confirm in writing by no later than 12h00 on Monday 4 May 2020, that our client's members may:

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Business Consultant: Mike Morgan Consultant: Amit Ramiez Dayal (BCom LLB)

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- 6.1 resume production, albeit subject to the conditions stipulated in the regulations; and
- 6.2 export processed tobacco and cigarettes. In this regard, our client confirms that it's members will comply with the provisions of the Customs and Excise Act 91 of 1964.
7. In the event that your client fails to provide the written confirmation as requested, our instructions are to seek the appropriate declaratory relief.
8. All of our client's rights are reserved.

Yours faithfully,

Ryan Merrifield

ryan@morganlaw.co.za

[transmitted electronically and therefore unsigned]



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Breaking News. First

Mandy Wiener: The case for lifting the cigarette ban

2020-04-21 07:04

news24

Breaking News. First



This bizarre decree around cigarettes, hot pies and roast chickens are an unnecessary distraction. Those heady with power must let go of their obsession with trying to control the population, writes **Mandy Wiener**.

I am not a smoker. I don't like smoking. I think it's dirty and repulsive. I would claim to have never smoked because my parents may read this, but I did for a brief period as a young journalist. We all did, to fill time during long hours standing around on crime scenes and waiting for press conferences to start. But that was a long time ago and I have no personal investment in this matter.

But Government's draconian measures around the sale of tobacco and its about turn on the prohibition of the sale of cooked foods, strikes me as irrational, inexplicable and an unnecessary distraction. At a time when our resolve is beginning to waver, three weeks into a five week lock down, it's upsetting a lot of people.

Many, many essential workers rely on pre-cooked food for sustenance and convenience and it makes no sense that government has all of a sudden implemented this restriction without a proper explanation.

Over the weekend, the Fair-trade Independent Tobacco Association (FITA) announced that it's going to court to challenge the decision to ban the sale of cigarettes. Yesterday, it sent a letter of demand to the President and several Ministers, arguing its case and giving them until 10:00 Tuesday morning to respond to its requests.

The chairperson of the South African Tobacco Transformation Alliance has also now written an open letter to the President, pleading with him to reconsider the ban.

Both these approaches are manifestations of a smoking public, an estimated 7 million South Africans who are becoming increasingly desperate. But it's also a frustration with several confusing and unexplained measures that seem to have been put in place to make lockdown as difficult to bear as possible.

No explanation given

Here's the fundamental problem with the cigarette ban – nowhere in the legislation does it actually stipulate that the sale of cigarettes is banned. It's an assumption on the basis of off the cuff remarks made by cabinet ministers.

Section 27(2) of the Disaster Management Act clearly states the limiting of the sale of alcohol but makes no mention of cigarettes. The amended regulations released after the initial three weeks of lockdown state that the retail stores are only allowed to sell "essential goods".

Again cigarettes don't feature there either. But other amendments were made then – such as the strange ban on cooked food – so why didn't government add in cigarettes at that point, considering the public confusion on the matter. Keep in mind the Western Cape government's initial reading of the law was that cigarettes could indeed be sold.

While Trade and Industry Minister Ebrahim Patel, Health Minister Zweli Mkhize and Police Minister Bheki Cele have all made public comments on the ban of cigarettes, none have explicitly given an explanation as to why this is happening.

We understand that research globally shows that those with underlying conditions are more likely to be susceptible to Covid-19. The working premise is that this also applies to current smokers. It is therefore safe to assume that government has implemented the ban to stop people from smoking so it reduces their risk if they contract the virus.

According to the WHO, 'Smokers are likely to be more vulnerable to Covid-19 as the act of smoking means that fingers (and possibly contaminated cigarettes) are in contact with lips which increases the possibility of transmission of virus from hand to mouth. Smokers may also already have lung disease or reduced lung capacity which would greatly increase risk of serious illness.'

Some have also suggested, rightly so, that the ban is also in place to prevent the sharing of cigarettes amongst the population. It is very common in low income areas for one entjie or skyf to be bounced amongst many, shooting up the risk of passing on the disease. A further argument could be that in this time of economic crisis, government would rather people use their disposable income on food, than booze and smokes.

But it is naïve and ignorant for the executive to think that smokers will benignly oblige and abide by these assumptions. What we are seeing instead is that people desperate for cigarettes will find a way to get them –at an inflated cost in an unregulated environment where the biggest loser is the consumer and the government.

The illicit market, which was already a vibrant enterprise pre-lockdown, is now booming. I've been told that cartons of cigarettes are going for as much as R1 250 at the top end to around R300 at the bottom. Police have intercepted millions of rands worth of fake cigarettes being moved around the country and those are just the ones they managed to stop. The market is being flooded with illicit product.

If government thought it was going to stop people moving around to go buy cigarettes, that's laughable. Anecdotally, some say they are now being forced to travel further from home to go get what they are looking for, instead of buying cigarettes whilst at the local grocery store stocking up on food.

It could also be argued that with fewer single cigarettes to go around, they will be shared more and more amongst those who can't afford them, rather than stopping smoking all together.

The problem with this spike in the black market sales is multi-faceted. It is not short term – the illicit industry is establishing long term trade routes and partnerships that will be maintained long after lockdown has disappeared.

It is a body blow to the fight against the illegal suppliers. We also know very well that organised crime syndicates are funded by the illicit tobacco market and they will be rubbing their hands in glee at the current set up. It is the crooks and gangsters who are benefiting the most.

Unnecessary distraction

The most rational argument for lifting the ban though is the enormous loss of revenue to the fiscus in sin taxes. It's estimated that the government is losing R35 million a day in taxes from the legal sale of cigarettes.

For the duration of lockdown that's a total of nearly R1,3 billion. FITA argues that it could be as much as R1.5 billion a month. That's money that could be pumped into the Solidarity Fund, to assist those who have been hardest hit by the economic plague accompanying Covid-19.

But this argument is also an emotive one. A successful lockdown requires a strong social contract with citizens. President Ramaphosa has garnered considerable support from the public with decisive leadership in the face of this pandemic. But as Rob Rose wrote in the Business Day this week, 'It's time for Cyril Ramaphosa to take back control from the roast chicken Gestapo, the police state disciples and the idiot ideologues in his cabinet'.

He is losing the faith of those who feel that power-hungry ministers are abusing this state of disaster by being overly aggressive, draconian and unconstitutional. Allowing the sale of cigarettes would have bought the government bucket loads of goodwill, particularly at the announcement of the extension of lockdown.

A large part of the emotive argument is also the fact that smoking provides a considerable degree of stress relief to those who rely on it as an outlet. Tensions are running high in households – salaries are being cut, many don't know if they can pay their staff, some don't know where the next meal is coming from.

Stress manifests in different ways. Those who have gone cold turkey will be falling apart at this point. Ask any cop how to calm down two gangsters who are at each others throats and he will



tell you to offer them each a cigarette. Those who choose to smoke as their method of release should be entitled to do so in a constitutional democracy.

This bizarre decree around cigarettes, hot pies and roast chickens are an unnecessary distraction. The focus should be on how we can ramp up testing for the coronavirus and how we can implement a stimulus package to help those who are the most in need financially. Those heady with power must let go of their obsession with trying to control the population.

Government should head the call of the tobacco industry to lift the ban on the sale of cigarettes. It may be an unpopular view – but at the very least, the executive should provide a clear explanation around its motivation for implementing the ban.

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May 2020

"SM13"



Peter Bruce
Columnist

■ OPINION / BRUCE'S LIST

PETER BRUCE: Logic now has nothing to do with handling Covid-19 in SA; it's just politics

President Cyril Ramaphosa is up against it if he is going to continue seeking political consensus on decisions that should be made on science alone

■ BL PREMIUM

29 APRIL 2020 - 06:00 by PETER BRUCE



Nkosazana Dlamini-Zuma. Picture: REUTERS

There must be the mother of all battles going on in the cabinet, or the National Coronavirus Command Council, which seems to consist of the entire cabinet. There is still no sure sign that there is agreement on whether President Cyril Ramaphosa's announcement that tobacco sales will resume when the national lockdown softens slightly from Level 5 to 4 on Friday after the President was openly challenged on the issue. The lockdown has left science behind it. From now on it is a political affair.

Pathetic, I know. But while the president announced on Thursday last week that tobacco would be back on sale at Level 4, the co-operative governance and traditional affairs minister directly challenged him at a media conference she and trade and industry minister Ebrahim Patel gave on Saturday. Answering a planted question about tobacco sales and why it was being allowed now when it wasn't before,

Nkosazana Dlamini-Zuma didn't hold back.

I did not hear the questioner being identified and the question was introduced by someone relaying questions to Dlamini-Zuma.

"She's asking if the sale of cigarettes during Level 4 of the lockdown is not an antithesis of what government is trying to do given the effects of smoking on the respiratory system," the question announcer said. "What scientific evidence and risk analysis was relied up to conclude that its logical to open the sale of cigarettes during a respiratory virus wreaking havoc all over the world?"

Dlamini-Zuma didn't miss a beat. "I did say that we are listening," she replied. "Yes, the President announced the issue of cigarettes; [but] we are hearing you, your arguments, and we will take it back and see what happens after those discussions. We are a listening government and we have listened to you and I think the other people who wanted smoking also have been speaking, but we are hearing. We will take the matter back and discuss it and see what comes out of it. But it's interesting that indeed quite a lot of questions have come up around this [*indistinct*] issue and understandably so."

And with that a line was drawn in the sand. Nowhere in a world hit by the coronavirus has the sale of alcohol and tobacco been banned. Only here in SA. Even in countries teeming with people and who have more than weathered the first wave of the virus have done so without these bans.

But Dlamini-Zuma has been trying to stop South Africans smoking for 20 years or more. The coronavirus is just another lever for her to pull on. She'll now challenge Ramaphosa on the matter in cabinet though it is hard to believe she didn't know he was going to announce the dropping of the ban last Thursday.

THE PRESIDENT IS UP AGAINST IT IF HE IS GOING TO CONTINUE SEEKING POLITICAL CONSENSUS ON DECISIONS THAT SHOULD BE MADE ON THE SCIENCE ALONE.

The President is up against it if he is going to continue seeking political consensus on decisions that should be made on the science alone. I know smoking is bad for your lungs but the lockdown is supposed to stop the spread of Covid-19 and smoking patently doesn't contribute to transmission of the virus. So Ramaphosa was fine on the science.

But we have left science behind, no matter how much we try to convince ourselves that it is still driving our response. It isn't. Politics is. It's a whole new thing.

Two weeks ago we were introduced to the science that led to our early (and impeccably timed) initial declaration of disaster and then a hard lockdown. That was because Prof Salim Abdool Karim, our most celebrated infectious disease specialist and head of the government's advisory committee on Covid-19, was hauled onto the television and, sitting next to health minister Zweli Mkhize, patiently explained what the virus did and how we had to combat it. For a while after that, his word was enough.

But Karim, before the week was out, gave an interview to Rapport, the Afrikaans-language Sunday paper. The interview was conducted in English and a recording of it exists. In it he says, "I think we've already reaped the benefits of the lockdown. I'm not



sure how much more the lockdown can help us.”

That's pretty clear English, and I have to say I was surprised to see it. If he is “not sure” the lockdown serves any more purpose then why are we still in one?

Other people would also have been taken aback, especially politicians such as Dlamini-Zuma. Presumably someone had a word and it wasn't surprising, a day or two after the Rapport interview appeared, to see Karim back-peddling on News 24: “I have not said the lockdown should or should not be ended. I just suggested some criteria for the decision. I have also not said whether the lockdown has or has not achieved its goals.” [Um, Prof, actually, that's exactly what you did say in the Rapport article].

“I have shown that the cases are not going up rapidly up to 9 April. I have not said anything on whether the lockdown should end as this is not my domain to comment.”

Moving at warp speed now away from “I'm not sure how much more the lockdown can now help us”, Karim then gave an interview to the multimedia team at Arena Holdings, owners of the Financial Mail. That flighted last weekend, a week after he had said the lockdown had reached its sell-by date.

“It is inevitable that we are going to have a severe epidemic,” he says in the interview. “It's inevitable. We're going to have it. We can't avoid it.” Listen to that interview here: <https://bit.ly/3f08dQH>

I think the best thing to assume is that the epidemic is going to have its way with us no matter what level we're at. It also means that while the health services and medicine remain important, the thing that brings medicine and maths together – epidemiology – has done what it can. Karim called the epidemic, government listened and locked down and now the rest is politics.

We need to recognise that for Ramaphosa, going to Level 4 is a *political* risk he simply has to take. It may be too little for the DA, which wants a wider opening, arguing that whatever is safe should be allowed, and for common sense. “Why,” asks one slogan I've seen on social media, “can't I open my hair salon and have four clients in it when a taxi a fraction of the size can carry seven people?” It's a perfectly good question.

But no-one is listening. The pressure is too much. And while the DA complains of too little, the EFF complains of too much. EFF leader Julius Malema says Ramaphosa will have blood on his hands if he goes to Level 4 on Friday. Malema supports the hard lockdown. Why? Because the harder the lockdown, the greater the economic devastation at the end and the better the political playing field is for him. Again, it's just politics.

The move down one level, with tobacco allowed, opens a new political fault line in Ramaphosa's cabinet. How might it play? Dlamini-Zuma, going back to cabinet with (probably) her own question still ringing in her ears – “What scientific evidence and risk analysis were relied on to conclude that it is logical to open the sale of cigarettes during a respiratory virus wreaking havoc all over the world?” is trying to squeeze Ramaphosa by shifting the focus of the lockdown, which is to stop the spread of the disease the virus causes.

In all likelihood, she would have introduced the cigarette ban all on her own. She is, after all, the last minister to see the rules before they are gazetted. If that is the case then her position in trying to keep the ban going is weakened, but not completely beaten.

There are not many smokers in cabinet; in fact, none I can think of, and of course all



of the ministers running the regulations are teetotalers, which is why it is so easy for them to hold the alcohol ban in place, even though there's scant evidence that lifting it would suddenly flood our hospitals with the results.

We're in lockdown. That's why the hospitals are empty. Not the alcohol ban. And on Level 4 you still can't go out in public except to buy supplies and to go to work. And there'll be a curfew at night. If anything, the relaxation of the lockdown is accompanied by even more stringent rules.

And our hospitals are *empty*. It's just crazy. Dlamini-Zuma threatened on Saturday to take us back to Level 5 lockdown if the rate of infection rises on Level 4. But that is almost guaranteed! It's rising on Level 5, for crying out loud. What is she saying?

Are we too slow to monitor the rates of illness in such a way as to be able to manipulate human behaviour depending on the capacity of the health services? If we see hospital cases rising, clamp down more socially. If the pressure recedes, ease off again. Logic, though, has nothing to do with it and even as the epidemic rises, as Karim warns it is politics now, and not science that will be making the calls. The political balance of forces will decide.

On smoking, it would be a case of the President and some powerful ministers against the puritans, led by Dlamini-Zuma and Bheki Cele, the police minister. Ramaphosa's allies would draw close if it came to a fight that could embarrass him — Pravin Gordhan, even Ebrahim Patel, Tito Mboweni and, crucially, Zweli Mkhize.

I also think he'd get support from defence minister Nosiviwe Mapisa-Nqakula and the military in general, if push ever came to shove over a pack of Camels or worse.


Mobilising just about the entire military has fed a frenzy of warnings from normally sensible people (and some incurable show-offs) that we are now dicing with the end of democracy as we know it. That's just nonsense. The military may have a screwed-up view of what their constitutional role is but they sure like Ramaphosa and, given the circumstances we're in and the political strain it is causing, I can live with that. The military will be able to help in health, transport and engineering. And they're a balance to Bheki Cele's police, and that may matter.

And of course there'll be bad behaviour. Watching soldiers make people do push ups in the street reminds me of my own enforced military training as a teenager back in 1971 with the infantry battalion in Grahamstown. The permanent force guys were all thugs. You did press-ups and squats for every tiny infraction and what was interesting is how many of the new schoolboy recruits joined in with them. They all became officers, little assholes. From what I can see of the army on the streets, not much has changed.

But for the moment it's Ramaphosa's army. They were thrilled when he put on a uniform to speak to them at the beginning of the (initially small) deployment. He's their commander-in-chief and there's a whole new political dimension to that that needs to be measured with an unfevered brain.

The big work going on behind the scenes, which the democratic warriors in the media ought to be more worried about than the army, or perhaps even the virus, is the creation of a so-called "new economy" after the virus has passed.

This has been Ramaphosa's dream, along with Pravin Gordhan and Ebrahim Patel, from the moment he won the ANC leadership back in 2017. It was there when he opened parliament two years ago with a speech dreaming of new cities and fast trains



and was laughed off the stage because it was the day after his MPs had elected some actual criminals to run portfolio committees.

But the dream persists and there are some big brains working on it. It is Ramaphosa's radical economic transformation – not stealing, as in the Jacob Zuma version, but actually changing the way we live, the way we make money and profit and the way we distribute it.

The only way to get out of the economic hole that junk status, poor economic management and, now, the virus has given us, is to spark an economic boom the likes of which this country has never seen. Imagine building a new city between Johannesburg and Pretoria, between East London and Mthatha or Durban and Pietermaritzburg. Imagine the jobs, the contracts and the wealth you could create. Imagine 100 new hospitals built and operated by the private sector for 20 years before handing them over to the state.

Build fast trains from Johannesburg to Durban and Cape Town. Put workers on the boards of all companies where they are organised. Force trust down the throats of capitalists and socialists alike. Figure a way, once and for all, for make an economy that works for SA instead of the clapped out Victorian trickle down we have now.

Only a form of capitalism can grow this country but it has to be more inclusive and more fair. Protect the profit motive is you only imperative. The rest can be negotiated. Just like the ban in cigarette sales and alcohol under lockdown now.

Profit is the thing in the new economy. Lockdown is the thing under Covid-19. The rest is politics. For myself and not for the first time, I'm not going to underestimate Cyril Ramaphosa's determination to get his way, one way or another.

