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URGENT

Our ref. DJ Eloff / MAT3627

13 January 2021

Dr Nkosazana Dlamini-Zuma
Minister of Cooperative Governance and
Traditional Affairs

Mr Cyril Ramaphosa
President of the RSA

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Dr Zweli Mkhize
Minister of Health

The Chairperson
Ministerial Advisory Committee

By email:

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MajaP@health.gov.za

Dear Sirs /Madam

**RE: SOLIDARITY & AFRIFORUM // MINISTER OF HEALTH – PROCUREMENT AND ROLLOUT
OF SARS-COV-2 VACCINE**

1. We act on behalf of the Solidarity Trade Union and AfriForum NPC (hereafter referred to as “our clients”).

Directors: WD Spies B Com LLB MBA (UP); JP Voges LLB (Unisa)

Associates: M van Schalkwyk LLB (UJ); DJ Eloff LLB (UP)

Consultants: JJ Hurter Dip Proc (UP); J du Toit Böning B Tech (TUT), BA LLB LLM (Unisa)

Acting as caretaker of the former practice of: LT Pretorius Attorneys

2. Solidarity is a registered trade union registered as such by the Registrar of Trade Unions in terms of section 96 of the Labour Relations Act, no. 66 of 1995. Solidarity has more than 120 000 members of which nearly 10 000 members are healthcare workers.
3. AfriForum is a registered not for profit company and civil rights organisation with over 265 000 registered members. It has an interest in the protection of constitutional and human rights. In particular, AfriForum is committed to the continuous monitoring of the status of civil rights in South Africa, and to taking appropriate action when such rights are violated or at risk of being violated.
4. The issues addressed herein are also in the public interest.
5. This letter is directed to all of the above-mentioned parties, who have certain obligations in relation to disaster management in terms of the Disaster Management Act, 2002 as a result of the Covid -19 pandemic; the promotion and protection of the health of the citizens of the Republic and the promotion and protection of all constitutional values, freedoms and rights.
6. The purpose of this letter is to seek clarity and to raise certain concerns on behalf of our clients, their members as well as their supporters regarding the government's strategy on the Covid -19 vaccine, specifically regarding its procurement and distribution.
7. In our clients' endeavour to seek clarity we trust that this letter will be received and responded to in the interest and spirit of the constitutional principles of accountability, transparency, clarity and responsiveness.

BACKGROUND

8. On 3 January 2021, the Ministry of Health held a public briefing on South Africa's Covid -19 vaccine strategy, which was accompanied by a short written public statement. This statement contains the broadly described strategy of government relating to the financing and distribution of Covid -19 vaccines for the South African public. It also sets out some targets regarding the phased approach to vaccine immunisation.

9. During the briefing, and through subsequent media engagements by representatives of the Department of Health, it was made clear that government appears to have arrogated the power onto itself as the sole buyer of approved Covid -19 vaccines and to control and centralise the procurement and distribution of all Covid -19 vaccines. In doing so, it is by no means clear whether it is intended that private sector organisations such pharmacies, medical practitioners or medical aid schemes or others, who are entitled by law in the ordinary course to obtain the vaccines, are excluded and not permitted to procure and sell the vaccines to their patients or members independently from the state's endeavours to do so. Moreover, it appears from the strategy that provincial health departments will also not be allowed to procure any Covid -19 vaccines despite the fact that that health services are the concurrent constitutional competence of national and provincial government.
10. It is also by no means clear whether the strategy is in the nature of a policy or the implementation of legislation. If it is the last mentioned, it is also not clear in terms of which provision or statute the power is exercised. As set out herein below, your clarification is required.
11. In a document titled "Covid -19 Response" issued by the National Department of Health dated 7 January 2020 the following is inter alia stated on page 9 under the heading "Key Principles" concerning the vaccine roll out plan:

"The SA government will be the sole purchaser of the vaccines for the country. The NDOH will contract with suppliers to purchase stock and allocate to provincial health departments and private health sector....."

Allocation of vaccines to the various priority groups will be guided by the MAC on vaccines"

12. By virtue of the public statement referred to above, coupled with various media reports and the government's vaccine strategic framework, our clients' interpretation of government's strategy regarding the procurement and distribution of Covid -19 vaccines can be summarised as follows:

12.1. National government has usurped the exclusive function and power to procure and to allocate any Covid -19 vaccines. National government has excluded private

procurement by the private health sector, outside of national government, of any approved Covid -19 vaccines;

12.2. National government has prohibited procurement of any Covid -19 vaccines by provincial health departments; and

12.3. All citizens are left at the mercy of government's procurement and allocation of Covid -19 vaccines (and the timing thereof), which is already delayed in comparison to various other countries and probably not compliant with the requirement of an effective and rapid response to the disaster in terms of the requirements of the Disaster Management Act.

13. As explained herein below, if it is indeed the intention of government to centralise and control the procurement of vaccines to the exclusion of others, including the private health sector then, our clients are firmly of the view that (i) no enabling statutory provisions exist which grant the Minister of Health the powers to prohibit the private procurement of any Covid -19 vaccines and (ii) the Minister of Health's policy regarding the procurement and distribution of Covid -19 vaccines violates several constitutional rights and contravenes various statutory provisions.

14. If our clients' interpretation is not correct, you are requested to clarify the position, officially, in order to remove any uncertainty.

CONCERNS WITH THE PURPORTED CENTRALISATION OF PROCUREMENT AND DISTRIBUTION OF COVID-19 VACCINES

15. At the outset, the ostensible proposed centralisation policy/strategy/decision undoubtedly constitutes an unjustifiable limitation of various constitutional rights including, but not limited to:

15.1. Section 1(a) - The advancement of human rights and freedoms;

15.2. Section 10 of the Constitution, which provides that: "*Everyone has inherent dignity and the right to have their dignity respected and protected*";

- 15.3. Section 11 – The right to life. It speaks for itself that any measure resulting in the inhibition to freely acquire approved vaccines by any individual through a private health practitioner and to await the government’s roll out plan is likely to delay vaccination of the population and will, inevitably, place lives at risk,
- 15.4. Section 12(1)(a) of the Constitution, which provides that: “*Everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause*”;
- 15.5. Section 12(2)(b) of the Constitution, which provides that: “*Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body*”;
- 15.6. Section 27(1)(a) of the Constitution, which provides that: “*Everyone has the right to have access to health care services*”;
- 15.7. Section 27(2) which places a positive obligation on the state to achieve the progressive realisation of each of these rights; and
- 15.8. Section 27(3) of the Constitution, which provides that: “*No one may be refused emergency medical treatment*”. You will appreciate that the country is facing a continuous emergency, especially with the current second wave, and it is all the more important that there be immediate and free access to the acquisition of the approved Covid -19 vaccines without any impediment to the private health sector. That will not impede government at all to procure vaccines.
16. It should also be noted that when formulating and implementing policies (such as the Covid -19 vaccine policy), the state must give effect to its constitutional obligations. In *Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC)* the Constitutional Court was critical of the government regarding an inflexible policy of government in the relation to the availability of Nevirapine for the treatment of HIV and the protraction it caused was not reasonable. Policies had to be consistent with the constitution and the law. The message from this judgement is clear, namely that government should not adopt inflexible policies, especially considering when dealing with a pandemic such as was the case with HIV during the *Treatment Action Campaign* case and dealing with access to health care.

17. In addition to the aforementioned constitutional concerns, the proposed vaccine policy also contravenes and/or is incompatible and/or ignores various other statutory provisions, for example:
- 17.1. To the extent that the Minister of Health seeks to rely on the Disaster Management Act, disaster management is premised upon an integrated multi-sectoral multi-disciplinary process of planning and implementation of measures aimed at a “... *rapid and effective response to disasters*” (section 1 of the Disaster Management Act). Owing to the fact that the Covid -19 vaccine centralisation policy would neither result in a “rapid” nor an “effective” response to the Covid -19 pandemic, any reliance upon the Disaster Management Act would be misplaced and misconceived;
 - 17.2. The centralisation strategy/policy/decision seemingly ignores the provisions of the National Health Act, No. 61 of 2003 (the “**NHA**”), which obliges every health establishment (as defined) to implement measures to minimise disease transmission (section 20 of the NHA). The same can be said for section 3 of the NHA which obliges the Minister of Health to determine policies and measures necessary “... *to protect, promote, improve and maintain the health and wellbeing of the population*”;
 - 17.3. The centralisation policy infringes upon the vested rights of manufacturers, distributors, wholesalers, pharmacists and persons licensed to dispense medicines in terms of the Medicines and Related Substances Act, No. 101 of 1965 (the “**MRSA**”) to possess and sell medicine; and
 - 17.4. It inhibits the rights and independence of medical practitioners to procure themselves vaccines from pharmaceutical companies and to dispense same to their patients in line with their professional obligations as well as statutory and constitutional rights.
18. In addition to what is set out above, our clients have additional concerns regarding the rationality and feasibility of the centralisation policy ostensibly adopted government:
- 18.1. Firstly, the centralised approach will undoubtedly lead to a delayed response in procurement of the vaccines (which delay would have unmitigated health and economic

consequences). In this regard, our clients note that South Africa is already behind other countries in procuring and distributing Covid -19 vaccines and prohibiting private procurement would place South Africa even further behind;

- 18.2. Secondly, the Council for Medical Schemes announced on 5 January 2021 that Covid -19 vaccines will be included as a prescribed minimum benefit ('PMB') after amendments to PMB regulations. Prohibiting private procurement of any Covid -19 vaccines by medical aid schemes (which includes the Government Employees Medical Scheme or "GEMS") will consequently lead to medical aids being unable and prohibited from providing the PMB and therefore rendering medical aids unable to comply with their statutory obligations; and
- 18.3. Thirdly, the prohibition to procure Covid -19 vaccines which is placed on the private sector, including but not limited to medical aid schemes and private hospital groups, infringes upon these entities' responsibilities to protect their members and patients, and impedes their ability to fulfil their duty of care.

DEMAND

19. In light of the above, our clients urgently require a written response to the following questions for the sake of transparency (over and above the issues and questions raised above) and in the quest for unequivocal clarity:
 - 19.1 Will national government prohibit the private procurement and distribution of any Covid -19 vaccines? Is the strategy designed to cause such exclusion? If not, could you kindly clarify the position not only in the interest of our clients but in the interest of the public;
 - 19.2 Will national government prohibit procurement and distribution of any Covid -19 vaccines by provincial departments of health?; and
 - 19.3 If the answers to the above questions in paragraphs 19.1.and 19.2. are affirmative, what empowering statutory provisions does government purport to rely on to have made and enforce the above policy/strategy/decision? In such event, you are also required to provide full reasons for the adoption of the policy/strategy/decision.

20. Given the serious and time sensitive nature of the matter our clients request your urgent response by close of business on **20 January 2021**. Should our clients not receive a response by the above-mentioned date:

20.1. Our clients will assume that the answers to the questions posed in paragraph 19.1 and 19.2 are affirmative and, furthermore, that there is no empowering provisions on which government can rely upon in order to make and enforce the vaccine centralisation policy; and

20.2. Our clients will be compelled to approach the High Court for appropriate relief.

21. Our clients wish to remind you of the obligation in terms of decisions of our courts, placed on organs of state and particularly members of cabinet, to respond to correspondence directed to it which obligation is further accentuated by the constitutional nature and paramount public importance of the subject matter of this letter.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'D. Eloff', written over a large, stylized initial 'D'.

HURTER SPIES INC

Per. Daniël Eloff