

5 May 2020

MEMORANDUM: LEGALITY OF LIMITATIONS ON EMERGENCY FOOD RELIEF

1. BACKGROUND

As a result of the Covid-19 pandemic and lockdown regulations introduced by government in terms of the Disaster Management Act, unemployment and hunger have assumed dangerous proportions in South Africa. This, in turn, could have an adverse effect on social stability and the safety of Agri SA members. Individual farmers, agricultural associations, provincial affiliates, commodities, Agribusinesses, churches and non-governmental organisations have responded spontaneously and are delivering food to thousands of hungry people. It now appears, however, that certain municipalities require licences for the distribution of food. Other legislation, such as the Foodstuffs, Cosmetics and Disinfectants Act and the Consumer Protection Act, also contain requirements which donors must take note of. The question is whether these bureaucratic measures are still applicable during the current state of disaster.

2. PROVISIONS OF THE CONSTITUTION

Section 27 of the Constitution states that every person has the right to sufficient food and water. According to the Human Rights Commission, this right entails the following:

“The right to food is a human right recognised under national- and international law, which protects the right of human beings to access food and feed themselves, either by producing their own food or by buying it. The right to food is linked to one’s right to life and dignity. The right to food requires that food be available, accessible and adequate for everyone without discrimination always. The right to food does not mean that individuals and groups have a right to be provided food. It means that one has the right to feed oneself in dignity, through economic and other activities. In other words, individuals and groups are responsible for undertaking activities that enable them to have access to food. Nonetheless, the state has an important role to play in supporting these efforts.”¹

3. THE DISASTER MANAGEMENT ACT OF 2002

We are currently operating under a state of disaster as announced in terms of the Disaster Management Act. Constitutional rights have not been suspended and any restriction of fundamental rights must meet the requirements of the limitation clause (section 36) of the Constitution. Section 36 requires, amongst other things, that such limitations must be rationally justifiable as well as proportional.

¹ https://www.sahrc.org.za/home/21/files/brochure_A3_English.pdf

Section 26 of the Disaster Management Act states that: “2) *The national executive must deal with a national disaster- (a) in terms of existing legislation and contingency arrangements. if a national state of disaster has not been declared in terms of section 27(1): or in terms of existing legislation and contingency arrangements as augmented by regulations or directions made or issued in terms of section 27(2) if a national state of disaster has been declared.*” The Disaster Management Act does not suspend existing legislation and must as far as possible be managed in line with such legislation.

Section 27 of the Act sets out the powers that the government may exercise when a national disaster is declared. The section states: “(2) *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 for the national executive to deal effectively with the disaster:*

- (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.
- (o) Or to steps to facilitate international assistance.

It is important to note the provisions in sub-section 3:

” The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of—

- (a) *Assisting and protecting the public.*
- (b) *Providing relief to the public.*
- (c) *Protecting property.*
- (d) *Preventing or combating disruption.*

(e) Or dealing with the destructive and other effects of the disaster.”

Section 33, which deals with the powers of municipal disaster management centres, states that these centres have, amongst others, a responsibility to *”promote an integrated and co-ordinated approach to disaster management in the municipal area, with special emphasis on prevention and mitigation, by departments and other internal units within the administration of the municipality and in the case of a district municipality, also by departments and other internal units within the administration of the local municipalities in the area of the district municipality and other role-players involved in disaster management in the municipal area”*. The municipal disaster management centres are therefore obliged to cooperate with other role players to mitigate the impact of the disaster.

4. LEGISLATION RELATING TO FOOD SECURITY

Section 61 of the Consumer Protection Act creates strict liability for all suppliers within the food chain. A consumer may hold the producer or any other person in the food chain liable for unsafe food. The definition of a consumer in the legislation, however, correlates with the definition of a transaction which assumes that the consumer pays for the goods. The legislation is therefore probably not applicable to food donations.

The Foodstuffs, Cosmetics and Disinfectants Act of 1972 regulates the manufacture, sale and importation of food. This means that it is not actually intended to regulate food donations. Regulations promulgated on 22 June 2018 in terms of this Act (see attached) stipulate as follows in section 3:

3. (1) Subject to subregulation (11) and regulation 14(4) and (5), a person may not handle food or permit food to be handled-
 - (a) on food premises in respect of which a valid certificate of acceptability, has not been issued or is not in force and this also applies to an outsourced vehicle used for the transport of perishable food on behalf of a person in charge of a food premises;
 - (b) in contravention of a restriction, condition or stipulation contained in a certificate of acceptability.
- (2) A person in charge of food premises wishing to obtain a certificate of acceptability in respect of the food premises must apply in writing, to the local authority in whose area of jurisdiction the food premises are situated, on a form containing at least the particulars that are substantially the same as those contained in the form in **Annexure A** to these Regulations.
- (3) Upon receipt of an application referred to in subregulation (2), the local authority must, without delay, refer the application to an inspector for consideration.
- (4) An inspector may, in considering an application, request such further information, as may be considered necessary or expedient, from the applicant or from any other person.

If the inspector is satisfied that the relevant standards have been met, a certificate of acceptability shall be issued to the person or organisation concerned.

There are also various requirements with which vehicles transporting foodstuffs must comply:

STANDARDS AND REQUIREMENTS FOR THE TRANSPORT OF FOOD

13. (1) A person may not transport food, including unprocessed agricultural crops, on or in any part of a vehicle—
 - (a) unless that part of a vehicle is clean and has been cleaned to such an extent that chemical, physical or microbiological contamination of the food is prevented;
 - (b) together with —
 - (i) contaminated food or waste food;
 - (ii) poison or any harmful substance;
 - (iii) a live animal; or
 - (iv) an object that may contaminate or spoil the food.

- (2) Subject to subregulations (1) and (4), the freight compartment of a vehicle that is used for the transportation of food that is not packed or wrapped in liquid proof and dustproof sealed containers—
 - (a) must have an interior surface made of an easy-to-clean and smooth, rust free, non-toxic and non-absorbent material without open joints or seams and, before food is loaded into the freight compartment, no square centimeter of the said surface must, upon analysis as contemplated in regulation 6(4)(b)(i), contain more than 100 viable micro-organisms;
 - (b) must be dustproof;

The regulations requiring a certificate of acceptability are not applicable in the following instances:

- (6) The provisions of regulation 3(1) do not apply to-
 - (a) a vehicle, used by the person in charge of a food premises, to transport, display or serve prepacked food derived from the food premises on condition that a certified copy of the certificate of acceptability issued to the person in charge is present in the vehicle; and
 - (b) a private residence where food is handled for the purpose of making it available, without compensation, to a church, educational or amateur sports organisation or a registered welfare or fund-raising organisation for sale but the person in charge of that organisation, who receives the food, must keep a record of the type of food and the address of the private residence where the food was handled, for a period of at least 30 days after receipt of the food.

This means that where food is handled at a private residence and provided free of charge to churches or schools or amateur sport clubs or registered welfare organisations, the persons who handle the food are exempt from the requirement to obtain a certificate of acceptability.

The Agricultural Product Standards Act of 1990 also deals with the sale of agricultural products. This means it is also not applicable to products that are donated and where no consideration is received for such products.

The Health Act of 1977 makes provision for food safety regulations, which deal amongst others, with the handling and transportation of food and persons who handle food. Local authorities are tasked with policing food control and food hygiene. Local authorities may inspect premises where food is handled.

5. The ban on distributing food parcels

During the weekend there were reports in the Afrikaans media to the effect that the distribution of food parcels without a permit is prohibited and that food distribution would be centralised at government packing houses. The *Daily Maverick* also reported on 5 May 2020 that a notice had been circulated in Emalahleni (formerly Witbank) in Mpumalanga, by the municipal manager in late April laying out the *requirements* to be *adhered to* by private persons or organisations wishing to give out food parcels. The requirements include the following:

- All cooked or uncooked food parcels to be inspected and approved by environmental health inspectors prior to distribution.
- Food parcels may not be distributed without a permit; and
- Clear details of what is being distributed, when, and to whom, must be provided to the municipality for sharing with the security cluster.

Gauteng Social Development, MEC Panyaza Lesufi, meanwhile, said last week that he was concerned about the ways in which individual citizens and NGOs were contravening regulations around food distribution under lockdown. Lesufi reminded the public that anyone in Gauteng wishing to distribute food directly to communities must apply to the provincial Department of Social Development at least 48 hours in advance in order to receive an authorisation letter and must then approach the local police station to inform the SAPS of the distribution plans.²

There was a report in the Afrikaans media on 5 May 2020 with the heading: "Jy mag self kospakkies uitdeel, maar volg die reëls".¹ A spokesperson of the Gauteng MEC for Social Development is quoted in the report. He asked that the following rules be adhered to when food parcels are distributed:

- Donors should notify the department at least 48 hours in advance of the planned donation.
- A distribution plan must be lodged. This is to keep record of which communities have already received food aid and which have not.
- Donors must ensure that officials are present on the day of distribution to ensure order and proper social distancing.

² <https://www.dailymaverick.co.za/article/2020-05-05-how-red-tape-is-hampering-the-hungry-from-receiving-food-in-south-africa/>

- A health official should be present to ensure that the food is safe for human consumption.

6. CONCLUSION AND RECOMMENDATIONS

Many individual farmers and agricultural associations, as well as commodity organisations and agribusinesses, are already involved in the distribution of food to the needy.

There does not seem to be a nationwide ban on providing food aid. No mention of such a ban is made in the Disaster Management Act and Covid-19 regulations. It is possible, however, that certain local authorities may require persons or organisations to apply for permits to distribute food merely to ensure order and adherence to health standards. It makes sense to consult the local authorities and keep them informed of such actions.

Advice to farmers and organisations that wish to distribute food is as follows:

- Ensure that the food is safe for human consumption and that hygiene standards are adhered to when handling and transporting food.
- Try to determine whether the local authority within whose jurisdiction the area where food is distributed falls, does in fact have a permit system.
- Preferably use well-known welfare organisations, churches or non-governmental organisations with a good track record for food distribution.
- Inform your local authority in any event of your intention to provide food.
- Preferably use bona fide NGO's, churches and welfare organisations to do the distribution of the food.
- Ensure that everyone involved wears masks, follows hygiene protocols and maintains social distancing.

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ⁱ <https://www.netwerk24.com/Nuus/Algemeen/jy-mag-self-kospakkies-uitdeel-maar-volg-die-reels-20200504>