

5 Mei 2020

MEMORANDUM: REGSGELDIGHED VAN BEPERKINGS OP NOOD VOEDSELHULP

1. AGTERGROND

As gevolg van die Covid-19 pandemie en die beperkings wat ingevolge die Wet op Rampbestuur deur die regering ingestel het, het werkloosheid en hongersnood gevaarlike afmetings in Suid-Afrika aangeneem. Dit hou weer 'n gevaar vir sosiale stabiliteit en die veiligheid van Agri SA se lede in. Individuele boere, landbouverenigings, provinsiale affiliasies, bedrywe, Landboubesighede, kerke en nie-regeringsorganisasies het spontaan gereageer en lewer kos aan duisende honger mense. Dit blyk egter nou dat sekere munisipaliteite lisensies vereis vir die verspreiding van voedsel. Daar is ook ander wetgewing soos die Wet op Voeding, Grimering en Ontsmettingsmiddels en die Wet op Verbruikersbeskerming wat vereistes bevat waarvan skenkers moet kennis neem. Die vraag is of hierdie burokratiese maatreëls steeds toepassing vind in 'n ramptoestand soos wat ons tans ondervind.

2. BEPALINGS VAN DIE GRONDWET

Artikel 27 van die Grondwet bepaal dat elke persoon die reg het op voldoende voedsel en water. Hierdie reg behels, volgens die Menseregtekommissie, die volgende:

“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. DIE WET OP RAMPBESTUUR VAN 2002

Huidiglik opereer ons onder 'n ramptoestand afgekondig in terme van die Wet op Rampbestuur. Grondwetlike regte word nie opgeskort deur 'n toestand van ramp nie en enige beperking van fundamentele regte moet voldoen aan die vereistes van die beperkingsklousule (artikel 36) van die Grondwet. Artikel 36 vereis onder andere dat sodanige beperkings rasioneel verantwoordbaar sowel as proporsioneel moet wees.

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

Artikel 26 van die Wet op Rampbestuur bepaal dat: “(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.” Die Wet op Rampbestuur skort nie bestaande wetgewing op nie en moet sover moontlik in lyn daarmee bestuur word.

Artikel 27 van die Wet sit die magte uiteen wat die regering kan uitoefen, wanneer ‘n nasionale ramp verklaar is. Die artikel bepaal: “(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 concerning- 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.

Belangrik om op te let is dat subartike 3 bepaal dat:

”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.”

Artikel 33 wat handel met die magte van munisiplale rampbestuursentrums bepaal dat hulle die verantwoordelikheid het om, onder andere: *”must 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.”* Daar is dus ‘n verpligting op die munisipale rampbestuure om saam te werk met ander rolspelers om die impak van die ramp te verminder.

4. WETGEWING OOR VOEDSELVEILIGHEID

Artikel 61 van die Wet op Verbruikersbeskerming skep ‘n skuldlose aanspreeklikheid vir alle verskaffers binne die voedselketting. ‘n Verbruiker kan die produsent of enige ander persoon in die voedselketting aanspreeklik hou vir onveilige voedsel. Die definisie van ‘n verbruiker in die wet hang egter saam met die definisie van ‘n transaksie wat veronderstel dat die verbruiker betaal vir die goedere. Die wet is dus waarskynlik nie van toepassing op skenkings van voedsel nie.

Die Wet op Voedsel, Grimering en Ontsmettingsmiddels van 1972 beheer die vervaardiging, verkoop en invoer van voedsel. Dit is met ander woorde nie werklik daargestel om skenkings van voedsel te reguleer nie. Regulasies wat op 22 Junie 2018 in terme van hierdie wet uitgevaardig is (wat hierby aangeheg word), bepaal in artikel 3 daarvan soos volg:

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.

Indien die inspekteur tevrede is dat daar aan die nodige standaarde voldoen word, sal 'n sertifikaat van aanvaarbaarheid aan die persoon of instansie uitgereik word:

Daar is ook allerlei vereistes waaraan voertuie moet voldoen waarin voedsel vervoer word:

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;

Die Regulasies wat die sertifikaat van aanvaarbaarheid vereis is nie van toepassing waar:

- (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.

Met ander woorde, waar die voedsel by 'n privaat woning hanteer word en gratis aan kerke of skole of amateur sportklubs of geregistreerde welsynsorganisasies verskaf word, is die persone wat die voedsel hanteer, vrygestel van die vereiste om 'n sertifikaat van aanvaarbaarheid te bekom.

Die Wet op Landbouprodukstandaarde van 1990, handel ook met die verkoop van landbouprodukte. Dit is dus ook nie van toepassing op produkte wat geskenk word sonder dat enige vergoeding daarvoor ontvang word nie.

Die Gesondheidswet van 1977, maak voorsiening vir regulasies oor voedselveiligheid en die regulasies handel onder andere met die hantering en vervoer van kos en van persone wat kos hanteer. Plaaslike owerhede is getaak met die polisiëring van voedselbeheer en voedselveiligheid. Plaaslike owerhede kan inspeksies doen van persele waar voedsel hanteer word.

5. Verbod op uitdeel van kospakkies?

Daar het oor die naweek berigte in die afrikaanse pers verskyn met die strekking dat die uitdeel van kospakkies sonder 'n permit verbode is en dat voedselverspreiding gesentraliseer sal word vanuit regeringspakhuis. Die Daily Maverick het ook op 5 Mei 2020 berig dat: In Emalaheni (formerly Witbank) in Mpumalanga, a notice was circulated 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:

- All cooked or uncooked food parcels to be inspected and approved by environmental health inspectors prior to distribution.
- Food parcels cannot 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 NGO's 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 not less than 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

In die afrikaanse media van 5 Mei 2020, was daar egter 'n berig met die opskrif: ”Jy mag self kospakkies uitdeel, maar volg die reëls”.ⁱ In die berig word 'n woordvoerder van die Gautengse LUR vir Maatskaplike Ontwikkeling aangehaal. Hy vra dat die volgende reëls nagekom moet word by die verspreiding van kospakkies:

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

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- + Skenkers moet die departement minstens 48 uur vooraf inlig van die skenkingsproses.
 - + 'n Verspreidingsplan moet ingedien word. "Dit is om rekord te hou van watter gemeenskappe reeds kospakkies ontvang het en watter nie. Sodoende kan ons verseker dat kospakkies eweredig versprei word," sê Hlongwane.
 - + Skenkers sal ook moet verseker dat die beamptes op die dag van verspreiding teenwoordig moet wees om maatreëls af te dwing. "Dit sal help dat ontvangers van kospakkies 'n gesonde sosiale afstand handhaaf asook om orde te skep sou 'n chaos uitbreek. Jy kan dink wat sal gebeur as daar nie genoeg kospakkies is nie," sê Hlongwane.
 - + 'n Gesondheidsinspekteur moet ook teenwoordig wees om te verseker dat die kos veilig is vir verbruik.

6. GEVOLGTREKKING EN AANBEVELINGS

Baie individuele boere en landbouverenigings, asook bedrywe en landboubesighede is reeds betrokke by die verspreiding van voedsel aan hulpbehoewendes.

Dit blyk dat daar geen nasionale verbod bestaan om die verlening van voedselhulp nie. Daar is geen sodanige verbod in die Wet op Rampbestuur of die Covid-19 regulasies vervat nie. Dit is wel moontlik dat sekere plaaslike owerhede, ter wille van goeie orde en die toepassing van gesondheidsstandaarde mag vereis dat persone of instansies moet aansoek doen vir permitte om voedsel te versprei. Dit maak sin om die plaaslike owerheid te ken en ingelig te hou van sodanige optrede.

Advies aan boere en organisasies wat voedsel wil versprei, is die volgende:

- Verseker dat die voedsel veilig is vir menslike gebruik en dat basiese higiëniese standaarde gevolg word met die hantering en vervoer van die voedsel.
- Probeer vasstel of die plaaslike owerheid binne wie se jurisdiksie die gebied val waar die voedsel versprei gaan word, wel 'n permitstelsel het.
- Gebruik verkieslik bekende welsynsorganisasies, kerke of nie-regeringsorganisasies met 'n goeie baanrekord om die verspreiding te doen.
- Stel in elk geval jou plaaslike owerheid in kennis van die voorneme om voedsel te verskaf.
- Moet verkieslik nie self betrokke raak by die uitdeel van kospakkies nie, maar lewer dit eerder aan kerke, welsynsorganisasies of nie-regeringsorganisasies met 'n goeie reputasie.
- Sorg dat almal betrokke maskers dra, higiëniese protokolle volg en die vereiste sosiale afstand van mekaar handhaaf.

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