**HARALD SITTA CC**

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**MEDIATION. ARBITRATION. LEGAL AND STRATEGIC ADVICE**

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**re:** final opinion on C-19 questions

 Parkhurst, 6th of August 2020

Dear Ladies & Gentlemen,

Understanding everyone who is frightened and deeply disturbed especially if thinking of fragile old people and of people with preconditions and after about 130 days of lock-down.

News, reports, messages are confusing but SITTA CC – legal and strategic advice - has done careful studies (our various previous opinions you can order by writing to harald@sittalegalstrategic.co.za ).

**Dr Sitta is 65 so I am in a risk group…. and dare to make this opinion my own birthday present.**

After careful deliberations based on our 43 years of legal practice (our CV attached) we may inform you as follows: Please take your time (maybe one hour?) and activate the brain & common sense as all these questions are important enough for you, your family, your business, your economic existence and the whole economy of South Africa.

**Based on the newest medical and epidemiological expert opinions** ( assembled by MD Gunter Frank \* who reports since mid of March on the “Corona situation and has in all his predictions and deliberations’ proven right and reasonable) and on the **judgement of the HIGH COURT FOR NORTHERN GAUTENG  dated 2nd of June and decision on application of government for leave to appeal** **dated 30th of June** we may give you in short the state of affairs both from the health (medical and epidemiological) and from the legal side:

**Health, medical and epidemiologist considerations:**

* Number of (real) sick cases and related deaths conform in Europe with a normal seasonal infection of respiratory parts called “*flu*”
* reliable indications that ‘lockdowns’ caused more health problems and deaths than C-19,
* Propaganda and alarmistic news have no fundament in the real data about  development of the infection, the strategy of spreading “fear and panic’ (like messages that “*the virus kills’* cause far more physical and psychological health damage than the infection in itself,
* No real sign for a second wave. To speak min South Africa that a “*corona storm rages through the health system’* is grossly wrong unprofessional, evident nonsense and utterly irresponsible. If people are made hysterical so that go to the hospitals just because they sneeze or cough a little bit (which is in the cold and chilly days of June and July perfectly normal and not worth mentioning) and public hospitals after more than 100 days of lockdown still disorganized it is not the virus.
* Most journalists and politicians and civil servants do not understand questions of evaluation of tests result and statistical considerations, about 1 – 1,5 % of tests are ‘wrong positive’. If the infection rate is low the share of “wrong positive” on really infected becomes significantly high and statistics become unreliable. In South Africa about 10% of positive testing’s may be ‘wrong positive”. That is statistically relevant.
* Only spot checks instead of mass testing makes sense,
* Mass testing increases numbers of “positive testing’s” without that being relevant both from a health and statistical point of view, mass testing is the problem not the virus,
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* It is now as in the beginning: 80% of positive tested show no symptoms ore only mild ones like sneezing or coughing. Do you consider yourself “sick “just because you sneeze and cough a little bit during winter?
* USA: in the recent weeks, the number of ‘new cases’ doubled BUT the number of tests tripled! That means the infection is already declining and the whole infection development in line with the annual normal winter flu or cold.
* Mass testing deceives and shows a problem which does not exist,
* Positive tests should be double checked but are not due to lack of capacity due to mass testing.  That means results sum of results unreliable and we have insecure and unprecise data.
* We must differ between deaths caused by C-19 and people dying with C-19. Post-mortems are not done now so it is easy to call a dead person victim of C-19. At the end of the day just

 the name of the death cause will have changed and in normal circumstances be named

 differently.

* High  risk groups like fragile elderly people and people with severe preconditions or infections are always endangered by annual flu waves , it is nothing new and an annual challenge which should in the interest of affected people be approached rationally and according to medical state of the art. Exactly this is not done now.
* Annual flu waves are sometimes stronger and sometimes milder,
* Improving hygienic standards and protecting high risk groups is correct anyway, for that an excitement around C-19 is not needed,
* *Completely not understandable is that politics, journalists and civil servants do not listen to reliable and serious state of the art medical and epidemiologists and statistical opinions and analysis but keep on being in panic mood, whatever.*

**Economy:** Had been most severe damaged by unnecessary C-19 measures : Tourism, wine and other alcoholic beverages, tobacco, restaurants, all kind of service providers in private live like fitness centres etc, 3 million job losses until end of April, unemployment will further rise, also people concede to lower incomes, devaluation of property and other wealth (who buys anyway and at which price ?), supermarkets and shops will see strongly reduced turnover, have to close or reduce number of outlets and reduce staff, more unemployment, service provider for business like property agents, attorneys, CAs will also see reduced mandates, manufacturers will see reduced orders and so on. Banks will experience lot of bad debts, general liquidity strongly reduced, will cause balance problems, Strong increase in insolvencies,   In the worst case a domino effect which carry through all sectors of the economy, strongly reduced tax income, for the state it will be impossible to budget and pay all civil servants. Economy could be reduced by end of the year to serve maybe 30% of the inhabitants. What about the others? Reduced to pre-industrial living and agriculture? End of South Africa as an industrial state and economy? We will see most severe consequences until the end of this year if gvt goes on like that and anyway really feel the punch mid of 2021 latest. But then it will be too late, sorry. See also [www.dearsouthafrica.co.za](http://www.dearsouthafrica.co.za) dated 6.8.20

**State of legal affairs**: The HIGH COURT for Northern Gauteng had with judgment dated 2.6.2020 declared most C-19 regulations invalid. The Minister applied for leave of appeal, which was only partially granted by judgement dated 30th of June. Essential details as follows, explained for common sense:

* Declaration of national disaster was in itself rational (at that time) as we may also say today at that time what was actually approaching was difficult to predict, to be on the safe side therefore reasonable,
* After reviewing in detail, the regulation most did not pass
1. The rationality test: do the regulations make sense measured on the purpose of the NDM Act and the objective danger to public health?
2. The constitutionality test: Are the severe limitations on fundamental rights constitutionally justified?

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* The declaration of invalidity was suspended and Minister (Dlamini-Zuma as head of NCCC) given **14 days’ time** to issue regulations which are valid and reasonable within the tenor of the judgement. It would have been not really difficult for the minister with all her staff of civil servants to show at least a minimum of respect to the Court and issue without prejudice such regulations together with an application for leave to appeal (to which the Minister is entitled anyway) .But not even that was done showing once more a callously disregard to the courts and the rule of law by this gvt. That this attitude nearly goes unnoticed in mainstream media (MSM) and the public is most embarrassing.
* Minister asked for leave of appeal for four reasons. For one a partly leave of appeal was granted so that parts of the judgment are in force and some regulations definitely invalid and lack any legal power and substance and therefore not be enforced.
* Now it becomes tricky as we must divide the judgments in various parts but that sounds more complicated as it is, with common sense we can follow:
1. regulations having passed the rationality test by the Court:
* cautionary regulations relating to education,
* prohibitions against evictions,
* initiation practices,
* closure of Night clubs and fitness centres (sorry, not our opinion but a certain degree of rationality given)
* closure of borders against immigration.
1. Regulations outside the realm of the judgment:
* Prohibition of the sale of tobacco and related products as these measures had been objects of another proceedings (**By the way**: why did the applicants in those proceedings argue that tobacco products are essential as it makes addicted and not simply that article 27, enlisting finally the measurements admissible in a disaster situation, of the NDM Act does simply not provide for the banning of sale of goods EXCEPT for alcoholic beverages . Can’t they read the Law & why bothers the DA the *ConCourt* with an application to declare the NDM Act unconstitutional when this act clearly is not, the misery does not lay within the Act but the arbitrary and unreasonable regulations issued )
1. Regulations which are covered by granted leave of appeal and therefore declaration of invalidity suspended:
* All not specifically expressly named in the judgment dated 2.6.2020. Now it is the hour of the sticklers to details. We – SITTA CC- can only do that if you give as a mandate to go line through line though the multitude of gvt regulations and this si costly as costs of *appletizer* bubbles went up!
1. Regulations declared invalid with no leave of appeal granted:
* Regulation number (RN) 35; attendance to funerals,
* Blanket ban on all kind of trades or more or less formal and informal economic activities,
* Ban on hairdressers,
* Limitations on movements of children,
* Limitations on exercise, especially in time,
* Closing of beaches and parks,
* **Financial compensation cannot remedy the loss of fundamental rights**,
* Aid relief regulations,
* Limitations on buying clothes,
* Businesses and other institutions may operate **with no valid exception**, means all may operate,
* The callously ordered criminalisation of violating regulations is invalid without if’s and when’s.

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**In general: *It is impossible to impose a penal or criminal provision by ordinance! If the legislator wants to introduce a penal code it must be by law. I believe a student of law learns that within the first months at university. Once again: No violation or contravening of the C-19 regulations is a criminal act and police etc have no right to arrest or punish people for any kind of C-19 contraventions.***

That means, do as you please as the state has no “weapon’ to punish you and also in the light of the development of infections it is unconceivable that your actions really damage others (except you really being severely sick and contagious but that is valid with any disease and not only limited to C-19) . **For example, selling and buying of alcoholic beverages or tobacco products, as open closed places and businesses or night vigils at funerals are not a criminal offence.**

 **Basically, from the point of view of criminal law the regulations had become sanctions less and in view of the whole package of C-19 regulations seen as irrational and unconstitutional also other state sanctions or threats (civil or administrative actions?) could be seen with utmost calm.**

*C-19 regulations therefore – surely every single one has to be checked before deciding finally what to do and what to ignore -* ***appear therefore on first view (prima vista) as leges imperfectae, as rules without sanctions and therefore it is dubious if they can be judged as real law as enforceability is an essential property of legal regulations.***

 To steer your live and business in that way through the miserable sea of C-19 regulation waves requires some guts, that you must provide, SITTA CC gladly provide professional legal advice.

The Court emphasised that curtailing fundamental rights is only authorized by section 37 of the Constitution (state of emergency) and according to the rules ‘of section 36 on “ how to limit reasonably ’ That the exercise of public power must be rational under the rules of the constitution goes without saying and must not be clarified again by a Supreme Court and these remarks of the court emphasizes our opinion in previous papers that the actions of this gvt under the NDM Act are *a demolishing change of the constitution* and not a lawful change.

What about the surprise regulations issued ‘overnight’ on Sunday 18th of July, especially introducing again a curfew, closing of schools and a ban on sale of alcoholic beverages (the “*finger snap regulations*”)? *As the judgments prior to those have already destroyed the fundament of all these arbitrary and unreasonable and unconditional regulations gvt cannot heal that by simply repeating such kind of regulations. What had been declared invalid remains invalid, “repetitio non sanat defectum”, acting unlawful repeatedly does not heal the legal defect! That regulations are null and void from the very beginning.*

Further we may safely say that there is no pandemic exception to the fundamental rights and liberties the constitution safeguards. Individual rights do not disappear during a public health crisis (p 14 of the judgment dated 30.6.) The individual rights are always in force and restrain and limit gvt actions. To argue differently would give the gvt unlimited arbitrary and tyrannical powers and we hope nobody likes to do that, even if concerned about the health issues. (One remark: an effective fighting of the disease would have with the tools given by the NDM Act and within the limits of reason and constitution been perfectly possible with no collateral damages done; this said to those who argue that critics of c-19 measures leave really sick or really endangered people out in the cold! )

In the decision on granting or not granting leave to appeal the court expressly demanded from the minister to review and remedy the regulations lacking rationality and constitutional compliance. That was end of June, the minister had remaining 10 days to do so and more than

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one month later the minister had done nothing. That does not surprise as arbitrary rule and callous disregards of Courts and rule of law is essential part of gvt policy.

**But granting leave to appeal in certain matters and the duty of reviewing and remedy unlawful regulations is in our humble opinion one legal package. The minister cannot exercise her right to appeal but on the other side disregards a fundamental duty.**

**Through the whole procedure the minister has not acted *bona fide* but - and we can safely say that the minister will try to gain as much time as possible by delaying with all kind of tricks the issue of a proper appeal – but *malissima fide* (with utmost bad faith) and has therefor forfeited the right to raise an appeal.**

*The constant abuse of power and of legal remedies and instruments can only be answered in a legally strong way.*

As the court rightfully told the 1st applicant, the law of the executive actions in discussion cannot be ignored **but**

* The arbitrary behaviour of the minister has consequences as set out above **and**
* The Court made the regulations sanction less **and**
* Courts and citizens have the right of self-defence against arbitrary gvt actions by reading the law and the Court decisions(s) in a way giving them as much legal power as possible in resisting

**Therefore, in our humble opinion the whole judgment dated 2.6.20 is not subject to any appeal and *in toto* (as a whole) final and enforceable.**

**Due to the callous disregards of the court and the rule of law the applicants brought forward a motion to declare the judgment operational and effective and to grant additional remedies to secure the rule of law.**

**The applicants may be lauded for their relentless efforts to secure the rule of law.**

That most of that goes unnoticed by MSM and the public, which should be highly interested is utterly embarrassing and we may emphasize that we are all citizens and not subjects or serves or slaves of a certain power.

**Conclusions:**

Dr Sitta is a permanent residence in ZA since 2007 and was until C-19 measures started thankful for a good live in my beloved South Africa. I am also not party bound as I am not allowed to vote which I am in my home state, Austria.

Therefore, Dr Sitta did until now see no specific sense to meddle in South African policies, especially party policies as I must live with any party or parties the ZA citizens decide to vote for. Until C-19 my constitutional rights had not been infringed and I had the chance, which I did with pleasure to make an input and make, small but meaningful investments.

The gvt had in the 2nd half of March due to the then very low cases a lead over other countries and with the MDM Act a solidly formulated law at hand with which some precise measures could have been ordered within the purpose of the said Act and within the limits of the constitution.

The gvt did not so but produced a GAU, biggest possible failure (BPF). Which will

* Create much more health problems as avoided (today we know that the virus comes and goes and gvt measures all over the work have nearly no effect)
* Most severely damage the economy for a long time, this combined with a severe depression, an extremely high unemployment rate and ultimately also a high inflation,
* Long-time damage to a modern, industrial society as responsible, freedom minded, and reasonable people are needed to build up mand maintain such a society. The C-19 measures
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have turned people into a frightened mass with a slave mentality, passive and subservient. You can run a slave plantation with that or a galley with rowing slaves but not an industrial society and economy asking for a high productivity.

As gvt will with a high degree of probability if analysing past behaviour and actions ignore the judgment of the HIGH COURT FOR NORTHERN GAUTENG  and the  ( in numerous parts of the case) denied leave of appeal from about mid of July on many measures are either not valid or without sanctions *and are then only based on arbitrary rule but not on the rule of law.* Both in many regulations issued and in many aspects of defending the case the gvt acted – if assuming a minimal degree of intelligent calculation - frivolous and with chicanery and if we do not like to assume that, with complete ineptitude, dumbness and stupidity.

Therefore, the gvt has changed with that kind of behaviour from being a TYRANNUS EX PARTE EXERCITII into A TYRANNUS EX DEFECTU TITULI.

Therefore, there exists now a state of *tumultum* which by every citizen may be overcome by the *iustitium*.

*What everyone makes out of our opinion that is their thing. As critics of C-19 measures get labelled as ‘narcissist’ and “psychopaths’ and “anti-social” or “extremist” SITTA CC – legal and strategic advice -is not part of demagogic and hysteric discussions and has informed enough, nothing more to say and we will not publish any opinion anymore and if someone prefers to be a C-19 slave or serf so be it.*

With kind regards

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* 23.7.2020 [www.achgut.com](http://www.achgut.com) (at present only in German language available, we work on a translation)