



## Maritime, International Trade and Insurance Law Team

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*Our Cox Yeats Maritime, International Trade and Insurance Law Team is committed to keeping you informed on pertinent legal issues, as well as developments within our firm.*

### CARGO MOVEMENT DURING COVID-19 LOCKDOWN

On Monday 23 March 2020, the President of the Republic of South Africa announced a nation-wide lockdown for 21 days in order to deal with the Covid-19 outbreak in the country. The lockdown was imposed pursuant to the declaration of a national state of disaster in terms of section 27(2) of the Disaster Management Act 57 of 2002 (“the Act”).

What this lockdown initially entailed was addressed by the Minister of Cooperative Governance and Traditional Affairs in Regulations issued in terms of section 27 (2) of the Act, published in Government Notice 318 of 18 March 2020 (“the Regulations”). In response to representations made by various sectors of society, the Regulations were subsequently amended by way of Government Notice 446 of 2 April 2020 (“the Amended Regulations”).

The most far-reaching provisions of the lockdown were contained in Regulation 11B, which provided that:

*“every person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service, obtaining an essential good or service, collecting a social grant, or seeking emergency, lifesaving, or chronic medical attention”*

and, further, that:

*“[d]uring the lockdown, all businesses and other entities shall cease operations, except for any business or entity involved in the manufacturing, supply, or provision of an essential good or service, save where operations are provided from outside of the Republic or can be provided remotely by a person from their normal place of residence”.*

The definition of “essential services” in the Regulations, included:

- Air traffic navigation, Civil Aviation Authority, **Cargo Shipping** and **dockyard services**;

- Production, manufacturing, supply, **logistics, transport**, delivery, critical maintenance and repair in relation to the rendering of **essential services**, including components and equipment; and
- Transport and logistics in respect of essential goods, as defined, to neighbouring countries.

The inclusion of “*Cargo Shipping and dockyard services*” as “*essential services*” has allowed for the continued operation of the ports. This is further consistent with Government Notice 216 of 26 March 2020, issued by the Minister of Transport, which provides that the loading and offloading of cargo in and out of commercial ports is permitted. In addition, on 31 March 2020, Marine Notice 21 of 2020 was issued by the South African Maritime Safety Authority, which confirmed that ports would remain open during the lockdown, and that all cargo would be loaded or discharged.

In relation to the movement of cargo, this meant that cargo loading and discharging operations within the ports was permitted, in respect of all cargo, whilst the carriage, by road or rail, was permitted only in respect of essential goods. The immediate concern that arose was that there was no provision permitting the carriage by road or rail of non-essential goods, leading to the possibility of cargo storage capacity, particularly containerised cargo, running out, in and around the port precincts.

Transnet circulated a Memorandum to its customers and interested persons on 26 March 2020 in which it indicated that the responsibility would be placed on shipping lines to provide a cargo evacuation plan prior to vessels entering ports with the intention of maintaining cargo movement and fluidity of container stacks. Transnet reserved the right not to allow vessels into port in the absence of an acceptable cargo evacuation plan. In this way, Transnet shifted the onus to the shipping lines to ensure continued cargo movement through the ports and in the surrounding port precincts.

The Amended Regulations have sought to address the issues arising from the wording in the Regulations.

The movement between provinces and between metropolitan and district areas is permitted for “**transportation of cargo from ports of entry to their intended destination**, on condition that necessary precautions have been taken to sanitise and disinfect such cargo”.

There is no definition of “*cargo*” in the Amended Regulations and they do not address the question of whether carriage of cargo *within* metropolitan and district areas is permitted. Nevertheless, interpreting the Amended Regulations according to their purpose, it now appears that the carriage of all goods (i.e. both essential and non-essential), by road or rail, from the ports to their intended destination, is permitted. This will hopefully prevent the overcrowding of container storage facilities in the areas surrounding port precincts.

However, it is likely that in many instances, the intended destination of cargo will not be a business that operates an “*essential service*”. Hence, delivery to the intended destination may not be possible during the lockdown period and delivery may have to be made into a temporary storage facility until the lockdown period is over. However, this carries with it some challenges – firstly, such a warehouse is not technically the “*intended destination*” (i.e. it will differ to what is contained in the contract of carriage as the place of delivery) and secondly, not all warehouse operators are classified as “*essential services*”.

Furthermore, given the requirement to “*sanitise and disinfect*” cargo, containers will be required to be opened after being delivered into a storage facility within the port precincts for sanitising and disinfecting. This will no doubt carry with it other risks, given that containers’ seals will be required to be broken prior to onward carriage. Warehouses within the

port precincts will have to permit this to occur in a controlled environment and a certificate will have to be prepared recording that sanitising and disinfecting in respect of the cargo has occurred.

The Regulations provided that all borders of the Republic would be closed during the period of lockdown, except for transportation of fuel and essential goods. The Amended Regulations now allow for transportation of fuel, **cargo** and goods across South African borders.

In regard to export cargo, the Regulations permitted the export of essential goods to neighbouring countries. The Amended Regulations included the words “*of cargo*” ahead of the words “*and goods*”. This suggests that cargo was intended to be something other than essential goods, namely, arguably, non-essential goods. However, cargo could also simply be a reference to goods that were carried on a ship (i.e. imported goods), consistent with the ordinary meaning of the word. The Amended Regulations still maintain a reference to “*cargo and goods as set out in part A*”, which can be interpreted to mean essential cargo (i.e. imported goods) and essential goods (i.e. goods manufactured or produced in South Africa).

In our view, therefore, the Regulations and Amended Regulations only permit the export of essential cargo and essential goods. The Amended Regulations seem to assume that the export of non-essential goods, manufactured or produced in South Africa, whether carried by road, rail or sea, cannot take place in any event as businesses manufacturing or producing non-essential goods, and consequently providing non-essential services, are prohibited from trading during the lockdown.

Whilst the Regulations and the Amended Regulations are not as clear and precise as one might like, it is important to bear in mind that they have been drafted in great haste and that it is to some extent inevitable that gaps will arise in these circumstances. It is for these reasons that we submit that the Regulations and the Amended Regulations need to be interpreted broadly, in a purposive manner, having regard to what the Government ultimately seeks to achieve through the national lockdown.

It is very encouraging to see both how swiftly the South African Government has moved to promulgate these Regulations and Amended Regulations and that they appear to have taken into account the concerns of various stakeholders in doing so.

Whilst the various industries involved in the transport of cargo, from cargo importer/exporters to cargo insurers to freight forwarders to road hauliers to shipping lines to warehousemen all digest the Regulations and the Amended Regulations and the impact upon their specific industries, it is an important time for industries to lobby Government and parastatals such as Transnet, and engage meaningfully in regard to issues of concern. We are in extraordinary times at present and the Government cannot be expected to do it all alone. On the contrary, a concerted, common effort is required with a view to minimising the impact of the national lockdown on all involved in these industries. With this in mind, it is likely that we will be seeing further Amended Regulations soon.

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