



Maritime, International Trade and Insurance Law Team

Legal Update
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Our Cox Yeats Maritime, International Trade and Insurance Law Team is committed to keeping you informed on developing legal issues.

UPDATE CARGO MOVEMENT DURING COVID-19 LOCKDOWN

With effect from 1 May 2020, the National Lockdown in response to Covid-19 was changed to Alert Level 4. Whilst there was an initial indication from Government in regard to the easing of restrictions and draft Regulations were circulated for industry comment, the amended Regulations were published in final form by the Minister of Cooperative Governance and Traditional Affairs on 29 April 2020 (“**amended Regulations**”).

The amended Regulations have repealed all of the previous Regulations published between 18 March 2020 and 20 April 2020, with the only savings provision relating to ongoing criminal investigation and prosecution. Notwithstanding such repeal, all directions issued under the previous regulations shall continue to apply unless varied, amended or withdrawn by the relevant Cabinet Minister.

The amended Regulations have furthermore updated the circumstances in which essential and non-essential goods, and cargo, can be transported within the country and through its various ports of entry. The definitions of “*essential goods*” and “*essential services*” have been also extended.

In particular, Regulation 21, “*Closure of Borders*” provides:

“All borders of the Republic remain closed during the period of Alert Level 4, except for ports of entry designated by the Cabinet member responsible for Home Affairs and for the transportation of fuel, cargo and goods during the period of Alert Level 4.”

Regulation 22, “*Transportation of Cargo*”, is an important provision and it reads as follows:

“(1) *Rail, ocean, air and road transport is permitted for the movement of cargo to other countries and within the Republic of South Africa, subject to national legislation, for the transport of the following goods:*

(a) *essential goods for import as set out in Annexure B to the Regulations;*

- (b) *the import of materials and components required for manufacturing activities allowed under Alert Level 4;*
 - (c) *cargo at ports of entry;*
 - (d) *goods cleared at ports of entry for removal in transit through the Republic destined for neighbouring countries;*
 - (e) *permitted goods for export as set out in Annexure C to the Regulations;*
 - (f) *transport of goods within the Republic of South Africa; and*
 - (g) *any other goods as set out in Directions by the relevant Cabinet member; taking into account health risks, constrained capacity at ports of entry and other factors relevant to the health, public order and economic effects of Covid-19.*
- (2) *The Cabinet member responsible for transport, may, after consultation with the Cabinet members responsible for cooperative governance and traditional affairs, trade, industry and competition, health, justice and correctional services and public enterprises, issue Directions relating to sea cargo operations and airfreight operations.”*

On 4 May 2020, directions were issued in terms of Regulation 22(2) by the Department of Transport, under Government Notice 496 of 2020, Measures to Address, Prevent and Combat the Spread of COVID-19 in the Sea Ports Directions, 2020 (“**the Directions**”).

Imports

The position with regard to essential goods remains the same but the definition of “*essential goods for import*” has been extended in Annexure B to the amended Regulations. These additional goods include hardware, components for after-sales vehicle services, chemicals, packaging and ancillary products used in the production of chemicals, textiles required to produce face masks and other personal protective equipment and ICT equipment to facilitate work-from-home arrangements.

There is less clarity around non-essential goods. The amended Regulations in some instances use the words “*cargo*” and “*goods*” interchangeably but in other circumstances, they are used in contexts from which it appears that they are intended to have different meanings. In our view, the reference to “*goods*” is a reference to any goods whereas a reference to “*cargo*” is a reference to goods that were carried on a ship and discharged at a South African port.

Regulation 22(1)(c) provides that cargo at ports of entry may be transported to other countries and within South Africa. In referring to cargo, there is no distinction between essential goods and non-essential goods. This must mean that both essential and non-essential goods may be transported from ports of entry both within South Africa and to other countries.

Regulation 22(1)(f) provides that the transport of goods within South Africa is permitted. Once again, given that no distinction is drawn between essential goods and non-essential goods, this provision must mean that non-essential goods may be transported within South Africa.

That said, it is important to note that if non-essential goods do not form part of materials and components required for manufacturing activities allowed under Alert Level 4, then they may not be delivered to the importer’s premises, unless the importer is lawfully trading under Alert Level 4 (for example, where an importer deals with both essential goods and non-essential goods). In these circumstances, the position remains that non-essential goods must be delivered into a temporary warehouse facility that is lawfully entitled to operate under Alert Level 4, pending the lockdown reaching a point where the importer is lawfully entitled to conduct business operations.

Section 10(1) of the Directions provides that transportation of cargo from sea ports of entry to their “*final destination*” is permitted. In respect of essential goods, materials and components required for permitted manufacturing activities and non-essential goods being delivered to an importer who is lawfully operational, the final destination will be the importer’s premises. For all other goods and cargo, the final destination will be a warehouse facility.

Exports

In terms of Regulation 22(e), permitted goods for export are as set out in Annexure C, as follows:

- Agricultural, agro-processing, forestry and fishing products.
- Manufacturing products and mining products permitted for production under Alert Level 4 table subject to directions issued by the relevant Minister.

The reference to “*manufacturing products and mining products permitted for production under Alert Level 4*” takes one to Part C (Manufacturing) and Part K (Mining and Quarrying) of Table 1. All of the services mentioned therein are permitted. In addition, the reference in sub-section (1) of Part C (Manufacturing) to “*Wholesale and retail products permitted to be sold under Alert Level 4*” also includes the goods mentioned in Part E (Wholesale and Retail Trade, covering Stores, Spaza Shops, e-Commerce and Informal Traders). This creates an extensive list of goods that are permitted to be exported (“**permitted export goods**”).

In respect of goods other than permitted export goods, it is our view that these goods may *not* be exported under the Regulations.

Section 10(2) of the Directions provides:

“Transportation of cargo to the sea ports of entry for export is permitted.”

On an ordinary reading of this Direction, it is tempting to interpret it to mean that *all* cargo (i.e. including cargo other than permitted export goods) can be transported to sea ports for export. However, this is *not* the case. The reason for this is that Directions are subservient to Regulations and the Minister of Transport does not have the power to authorise cargo/goods to be transported for export, where such cargo/goods are not expressly permitted to be exported under the Regulation. The Minister’s powers are constrained by the Regulation (failing which, he would act *ultra vires*) and his primary power is under Regulation 22(1)(g) in respect of which he can identify additional goods, on a case-by-case basis, which he has not yet done.

In respect of wine, whilst it is not expressly included within the definition of permitted export goods, Regulation 26, “*Sale, dispensing or transportation of liquor*” provides:

“(3) The transportation of liquor for export purposes is permitted.”

Transport and export to neighbouring countries

Regulation 22(1)(d) provides:

“Goods cleared at ports of entry for removal in transit through the Republic destined for neighbouring countries.”

Therefore, *all* removal in transit cargo can be transported through South Africa and exported to neighbouring countries.

The applicable regulations are confusing, but in our view, one ends up in the same position, namely that in respect of exports to neighbouring countries, the same criteria apply.

Information and Communications Technology

The Directions on the Risk-Adjusted Strategy for the Communications and Digital Technologies Sector issued under Regulation 4(10) of the Disaster Management Act 2002 (Act No. 57 of 2002) was issued on 3 May 2020 (“**the ICT Directions**”). These set out operational requirements for elements of the ICT sector which may operate during Alert Level

4. Of interest is the “*Mitigation measures*” which have been set out in the ICT Directions in respect of certain goods, and goods related to certain ICT services.

“... *In addition to the requirements of Regulation 28(2) [occupational health and safety measures to be adopted by businesses operating during lockdown], the following mitigation measures apply ... all containers / shipments must on arrival be sanitised before handover.*” (emphasis added)

Therefore, in respect of ICT cargo, there is an additional requirement, namely that containers/shipments must be sanitised on arrival. What is not clear is whether the reference to “*before handover*” is intended to apply each time a container changes hands during the transportation process, or only upon delivery to a consignee/importer. It appears that the provision envisages *one* handover point and logic suggests that this would be the point at which the consignee/importer takes delivery of the container. The reference to “*shipments*” suggests the cargo itself, meaning that both the container and the cargo are to be sanitised on delivery.

Conclusion

We can certainly understand that clients might find the amended Regulations and Directions both confusing and overwhelming. The truth is that these documents are not easy to navigate when it comes to determining what is permitted in respect of the transportation of cargo/goods. Therefore, whilst we have set out general comments herein, we would strongly recommend that legal advice be sought in respect of specific goods and services.

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