

**To:** The Chairperson & Members of the Committee  
**The COGTA Parliamentary Portfolio Committee**

**For attention:** Ms Shereen Cassiem  
Committee Secretary  
Per e-mail: [scassiem@parliament.gov.za](mailto:scassiem@parliament.gov.za)

**Re:** **Impact of the Disaster Management Act Regulations on the religious sector**

**From:** Advocate NL Badenhorst  
Legal Counsel, Freedom of Religion South Africa (FOR SA)  
E-mail: [legal@forsa.org.za](mailto:legal@forsa.org.za)

**Date:** Thursday, 22 April 2021

---

<b>CONTENTS:</b>	<b>PAGE NUMBER:</b>
About <i>FOR SA</i> , and our constituency	2
History of <i>FOR SA</i> 's engagement with Government	2
Comments relating to the impact of the DMA Regulations	3
Recommendations	6

---

Dear Honourable Muthambi MP,

1. Thank you for calling for engagement on the impact of the Regulations promulgated in terms of the Disaster Management Act, 57 of 2002 ("the DMA") on the religious sector, and the opportunity to make submissions to the COGTA Parliamentary Portfolio Committee (COGTA PPC) in this regard.
2. We are greatly appreciative of the Committee's past and continued engagement on this issue - especially the Committee's proactiveness in calling the National Disaster Management Centre (NDMC) to respond to the issues raised in this round of written submissions. We understand that such response will take place during at the Committee's meeting on 29 April 2021.

### **ABOUT FOR SA, AND OUR CONSTITUENCY**

3. *Freedom of Religion South Africa NPC (FOR SA)* is a legal advocacy organisation working to protect and promote the religious freedom rights of all South Africans, regardless of their specific religious or ideological beliefs. *FOR SA* is therefore neutral and non-partisan in terms of any interpretation of doctrine, faith or belief to the extent that it complies with the rule of law.
4. In the matter of COVID-19 and the impact of the Regulations on the religious community of South Africa, *FOR SA* has been mandated by religious leaders and organisations representing between 11 million and 18.5 million people (including 10 million people from the African Indigenous and Spirituality Churches) from a cross-spectrum of churches, denominations and faith groups, to engage with Government and make submissions on their behalf.
5. As such, and because the constitutional right to freedom of religion, belief and opinion (s 15) and the rights of religious communities (s 31) have been directly affected by (both the national and provincial) Government's response to COVID-19, our constituency has a direct interest in this matter.
6. *FOR SA's* submission will focus on how the religious community has been impacted by the Lockdown Regulations and *Directions pertaining to religious gatherings* issued by the COGTA Minister. However, we wish to state at the outset that *FOR SA* has not, and is not, specifically advocating for the religious community to be allowed to "re-open" at 100% capacity at this point. We are, however, explicit in our position that the religious community's constitutional rights to religious freedom must be fully restored at the earliest opportunity this pandemic allows.

### **HISTORY OF FOR SA's ENGAGEMENT WITH GOVERNMENT**

7. Since the national state of disaster was first declared in March 2020, *FOR SA* (on behalf of the churches and other religious organisations we represent) has been actively engaging with Government with regard to the Lockdown Regulations and its impact on the religious community.
8. We have written numerous letters to the President and various ministers, particularly COGTA Minister Dr Dlamini-Zuma, to obtain clarity with regard to the interpretation and practical outworking of various of the Regulations and *Directions pertaining to religious gatherings*, and to put forward the concerns of the religious community (including particularly our constituency) in this regard. Unfortunately, the majority of these letters went unanswered.

9. *FOR SA* has also, during the last year, sent two Petitions to the COGTA PPC in relation to the issue of COVID-19 and the Lockdown Regulations.
10. The first Petition, dated 20 May 2020, was submitted in response to Parliament's call for comments on Government's actions and responses to COVID-19. Following the Petition, we were invited to a virtual meeting with the Committee and the COGTA Deputy Ministers, Minister Obed Bapela and Minister Parks Tau (who we understand to no longer be filling this position). This was the first opportunity *FOR SA* (and our constituency) had to directly engage with the Government, which only came about as a direct result of this Committee's intervention and for which we remain very appreciative.
11. At the aforesaid meeting facilitated and chaired by the COGTA PPC on 24 June 2020:
  - 11.1. The COGTA Department acknowledged that it had not done enough to respond to the various letters and other follow-up from *FOR SA* and our constituency; and
  - 11.2. The Acting Chair of the COGTA PPC stated that although the Committee was not in a position to respond to the questions posed by *FOR SA*, it was willing to take an oversight role to ensure that the COGTA Department addressed and responded appropriately to *FOR SA*'s questions.
12. Subsequent to this meeting, *FOR SA* has written various further letters to the President and the COGTA Minister, to raise ongoing matters of concern for, and matters requiring clarification by, the religious community – again, without substantive reply.
13. In the circumstances, *FOR SA*, on 10 November 2020, and on the back of the Committee's invitation (at the aforesaid meeting) to revert should our issues not be attended to by the COGTA Department, sent a second Petition to the COGTA PPC. In our letter, we appealed to the Committee to take up its oversight role and to ensure that the COGTA Minister address and respond appropriately to the issues raised by *FOR SA* in our letters.
14. The Committee may further be aware that *FOR SA* - with the support of religious leaders and organisations representing over 11 million people - subsequently instituted litigation proceedings against the COGTA Minister in the Johannesburg High Court. The application was instituted on an urgent basis, specifically with a view to lifting the (then) complete ban on religious gatherings imposed by the Regulations of 29 December 2020 and extended indefinitely on 11 January 2021. (Similar applications were instituted by the *South African National Christian*

*Forum, Solidariteit Helpende Hand, and the Muslim Lawyers Association, all of which have been consolidated for hearing with FOR SA's own application).*

15. On the evening before the application was due to be heard however (i.e on the evening of 1 February 2021), the President announced that the ban on religious gatherings would be lifted, thereby essentially conceding the relief asked for. This removed the need for the Court to hear the matter on an urgent basis the next day. As certain issues (including the constitutional validity and lawfulness of certain Regulations promulgated by the COGTA Minister in relation to religious gatherings) remain however, the matter is going ahead. All the papers in the matter have now been filed, and a court date for the hearing of the (consolidated) application will be determined soon.
16. We wish to make it clear that, ***even though litigation proceedings are currently pending against Government, the religious community – and certainly those churches and faith structures we represent – have no desire to litigate against Government, except as a very last resort. We believe that the Regulations should be a matter of conversation (rather than litigation) between Government and the religious community – and that we should ideally join hands in finding solutions that would both serve Government's legitimate health objectives, while at the same time respecting the religious community's constitutional right to meet*** (as an integral component of the right to freedom of religion and belief in section 15 of the Constitution).
17. In the circumstances, and despite the pending litigation, FOR SA has continued our attempts to engage with Government with regard to the Regulations and the impact thereof on the religious community.
18. Most recently, on 12 April 2021, FOR SA sent another letter to the President and the COGTA Minister, referring to the Regulations promulgated on 30 March 2021 (i.e. before the Easter weekend), which were subject to review and possible amendment within 15 days (i.e. by 14 April 2021.)
19. In the aforesaid letter, we referred to the current (low) rate of infection and, in light of the scientific data, made certain proposals for the further reopening of religious gatherings. (A copy of our letter is attached hereto for the Committee's reference.)
20. While receipt of our letter has been acknowledged, no reply has been received to date. Nor is it clear whether the Regulations had actually been reviewed and considered for possible amendment by the COGTA Minister and responsible persons / structures, as they were legally obliged to do in terms of Regulation 72(8) thereof.

## **COMMENTS RELATING TO THE IMPACT OF THE DMA REGULATIONS**

21. The Committee will be aware that Government's stated, and sole, purpose of the lockdown and its Regulations, Directions etc is to slow the spread of COVID-19 infections so as not to overwhelm our health care system – i.e. to "*flatten the curve*".
22. *FOR SA* affirms that COVID-19 is a serious and highly transmissible virus. We also believe that, as long as it is properly justified in terms of scientific data, certain targeted restrictions may be imposed on religious gatherings in order to achieve legitimate health goals.
23. However, regardless of how legitimate the goal and compelling the reason, any limitation on fundamental rights must nonetheless comply with the requirements of s 36 in the Constitution ("the limitations clause"), including that it must be rational and proportional (i.e. go no further than what is absolutely necessary to achieve the stated goal).
24. In essence, *FOR SA* believes that the Regulations have unreasonably and unjustifiably limited the fundamental rights of religious people and organisations, and in particular:
  - 24.1. The right to equal treatment, and to not be unfairly discriminated against on grounds of religion and belief (section 9(3)).
  - 24.2. The right to human dignity (section 10);
  - 24.3. The right to freedom of religion and belief (section 15);
  - 24.4. The right to peaceful assembly (section 17);
  - 24.5. The right to freedom of association (section 18); and
  - 24.6. The rights of religious communities to collectively exercise their faith (section 31).
25. On the issue of unfair discrimination in particular, we have – in our various letters to, and also meetings with, the President and COGTA Minister – cited various examples of irrational, unequal and unfair treatment of the religious sector in comparison to other sectors, during the last year. In this regard, we mention but two recent / current examples:
  - 25.1. In terms of the Regulations of 29 December 2020 and 11 January 2021 respectively, a complete ban was imposed on religious gatherings; whereas gatherings at shops and shopping centres, and workplaces, were allowed to continue largely without restriction. Likewise, gatherings at cinemas and theatres; casinos; museums, galleries, libraries and archives; gyms and fitness centres; restaurants; as well as conferencing, dining and entertainment facilities; and funerals (using the same venue in which religious services take place, and subject to the same health and social

distancing protocols) were allowed to continue subject to a maximum number of 50 people (for an indoor venue) and 100 people (for an outdoor venue) (or if the venue is too small to hold that number of persons observing a distance of least 1.5 metres from each other, then not more than 50% of the capacity of the venue may be used). Likewise, taxis were able to continue travelling at 70% capacity for long distance travel and 100% for other trips; and aircraft continued to operate at 100% capacity also.

- 25.2. In terms of the current Regulations of 30 March 2021, religious gatherings are permitted up to a maximum of 250 people (indoors) and 500 people (outdoors) and if the venue is too small to hold that number of persons observing a social distance of at least 1.5 metres from each other, then not more than 50% of the capacity of the venue; whereas the same Regulations place no limitation on gatherings at workplaces, and limited business premises (including but not limited to supermarkets, shops, grocery stores, produce markets and pharmacies) to 50% of their floor space.
26. Various foreign Courts (including the Supreme Court of the United States) have already struck down similar discriminatory provisions that treat religious gatherings less favourable than comparable secular activities. ***These Courts have found that, absent any concrete scientific evidence that religious gatherings where health and social distancing protocols are in place, indeed pose a greater risk than other gatherings*** (whether in casinos, conference centres, restaurants, gyms, shops, or other business premises where large groups of people can also gather in close proximity for an extended period of time), ***there is no legal justification for imposing greater restrictions on religious gatherings.***
27. In the South African context, very strict protocols apply to religious gatherings in terms of the *Directions pertaining to religious gatherings* issued by the COGTA Minister at both Alert Levels 3 and 1. There is also no evidence of a religious gathering having been a “super-spreader”. As such, it is difficult to understand why the religious sector continues to be subject to greater restrictions than other sectors of society, who are allowed to operate at 50% or even 100% of capacity.

#### **REQUESTS AND RECOMMENDATIONS:**

28. In view of the foregoing, *FOR SA* respectfully requests the COGTA PPC, in its role as a custodian of the DMA, its Regulations and Directions, to:
- 28.1. Hold the COGTA Minister to account with a view to ensuring that the Regulations and *Directions pertaining to religious gatherings* issued by her, are rational, reasonable and justifiable in terms of section 36 of the Constitution. In particular, the Regulations and

Directions should be based on scientific data, and go no further than what is absolutely necessary to achieve Government's stated health goals.

28.2. Insofar as *FOR SA*'s letter to the President and COGTA Minister dated 12 April 2021 (attached hereto) is concerned:

28.2.1. Require the COGTA Minister to reply to our letter, including the specific proposals made therein for the further reopening of religious gatherings; and

28.2.2. Require the COGTA Minister to state on record whether the Regulations of 30 March 2021, which were subject to review within 15 days (i.e. by 14 April 2021), had indeed been reviewed and considered, as it was incumbent on her to do. If yes, on what basis (given the scientific data) was it decided not to review and amend the Regulations pertaining to religious gatherings? If no, why were the Regulations not considered?

We thank you once again for the opportunity to engage, and look forward to the outcome of the submissions and engagement with the NDMC. (To the extent that there may be an opportunity to make verbal representations at the meeting on 29 April 2021, *FOR SA* would appreciate the opportunity to do so).

Kind regards,

**ADV N.L. BADENHORST**

Legal Counsel

*Freedom of Religion South Africa (FOR SA)*

E-mail: [legal@forsa.org.za](mailto:legal@forsa.org.za)

&

**DANIELA ELLERBECK**

Attorney / Legal Advisor

*Freedom of Religion South Africa (FOR SA)*

E-mail: [daniela.ellerbeck@forsa.org.za](mailto:daniela.ellerbeck@forsa.org.za)

**THE END.**