

Your:

Our: SB de Beer/

Date: 16 March 2020

Mr André du Toit
firstEquity Insurance Group
10 Rydall Vale Park
Douglas Saunders Drive
LA LUCIA RIDGE

BY E-MAIL: andre@firstequity.co.za

Dear sirs,

IN RE: COVID-19 ENQUIRY ON RIGHT TO DEMAND TESTING AND POSSIBLE CIVIL LIABILITY

1. We refer to the above matter, our telephonic discussion on **13 March 2020** as well as your letter dated **15 March 2020** and noted the contents thereof.
2. We confirm that we were tasked to advise on the following two aspects in light of the Covid-19 pandemic that has now also led to a declaration of national disaster by the President of the Republic:
 - 2.1. Would a local Tour Operator be able to demand/force a passenger/tourist/visitor/client/patron ("Passenger") to undergo a medical screening or test to establish whether said passenger may be suffering from the Covid-19 Virus ("the Virus")?;
 - 2.2. Would a local Tour Operator be vulnerable to civil claims for damages in the event that another passenger becomes infected as a result of exposure under the care or whilst utilising the facilities of the Tour Operator?
3. We confirm that we are in the process of formulating answers to some of the FAQ's that have arisen in the tourism industry, but we believe that the information contained herein ought to be distributed amongst your clients soonest.
4. Please be advised that the advice that follows may be subject to change depending on the merits and set of facts of each incident involving Tour Operators and Passengers *in re* their actions and/or omissions *in re* the Virus. Your clients are advised to contact their attorneys or our offices should they have specific queries in relation hereto.

Is forced testing possible and, if so, under which circumstances?

5. Chapter 2 of the Constitution¹ encapsulates the Bill of Rights in terms of which various basic human rights are enshrined. Amongst these rights are the rights to human dignity², bodily integrity³, privacy⁴ and an environment that is not harmful.⁵
6. Section 36 of the Constitution, however, confirms that the mentioned rights in the Bill of Rights may be limited in the law of general application should it be reasonable and justifiable to do so. In order to enforce the limitation of any of the mentioned rights, all relevant factors must be taken into account when applying the balancing test.⁶
7. Our Courts have considered the question of forced medical treatment as a limitation to the mentioned rights on a number of occasions:
 - 7.1 The constitutionality of the use of force to obtain blood samples against the consent of an accused was considered in the matter of *S v Orrie*.⁷ The Court held that although it amounted to a limitation of the accused's rights, said limitation was justified in the circumstances since said limitation was minimal and in the interest of justice;
 - 7.2 In the matter of *Minister of Safety and Security v Gaqa*⁸ the Court had to consider whether a surgery to remove a bullet from an accused's leg against his consent would constitute an infringement of the accused's right to bodily integrity, privacy and dignity. The Court confirmed that surgery without consent would indeed be an infringement of said rights, but that the reasonableness of forced surgery should be determined by weighing up the interests of the individual against those of the society. After determining that the required surgical procedure had only minimal risks, amongst other factors, the Court ordered the accused to consent to the surgery, failing which the Sheriff of the Court was to give consent on his behalf;

¹ Constitution of the Republic of South Africa, 1996

² Section 10

³ Section 12(2)

⁴ Section 14

⁵ Section 24

⁶ i.e. the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose

⁷ 2004 SACR 162 (C)

⁸ 2002 (1) SACR 654 (C)

7.3 In the matter of *Minister of Health v Goliath*⁹ the Court was tasked with determining whether, in terms of Section 7(1)(d) of the National Health Act¹⁰, the respondents could be compelled to be detained at a specialist facility to receive treatment for their diagnosed drug-resistant tuberculosis. The Court considered various factors, including the Minister's duty to prevent and control the spread of communicable diseases; that the respondents were capable of spreading the disease but had failed to adhere to the voluntary programme. Although the Court found their detention and treatment against their consent to be in breach with their Section 12 rights, it was both necessary and in the public's interest.

8. Although none of the mentioned precedents concerned private individuals/entities against another, we are of the view that the circumstances and realities of the Virus would justify a private individual/entity approaching the Courts to assist it in compelling a Passenger to undergo the relevant test(s) and/or medical screening.¹¹
9. It stands to be mentioned, however, that the Tour Operator would have to show good cause for its belief that treatment and detention against consent is in the interest of justice and thereby outweighs the rights of the Passenger. A clear understanding of the symptoms and forms of treatment should be acquired from medical experts and the Department of Health before one ought to consider approaching the Courts for relief.

Is the Court process avoidable?

10. It is indeed possible, to a certain extent, to avoid the Courts, but only in as far as the Agreement between the Tour Operator and Passenger (i.e. Terms and Conditions or Booking Terms) affords the Tour Operator the right to refuse services to the Passenger due to *force majeure* (effectively leading to cancellation of the Agreement), through mutual cancellation of the Agreement between the Parties and/or other specific remedies stipulated in the Agreement.
11. Kindly note that although the Consumer Protection Act¹² ("CPA") does specifically regulate the position of the Parties under the mentioned circumstances, it stands to be noted that all Consumers/Passengers have the right to quality service¹³, safe and quality goods¹⁴ and

⁹ 2009 (2) SA 248 (C)

¹⁰ Act 61 of 2003

¹¹ We are of the view that the Department of Health should be notified of the Tour Operator's intention to approach the Court to compel said testing/screening so as to avoid a Plea of Misjoinder, amongst others.

¹² Act 68 of 2008

¹³ Section 54

that it must be informed, in terms of Section 49, of the inherent risks and their assumption of that liability. The Tour Operator would therefore have to formally advise all Passengers of the risk of exposure to the Virus, whilst also respecting the constitutional rights to privacy and dignity of the Passenger(s) who may be suffering from the Virus.

12. Tour Operators should also note that the enforcement of any rights they may have, whether in Contract or otherwise, will likely have to be enforced through the Courts in the event of refusal by a Passenger to present himself/herself to testing and/or treatment.

Could a Tour Operator be held liable, in a civil claim, for the spread of the Virus to other Passengers?

13. That depends on the facts and circumstances of each claim. Our Courts will interpret the facts and circumstances, the Agreement between the Parties as well as the Law of Delict to determine whether liability could be proven against the Tour Operator.
14. Although there have been a number of cases in which the spread of infectious diseases (and/or negligence resulted in substantial damages suffered by individuals) were attributed to the negligence of certain state departments (mostly Ministers of Health, Police and Correctional Services), we are of the view that Tour Operators would likely be able to successfully defend a civil claim if they can prove that they acted reasonably under the circumstances.
15. *Culpa* by negligence would ultimately only be found against the Tour Operator if, in the particular circumstances of the matter at hand, the conduct or omission complained of (by the Passenger) falls short of the standard of the reasonable person (Tour Operator).
16. It is obvious that intentional/wilful dereliction of one's duty to safeguard, as best one can, the interests of the Passengers through the conduct or omission of the Tour Operator will likely result in liability following.
17. We are of the view that, in light of the numerous private and public sources of information as well as resources available to all, Tour Operators should familiarise and educate themselves as well as their Passengers on the Virus. Reasonable precautions and actions should be taken to safeguard all of the Passengers.

¹⁴ Section 55

18. Should the Tour Operator therefore act reasonably under the circumstances in its efforts to minimize the risk of the Virus spreading to other Passengers, it would be unlikely for it to be held liable for the actual spread of the Virus.
19. Tour Operators should also be mindful of the fact that they may be liable for a refund to its Passengers in the event of cancellation of their booking due to the *force majeure*.

What practical steps should be taken to minimize the risks associated with the Virus and/or to protect the interests of Tour Operators, Passengers and Staff?

19. Please contact the National Institute for Communicable Diseases on its toll-free number **0800 029 999** for information on the testing and treatment for the Virus, the closest facilities and preventative measures that should be implemented.
20. Please contact your attorneys should you require assistance in determining possible liability as a result of the Virus as well as the processes to be followed to compel a Passenger to undergo testing and/or treatment.
21. Please contact your insurance broker to ascertain the availability of cover for any of the eventualities of the Virus.

We confirm that the above views are expressed based on our understanding of the law and should not be construed as legal advice applicable to all Tour Operators or Passengers. Please contact our offices should there be any uncertainty regarding this qualification or queries specific to any Tour Operator or Passenger.

We trust you find the above in order.

Yours sincerely,


MARTIN & DE BEER INC.
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