

# WLB

## “Testing the legality of compulsory COVID-19 testing at the expense of the employer”

On the 11<sup>th</sup> day of March 2020, the World Health Organisation declared the coronavirus disease “COVID-19” a global pandemic with the virus having spread across multiple countries in the world at the same time.

Zimbabwe recorded its first case on the 21<sup>st</sup> of March 2020 which was followed by an announcement by the Government that the country would be under national lockdown as at the 30<sup>th</sup> of March 2020. The lockdown was initially regulated by Statutory Instruments 83 of 2020,<sup>1</sup> and 77 of 2020<sup>2</sup> as published by the Minister of Health and Child Care in



consultation with the President.

The effect of the lockdown order was to limit the movement of all persons in the country, both juristic and natural, save for those persons defined as essential services in S.I. 83 of 2020 and where absolutely necessary.

As the global pandemic has progressed, the national lockdown has been extended several times and still continues to date. The Minister of Health and Child Care in consultation with the President has published amendments to the initial lockdown orders which provide for limited and gradual relaxation of the overall national lockdown as we prepare the way for a new way of living for as long as the global pandemic persists.

This opinion looks particularly at the amendments made in Statutory Instruments 102 and 103 of 2020 in order to allow the formal commercial and industrial sectors to resume operations, subject to fulfilling the following pre-conditions:

- **Mandatory screening and testing of themselves and their employees for the COVID-19 disease whether by use of the rapid results diagnostic test or other test approved by the Minister of Health, and**
- **To keep documentary proof that such screening and testing has taken place in relation to each individual subjected to the screening and test.**

By an amendment on the 6<sup>th</sup> of May 2020, commercial and industrial sector workers were allowed to commence work on the 7<sup>th</sup> of May 2020 on the mandatory condition that they will be subjected to COVID-19 testing on or before the 27<sup>th</sup> of May 2020 and entirely at their own expense.



liability to a fine not exceeding level 12 (ZWL\$36 000)<sup>3</sup>

This requirement comes with a heavy penalty for failure to comply being a criminal offence and

<sup>1</sup> Statutory Instrument 83 of 2020 cited as the Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown Order, 2020).

<sup>2</sup> Statutory Instrument 77 of 2020 cited as the Public Health (COVID-19 Prevention, Containment and Treatment) Regulations 2020.

<sup>3</sup> Statutory Instrument 57 of 2020. Criminal Law Codification and Reform (Standard Scale of Fines) Notice, 2020

or to imprisonment for a period not exceeding one year or both such fine and imprisonment.

This therefore places an extreme onus on any employer and business person that wishes to continue their operations after the national lockdown which left many economically devastated after being unable to generate income for well over a month.

### Testing the Constitutionality of the requirement

Any law made in our jurisdiction must comply with and uphold the standards set by our Constitution.<sup>4</sup>

Broadly this looks at the fairness, reasonableness and rationality of a particular instrument in its achievement of a legitimate government purpose.

In the present circumstances, well the legislative measures by the government fall well short of the standards of rationality, reasonableness and fairness which are expected in our law and this can be challenged on several grounds.

- In the first instance, it contravenes section 134(c) of the Constitution which dictates that all statutory instruments must be consistent with the Act of Parliament under which they are made.
- It offends the right to just administrative justice as set out in section 68 of our Constitution which requires that legislation and administrative conduct must be done in a manner that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
- Further, it fails to meet the common law standard of rationality in that the tests available do not serve a diagnostic purpose. Thus, the requirement to test your employees before opening business is not logical in that it will neither detect nor prevent the presence and infectiousness of the disease.

<sup>4</sup> The Constitution of the Republic of Zimbabwe, 2013.

<sup>5</sup> Section 56 of the Constitution of the Republic of Zimbabwe, 2013.

- Notably and contrary to the equality and non-discrimination clause of the Constitution,<sup>5</sup> the provisions unfairly discriminate against operators who happen to trade in businesses that are not considered to be “essential services” in that these workers are required to be tested before returning to the workplace whereas essential service workers are not. This is hardly logical considering the essential workers’ exposure to the public throughout the lockdown period, and

that they are more likely to have contracted the virus.

- Finally, these provisions unfairly place the financial burden and duty of testing the public on individuals in the private sector instead of on the Government which has a Constitutional duty to do so as per section 76(4) of the Constitution.

### The utility of available “point-of-care immunodiagnostic tests for COVID-19”

From the onset of the global pandemic, multiple diagnostic manufacturers have begun have developed and begun selling rapid and easy-to-use devices to facilitate testing outside of laboratory settings.<sup>6</sup>



These rapid tests in Zimbabwe are valued at a minimum of roughly USD 25 per kit. None of these tests are produced locally and there has been no standardization of the various forms of these tests.

<sup>6</sup> World Health Organisation. Advice on the use of point-of-care immunodiagnostic tests for COVID-19. Scientific Brief; April 8 2020.

The World Health Organization has warned against the reliance of these various test kits while it continues to assess and evaluate their utility in the fight against COVID-19.

**“At present, based on current evidence, WHO recommends the use of these new point-of-care immunodiagnostic tests only in research settings. They should not be used in any other setting, including for clinical decision-making, until evidence supporting use for specific indications is available.”**

Dr. Christopher Pasi, a consultant and specialist physician of Zimbabwe has also published a report on these tests in our context, in which he concludes that these Antibody tests remain useful in population surveillance research but not to make decisions of “no disease” or “disease present” required for admitting people back to work.<sup>7</sup>

It is evident, therefore, that there was insufficient engagement with various stakeholders and scientific researchers in the policy that has been implemented by the Statutory Instruments published by the Government.

Molecular (e.g. PCR) testing of respiratory tract samples remains the sole recommended method for the identification and laboratory confirmation of COVID-19 cases. This is a highly specialised test currently being conducted by our National Microbiology Reference Laboratory. This test has to be conducted by an expert and is a lot more expensive than the rapid results tests. It is not likely that the Statutory Instrument envisages this to be the test administered in a workplace set up at the instance of the employer. This is likely to cause a strain on our Health Care professionals who should rather limit PCR testing to contact tracing suspects as per the global norm.

## **Remedies**

Despite the concerns raised above, the legislation remains in place and thus the duty to test employees still exists in the commercial and industrial sector. For many companies with a large workforce of over hundred of people, this will be a devastating expense that will further exacerbate the

economic impact of the global pandemic and the lockdown measures that followed.

Due to the fact that this has been passed into law, the most helpful remedy to employers in this position would be to challenge these provisions in court on the grounds which have been briefly set out above.

The High Court has the power and mandate to test legislative provisions on the standard of reasonableness, rationality and fairness as outlined in our law. If it is found that the provisions fall short of this standard, the Court has the power to set aside the operation of these provisions.

In our view all the arguments set out above which could be used in application to the High Court, could be used as a possible defence in criminal prosecutions brought against companies which do not have their employees tested.

Clearly a balance must be struck. The health of the nation requires that there should be laws which protect the public. The problem with the legislation reviewed in this opinion is that not only, in our opinion, does it not comply with the Constitution, but more seriously, it potentially endangers the public and will further undermine the economy.

---

<sup>7</sup> Utility of COVID 19 Antibody RDTs for screening Zimbabwean population; what does biostatistics analyses tell us? Dr. C.Pasi

## LINKS TO REFERENCES

1. Statutory Instrument 83 of 2020, Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020 [https://www.veritaszim.net/sites/veritas\\_d/files/SI%202020083%20Public%20Health%20%28COVID19%20Prevention%2C%20Containment%20and%20Treatment%29%20%28National%20Lockdown%29%20Order%2C%202020.pdf](https://www.veritaszim.net/sites/veritas_d/files/SI%202020083%20Public%20Health%20%28COVID19%20Prevention%2C%20Containment%20and%20Treatment%29%20%28National%20Lockdown%29%20Order%2C%202020.pdf)
2. Statutory Instrument 77 of 2020, Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020 [http://www.veritaszim.net/sites/veritas\\_d/files/SI%202020077%20Public%20Health%20%28COVID19%20Prevention%2C%20Containment%20and%20Treatment%29%20Regulations%2C%202020.pdf](http://www.veritaszim.net/sites/veritas_d/files/SI%202020077%20Public%20Health%20%28COVID19%20Prevention%2C%20Containment%20and%20Treatment%29%20Regulations%2C%202020.pdf)
3. Statutory Instrument 102 of 2020 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 7) [http://www.veritaszim.net/sites/veritas\\_d/files/SI%202020102%20Public%20Health%20%28COVID19%20Prevention%2C%20Containment%20and%20Treatment%29%20%28National%20Lockdown%29%20%28Amendment%29%20Order%2C%202020%20%28No.%207%29.pdf](http://www.veritaszim.net/sites/veritas_d/files/SI%202020102%20Public%20Health%20%28COVID19%20Prevention%2C%20Containment%20and%20Treatment%29%20%28National%20Lockdown%29%20%28Amendment%29%20Order%2C%202020%20%28No.%207%29.pdf)
4. Statutory Instrument 103 of 2020, Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020 (No. 3) [http://www.veritaszim.net/sites/veritas\\_d/files/SI%202020103%20Public%20Health%20%28COVID19%20Prevention%2C%20Containment%20and%20Treatment%29%20%28Amendment%29%20Regulations%2C%202020%20%28No.%203%29.pdf](http://www.veritaszim.net/sites/veritas_d/files/SI%202020103%20Public%20Health%20%28COVID19%20Prevention%2C%20Containment%20and%20Treatment%29%20%28Amendment%29%20Regulations%2C%202020%20%28No.%203%29.pdf)
5. Constitution of the Republic of Zimbabwe , 2013 [https://www.constituteproject.org/constitution/Zimbabwe\\_2013.pdf](https://www.constituteproject.org/constitution/Zimbabwe_2013.pdf)
6. Utility of COVID 19 Antibody RDTs for screening Zimbabwean population; what does biostatistics analyses tell us? Dr. C.Pasi
7. World Health Organisation. Advice on the use of point-of –care immunodiagnostics tests for COVID-19. Scientific Brief; April 8 2020.

<https://www.who.int/newsroom/commentaries/detail/advice-on-the-use-of-point-of-care-immunodiagnostic-tests-for-covid-19>