

# VANDERSPUY

CAPE TOWN

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BY EMAIL

25 January 2021

TO:  
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

AND TO:  
THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS

AND TO:  
MINISTER OF HEALTH

AND TO:  
THE PREMIER OF THE WESTERN CAPE PROVINCE

AND TO:  
MINISTER OF HEALTH, WESTERN CAPE PROVINCE

AND TO:  
MINISTER OF COMMUNITY SAFETY, WESTERN CAPE PROVINCE

AND TO:  
THE STATE ATTORNEY, WESTERN CAPE

Dear Sir/Madam

**OUR CLIENT: VINPRO NPC**

**REGULATIONS 44 AND 86 OF THE REGULATIONS PROMULGATED BY GOVERNMENT NOTICE NO.: R11 OF 11 JANUARY 2021 (GG 44066) IN TERMS OF S 27(2) OF THE DISASTER MANAGEMENT ACT, 57 OF 2002**

1. We act on behalf of Vinpro NPC ("Vinpro").
2. Vinpro is a non-profit company representing 2 575 South African wine producers, sellers and industry stakeholders, consisting of a significant workforce, all of whom owe their livelihood to and are dependent upon the wine industry. Many of Vinpro's members also sell and distribute their wines to licenced restaurants and hotels, and furthermore, operate licenced restaurants on their own farms where wine-tastings are offered to consumers.

Van der Spuy and Partners (Cape Town and Bellville) Incorporated

Company number: 1999/024501/21 VAT registration number: 4800186266

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3. We have received instructions to advise Vinpro in respect of the validity of the ban on the selling, dispensing, distributing and transporting of liquor ("**the liquor ban**") contained in Regulations 44 and 86 of the Regulations made by the Minister of Cooperative Governance and Traditional Affairs ("**the Minister**") in terms of s 27(2) of the Disaster Management Act, 57 of 2002 ("**the DMA**") and promulgated by Government Notice No. R.11 of 11 January 2021 (GG 44066) ("**the Regulations**").
4. It has become apparent that, notwithstanding numerous representations by liquor industry stakeholders, including Vinpro to government, government has no intention of lifting the liquor ban. Clearly, at this stage, no purpose would be served by making yet more representations or asking for undertakings.
5. In the circumstances, we have received instructions to launch urgent legal proceedings challenging Regulations 44 and 86 of the Regulations and seeking urgent interim relief, the nature of which I will explain below.
6. It is however important to emphasize at the outset what Vinpro's court application is not about.
7. Firstly, Vinpro is not challenging Regulation 39, which relates to places and premises closed to the public. In terms of that Regulation certain places are closed to the public, including night clubs, bars, taverns and shebeens. The closure of these places is not challenged.
8. Secondly, Vinpro will not be seeking an order from the Court lifting the liquor ban, at least not in the entire country.
9. Vinpro's case is about the following three issues:
  - 9.1. Which level of government (national or provincial) is legally and constitutionally responsible for taking decisions regarding the retail sale of liquor during a national state of disaster? Vinpro contends that the provincial government should take these decisions or that, at the very least, the provincial government must be consulted regarding a liquor ban in the province during a national state of disaster.
  - 9.2. Is the uniform, blanket liquor ban across all provinces and districts in South Africa ("**the nationwide ban**") necessary for achieving the purposes set out in s 27(3) of the DMA, such as "protecting the public" or "dealing with the destructive and other effects of the disaster"? Vinpro contends that the imposition, and the maintenance, of a nationwide ban is not necessary to achieve any of those objectives and that Regulations 44 and 86 are accordingly overbroad and *ultra vires* s 27 of the DMA.
  - 9.3. Is the infringement of various fundamental rights by the nationwide ban proportional to the objective sought to be achieved, i.e. are the infringements justified under s 36 of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**")? Vinpro contends that the nationwide ban is not justified under s 36.
10. Differently put, Vinpro is of the view that, not only has the wrong level of government been dealing with the retail sale of liquor during the national state of disaster, but the Minister has used, and maintained, nationwide bans which are overbroad, unnecessary, unjustified and, indeed, counter-productive.
11. The liquor ban is evidently intended to ensure that hospitals have the requisite capacity to treat those who become ill, especially those who become seriously ill. However, it cannot be disputed that the pandemic affects provinces very differently at any given point in time, and the need for additional capacity in hospitals is hardly ever the same across the country. Despite this, the Minister has never differentiated between provinces when it comes to the imposition or lifting of the liquor ban. Instead, a nationwide ban has been imposed and then again lifted, without regard to the circumstances in individual provinces. This means

that the liquor ban has been imposed on provinces with more than enough capacity in hospitals, seemingly on the basis that there is a need for additional capacity in other provinces, even ones which are thousands of kilometres away. Conversely, the ban has been lifted across the country when hospital admissions were rising or peaking in some provinces, and, on the Minister's justification, all available capacity was needed in those provinces.

12. Vinpro will seek to have the two Regulations invalidated on the above basis but in the interim it seeks an order that the ban is no longer justified in the Western Cape (given the sharp drop in infections over the last weeks and the drop in hospital admissions) or that the Western Cape Premier should be empowered to issue deviations from the ban, pending the return day when the application for final relief will be heard. (Vinpro has selected the Western Cape to bring this challenge as the wine industry is primarily situated here. Similar challenges may be brought in other provinces in due course.)
13. Vinpro is ready to launch the court application and deliver the court application on the State Attorney shortly. However, we are instructed by our client to seek an assurance from you that the liquor ban will be lifted in the Western Cape or that the Premier will be authorised in terms of section 27(2) of the DMA to deal with the issue of liquor bans. We seek the above undertaking by 12h00 on Wednesday, 27 January 2021. Should there be appetite to come to such an agreement, we will gladly enter into discussions with the six respondents in order to come, at the very least, to some kind of interim arrangement which would obviate the need for the urgent application in the fast lane of the Western Cape High Court.
14. Furthermore, in order to ensure that the court application is brought to the attention of all relevant functionaries, you are urgently requested to provide us with the email addresses of the office of the President of the Republic of South Africa, the office of the Minister and the office of the Western Cape Premier and Ministers of Health and Community Safety and anyone else who should be furnished with the court papers.
15. We await your urgent response to our request.
16. Vinpro's rights are reserved.

Yours faithfully

**VANDERSPUY CAPE TOWN**  
**PER: CHARLES VAN BREDA**