Power grab or tying loose ends?

Experts respond to Zweli Mkhize's new health regulations

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Health Minister Dr Zweli Mkhize's proposed amendments to regulations on notifiable medical conditions came under fire in Parliament this week with some opposition parties slamming it as an attempt to give the minister, "through the back door", powers which will "allow him and the executive to impose far-reaching restrictions".

But public health and medical law experts welcomed the proposed amendments to the regulations and even made some suggestions on how it could be improved.

For a while now, the country has been caught between the pressure of a suffering economy under COVID-19 lockdown restrictions, and fears about a possible second wave. Now, it seems that there may be a way out of this 'hostage situation', albeit not a perfect one.

For this, Mkhize and his department dusted off old, previously repealed Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions in the Schedule to the National Health Act (NHA), which will enable them to still impose restrictions, without the severity of a full scale lockdown.

At 20:00 Tuesday night, MPs in Parliament's Health Portfolio Committee met after Mkhize requested an urgent meeting just hours before.

Mkhize, who does not legally need Parliament's approval to pass regulations or amendments thereto, nevertheless in what he called a "courtesy", briefed the committee.

Concerns

Mkhize and his chief of staff, Sibusiswe Ngubane's briefing, was met with a mixture of

Some opposition MPs dug in their heels and accused Mkhize of trying to use the NHA to "circumvent the Disaster Management Act (DMA)".

"Executive powers are very dicey at the best of times," said DA MP, Lindy Wilson. "So we are concerned. We cannot step on civil liberties." Wilson was also concerned over the broad scope of the regulations.

Some opposition MPs also questioned the timing and urgency of the meeting Mkhize called a day before the national state of disaster would have ended (it was extended). Some called for the proposed amendments to the regulations to be debated by Parliament.

ACDP MP, Marie Sukers, pointed out that a national state of disaster is an exceptional event warranting the exercising of extraordinary powers which are circumscribed by the relevant act and which has a time limit. “The powers contemplated in these regulations are in fact emergency powers, but without being of limited duration. It would create an indefinite state of disaster at the discretion of the minister.” Sukers argued that these proposed regulations will be “sustaining the abnormality in which we are” and will ask people to give up their civil liberties under a government which has lost the confidence of the people, *sommer net so*,” Sukers said, clearly worked up.

What the regulations say

But it would appear as if government, at least for now, may have found some middle way for managing the COVID-19 pandemic going forward.

Should Cabinet approve the proposed amendments to the regulations, it will give Mkhize powers to impose restrictions similar to, but not on the same scale, as those imposed under the Disaster Management Act (DMA) during the country’s state of disaster first declared in response to the COVID-19 pandemic in March.

The national state of disaster, would have expired on 15 October, but is now extended for another month.

When the state of disaster is eventually lifted, the regulations will mean that the minister will have legal powers to impose differential restrictions such as restrictions on movement at certain points of entry or across some provinces, closure of schools and institutions of higher learning as well as specify hours “requiring persons to remain indoors” in response to any disease considered as a major threat to public health in the country.

It is proposed that Regulation 12 be amended by adding a subsection enabling the health minister to impose the necessary restrictions by publishing it in the Government Gazette. Imposing restrictions, however, must be done in consultation with the relevant member of the executive whose portfolio will be affected.

Head of SECTION27’s Health programme, Sasha Stevenson, argues that unlike the requirements in the DMA (which contains the phrase ‘after consultation’ with other ministers), the new proposed regulations require that decisions on restrictions must be done in consultation with other relevant ministers and is arguably better.

Government has come under fire before for publishing regulations to the DMA to enforce the state of disaster, and several decisions were challenged in court. Among the criticisms were the lack of sufficient public participation before publishing some regulations and what some stakeholders deemed the irrationality of some decisions taken.

It appears the proposed regulations will be similarly vulnerable to a lack of public participation and potential irrationality, given that the only consultation required is with ministers in the portfolios that will be affected by decisions.

DA MP, Siviwe Gwarube, during the meeting this week noted that one of the things raised about the DMA, “was around the constitutionality and the times it took for people to give input”.

“Of course these decisions are made with the urgency that they require, but to build these in an existing piece of legislation as almost a normal cause of action, is something that I don’t think is wise especially without the necessary checks and balances,” she said.

According to Gwarube, this may just be a matter of drafting. “Perhaps the regulations as it stands is drafted too broadly,” she told Mkhize. “As MPs it is important to raise issues when we cannot effectively hold the executive to account and I’m worried that under Regulation 12 where there’s no other input except the opinion of the minister where this can simply be just declared as such and prohibitions be put in place. So, that’s my concern.”

Gwarube conceded that COVID-19 will “probably not be the only health threat we face so we need to tighten these things”. “But,” she said, “we have to be careful in how we are drafting laws that only amass power to members of the executive and give no power at all for oversight.”

No malice intended: Minister

Mkhize in response to concerns raised stressed that the regulations are “actually not the same as the restrictions that would have been imposed under the DMA”. Mkhize in distinguishing between the national state of disaster and the proposed regulations said it is “basically to encourage a particular conduct by society” and still [have people] behaving in a way that will prevent spreading the infection particularly since we are still waiting on a vaccine.

Mkhize explained that when the state of disaster is lifted, it will mean that there has to be an instrument to enforce conduct around washing hands, wearing masks and social distancing. “We are not out of the woods yet,” he warned. “There are still certain things we need to maintain. It would send a very wrong message if we left everything like that (after the state of disaster is lifted) and never tried to use a legal instrument to remind people of the new normal that we are expected to live by,” he said.

“There’s no malice that should be construed in the discussion about the restrictions that are being proposed. The nature of the notifiable medical conditions, particular infectious conditions, require various restrictions and in the context of this pandemic there was always going to be a possibility, depending on how the infection was going to fare in various areas, for localised restrictions.”

Mkhize explained that the major focus now is to get rid of COVID-19 and rebuild the economy.

“And we need to do that as fast as possible. To do that, he said, “we must have adequate ammunition or tools or instruments to be able to respond should the situation change. Now the numbers are showing a degree of stabilisation, but the numbers are still high. So, we can’t relax and we can’t do nothing.”

The need for legal flexibility

Some experts in medical law and public health agree with Mkhize and welcomed the proposed amendments.

Prof Keymanthri Moodley, director of the Centre for Medical Ethics and Law in Stellenbosch University's Faculty of Health Sciences, told Spotlight it is necessary to have legal flexibility to implement regulations responsibly.

"It is important to separate the procedural issues from the substantive issues. The substantive issues relating to public health and public health ethics are important," she said. "In the absence of a hard lockdown, which the World Health Organization is advising against, other targeted restrictive measures may be important to implement, such as limiting or restricting mass religious or political gatherings and super-spreader events. The amendments suggested will make this possible for COVID-19 and non-COVID-19 crises as well in the absence of a state of disaster."

Prof Narnia Bohler-Muller, Executive Director of the Democracy, Governance and Service Delivery research programme at the Human Sciences Research Council, also noted the legislative basis for this. Referring to the National Health Act she said "Section 90(IA) (4) determines in sub-paragraph (a) that regulations must be published three months before in the Gazette for public comment. However, paragraph (c) states that "the Minister may, if circumstances necessitate the immediate publication of a regulation, publish that regulation without the consultation contemplated in paragraph (a)". "In other words, the Minister is acting within the confines of the law; however, the constitutionality of the regulations can be tested once published," she explained.

Rational and reasonable response

Bohler-Muller and other experts echoed Mkhize's sentiments. "We cannot remain in a state of disaster or lockdown forever, so there is a need for laws that deal with outbreaks, epidemics and even what is being called the 'long COVID'," she explained. "This is a rational response to the situation we are in now and based on lessons learned the hard way. At the beginning," Bohler-Muller said, "we had to feel our way through an excessive event and we have not done badly this far with the recovery rates high and the death rates low. No doubt the economy has suffered and this must be addressed as a matter of urgency, but Mkhize is the Minister of Health and that is his primary mandate. It is also unlikely that these regulations would have the same dreadful consequences as the DMA and lockdown has had on the economy, and at times we need to think about the rights of others and not merely our own liberties, especially in a country with such high rates of poverty and inequality, and thus increased vulnerability to public health risks."

Prof Sylvester Chima, Head of the Programme for Bio & Research Ethics and Medical Law at the Nelson R Mandela School of Medicine at the University of KwaZulu-Natal, labelled the proposed amendments to the regulations as "reasonable". Chima said the regulations represent amendments to a law of general application to the public, rather than "the ad hoc regulations or restrictions in the DMA, some of which were arbitrary, poorly implemented, and panicky in its development in face of the COVID-19 pandemic".

"The new NHA regulations will be in place for any other public health emergency, such as a resurgence of COVID-19, and can be easily implemented without the draconian or somewhat arbitrary measures as introduced by the Disaster Management Act (DMA), in response to the COVID-19 pandemic," he said.

Dr Harsha Somaroo, Vice President of the Public Health Association of South Africa (PHASA) affiliated to the Wits School of Public Health, reminded that the powers the

minister will have in terms of the regulations will help him regulate well established risk factors for rapid transmission of COVID-19. “It must be considered that after more than ten months of the COVID pandemic, despite intensified research, improved treatment approaches, and the promise of a vaccine in the next few months, the best defences that we have against COVID-19, remain non-pharmaceutical interventions. Adherence to these non-pharmaceutical interventions has been, and understandably in certain circumstances, variable. In extreme situations, for example, if individuals resist the required management and pose a risk to others when the transmission rates are predicted to rise significantly, or when the capacity of the country’s healthcare system is threatened, the minister would need the authority to intervene at a more primordial level, to protect health at the population level,” she argued.

Trade-offs: Rights and Public health

According to Moodley, there is widespread lack of public health literacy in South Africa and a poor understanding of public health ethics. Moodley noted that there is “an overvalued emphasis on individualism (from a Western or Global North moral and legal framework) which does not serve us well in the midst of a public health crisis”. She said although the DMA made it possible to implement restrictions on civil liberties and individual rights during this pandemic, it remains important that restrictions on individual rights are implemented humanely according to the Siracusa Principles. “That caveat must be included.”

Prof Leslie London, Chair of Public Health Medicine in the School of Public Health and Family Medicine at the University of Cape Town, explained that imposing limits on civil liberties is something that is done all the time in the public interest.

“The trade-off between public health (or public good) and human rights (as in individual rights) is sometimes misunderstood where the public good is actually a human rights obligation on government to take action to prevent epidemic (and endemic and other) diseases as per the International Covenant on Economic Social and Cultural Rights. So, meeting your state obligation may require you to balance limiting rights of some individuals in the interests of public health.”

London said the obsession with civil liberties is often misplaced and the relationship between rights and the public good is often misunderstood.

“We still believe that we need to do the best for as many people as possible, and our Constitution tells us that the most vulnerable deserve our best attention and resources. So, if you have to limit civil liberties to do that, it is ok as long as you meet section 36 of our Constitution. There’s the rub. Put simply, if the regulations can be shown to address a cogent objective, be necessary to achieve that objective, have some likelihood of effectiveness overall and not limit or restrict rights in ways that are out of proportion to the goal, and where there is no other alternative, the Constitution permits such restrictions.”

DMA versus NHA

Some argue the proposed amendments to the regulations can help rectify some issues mismanaged by the DMA while some public health experts say it is not the panacea.

Chima said he considers the new amendments as superior to the DMA regulations because they represent a law of general application, consistent with constitutional provisions, which are less arbitrary and less subject to abuse by those in power. “In other words, everybody would know what the rules are whenever we are confronted with another pandemic or public health emergency, rather than being left to the whims and caprices of any minister in power at the time.”

London told Spotlight the proposed amendments to the regulations is enabling the department to issue regulations without a state of disaster in place. “So, in theory, if things are really bad the regulations could well resemble a full lockdown or something less than full, but the difference is that it is the minister of health empowered in law to initiate that without a disaster being declared. And let’s be honest,” he said, “I would rather a minister of health is running this kind of show than a minister of cooperative governance who knows and cares little about health. Of course, it is also individual-dependent, but the logic is that health is the primary reason why we should lock down or open up,” he said. London, however, noted that even if this makes the process less cumbersome, “the flip-side is that it is easier to abuse if the checks and balances are not in place”.

Suggestions

According to London the regulations are not necessarily the panacea. “The same issues of lack of public input will exist here as well,” he said. “Some kind of structured opportunity for input and oversight will be necessary whether it is the minister of health or the minister of cooperative governance that makes the judgement call.”

According to Stevenson, the DMA to some extent is more protective of people’s rights and has built-in mechanisms to keep a check on decision-making. These include requiring that a disaster be declared, that it extends only for a set period and that there is consultation with ministers, an advisory committee and stakeholders. “These checks are far from perfect and have not all worked,” said Stevenson, “but they are protective of people’s rights by ensuring transparency and participation in those decisions and limiting the power of the executive. The proposed amendments to the notifiable conditions regulations don’t contain these requirements and protections.” Stevenson said the proposed amendments, for example, do not provide for a set time limit, which potentially opens it up to abuse.

On a more practical note, and given some lessons learned during the COVID-19 pandemic, Moodley suggested a few more amendments.

“Amendments such as those necessary for urgently needed health research should have been included. This includes a waiver of consent on the basis of necessity for urgent research that will inform treatment of current and future patients, storage of biological samples for future use during a public health crisis related to the disease responsible for the crisis. He should have included the urgency of re-instating the National Health Research Ethics Council (NHREC), which is critical to provide oversight regarding research during a public health emergency,” Moodley argued.

“Most importantly,” she said, “he ought to have included legal indemnity for healthcare professionals who are forced to make difficult decisions during public health crises.”

According to Chima, the notifiable diseases listed in the NHA includes ‘Respiratory disease caused by a novel respiratory pathogen’, for example MERS. Therefore, he said, COVID-19 or SARS-CoV-2, falls into this category. “One would like to suggest that COVID-19 should specifically be included in the list of Category 1 notifiable diseases, to avoid doubt,” he said.

Now, with the state of disaster extended until 15 November, it appears government has a little more time to consult and finalise the new regulations.