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# DISPUTE RESOLUTION ALERT

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### The fundamental importance of aligning legislation and criminal sanctions with the norms and everyday life of society

It is essential for the stability of our society, and respect for the rule of the law, that Parliament should pass laws and promulgate legislation, which will bear scrutiny when evaluated against the norms of our society, the expectations of the everyday life of South Africans, and the values enshrined in our Constitution.

### The COVID-19 alcohol ban – how is the retailer affected?

On Sunday, 12 July 2020, South Africans were left shocked when President Cyril Ramaphosa announced the reinstatement of the ban on the sale, dispensing and distribution of liquor with immediate effect.

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## The fundamental importance of aligning legislation and criminal sanctions with the norms and everyday life of society

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It is essential for the stability of our society, and respect for the rule of the law, that Parliament should pass laws and promulgate legislation, which will bear scrutiny when evaluated against the norms of our society, the expectations of the everyday life of South Africans, and the values enshrined in our Constitution.

A critical aspect of our social fabric is that laws and regulations must be capable of being enforced and must in fact be enforced. There is no purpose in promulgating laws and regulations merely for the sake of it. That would serve to detract from the respect which the general public ought to have for the laws of the country.

It is equally important that our Parliament should not seek to criminalise what most South Africans might regard as normal or acceptable behaviour. Part of the reason

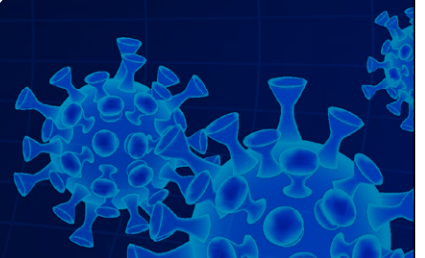
why criminal sanctions serve (as they of course should) as a deterrent to criminal conduct, is because society shuns criminal behaviour. People therefore attempt to conduct themselves in a manner which will avoid criminal consequences, and the blemish which a criminal record ought to have on a person's reputation.

If laws and regulations are promulgated, however, which tend to make criminals of all of us, then something will have gone wrong. If everyone is a criminal, then there is little, if anything, reprehensible in receiving a criminal conviction. One of the most important deterrents, discouraging people from criminal conduct, will have been laid to waste.

We have seen what happened in South Africa when overzealous politicians sought to enforce aspects of a lockdown, in the face of the COVID-19 pandemic, which resulted in public opinion turning full

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## The fundamental importance of aligning legislation and criminal sanctions with the norms and everyday life of society...continued

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circle against what society had initially regarded as a sensible and necessary process. Popular support for the lockdown turned into dismay, ridicule, and eventually an outright disregard for many of the measures sought to be implemented. This is what happens when a government seeks to enforce laws and regulations which the public at large regard as inappropriate or applies an overreach of the measures which ought properly to be adopted, for purposes of achieving an appropriate goal.

One now reads of proposed amendments to legislation, aimed at curbing road deaths caused by drunken driving. So far so good. No one is seriously going to argue that proper steps should not be taken to address the problem of motor accidents and deaths caused by drunken driving. If, however, one introduces measures which, on a common-sense basis amount to overreach, then one runs the risk that no one will respect these measures. If all and sundry are potentially to become criminals for conducting themselves in a manner which society does not regard as wrong or reprehensible, then the state is inviting disobedience from its citizens.

It is often helpful to use a silly example to illustrate a good point. So, if one wished to eradicate deaths on the road, then government might consider banning motor vehicles and making it a criminal offence to drive any vehicle. If there are no cars on the road, there will be no accidents.

Self-evidently, this would be ridiculous.

Why, one is then driven to ask, does our government sense that it might be commendable to introduce legislation which places an absolute prohibition on driving any vehicle whilst having any (even the minutest amount) alcohol in one's system? The problem on our roads, after all, is accidents caused by drunken drivers. The problem is not accidents caused by people who are driving after one drink, or within the existing alcohol limits. Why then does the government seek to impose criminal sanction on those who are not at the heart of the problem?

The proposed legislation threatens to make a criminal of the following examples of everyday people, going about a normal life, in a manner which society, at least until now, has regarded as responsible and normal:

- Enjoying a bottle of wine with three friends over a lunch or dinner (i.e. not much more than a glass each).
- Enjoying a beer after a game of golf.
- Visiting a wine farm and enjoying a wine tasting (even if you are liberally using the spittoon).
- Enjoying just one drink at a work gathering.

The ostensible reason for the proposed Draconian legislation is that existing legislation is not curbing road deaths. The assumption seems to be that a change in the permitted alcohol limit will miraculously change the habits of the real drunk drivers (i.e. those who are driving at twice the legal limit or more).

## The fundamental importance of aligning legislation and criminal sanctions with the norms and everyday life of society...*continued*

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What our politicians and state officials need to do is to fix the underlying problem - i.e. eliminate the rot of bribery, dishonesty and corruption within the law enforcement agencies, and restore the efficiency of the prosecutorial system.

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If the people who are happy to drive after having six or eight beers, or four double brandy and coke's, are presently happily driving around drunk, then why would those same offenders choose to change their behaviour, simply because government now legislates against those who drink responsibly? Self-evidently, the premise motivating the new legislation is misguided.

Why do we then have so many road deaths and accidents caused by drunken driving? It seems to me that it is far more likely that the answer lies in the way the criminal justice system is functioning (or not functioning). The stories of people escaping arrest by paying bribes to willing police officers or traffic officials, are legend. If that is not bad enough, others are paid to make dockets go missing. That is the rot which must be eliminated. All that the new legislation is likely to do, is to expose a greater number of the public to accusations that they are "driving under the influence" and that, unless they accompany the officer to the nearest ATM machine (to pay over a bribe), they will simply have to spend the night in jail, until a court has

dealt with their bail application in the morning (or God forbid, on Monday after a weekend). This, after all, is the common experience or threat faced by the average South African.

What our politicians and state officials need to do is to fix the underlying problem - i.e. eliminate the rot of bribery, dishonesty and corruption within the law enforcement agencies, and restore the efficiency of the prosecutorial system.

What we don't need is ill-conceived legislation which threatens to exacerbate existing problems and, worse still, is likely to lead to a deterioration in the respect which the general public has for the credibility and legitimacy of our laws. That has the potential to detract from the social fabric of our society. Put differently, promulgating overzealous legislation against the background of a poorly functioning criminal justice system, is likely to instigate, by way of response from the public, a general disregard for the law, to the detriment of the well-being of an orderly society.

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*Jonathan Witts-Hewinson*

## The COVID-19 alcohol ban – how is the retailer affected?

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Regulation 44(1) of the Disaster Management Act 57 of 2002 (the Act) provides that the sale, dispensing and distribution of liquor is prohibited.

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**On Sunday, 12 July 2020, South Africans were left shocked when President Cyril Ramaphosa announced the reinstatement of the ban on the sale, dispensing and distribution of liquor with immediate effect.**

Regulation 44(1) of the Disaster Management Act 57 of 2002 (the Act) provides that the sale, dispensing and distribution of liquor is prohibited. This has a major effect on retailers as the sale of liquor contributes a significant amount to the stores' sales. This could be seen when the alcohol ban was lifted and citizens queued during the early hours of the morning at retailers such as Spar and Makro.

The alcohol ban has a massive impact on retailers who provide a three-in-one service, these are your stores which have a general merchandise, food and liquor department. Alcohol sales contribute on average about 20% towards a stores' turnover. This 20% sets the store behind in meeting their budgets set for the year. It also results in extra pressure being put on employees in the other departments to make sales during a pandemic as well as in our already struggling economy. Retailers which provide a three-in-one service have had to place staff that would usually work in the liquor store, into a different area in the business to ensure that they are still able to work and earn a salary. This requires a great amount of planning and results in a store having staff working in a department in which they do not have the expertise in.

Suppliers and retailers are also sitting with short-dated stock. This stock will ultimately either end up not being able to be sold anymore which means further losses for the retailer or the stock is discounted for half price by the supplier or becomes a company expense which ultimately results in loss of profits for the retailer.

Most retailers have a 90-day payment plan with their creditors. The alcohol ban inevitably results in the retailer having to renegotiate their payment plans with parties such as South African Breweries and Distell. This requires extensive planning and negotiating. This is just one of the instances that demonstrate how all parties in the liquor value chain are affected by the alcohol ban.

Retailers hire machinery to move stock around, for example hysters, and are not utilizing this machinery but must still pay this monthly expense. This machinery would usually aid in the day to day running of the business but are not able to do so and are sometimes sent back to the hiring company.

Retailers also employ staff in the liquor department who work on an hourly basis and these employees have not been able to work during the period of the alcohol ban. These employees are not paid during this time.

There has been looting of liquor stores during the alcohol ban and retailers have had to respond to this added risk by upgrading the security around the building. In certain situations, this includes having

## The COVID-19 alcohol ban – how is the retailer affected?...*continued*

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dogs on the property. This is once again an added expense even without the alcohol ban but adds even more strain on the retailer during the alcohol ban as the store is closed but is still incurring this expense.

The previous unbanning of the sale of liquor helped retailers get back to their original budget plan in terms of profits but the reinstatement of the liquor ban has once again placed these stores in a position where they are not able to successfully meet these budgets. There is a lot of uncertainty and retailers have had to plan, adjust and be proactive during this time.

As previously mentioned, larger retailers are able to place staff who usually work in the liquor store in a different department whereas smaller retailers and taverners are not able to do this. They are experiencing the full effect of the alcohol ban. Smaller retailers and taverners remain closed, are not able to generate an income and this results in further job losses for their employees. This would not be the case if the alcohol ban was lifted seeing as the smaller retailers and taverners contribute a significant amount of sales to the alcohol industry.

One can argue that retrenchments, job losses and stores not meeting their budget plan would occur regardless of the alcohol ban, but the full effect of the alcohol ban is yet to be seen.

Regulation 44(1) of the Act can potentially be constitutionally challenged as it infringes on the section 22 constitutional right to freedom of trade, the section 10 right to human dignity and the section 14 right to privacy. The State must prove that the alcohol ban is a reasonable and justifiable limitation of these rights. It has been noted that the number of alcohol related hospital admissions had increased at an exponential rate once the alcohol ban was lifted and this resulted in hospitals being overburdened. Taking this into account, there are less restrictive means to achieving the purpose of ensuring that hospitals have enough resources to assist COVID-19 patients. This includes allowing for the sale of liquor only on certain days of the week or limiting the amount of alcohol a customer is able to purchase. These less restrictive means could limit alcohol consumption and therefore reduce the amount of alcohol related hospital admissions.

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*Nick Muller and Kirsten Felix*

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**A better place to work**

The module will empower your organisation with a greater appreciation and understanding of what constitutes sexual harassment, how to identify it and what to do if it occurs.

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### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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