

**// POWER SINGH INCORPORATED**

LCP Reg. No: F18433 | CIPC Reg. No: 2018/071686/21

**Public Interest Law.**

**a.** 20 Baker Street, Rosebank, South Africa, 2196

**t.** +2711 268 6881

**f.** +2786 614 5818

**e.** [connect@powersingh.africa](mailto:connect@powersingh.africa)

**w.** [powersingh.africa](http://powersingh.africa)



---

*This message / correspondence contains information which is confidential and/or legally privileged. It is intended for the addressee only. If you are not the addressee and you have received this message in error, you may not read, use, disseminate, distribute, or copy its information. Please notify us immediately and we shall arrange for the return of this message / correspondence at our own cost.*

**URGENT**

**Date: 1 February 2021**

Your ref: --

Our ref: PSIHJ-202015

**TO: MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS**  
Department of Cooperative Governance & Traditional Affairs  
Per email: [MandisaMB@cogta.gov.za](mailto:MandisaMB@cogta.gov.za); [pamelas@cogta.gov.za](mailto:pamelas@cogta.gov.za)

**AND TO: MINISTER OF HEALTH**  
Department of Health  
Per email: [Lwazimanzi@gmail.com](mailto:Lwazimanzi@gmail.com);  
[georgina.sylvester@health.gov.za](mailto:georgina.sylvester@health.gov.za); [georgina.sylvester1@gmail.com](mailto:georgina.sylvester1@gmail.com)

**AND TO: HEAD OF CENTRE: NATIONAL DISASTER MANAGEMENT CENTRE**  
National Disaster Management Centre  
C/o Dr Mmaphaka Tau  
Per e-mail: [MmaphakaT@ndmc.gov.za](mailto:MmaphakaT@ndmc.gov.za)

**AND TO: THE PRESIDENCY: NATIONAL COMMAND COUNCIL**  
C/o Ms Khusela Diko, Mr Mike Louw and Ms Nokukhanya Jele  
Per e-mail: [khusela@presidency.gov.za](mailto:khusela@presidency.gov.za);  
[presidentrsa@presidency.gov.za](mailto:presidentrsa@presidency.gov.za); [njjele@law.co.za](mailto:njjele@law.co.za); [Thamsanqa@presidency.gov.za](mailto:Thamsanqa@presidency.gov.za)

**AND TO:       SPEAKER OF THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA**  
C/o Ms Thandi Modise  
Per e-mail: [speaker@parliament.gov.za](mailto:speaker@parliament.gov.za)

---

To the aforementioned parties,

**DEVELOPMENT AND CONSOLIDATION OF A PLAN TO ENSURE ACCESS TO AND THE  
EQUITABLE ALLOCATION OF COVID-19 VACCINES: DEMAND FOR MEANINGFUL ENGAGEMENT**

1. We act on behalf of the Health Justice Initiative (“**HJI**” or “**our client**”) in this matter. As you are aware, HJI is a dedicated public health and law initiative addressing the intersection between racial and gender inequality with a special focus on access to life-saving diagnostics, treatment and vaccines for COVID-19, TB and HIV.

***Previous correspondence from our client***

2. Our client has previously written to the aforementioned parties on three occasions: 16 November 2020, 2 December 2020, and 15 December 2020. These letters are attached for your ease of reference and marked “**A**”, “**B**” and “**C**”, respectively.
3. Various officials in the Presidency, the Department of Health and the Ministerial Advisory Committee on Vaccines (“**MAC**”) were copied into all three of our client’s written correspondence. In addition, we are advised that various phone calls and emails were issued by our client to get a response from those entrusted with providing the public with much-needed information during this pandemic, without success.
4. While our client received the attached response, marked “**D**”, from Dr Mmaphaka Tau, the Head of the National Disaster Management Centre (“**National Centre**”), the limited response advises only that the Department of Health is “responsible for vaccine-related matters”, which response, in our view, is incorrect in law.
5. We are further advised that despite being promised a written response by the Office of the Director-General for Health in or about mid-December 2020, to date, none has been forthcoming. Importantly, we are advised that no reasons have been provided for the lack of a formal reply or for the discourteous and disengaged manner in which this matter is being approached by the aforementioned parties.
6. The lack of transparency and reply to our client’s correspondence is regrettable and concerning, and fails to meet the threshold for meaningful engagement. Given the gravity of the situation at hand, simply not engaging with civil society and other groups acting in the

public interest is unhelpful. HJI, among others, has much to offer in this time of crisis, should it be consulted and not simply ignored.

### ***Issues which remain unaddressed***

7. Since our client's last letter dated 15 December 2020, to which no response has been received, we note that there has been some information, albeit limited and disjunctive in its nature, which has been shared with the public on the now urgent plan(s) to acquire and equitably distribute and allocate vaccines for South Africa.
8. Notwithstanding these updates, our client's letters raised several questions and concerns, many of which remain unaddressed:
  - 8.1. Have any of the aforementioned parties developed guidelines concerning the development, review, and updating of disaster management plans which deal with access to and allocation of vaccines (Vaccine Access and Allocation Plans)?<sup>1</sup> If so, kindly provide us with a copy of the guidelines.
  - 8.2. Is there a plan to budget and prioritise vulnerable groups and key populations including refugees, asylum seekers and undocumented migrants and communities without identity documents, in relation to access to and allocation of vaccines? If so, what is the plan? It will be appreciated if we can receive a copy of any such plan.
  - 8.3. Our client assumes that to the extent that Vaccine Access and Allocation Plans have been developed and / or consolidated, they will be made public in the interest of transparency, accountability, and general good governance. It is in that context that our client has requested copies of any guidelines and Vaccine Access and Allocation Plans. If the aforementioned parties are, for any reason, unable to provide copies to us, please advise as to the reason(s) why, and how we may otherwise obtain copies. Our client is of the view that consolidated versions of these plans should be made publicly available, without delay, should this not have been done already.
  - 8.4. In the event that Vaccine Access and Allocation Plans have been developed and / or consolidated, we respectfully request that you advise on the proposed timeline for consolidation and urgently constitute a series of multi-stakeholder engagements regarding the factors which should be considered in the consolidation and review process.

### ***Vaccine financing and procurement***

9. In addition to the above questions, we are instructed to seek clarity on the following matters relating to vaccine financing and procurement which, we are advised, have gained increasing

---

<sup>1</sup> See section 19(a) and (e) of the Disaster Management Act.

importance since our client's last correspondence:

- 9.1. When will the financing model for vaccine acquisition be publicly released for comment? According to the President, and within the extent of our client's knowledge, the three supply sources are COVAX, the African Vaccine Acquisition Task Team ("AVATT"), and bi-lateral deals between pharmaceutical companies and the South African government.
- 9.2. Given serious concerns about price gouging and the lack of vaccine price transparency globally which, to the extent of our client's knowledge, has resulted in South Africa paying higher prices for vaccines, please provide reasons as to:
  - 9.2.1. if pricing is confidential, why is this the case?
  - 9.2.2. to the extent that non-disclosure agreements exist, please confirm which mechanisms and companies have caused the South African government to sign such agreements and the rationale for signing these agreements in an open and democratic society.
- 9.3. What is the South African government's position in relation to the procurement of vaccines by the private sector? To the extent that procurement by the public sector is not permitted, what oversight powers exist or will be established to oversee the procurement of vaccines?
- 9.4. Lastly, apart from the temporary waiver being sought at the World Trade Organisation (WTO), is the South Africa government considering the use of state licensing and / or compulsory licensing measures to address the urgent supply crisis of vaccines brought about, in part, by the patent monopolies that now exist? Our law permits such action. If the South African government is not considering such action, why not? If such action is being considered, please provide further information, inclusive of timeframes for the introduction of such measures.

***Meaningful engagement as a tenet of our democracy***

10. In addition to the questions detailed above, we are instructed to note our client's concern in relation to the level of engagement with the public that is presently taking place, particularly in relation to vaccine access and allocation, and vaccine financing.
11. As you are aware, the Constitutional Court has engaged with and developed the principle of "meaningful engagement".<sup>2</sup> At its essence, meaningful engagement requires "good faith and reasonableness on both sides and the willingness to listen and understand the concerns of the

---

<sup>2</sup> See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16; 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC).

other side.”<sup>3</sup> This requires bilateral dialogue and not simply unilateral information-sharing. In an earlier judgement,<sup>4</sup> the Constitutional Court assessed meaningful engagement as a more substantive remedy and remarked that “[t]he proceedings would have been obviated if there had been meaningful engagement before the case had been started.”<sup>5</sup>

12. In light of the above, our client takes the view that there is a positive obligation on the South African government to facilitate meaningful engagement in its decision-making processes, particularly in the midst of a pandemic. Our client is of the view that the South African government is presently failing in this regard. The COVID-19 pandemic has, undoubtedly, exacerbated inequality in our country and wreaked havoc on the lives of millions of South Africans. In the view of our client, the state’s present failure to facilitate open and robust dialogue with the public only serves to fuel public mistrust and potentially contribute to vaccine-hesitancy. The below research is apposite:

“The public’s evaluation of how the President and the national government have been handling the Covid-19 pandemic plays a major role in vaccine acceptance. Those who think the President and national government have been doing a bad job were appreciably less favourable towards vaccination than those offering positive approval ratings.”<sup>6</sup>

13. While our client acknowledges the complex and legitimate constraints facing the South African government in establishing a COVID-19 response, we are instructed to note our client's concern at the persistent disinclination by the South African government to meaningfully engage civil society actors, including HJI, on vaccine acquisition and allocation, and vaccine financing.
14. Resultantly, our client seeks an undertaking that, going forward, the South African government will meaningfully and transparently engage on all COVID-19-related matters. In addition, our client enjoins the South African government to arrange an urgent civil society convening with the Inter-Ministerial Committee on Vaccines and the Vaccine Acquisition Task Team.

### ***The state’s obligation in terms of section 231(3) of the Constitution***

15. Section 231 of the Constitution pertains to international agreements. In particular, section 231(3) states:

“An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and

---

<sup>3</sup> Id at para 244.

<sup>4</sup> *Occupiers of 51 Olivia Road v Johannesburg* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC).

<sup>5</sup> Id at para 53.

<sup>6</sup> UJ-HSRC COVID-19 Democracy Survey: <https://www.uj.ac.za/newandevents/PublishingImages/Pages/UJ-HSRC-survey-shows-that-two-thirds-of-adults-are-willing-to-take-the-Covid-19-vaccine/2021-01-25%20Vaccine%20briefing%20%28final%29.pdf>

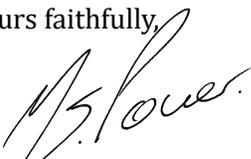
the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.”

16. To date, it is unclear whether there has been compliance with this provision in relation to the agreements that appear to have been reached with COVAX, AVATT, and bilaterally. For this reason, we have included the Speaker of Parliament in this correspondence, with the intention of requesting urgent clarification on whether the agreements which South African has entered into with suppliers of vaccines have been tabled in Parliament. If not, our instructions are to enquire when this will be done. To the extent that the agreements have been tabled, kindly provide us with copies.

***Conclusion***

17. In light of the above, we are instructed to demand, as we hereby do, a comprehensive response to the questions and concerns posed by our client by no later than the close of business on **Friday, 12 February 2021**. Failing which, our client reserves the right to seek appropriate legal recourse. We are further instructed to demand an undertaking from the aforementioned parties that meaningful and transparent engagement in relation to all COVID-19-related matters will take place going forward.
18. We are instructed to advise that our client is of the view that resorting to legal recourse will be unnecessary should the aforementioned parties respond urgently to our client's questions and concerns and meaningfully engage with our client, and other civil society actors, going forward.
19. Our client's rights are reserved.

Yours faithfully,



**POWER SINGH INC.**

Per: Michael Power & S'lindile Khumalo | *Director* | *Associate*

E-mail: [michael@powersingh.africa](mailto:michael@powersingh.africa) and [slindile@powersingh.africa](mailto:slindile@powersingh.africa)

**CC: MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**

Department of Justice and Correctional Services

C/o Ms Zanele Ndlovu, Mr Bruce Sarela and Ms Kalayvani Pillay

Per e-mail: [ZaneNdlovu@justice.gov.za](mailto:ZaneNdlovu@justice.gov.za); [bsarela@justice.gov.za](mailto:bsarela@justice.gov.za); [KalaPillay@justice.gov.za](mailto:KalaPillay@justice.gov.za)

**MINISTERIAL ADVISORY COMMITTEE ON VACCINES**

C/o Professor Barry Schoub

Per e-mail: [barry.schoub@gmail.com](mailto:barry.schoub@gmail.com)

**SOUTH AFRICAN HEALTH PRODUCTS REGULATORY AUTHORITY**

C/o Dr Boitumelo Semete-Makokotlela

Per e-mail: [Boitumelo.Semete@sahpra.org.za](mailto:Boitumelo.Semete@sahpra.org.za)

**SOUTH AFRICAN MEDICAL RESEARCH COUNCIL**

C/o Dr Glenda Gray

Per e-mail: [Glenda.Gray@mrc.ac.za](mailto:Glenda.Gray@mrc.ac.za)

**THE COUNCIL FOR MEDICAL SCHEMES**

C/o Dr Memela Makiwane

[media@medicalschemes.co.za](mailto:media@medicalschemes.co.za)

**COMPETITION COMMISSION OF SOUTH AFRICA**

Mr Thembinkosi Bonakele, Mr Joise Oliver, Mr Siyabulela Makunga

Per e-mail: [thembinkosib@compcom.co.za](mailto:thembinkosib@compcom.co.za); [oliverj@compcom.co.za](mailto:oliverj@compcom.co.za);

[SiyabulelaM@compcom.co.za](mailto:SiyabulelaM@compcom.co.za)

ENDS.