

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 32858/20

In the matter between:

HELEN SUZMAN FOUNDATION

Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

Second Respondent

**THE CABINET OF THE REPUBLIC OF
SOUTH AFRICA**

Third Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES**

Fourth Respondent

**THE MINISTER OF COOPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS**

Fifth Respondent

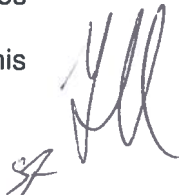
COMPOSITE REPLYING AFFIDAVIT

I, the undersigned,

FRANCIS ANTONIE

do hereby make oath and state that:

1. I am an adult male director of the applicant, the Helen Suzman Foundation ("**HSF**"). I am duly authorised to depose to this affidavit on its behalf. The facts contained herein are within my personal knowledge and belief, unless the context indicates otherwise, and are both true and correct. Where I make legal submissions, I do this

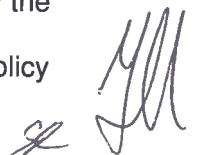


on the strength of the advice of my legal representatives, which advice I accept as being correct.

2. I am also the deponent to the founding affidavit in this application, dated 23 June 2020 ("**the founding affidavit**"). Defined terms used in the founding affidavit will be used in this affidavit unless otherwise indicated or evident from context.
3. I have read the answering affidavit deposed to on behalf of the first respondent ("**the Speaker**"), dated 14 August 2020 ("**Parliament's Affidavit**"), and the affidavit that is deposed to on behalf of the President, Cabinet and Minister, dated 14 August 2020 ("**National Executive's Affidavit**"). I depose to this affidavit on behalf of the HSF in reply to both Parliament's and the National Executive's Affidavits.

INTRODUCTION

4. This affidavit starts with a recapitulation of the arguments in the founding affidavit. This is necessary for two reasons.
 - 4.1 Parliament's and the National Executive's Affidavits fail to address the structure or substance of the founding affidavit in detail, or at all. Rather, they articulate purported defences and make claims which, whatever their abstract merits or factual truth, do not bear on the issues before this Court.
 - 4.2 Their Affidavits make personal allegations against the HSF, which in addition to being gratuitous are irrelevant to these issues of law and principle.
5. Once the structure and substance of the HSF's argument, as this is articulated in the founding affidavit, is seen clearly, much of Parliament's and the National Executive's Affidavits falls aside as irrelevant or ill-conceived.
6. The HSF's case, while raising fundamental questions, is a focused one:
 - 6.1 This application is not about particular regulations that have been made by the Minister, acting alone or together with Cabinet. Nor is it about difficult policy



choices or value judgments made by the Executive relating to COVID-19.¹ The Speaker² and National Executive may not believe that the HSF, despite its decade-long, overwhelmingly successful³ pursuit of litigation in the public interest, is acting in good faith,⁴ or respect the HSF's efforts to uphold and defend the values of our Constitution.⁵ In bringing this application, though, the HSF is entirely and only concerned with an issue of constitutional principle that is as narrow as it is fundamental.⁶

6.2 The starting point is the proper interpretation of the Disaster Act. The Disaster Act exists to regulate disasters, as defined in this Act. On both a plain and a constitutionally purposive reading of the definition of disaster, the function of

¹ Paragraphs 8, 17 and 18 of the founding affidavit.

² Paragraphs 91 and 114.2 of Parliament's Affidavit.

³ For example, see *Helen Suzman Foundation v President of the Republic of South Africa and Others*; *Glenister v President of the Republic of South Africa and Others* (CCT 07/14, CCT 09/14) [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC) (27 November 2014); *Ntlemeza v Helen Suzman Foundation and Another* (402/2017) [2017] ZASCA 93; [2017] 3 All SA 589 (SCA); 2017 (5) SA 402 (SCA) (9 June 2017); *Helen Suzman Foundation v Judicial Service Commission* (CCT289/16) [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) (24 April 2018); *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011); *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*; *Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23; 2018 (10) BCLR 1179 (CC); 2018 (2) SACR 442 (CC) (13 August 2018); *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) (15 March 2016); *McBride v Minister of Police and Another* (CCT255/15) [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) (6 September 2016); *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP); 2017 (1) SACR 623 (GP) (22 February 2017); *Helen Suzman Foundation v Minister of Police and Others* (1054/2015) [2015] ZAGPPHC 4 (23 January 2015); *Helen Suzman Foundation and Another v Minister of Police and Others* (23199/16) [2017] ZAGPPHC 151; [2017] 3 All SA 253 (GP) (10 May 2017); *Helen Suzman Foundation and Another v Minister of Police and Others* (23199/16) [2017] ZAGPPHC 68; 2017 (1) SACR 683 (GP) (17 March 2017); *Helen Suzman Foundation v President of the Republic of South Africa and Others* [2013] ZAWCHC 189; [2014] 1 All SA 671 (WCC); 2014 (4) BCLR 481 (WCC) (13 December 2013); *Helen Suzman Foundation v South African Broadcasting Corporation Soc Ltd and Others* (52160/16) [2016] ZAGPPHC 606 (20 July 2016); *Lawrence v Magistrates Commission and Others* (1070/2019) [2019] ZAFSHC 269; 2020 (2) SA 526 (FB) (12 December 2019); *McBride v Minister of Police and Another* (06588/2015) [2015] ZAGPPHC 830; [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP) (4 December 2015); *Chang v Minister of Justice and Correctional Services and Others*; *Forum de Monitoria do Orcamento v Chang and Others* (22157/2019; 24217/2019) [2019] ZAGPJHC 396; [2020] 1 All SA 747 (GJ); 2020 (2) SACR 70 (GJ) (1 November 2019).

⁴ Paragraph 72 of Parliament's Affidavit.

⁵ Paragraphs 135 and 156 of the National Executive's Affidavit.

⁶ Paragraphs 9 and 16 to 18 of the founding affidavit.

the Disaster Act is to regulate the state's response to certain types of social or natural ills, in particular types of situations. Two conditions must be met for the Act, together with its institutional machinery and legislative and executive powers, to become operational:

- 6.2.1 the absence of existing technical measures that can be implemented by organs of state that will deal adequately with the serious threat posed or harm caused; and
- 6.2.2 the presence of time-sensitive reasons that frustrate the making of new technical measures through regular legislative and executive processes, i.e. Parliament and the National Executive.⁷

6.3 Below, I unpack these conditions, clarifying their meaning and significance, as the Speaker and National Executive appear not to appreciate what the HSF means to say about and derive from these legislatively stipulated conditions. For now, though, what matters is that whilst the exceptional nature of disasters can explain the exceptional powers in the Disaster Act, they also point towards the importance of respecting this precise definition of disaster.⁸

6.4 Whilst the initial appearance of COVID-19 may have satisfied both conditions in 6.2, this alone does not warrant the conclusion that the Disaster Act can or should be expected to continue to operate without more.⁹ When the National Executive and Parliament have gathered themselves to reassert their basic legislative and executive functions, which self-gathering they must effect as soon as practically possible, the Minister's extensive, albeit initially justified, power under the Act is exhausted.¹⁰ In other words, on a proper interpretation

⁷ Paragraphs 16 and 65 to 71 of the founding affidavit.

⁸ Paragraph 70 of the founding affidavit.

⁹ Paragraph 72 of the founding affidavit.

¹⁰ Paragraphs 71 and 116 of the founding affidavit.

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of the Disaster Act, it operates as a short-term measure or stop-gap. It applies only for so long as the National Executive and/or Parliament cannot exercise their powers to create new, more specific legislation.

- 6.5 When this application was launched, the Minister's powers under the Act had been in effect for 4 months. When this application is argued before this Court, this period will have exceeded 5 months. As a matter of fact, sufficient time has passed for Parliament and the National Executive to gather themselves, for the sake of performing their original, constitutional functions.
- 6.6 The Court can reasonably infer from their conduct or statements that neither branch of government intends to do so.
- 6.7 This can be inferred because rather than considering, initiating, preparing and passing "*concrete and effective*" legislation,¹¹ in the words of Moseneke DCJ and Cameron J for the majority of the Constitutional Court, that structures and regulates state power in response to COVID-19, with its consequential and substantial impact on the rights of every South African,¹² both Parliament and the National Executive appear content to rely on the institutional framework in the Disaster Act as the response to COVID-19, for so long as the threat posed or harm caused by COVID-19 persists.¹³
- 6.8 This response by Parliament and the National Executive, or perhaps better, this lack of response, constitutes an ongoing and fundamental breach of their respective obligations under sections 7, 42(3), 44(1), 55(1), 68 and 85(2) of the Constitution to consider issues, initiate, prepare and/or pass legislation relating to the threat posed and harm caused by COVID-19,¹⁴ in a way that not

¹¹ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para. [175].

¹² Paragraphs 12, 50, 82 and 101 of the founding affidavit.

¹³ Paragraphs 11, 43 to 48, 96 and 112 to 114 of the founding affidavit.

¹⁴ Paragraphs 52 to 55 of the founding affidavit.

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only respects, protects, promotes and fulfils the rights in the Bill of Rights, but is consistent with the basic principles, structures and process embodied in the Constitution.¹⁵

6.9 In particular, these duties arise from the fact that:

6.9.1 the COVID-19 pandemic poses an unprecedented threat to a panoply of constitutional rights;

6.9.2 regulations made pursuant to the exercise of power under the Disaster Act dealing with COVID-19 limit constitutional rights (whether or not such limitation is justified under section 36 of the Constitution); and

6.9.3 the state, i.e. Parliament and the Executive, bears a constitutional duty to implement measures to address the COVID-19 pandemic, in terms of section 7(2) of the Constitution, which includes a duty to initiate, prepare and/or pass legislation.

6.10 The duty to act in this way is evident from a plain and purposive reading of the Constitution, as well as a long-established line of judgments emanating from the Constitutional Court.¹⁶ Further, the wording of the Disaster Act and indeed its internal logic embodies recognition of this duty.¹⁷

6.11 Whatever oversight functions are performed by Parliament over the Minister or National Executive's exercise of power under the Disaster Act, this does not detract from or diminish the above failures. The original, primary locus of law-making power vests in Parliament. As important as checking the power of the executive in managing, administering or implementing laws is,¹⁸ not even the

¹⁵ Paragraphs 9, 11, 15, 18, 92, 101, 102, 111 to 114, 117 and 118 of the founding affidavit.

¹⁶ Paragraphs 77 to 88 and 92 of the founding affidavit.

¹⁷ Paragraphs 89 to 91 and 93 to 95 of the founding affidavit.

¹⁸ Paragraph 49 of the founding affidavit.

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most proper, fulsome performance of oversight can justify or excuse the failure of Parliament to reassert its proper, constitutionally-demanded place of power within our Constitution's carefully calibrated structure.¹⁹

6.12 Simply put, Parliament's obligation to exercise oversight, and its duty to enact legislation, are distinct. It shoulders both duties. It cannot abdicate the latter on the basis that it is performing the former.

6.13 Given these constitutional breaches, the HSF prays for the declarations and the mandamus contained in its notice of motion.

7. In their affidavits, the Speaker and the National Executive fail to address any part of this argument, either adequately or at all. Given the constitutional and immediately practical significance of this matter, this failure is regrettable.

8. Instead, the National Executive and the Speaker make a variety of ill-conceived and legally irrelevant points. These are as follows:

8.1 there is no duty on Parliament and the National Executive to adopt a concrete and effective mechanism to regulate the state's response to COVID-19, for one or more of the following reasons:

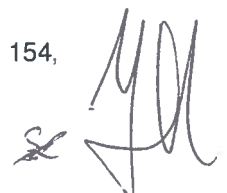
8.1.1 the HSF has not identified violations of constitutional rights flowing from the exercise of power under the Disaster Act;²⁰

8.1.2 the power to initiate, prepare and/or pass legislation is permissive and discretionary;²¹

¹⁹ Paragraphs 56 to 63 of the founding affidavit.

²⁰ Paragraphs 7.2, 13 to 19 and 87 of Parliament's Affidavit and paragraphs 27 and 204 of the National Executive's Affidavit.

²¹ Paragraphs 7.2, 24 to 26 and 44 of Parliament's Affidavit and paragraphs 17, 22 to 25, 28, 154, 175, 182 and 214 of the National Executive's Affidavit.

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- 8.1.3 COVID-19 is a disaster, the Disaster Act is the legislative tool for dealing with disasters, and, therefore Parliament has responded;²²
- 8.1.4 the HSF ought to have challenged the Disaster Act if it considers that the response it embodies is inadequate;²³
- 8.1.5 efficiency considerations, rooted in the lack of knowledge about COVID-19, dictate the location of legislative power in the hands of the National Executive;²⁴ and
- 8.1.6 in any event, a mandamus would not be enforceable;²⁵
- 8.2 Parliament has exercised oversight;²⁶
- 8.3 there is no urgency in this application;²⁷ and
- 8.4 the HSF does not have standing to bring this application.²⁸
9. None of the above can be sustained. These points do not address and answer the principal and principled position taken and argument made in the founding affidavit. Before replying to the answering affidavits *ad seriatim*, I shall reply thematically, in a manner that is brief but dispositive, to each argument.

THE DUTY TO INITIATE, PREPARE AND PASS LEGISLATION

10. In this application, the HSF does not criticise the coherence or the capacity of the

²² Paragraph 7.1 of Parliament's Affidavit and paragraphs 12, 154, 170 and 197 of the National Executive's Affidavit.

²³ Paragraphs 7.3, 44, 49, 54 and 57 of Parliament's Affidavit and paragraphs 148 and 154 of the National Executive's Affidavit.

²⁴ Paragraphs 33, 38, 41, 47 and 103.4 of Parliament's Affidavit and paragraphs 152, 156, 163, 171, 176, 190, 195 of the National Executive's Affidavit.

²⁵ Paragraph 7.4 of Parliament's Affidavit.

²⁶ Paragraphs 7.5, 7.6, 28 to 30 and 101.2 of Parliament's Affidavit and paragraphs 60 to 130 of the National Executive's Affidavit.

²⁷ Paragraphs 10 to 12 of Parliament's Affidavit.

²⁸ Paragraphs 13 to 19 of Parliament's Affidavit.

Disaster Act to regulate the state's response to disasters, nor does it dispute the applicability or utility of the Disaster Act as a first response to the initial threat posed or harm caused by COVID-19.

11. What the HSF submits in its founding affidavit and what neither answering affidavit addresses, adequately or at all, is that the framework and machinery of the Disaster Act exists to fulfil a discrete, particular purpose.

12. The Disaster Act exists to serve two functions:

12.1 to prevent or mitigate or repair serious harm;²⁹ **and**

12.2 to empower the Minister to fulfil this first purpose, **when:**

12.2.1 there are no existing concrete and effective mechanisms to deal with the threat or harm;³⁰ **and**

12.2.2 time-sensitive facts preclude the adequate activation of constitutionally-defined, democratic processes for creating new concrete and effective mechanisms that function to structure and direct the state's response to the new threat or harm.

13. When one or more of the three conditions—serious harm, no existing mechanism, inadequate procedure—are not present, the Disaster Act does not apply. **Thus, the crisp legal issue in this matter is: Once these conditions are met:**

13.1 does the Disaster Act continue to be of force and effect until the threat or harm is vanquished or tamed or no longer serious;³¹ **or**

²⁹ This function is recognised in paragraph 53 of the National Executive's Affidavit.

³⁰ This function is recognised in paragraph 51 of the National Executive's Affidavit.

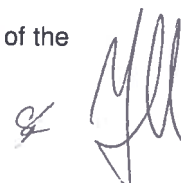
³¹ This is the suggested implication of paragraphs 45 to 57 of the National Executive Affidavit's only ostensibly formal description of the classification process. See further paragraph 163 of the National Executive's Affidavit.

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- 13.2 do the National Executive and Parliament have duties to initiate, prepare and pass legislation that regulates concretely and effectively the state's continued and future exercise of power in response to the threat or harm?
14. The Speaker and National Executive take the first of these two alternatives, the HSF argues that the second of the two should be adopted. From their affidavits, it seems that the Speaker and National Executive take the view that the Disaster Act exists to empower the National Executive to deal with unpredictability and severity as such.³² It is asserted and assumed by them that concerns about efficiency and inadequate knowledge trigger the operation of the Act. For so long as these concerns exist, the threat and harm can, **and in fact should**, be regulated by the institutional structure established through and in the Disaster Act.
15. What the Speaker and National Executive assume throughout is that once a disaster is declared, this is the end of the matter. So, they presume that once something is a disaster,³³ the Disaster Act operates until the threat or harm to which we attached the label disaster is vanquished, tamed or no longer serious, for **unpredictable and changing circumstances necessitate its, and only its, operation**.
16. This view is unsustainable. It is wrong as an interpretative claim about the Disaster Act. It is also wrong from a principled, constitutional perspective.
17. The framework that is created by the Disaster Act **does not** function to empower the Executive to deal with all severe threats or harms that unfold or evolve in ways that are unpredictable.
18. The Disaster Act exists to regulate those thankfully rare circumstances when new and serious threats or harms appear or manifest in respect of which we do not have existing concrete and effective mechanisms to regulate our response thereto; **and**,

³² For example, paragraphs 33, 41, 48 and 104 of Parliament's Affidavit.

³³ For example, see paragraph 34 of Parliament's Affidavit and paragraphs 45 to 57 and 163 of the National Executive's Affidavit.

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for time-related reasons the democratic, constitutionally-entrenched processes for creating new concrete and effective mechanisms to regulate how we respond to this new threat or harm cannot adequately be activated.

19. **The purpose of the Disaster Act is to deal with institutional lacunae at speed, not with gaps in our knowledge of the facts.**
20. Once understood, and despite the Speaker's stipulation otherwise,³⁴ it follows as a matter of logic that these branches of government must act to remedy the lacunae. This is their duty. Not the applicant's. It is they who must act, not the HSF "*through a political party of its choosing*".³⁵ The Speaker, Parliament and National Executive represent, in their respective constitutional roles, the entire country, including the HSF. Each one of them is required under the Constitution to act.
21. The founding affidavit spends some time explaining why this understanding is to be preferred, both as proper interpretation of the Disaster Act, and when it concerns our most basic constitutional principles. With the Disaster Act, this conclusion has two basic roots or supporting legs:
- 21.1 the definition of disaster requires that the threat or harm be "*progressive or sudden*" and of a "*magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources*", which for this reason calls for a "*rapid and effective response*"; and
- 21.2 the reference in sections 2(1)(b) and 27(1)(a) of the Disaster Act to existing concrete legislative measures, which of course would have to be created in a way that is democratic, participatory, open, transparent and accountable, that can be implemented to respond effectively.

³⁴ Paragraph 7.6 of Parliament's Affidavit. This speaks to the Speaker's misunderstanding of what this application is about. The HSF does not complain that the prevailing legislative framework fails to ensure accountability (paragraph 7.7), but that the National Executive and Parliament have failed to exercise their proper powers under the Constitution.

³⁵ Paragraph 7.7 of Parliament's Affidavit.

22. The definition of disaster speaks clearly to the mischief that Disaster Act seeks to remedy: the presence of all three conditions articulated in paragraph 12. Sections 2 and 27 reflect the basic constitutional principle that Parliament, through its ordinary, democratic processes must create concrete and effective mechanisms to address social and natural ills. It is also reflected in section 26 of the Act.
23. Neither affidavit responds to these interpretations. With both sections 2 and 27, the interpretation attributed to them is just denied outright.³⁶ Nothing is said about why the interpretation offered by the HSF, though consistent with constitutional principles and values, should not be adopted. The interpretative peak of the Speaker's submission is to say (in reply to the HSF's argument that the Disaster Act should not be interpreted as relieving Parliament of its obligation to initiate, prepare and pass concrete and effective laws): "*But that is what it does*".³⁷ The response is logically circular. It does not address how the Disaster Act ought to be interpreted or why. Worse still, with the definition of disaster, no alternative interpretation is offered at all.³⁸ All that is said is that every word in the definition is relevant.³⁹ That is trite, but takes the matter no further.
24. More importantly, the HSF's interpretation of the Disaster Act flows ineluctably from our Constitution's principles and structure. In the founding affidavit, it is explained why the state's response to threats or harms must be concrete and have their origin in Parliament. No real answers are offered to these submissions. Of the arguments in fact offered, the highpoint is that efficiency and epistemic concerns legitimate not just the Disaster Act's structure, but its indefinite operation.
25. This assertion cannot be sustained, for the reasons of general principle articulated in

³⁶ Paragraphs 38 to 40 and 50 to 53 of Parliament's Affidavit and paragraphs 150, 151, 165, 166 and 210 of the National Executive's Affidavit.

³⁷ Paragraph 45 of Parliament's Affidavit.

³⁸ Paragraph 36 of Parliament's Affidavit and Paragraphs 12 to 15, 47 to 49 and 187 of the National Executive's Affidavit.

³⁹ Paragraph 188 of the National Executive's Affidavit.

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the founding affidavit. To give this general principled explanation a more definite meaning, it might assist to consider where the distorted interpretative, or stipulated, logic of the Speaker and the National Executive necessarily take us.

26. Before and since the Declaration, we have faced and still face threats and harms the magnitude of which far exceed the ability of those who are affected by them to cope with their effects using only their resources, and which threats and harms by nature manifest as a "*moving target*",⁴⁰ or possess an "*evolving nature*", which require rapid responses from government.⁴¹ Gender-based violence and corruption and racism have, often understandably and quite appositely, been described as pandemics that threaten or harm individual bodies and the body politic, that is, as scourges that call for the most urgent and rapid response from government:

26.1 On 17 June 2020, the President said: "*It is with the heaviest of hearts that I stand before the women and girls of South Africa this evening to talk about another pandemic that is raging in our country – the killing of women and children by the men of our country.*"⁴²

26.2 In 2011, former Chief Justice Ngcobo said: "*Corruption is a scourge that must be rooted out of our society.*"⁴³ Likewise, in *S v Yengeni* 2006 (1) SACR 405 (T) para. [59], Bertelsmann J and Preller J framed the matter thus:

"To state that corruption and other crimes of dishonesty on the part of elected office bearers and officials in the public service have become one of the most serious threats to our country's well-being, is to state the obvious. Their incidence may well be characterized as a pandemic that needs to be recognised as such and requires concerted and drastic efforts to combat it."

⁴⁰ Paragraph 176 of the National Executive's Affidavit.

⁴¹ Paragraphs 152 and 163 of the National Executive's Affidavit.

⁴² A copy of this statement is annexed hereto marked "**RA1**".

⁴³ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para. [85].

- 26.3 Citing with approval the unanimous judgment of Chief Justice Mogoeng in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration*, where the continued reality of "South Africa's special sect or brand of racism" was described as "a very rude awakening call to all of us",⁴⁴ Jafta J wrote for a unanimous Constitutional Court about the "firmness demanded in dealing with the scourge of racism".⁴⁵ Indeed, as a unanimous Supreme Court of Appeal explained, to "eliminate [this scourge] from our midst", demands that "all the necessary steps" be taken.⁴⁶
27. As we well know, each is a social problem that exceeds the ability of those affected by them to cope with their effects using only their resources. We also know that by their nature, these threats and harms evolve, exist as moving targets, and demand a rapid, collective response from government: all the necessary steps. Yet, we do not afford the National Executive indefinite, wholesale power to fix the state's response to these real, immediate and entrenched problems.
28. We do not do this because we are a constitutional democracy, one in which "*We the people*", through our elected and accountable representatives in Parliament, decide how best to respond. We do not abandon this open, transparent and participatory space whenever "*agility*" is required.⁴⁷ Neither "*evolution*" nor "*severity*",⁴⁸ alone or together, can justify a substitution of the Disaster Act for this structured, deliberative process of law-making that is demanded by our Constitution.
29. When faced with "*evolving*" and unpredictable threats and harms,⁴⁹ when dealing with "*immediate, swift and dynamic*" problems, which operate as moving targets and

⁴⁴ 2017 (1) SA 549 (CC) para. [2]

⁴⁵ *Duncanmec (Pty) Limited v Gaylard NO and Others* 2018 (6) SA 335 (CC) para. [9].

⁴⁶ *Manong and Associates (Pty) Ltd v City of Cape Town* 2011 (2) SA 90 (SCA) para. [2].

⁴⁷ Paragraph 156 of the National Executive's Affidavit.

⁴⁸ Paragraph 171 of the National Executive's Affidavit.

⁴⁹ Paragraph 191 of the National Executive's Affidavit.



therefore call for our responding "*readily*", we do not just assert that the National Executive and Parliament have no duty to pass "*social-ill-specific-legislation*".⁵⁰ We do the opposite. Together, we the people of South Africa make law: the Domestic Violence Act, 1998, the Prevention and Combating of Corrupt Activities Act, 2004, or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, and so on, depending on the nature of the specific social ill.

30. This is how we deal with our various, manifold, historically-given **and new** problems, both social and natural: through Parliament's democratic, deliberative, transparent, open and accountable structures. We respond in this way because this is what our Constitution obliges us to do. This is the structured process that we have elected as our own. For better or for worse, South Africa is not a technocracy or epistocracy, where legislative power resides in apparently "*suitably qualified*" women or men.⁵¹ We are a living and robust and diverse democracy founded in the rule of law. The merely stipulated fact that there are "*changing . . . circumstances*", that there is "*new information*", does not alter this fundamental, structural feature of our political and legal community.⁵² If there is new information and changing circumstances, it is for Parliament, ultimately and through its original constitutional powers, to deal with the matter: not for a solitary Minister or even the Executive as a whole.
31. Even less does the fact that the "*process*" of law-making will "*consume*" the time of the National Executive or Parliament alter these facts.⁵³ Taking the time to construct legislation that deals concretely and effectively with the COVID-19 pandemic is not just their power, it is their duty.
32. If it were true, as the answering affidavits allege, that the existence of severe threats or harms coupled with mere knowledge- or fact-based unpredictability were

⁵⁰ Paragraphs 33, 41 and 103.4 of Parliament's Affidavit.

⁵¹ Paragraph 38 of the National Executive's Affidavit.

⁵² Paragraph 190 of the National Executive's Affidavit.

⁵³ Paragraph 47 of the Parliament's Affidavit.



sufficient for the operation of the Disaster Act and the indefinite, wholesale handover of primary legislative authority to the Minister, it is these simple constitutional facts that would have to be ignored. If it were true that the presence of unknowns about how an identified threat or harm will evolve or manifest in particular places and times were enough for the Minister to exercise the sweep of powers afforded to her by the Act, then the Disaster Act would, in principle, know no limit and in practice would have no end. Such an interpretation should be rejected. It would either result in a constitutional crisis or the end of the separation of powers under our Constitution.

33. Just as Parliament and the National Executive, when gathered in session or Cabinet meeting, have constitutional obligations to initiate, prepare and pass legislation that regulates concretely and effectively the state's response to social pandemics like gender-based violence, corruption and racism, so they have these obligations in the context of biological pandemics, including COVID-19.
34. No principled basis exists to resist this conclusion.
35. This is especially because neither the structure nor the content of the constitutionally necessary legislation will undermine our efforts to confront COVID-19. Our Constitution demands that concrete state action in response to threats or harms have their origin in Parliament not for merely formal reasons. It demands this because this process by its nature produces better responses to these threats and harms. This point has repeatedly been made by our Constitutional Court.
36. As South Africans, we have Parliamentary-determined national legislation dealing concretely with violence against women, corruption and racism because this is how we meaningfully, sustainably and effectively confront these threats or harms. We do not in the face of cancerous corruption halt Parliament's operations, citing efficiency and epistemic concerns: so-called changes in circumstance or new facts. Rather, Parliament rises to the occasion, does its job, and makes laws structuring the state's concrete and, hopefully, effective response.

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37. This is what the COVID-19 pandemic has always demanded.
38. Having not acted in this way for 5 months, the National Executive and Parliament have failed in their constitutional duties. This failure cannot be countenanced by any constitutionally permissible reading of the Disaster Act. And a proper embrace of our Constitution's principles, structures, values and rights could not tolerate it.
39. Thus understood, Parliament's and the National Executive's arguments for why they have no duty to initiate, prepare and/or pass legislation are unavailing, as I now show:
- 39.1 The HSF has not identified any violations of constitutional rights flowing from the exercise of power under the Disaster Act: But this application is not about the violation of particular rights flowing from the exercise of power by the Minister. It concerns the constitutional duties of Parliament and National Executive to initiate, prepare and pass legislation, which duties are rooted in and generated by the powers gifted to them by sections 42(3), 44(1), 55(1), 68 or 85(2) of the Constitution. The HSF approaches this Court on the back of their breaches of these duties. Therefore, it is not necessary for it to establish any rights-violations, but only to direct this Court's attention, as it has, to the common cause⁵⁴ fact that: i) the exercise of power under the Act limits rights; and ii) the pandemic itself threatens and impacts rights. The matter concerns duties and powers, within the context of a national threat that on a daily and ongoing basis impacts thoroughly and pervasively upon rights. The failure to grasp the distinctions amongst duty, power and rights plagues Parliament's as well as the National Executive's Affidavits.⁵⁵
- 39.2 The power to initiate, prepare and/or pass legislation is permissive: But once the HSF's argument is characterised properly, this strand of the answering

⁵⁴ See paragraph 112 below.

⁵⁵ See paragraphs 62 to 68 below.



papers' argument cannot meaningfully be sustained. To assert that these branches of our government do not have a duty to initiate, prepare and pass concrete and effective legislation to regulate the state's response to the threats and harms of COVID-19 is to misunderstand the *raison d'être* of the National Executive and Parliament. They have what the Constitutional Court has described in other contexts as "*a power coupled with a duty to use it if the requisite circumstances were present.*"⁵⁶ To argue either that these powers exist as a "*prerogative*",⁵⁷ or do not apply "*in these circumstances*" cannot withstand reflective scrutiny.⁵⁸

39.3 The Disaster Act is Parliament's response to COVID-19: The HSF has never denied and does not deny that the Disaster Act was legitimate or appropriate when this novel threat initially appeared. The HSF asserts that this legislation does not release the National Executive and Parliament from their duty to initiate, prepare or pass legislation that concretely and effectively regulates our continued response to this, or this class of, threats.

39.4 For this reason, the principle of subsidiarity does not apply to this application.⁵⁹ We are not here in a world where legislation must expressly be enacted to give effect to a right, e.g. section 32(2) of the Constitution. The HSF is not, as in *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31, required to seek its rights in the Disaster Act and challenge this Act, for the HSF does not think that there are constitutional deficiencies with the Disaster Act. In short, the HSF does not assert that the Disaster Act has shortcomings and hence does not attack its validity. Properly interpreted, it does its work as

⁵⁶ *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) para 15; *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) para 181.

⁵⁷ Paragraph 44 of Parliament's Affidavit.

⁵⁸ Paragraphs 146 and 154 of the National Executive's Affidavit.

⁵⁹ Paragraphs 55 to 57 of Parliament's Affidavit.

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a stop-gap for so long as the National Executive and Parliament cannot exercise their original constitutional powers for the sake of creating new concrete and effective mechanisms. The HSF, therefore, only looks to the Constitution for the purposes of interpreting the Disaster Act. This does not require a frontal challenge.

39.5 The HSF ought to have challenged the Disaster Act: The Disaster Act has not been challenged in this application because the HSF does not take issue with the Disaster Act. The HSF does not object to the use of its institutional machinery for the purpose of dealing with the novel threat posed or and harm caused by COVID-19, in the initial conditions in which the state was required to respond. It does not object to the initial use of this legislation, as there then existed no more concrete and effective institutional framework for dealing with it. Rather, as explained, the HSF objects to the failure by the National Executive and Parliament, after the appearance of COVID-19 as a threat and harm that required an enduring and comprehensive national response, to perform their constitutional duties to initiate, prepare and pass legislation that concretely and effectively regulates the state's continued and future response to this threat and harm.

39.6 As stated in the founding affidavit, **this application concerns abdication of power, not its unlawful delegation.**⁶⁰ The reason for this is that the Disaster Act, properly read, does not delegate the power assumed by the National Executive and Speaker in their affidavits. The power afforded to the Minister is meant to be temporary—a stop-gap to be utilised if no other more concrete legislation exists, and only until such time that such more concrete legislation is expeditiously initiated, prepared and passed. Thus, the power given to the Minister is given pending activation of Parliament and the National Executive's

⁶⁰ Paragraph 61 of the founding affidavit.



regular procedures. **Parliament and the National Executive cannot simply perpetuate the vacuum of this concrete legislation, in breach of their constitutional duties, and thereby perpetuate the exercise of exclusive Ministerial legislation under the Disaster Act.**

39.7 That said, what the Constitutional Court has said about delegation of power in the context of disaster offers important guidance for this matter. In *Executive Council, WC Legislature v President of the RSA*,⁶¹ Chaskalson P stated that in cases of national disaster or states of emergency, there may be a **necessity** for greater executive action, but that this must always be kept to a **minimum**, and even in those cases there is little reason to believe that Parliament cannot or should not be prescribing the detail of the legislation, subject to executive refinement or implementation. That judgment makes clear that Parliament cannot divest itself of legislative power except in rare circumstances and then only insofar as absolutely necessary.

39.8 Whilst "delegation" issues usually arise when legislation itself is attacked, this does not bar this Court from taking guidance from these cases. Questions as to the limit of lawful delegation demarcate where permissible regulatory action ends and impermissible executive legislation begins. The cases demonstrate and illustrate the ultimate, plenary legislative function of Parliament under our Constitution. All this must feed into the interpretation of the Disaster Act. As Khampepe J said just a month ago, in *Chisuse and Others v Director-General, Department of Home Affairs and Another*, we must always interpret legislation in the way that avoids "*possible constitutional concerns which may arise if a different interpretation is adopted*".⁶²

⁶¹ 1995 (4) SA 877 (CC).

⁶² [2020] ZACC 20 para [22].

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39.9 The COVID-19 threat is novel: It is correct that COVID-19 presented and presents a novel threat. The issue, though, is **whether novelty plus severity are by themselves sufficient to justify the ongoing location of this comprehensive legislative power in the Minister for indeterminate time.**

It is the novelty of the threat posed by COVID-19 to the rights of millions of South Africans (both by the virus, and through the state's response thereto), which demand a proper and expeditious location of legislative power. It follows for all the reasons of constitutional principle that were identified in the founding affidavit—democracy, transparency, openness, accountability, legitimacy, outcomes—that the National Executive and Parliament must initiate, prepare and pass the concrete and effective legislation prayed for in the notice of motion.

39.10 The mandamus would be unenforceable: The nature of this argument by the Speaker is not understood. If Parliament had failed to pass legislation like the Promotion of Administrative of Justice Act, 2000, does the Speaker mean to say that an applicant who sought to compel it to do so would by initiating these proceedings "*bring the judiciary into disrepute*"?⁶³ Presumably not, for she cites section 33(3) of the Constitution as an exception to this argument.⁶⁴ If this Court were to conclude that, like section 33, Parliament must pass concrete and effective legislation to regulate the state's response to threats or harms like COVID-19, why will this be different? It will not be, with respect. The only other meaning that I can attribute to this argument is that the majority in Parliament might refuse to comply with this Court's order. Yet, presumably the Speaker and her legal representatives are likewise not suggesting this. Parliament's and the National Executive's first fidelity is to the Constitution. If the Constitution requires them to act, then the judiciary has a constitutional

⁶³ Paragraph 66 of Parliament's Affidavit.

⁶⁴ Paragraph 70 of Parliament's Affidavit.

duty to pronounce that they have failed to act and compel them to do so. That is the judiciary's constitutional role. And in terms of section 165 of the Constitution, Parliament and the National Executive would be compelled to act.

40. At this point, it bears stating explicitly what the HSF seeks by remedy, given various statements in Parliament's and the National Executive's Affidavits.⁶⁵ **The relief does not ask** this Court to make an order directing the National Executive and Parliament to initiate, prepare and pass legislation that:

40.1 **deals only with COVID-19.**⁶⁶ This is a permissible legislative response for these branches of government to adopt. It would also be open, though, to the National Executive and Parliament to initiate, prepare and pass law that regulates, **at the very least**, responses to COVID-19. Of course, it is open to the National Executive and Parliament also to regulate other matters in the legislation, but this is not essential to this application. COVID-19 is the ill that the country is now facing and that requires expeditious action. Provided the legislation complies with the Constitution, government can fulfil its legislative duty in the way it judges best. **Whilst the most immediate legislative action required must relate to**, and deal effectively with, COVID-19, it is within the power of Parliament also to regulate other matters or events in the legislation in question.

40.2 **takes any particular form or has any particular content.** This relates to the point just made. This Court would not have to "*prescribe*" anything,⁶⁷ nor does the HSF have any desire to impose on Parliament the "*granular detail*" of the

⁶⁵ Paragraphs 44 and 69 of Parliament's Affidavit and paragraphs 18, 142 and 148 of the National Executive Affidavit.

⁶⁶ Paragraphs 142, 173 and 198 of the National Executive's Affidavit.

⁶⁷ Paragraph 44 of Parliament's Affidavit

legislative scheme.⁶⁸ What the National Executive and Parliament must do is initiate, prepare and pass legislation that regulates concretely and effectively the state's response to COVID-19, either by itself or as a class of threats and harms of this kind. The structural features of this legislation must conform to the principles and values of the Constitution, such as transparency, the rule of law, democracy, accountability, openness, proportionality, equality, dignity and freedom, as well as the rights in the Bill of Rights. Provided that the legislation is consistent with the Constitution, Parliament is free to determine the concrete content of the law as it judges best. It can do this because unlike the HSF, the Court and the National Executive, it is the constitutionally-constituted forum in which all decisions of this nature are made;

40.3 **will require Parliament itself to "manage this type of [threat or harm] effectively and efficiently", or require that it be equipped with "capacity and practical, logistical resources"**.⁶⁹ The Speaker has misunderstood the HSF's case. The relief sought in the notice of motion prays for an order that, *inter alia*, Parliament initiate, prepare and pass legislation that regulates concretely and effectively the state's response to the threat and harm caused by COVID-19. There is nothing in this relief, nor could the HSF's affidavit be read to suggest, that Parliament would be tasked with management and administrative and logistical functions. This is not Parliament's job. These functions belong to the executive branch of government, in implementation of legislation. The job of Parliament, however, is to provide the institutional framework within which these executive functions must be exercised through the exercise of law-making. There is nothing at all in the nature of viral threats, novel or otherwise, that precludes or disables our Parliament from performing this original, institution-designing role or function. In fact, its

⁶⁸ Paragraph 18 of the National Executive Affidavit.

⁶⁹ Paragraph 33 of Parliament's Affidavit.

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democratic, deliberative, transparent, accountable and open nature means that it, unlike the National Executive, is structurally well-equipped to perform this law-making function.

41. Thus, the Speaker and National Executive are mistaken to assert that relief sought is "*unprecedented*",⁷⁰ "*drastic*" or would constitute an "*invasion*".⁷¹ There is nothing unprecedented in the relief. It is the stuff of ordinary constitutional litigation, with which this Court will be quite familiar. The fact that the Speaker asserts that the HSF's case, which seeks to uphold Parliament's role as the primary law-giver, constitutes an invasion is concerning.
42. In the same way, the Speaker is wrong to suggest that this Court would be violating the separation of powers and interfering in the processes of Parliament or the National Executive by ordering them to initiate, prepare and pass legislation that deals concretely and effectively with viral pandemic threats or harms like COVID-19.⁷² Our courts have repeatedly held that where a court enforces a proper delineation of separation of powers, it is itself correctly and appropriately giving effect to, rather than undermining, the separation of those powers. That is the court's permissible and indispensable role.

OVERSIGHT

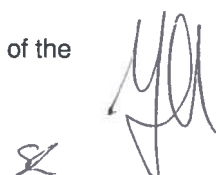
43. The answering affidavits spend many pages sketching the oversight that apparently has been exercised by Parliament since the Declaration.⁷³
44. Whilst the performance of this function is laudable, it has no bearing on the issues before this Court. In this application, this Court is called upon to decide whether the

⁷⁰ Paragraph 9 of the National Executive's Affidavit.

⁷¹ Paragraph 7.6 and 75 of Parliament's Affidavit.

⁷² Paragraphs 20, 27, 43 and 75 of Parliament's Affidavit.

⁷³ Paragraphs 7.5, 7.6, 28 to 30 and 101.2 of Parliament's Affidavit and paragraphs 60 to 130 of the National Executive's Affidavit.

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National Executive or Parliament have a duty to initiate, prepare and pass legislation that regulates in a concrete, effective way the state's response to the threat posed or harm caused by COVID-19. The power to make law lies in Parliament originally. This power is independent from its power to oversee the executive. Whatever our Parliament has done or not done in this regard, whether it has scored full marks or failed abysmally, is irrelevant to this application.

URGENCY AND STANDING

45. The Speaker says that this application is not urgent.⁷⁴ She also says that the HSF lacks standing.⁷⁵ Both arguments are clearly wrong, so my reply is brief.
46. In support of the argument regarding urgency, the Speaker relies only on the 3-week period between the Constitutional Court's order, dated 3 July 2020, and the filing of this application. She does not contend that the nature of the application does not raise issues of urgent import. This is because this application clearly calls for urgent consideration by this Court. So, whilst it is denied that the 3 week period disentitles the HSF from bringing this claim in the public interest on an urgent basis, the issues before this court are such that the interests of justice in hearing this matter outweigh any criticism that can be made against the HSF. In any event, the matter has been specially allocated. Questions of urgency are no longer germane.
47. Conspicuously absent from the Speaker's objection to urgency is any suggestion of prejudice. This is because neither the Speaker nor the National Executive has suffered any prejudice by this lapse of 3 weeks. The National Executive recognises this, which is why they do not resist this application on this ground.
48. Likewise, the National Executive does not assert, against all legal principle and all precedent, that the HSF does not have standing. This application concerns issues

⁷⁴ Paragraphs 10 to 12 of Parliament's Affidavit.

⁷⁵ Paragraphs 13 to 19 of Parliament's Affidavit.

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of profound and lasting importance. It concerns, *inter alia*, the separation of powers, the duties of Parliament and the National Executive, the principles of transparent, accountable and participatory democracy, and the rule of law. It also concerns the exercise of ministerial power that has impacted, continues to impact, and will for an indefinite period continue to impact in serious and often irremediable ways almost all the rights in the Constitution.

49. The HSF has standing.

***SERIATIM* RESPONSES**

50. For sake of clarity, I now address *seriatim* certain paragraphs in Parliament's and the National Executive's Affidavits. To the extent that I do not specifically admit any allegation in these affidavits or the allegations therein are contrary to the founding or what is said in this replying affidavit above, such allegations are denied.

Parliament's Affidavit

Ad paragraphs 1 to 5

51. The content hereof is noted.

Ad paragraph 6

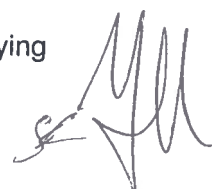
52. Save to note that the application has been granted a special allocation by this Court, the content hereof is noted to the extent that it records accurately the relief sought in the notice of motion.

Ad paragraphs 7 to 10

53. For the reasons articulated in the founding affidavit and the main part of this replying affidavit, the content hereof is denied.

Ad paragraphs 10 to 12

54. For the reasons articulated in the founding affidavit and the main part of this replying affidavit, the content hereof is denied.

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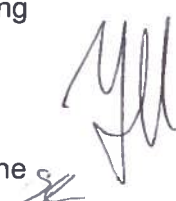
55. Moreover, it is denied that the HSF went "*forum shopping*" when it initially decided to approach the Constitutional Court.
56. As the Speaker, or at least her legal team, would know from the founding affidavit in the application before the Constitutional Court, that Court was approached not primarily on the basis of direct access but under that Court's and the Constitution's exclusive jurisdiction provisions. The HSF took the considered and reasonable view that an application in which it is alleged that Parliament or the President have failed to perform their constitutional obligations, required the HSF to approach that Court. As it turned out, the Constitutional Court took a different view. It was, *inter alia*, this unexpected decision that the HSF along with its lawyers had to consider following the 3 July 2020 order.
57. It is regrettable that the Speaker takes the position that she does in these paragraphs. This application raises issues of principle and practice that have a fundamental bearing on the future functioning of the Constitution and its impact on the lives of our people. To resist this application on these grounds is inexplicable, particularly given the fact that this matter has been granted a special allocation and that the Speaker cites no prejudice for the timelines afforded in the notice of motion or prescribed by this Court.

Ad paragraphs 13 to 19 and 94.2

58. For the reasons articulated in the founding affidavit and the main part of this replying affidavit, the content hereof is denied. In short, this application concerns issues of law and principle that will have profound, lasting importance. It is settled law that, in these circumstances, the HSF has standing.

Ad paragraphs 20 and 21

59. For the reasons articulated in the founding affidavit and the main part of this replying affidavit, the content hereof is denied.
60. In particular, it is denied that the HSF is asking this Court illegitimately to intervene



in the proceedings of Parliament. The interpretation and the enforcement of the Constitution is our courts' principal constitutional function: the orders will follow as a matter of logic, established case law and common sense from sections 1, 2 and 172(1)(a) of the Constitution.

Ad paragraphs 22 to 27

61. To the extent that these paragraphs accurately record the text of the Constitution, the content hereof is noted.
62. For the reasons articulated in the founding affidavit and the main part of this replying affidavit, the content hereof is denied.
63. In particular, it is denied that Parliament "*retains the discretion to determine when it is appropriate to initiate and pass legislation*". These paragraphs, like various others in Parliament's Affidavit, reveal a confusion about the conceptual relation that exists between power, duty and right. To have power or authority does not mean that one necessarily has any discretion to exercise this authority. The logic of the concept of power caters for discretionary and mandatory forms of powers. As I have explained, our courts have recognised that an express power is coupled with an implied duty to use it if the requisite circumstances are present. In any event, the duty to legislate is also sourced in section 7(2) of the Constitution. And the Constitution commands that all constitutional obligations "*must be performed diligently and without delay*" (section 237).
64. For all the reasons articulated in the paragraphs above, together with those reasons articulated in the founding affidavit, it is submitted that the power to initiate, prepare and pass laws is mandatory and the duty to do so needs to be discharged in this case so that these two branches of government respect, protect, promote and fulfil the rights in the Bill of Rights.
65. Insofar as Parliament or the National Executive retains any discretion, this is only to the extent that they can rely on policy or political judgment to determine, albeit only

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and always within the parameters set and the spirit directed by the Constitution, the particular and precise content of the legislation.

66. In any event, to the extent that there is any discretion as to whether to legislate or not to legislate on a specific topic, there is simply no doubt in the current case that legislation is needed. This is underscored by the fact that the National Executive saw the need to promulgate a raft of legislation since the initial response to COVID-19 in March 2020. **The answering affidavits admit that legislation is not only appropriate but vital. Everyone agrees, therefore, that a legislative response is necessary. As such, the only remaining question is where, constitutionally-speaking, this response is properly located.**

67. In other words, any successful defence to this application cannot be rooted in the word "*may*" in these sections of the Constitution. This word cannot bear the load the Speaker wishes to place on it.

68. For this reason, together with those already articulated, the relief prayed for in the notice of motion would not require this court to "*interfere*" or breach the separation of powers. An order directing Parliament to do its job, with respect, cannot be and never has been considered to be interference or in breach of the separation of powers. Rather than breach this separation, the relief seeks to uphold it.

Ad paragraphs 28 to 30, 101.2 and 106

69. These paragraphs concern the oversight exercised by Parliament during the course of the Declaration.

70. For the reasons articulated throughout this affidavit, and as the Speaker sometimes seems to acknowledge, the exercise of this function is irrelevant to this application.

Ad paragraphs 31 and 32

71. The content of these paragraphs is denied.

72. Once again, this application is not about accountability. It is about original exercise



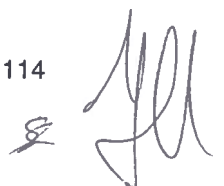
of power. This application is not about checking what others have done. It is about who must be the legislative author of the response. Under our Constitution, the original legislative authority is Parliament. It has the duty jointly with the National Executive to initiate and prepare legislation, but it alone has the authority to make primary legislation. It cannot ever abdicate this responsibility, as it has done for 5 months, under grounds of efficiency and epistemic limit and wanting to let the Executive act without "*interfering*",⁷⁶ and thereafter excuse its failings by pointing to how it has, *post hoc*, considered what the Minister and others appear to have been compelled to do as a consequence of Parliament's sustained abandonment of the legislative scene.

73. This is vital, not just to this application, but all future exercises of power. Parliament **makes** laws; it does not only check their **implementation or execution**. In any event, Parliament has not simply been checking the implementation or execution of primary legislation passed by Parliament, but has sat by while its primary legislative functions have been exercised by the Minister.
74. For this Court to direct Parliament to make a law would not be a failure to "*respect*" this branch of government. The opposite. For this is how this Court respects it, by reminding it of its power and correlative duty.

Ad paragraphs 33 and 34 and 49

75. The content of these paragraphs is denied.
76. As explained, this application is not concerned with the constitutionality or otherwise of the Disaster Act. It is not a case about unlawful delegation. This matter is about Parliament and the National Executive's powers and duties, ultimately, to pass law that creates a concrete and effective mechanism to regulate the state's response to COVID-19.

⁷⁶ This word is Parliament's. See the extract quoted and referred to in paragraphs 47, 48 and 114 of the founding affidavit.



77. Further, for the reasons articulated above, these paragraphs misunderstand the function and therefore scope of the Disaster Act. Despite the detailed analysis of the Disaster Act, the Speaker just asserts that the Act is "*sufficiently broad*" to cover all; and, that it can and should necessarily be understood to operate as lasting until COVID-19 "*no longer presents a threat*" or "*for as long as*" this threat "*persists*". This is an interpretation that is at odds with the wording and scheme of the Disaster Act itself, and at odds with the constitutional scheme which disallows South Africa being ruled by Ministerial decree for an indefinite future period, despite Parliament long-being capacitated to legislate as required under the Constitution.

Ad paragraphs 35 to 45 and 48

78. For all the reasons articulated above, in particular paragraphs 10 to 36, the content of these paragraphs is denied.

Ad paragraphs 46 and 90

79. This paragraph illustrates starkly the legal and conceptual confusion that runs through Parliament's Affidavit.
80. The fact that Parliament can exercise oversight and courts can review the exercise of power does not undo the original constitutional breach, that is, the failure by our Parliament to pass national legislation that regulates the exercise of this power from the outset, or so soon thereafter as procedural realities permit.

Ad paragraph 47

81. The content of this paragraph is denied.
82. It is no answer that passing laws is time-consuming. Even if it were, Parliament has had 5 months, yet has done nothing. Worse still, the Speaker here tells us that it **will do nothing**.

Ad paragraphs 50 to 53

83. The content of this paragraph is denied.

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84. Instead of properly engaging the HSF's sustained interpretative analysis of sections 2 and 27 of the Disaster Act, read textually, contextually and purposively, the Speaker here merely asserts the opposite, that is, the Disaster Act has nothing at all to say, expressly or implicitly, about the general constitutional fact that power to make law lies ultimately and originally with Parliament.
85. Of course, those general constitutional facts are always the lodestar by which the Act must be understood.

Ad paragraph 54

86. The Speaker misunderstands the purpose of the HSF's reliance on the examples of the United Kingdom and Scotland. As stated in the founding affidavit, we choose to cite them not because of what they have done, but to illustrate that in times of crisis it is possible to act quickly.
87. Now 5 months into our state of disaster, this point only takes on greater weight, with Parliament's failure becoming ever graver by the day.

Ad paragraphs 55 to 57

88. For the reasons articulated in the founding affidavit and the main part of this replying affidavit, the content hereof is denied.
89. In particular, as explained in paragraphs 39.3 and 39.4, the principle of subsidiarity does not apply to this application because this Court is faced with "*the absence of legislation that deals specifically [though not necessarily exclusively] with [COVID-19]*".⁷⁷ We are not dealing with deficient legislation in circumstances where there is a specific constitutional duty to pass laws to give effect to a constitutional right.

Ad paragraphs 58 to 71

90. The content of these paragraphs is denied.

⁷⁷ Paragraph 202 of the National Executive's Affidavit.

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91. As explained in paragraph 39.10, it is not quite clear what the Speaker means to say in these paragraphs. One of two interpretations suggests itself. The first one is incoherent; and, the second would constitute a threat of contempt, with a resulting constitutional crisis. Neither is sustainable.

Ad paragraphs 72 to 73

92. The content of these paragraphs is denied.
93. It might be that the Speaker considers efforts by citizens and civil society to enforce and uphold the Constitution "*tediously meddlesome*", but unfortunately having taken up the role of Speaker she has certain duties. To accuse the HSF of considering itself "*the conscience of the nation*" and behaving as "*the fourth arm of the state*" not only has no basis in the present instance, it is entirely inconsistent with the historical litigation activity of the HSF over more than a decade. It is regrettable that the Speaker has chosen to respond in this way. Civil society has played a critical role in the development of our constitutional democracy.
94. The HSF initiated this application in good faith and in the interests of justice and with more than reasonable prospects of success. The *Biowatch* principle regarding costs is clearly applicable.

Ad paragraphs 74 to 77

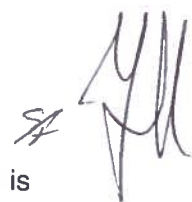
95. For the reasons articulated in the founding affidavit and the main part of this replying affidavit, the content hereof is denied.

Ad paragraph 80.2

96. This matter almost exclusively concerns legal principle. The only facts on which the HSF relies are known and common cause. It is not clear what facts the Speaker denies being in my personal knowledge.

Ad paragraphs 82.2, 82.3, 87.2, 91.2, 99.3, 103.5, 110.3 and 114.1

97. These paragraphs illustrate confusion about the nature of this application, which is



related to the Speaker's denial that I do not have personal knowledge of the claims made in the founding affidavit.

98. This application is about the National Executive's and Parliament's constitutional and legal duties. This is a question of interpretation. Factual evidence, not a "*scintilla*" let alone anything substantial, bears on such interpretative questions. Evidence of this nature can be relevant in cases where the results of constitutional breaches are relevant. This is not so here. To speak of "*effect*", as the HSF does in its founding affidavit to which the Speaker answers here, is to speak of the *legal* effect, i.e. the meaning of the Disaster Act. Conclusions about the effect of law in this sense calls for interpretation not factual evidence.
99. Since this application is not about whether Parliament has exercised oversight, the facts in this regard are irrelevant.

Ad paragraph 87

100. For the reasons articulated in the founding affidavit and the main part of this replying affidavit, in particular paragraph 39.1, the content hereof is denied.

Ad paragraph 91



101. The content of this paragraph is denied.
102. There is a very significant constitutional difference between attacking the location of power and the failure to act, on the one hand, and the outcome of any exercise of this power. As the Constitutional Court has explained (in the delegation context): delegation is about the existence of powers; the manner in which those powers should be exercised should not affect the question whether they have in fact been properly given to a particular body.

Ad paragraph 103

103. The content of this paragraph is denied.

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104. As explained in paragraphs 35 and 40, the necessary legislation will not undermine but enhance the state's response to the threats posed and harms caused by viral pandemics like COVID-19. This is what it means for the legislation, in the language of Moseneke DCJ and Cameron J, to be "*concrete and effective*". The law would not disable the administrative and logistical and practical capacity of the executive. It will enhance these aspects of its executive function. This law **would empower the executive to respond**, but will do so in a way that is effective **whilst also being maximally consistent with the Constitution**.
105. It will do both because these two constitutional goods cannot be prised apart. It is only through maximal compliance with the Constitution, which requires, *inter alia*, that Parliament be the font of the concrete mechanism, that this mechanism can be effective, in the constitutional sense of this word.
106. Ultimately, the problem with both Parliament and the National Executive's Affidavits is that they conflate power with licence, that is, the capacity or ability to act with the lack of meaningful and concrete structure. This is an error. Under our Constitution, power is rooted in and emanates from the law, which is to say, all power comes from concrete and, ideally, effective structures.
107. Law does not diminish, constrain, hobble or just check power. It brings all power into being in the first place.
- Ad paragraph 107**
108. Without admitting or denying anything in this paragraph, it must be noted that the mere briefing on or consideration of regulatory power by Parliamentary committees does not negate the ultimate imperative that Parliament initiate, prepare and pass law, nor does it obviate the need to do so in the open, transparent and deliberative forum that is Parliament itself.
109. That duty is pronounced in circumstances where the Minister has been reported as saying, on affidavit, that in respect of the law-making powers that she has exercised

under the Disaster Act there is no duty to consult.⁷⁸ It is to avoid unilateral action of precisely this kind that our Constitution invests legislative power in Parliament.

Ad paragraph 114

110. In paragraph 81 of the founding affidavit, I state that "*[i]t is presumably common cause that [this application] also concerns the exercise of ministerial power that has impacted and will for an indefinite period continue to impact in serious and very often irremediable ways almost every right in the Constitution*". I then list how these rights are impacted. On this basis, I say, in paragraph 82, that "*[t]his impact of the Minister's exercise of her powers on constitutional rights makes plain the constitutional necessity for an effective and thoroughgoing legislative mechanism to respond to the threat posed and harm caused by COVID-19.*"
111. The Speaker denies my averments in paragraphs 81 and 82, and, *inter alia*, says that "*the applicant has not produced the necessary evidence to show a violation of the rights it catalogues in subparagraphs 82.1 to 82.16 of the Constitution. Their mere allegation of a breach is not enough.*" It is not clear what the Speaker intends by her general denial or her statement. But, presumably, she cannot seriously be understood to be suggesting that there is any dispute that:
- 111.1 the regulations under the Disaster Act dealing with COVID-19 severely curtail constitutional rights (whether or not such limitation may be justified under section 36 of the Constitution);
- 111.2 the COVID-19 pandemic itself impacts on constitutional rights; and
- 111.3 the State (that is Parliament and the Executive) bear a constitutional obligation to implement measures to deal with the COVID pandemic, in terms of section 7(2) of the Constitution.

⁷⁸ For this report, see "RA2".

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112. That the above propositions are not in dispute is confirmed by the affidavit filed by the Minister, *inter alia*, on her own behalf and on behalf of the President in *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* (5807/2020) [2020] ZAWCHC 56 (26 June 2020). In that matter, the Minister, in an affidavit deposed to on 5 June 2020, stated that:⁷⁹

"178 The state is required to respect, protect, promote and fulfil the rights in the Bill of Rights (section 7(2) of the Constitution).

179 These rights include the rights to dignity, life, to bodily and psychological integrity, and to access to health care, as well as everyone's right to an environment that is not harmful to their health or well-being.

180 The COVID-19 pandemic poses an unprecedented risk to the lives and health of everyone living in South Africa.

181 The State was, and remains, constitutionally obliged to act to prevent COVID-19 from killing hundreds of thousands of people in South Africa, and from leaving hundreds of thousands of others permanently affected by the lasting effects of SARS-CoV-2 on the human body, the full effects of which are still unknown.

182 Measures to address the COVID-19 pandemic, including the Disaster Management Regulations, limit rights in the Bill of Rights, including the rights identified by the applicants being the rights to human dignity, freedom of movement, trade and occupation, and privacy.

183 This is constitutionally permissible. Rights are subject to their own internal limitations, and to general limitation in terms of section 36 of the Constitution, provided of course that the limitations meet the standards imposed by the Constitution." (Emphases added)

113. Moreover, in *Freedom Front Plus v President of the Republic of South Africa and Others* (22939/2020) [2020] ZAGPPHC 266 (6 July 2020), a Full Court of this Court held, in paragraph 3, that:

⁷⁹ A copy of the relevant pages is attached marked "RA3".

"The measures adopted under the [Disaster Act] have been as far-reaching as the threat posed by the virus. They have affected every aspect of the lives of the populace and the economy. As befits our constitutional democracy, the government has not been spared a range of constitutional challenges to the decisions and regulations made under the [Disaster Act]."

The National Executive's Affidavit

Ad paragraphs 5 to 11

114. To the extent that these paragraphs record accurately the relief sought in the notice of motion, the content hereof is admitted. For the reasons articulated in the thematic parts of this replying affidavit, this relief is not unprecedented. It falls squarely within the established purview of the judicial function.
115. Moreover, it is denied that the relief is incompetent, for reasons of the separation of powers or substance.

Ad paragraphs 12 to 15

116. For all the reasons articulated above, in particular paragraphs 10 to 36, the content of these paragraphs is denied.
117. The National Executive cannot just assert what the law "**is**". This is not the method and mode in which the existence and content of law is determined. All questions of existence and meaning are interpretative. The National Executive must argue for its position on what the law is, rather than declare it by fiat.
118. For this reason the deponent must, as they admit, "*plead over*".

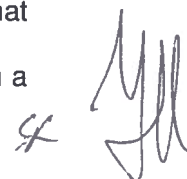
Ad paragraphs 16 to 21

119. To the extent that these paragraphs accurately record the text of the Constitution, the content hereof is noted. For the reasons articulated in the founding affidavit, the thematic part of this replying affidavit, as well as paragraphs 61 to 68 above, the remaining content of these paragraphs is denied.



Ad paragraphs 22 to 25 and 28 to 30

120. To the extent that these paragraphs accurately record the text of the Constitution, the content hereof is noted.
121. Save as aforesaid, for the various reasons articulated in the founding affidavit, the thematic part of this replying affidavit, as well as paragraphs 61 to 68 above, the content of these paragraphs is denied.
122. In particular, it is denied that because section 85(2) of the Constitution empowers the National Executive to perform several functions that the Executive is then free to exercise whichever function however it sees fit. As the deponent to the affidavit in fact notes, what is decisive are the "*circumstances*", for different circumstances can determine which function is "*appropriate*". One way to articulate the nature of the HSF's challenge is that the National Executive has not exercised their power under section 85(2) appropriately. In the circumstances, the HSF argues, what is needed is concrete and effective legislation to regulate the state's response to the threat that is posed and harm that is caused by COVID-19—either as a particular natural ill, or as a member of class of such ills.
123. These paragraphs place too much weight on the words "*may*" and "*when*" in the cited sections of the Constitution, and ignore entirely the purpose of and context in which these powers are granted, as well as the word "*must*" (and the interpretation of the section by the courts) in section 7(2) of the Constitution.
124. Moreover, it is incorrect that the HSF has "*not given any reason*" why the National Executive ought to have exercised its powers under section 85. These reasons can be found in the founding affidavit. In this replying affidavit, I have unpacked these further, for the sake of clarity and, hopefully, to assist this Court.
125. For this reason, it is significant that the National Executive ultimately concedes that there can in fact be a duty to make law, citing the existence of a "*lacuna*". In such a case, it is acknowledged, "*Parliament would clearly have to legislate*".



126. The National Executive then continues to say that this is not the case here, for the Disaster Act is the required legislation.
127. This is denied. Relevant for the purposes of these paragraphs, though, is that in conceding that there can be a duty to make law, various arguments fall away, including arguments that the power to initiate, prepare and pass legislation is discretionary, and that the relief is unprecedented. They fall away because the issue before this court becomes not whether this duty exists or the court can grant the relief, but whether it is appropriate in the circumstances.

Ad paragraph 27

128. For the reasons articulated in the founding affidavit and the main part of this replying affidavit, in particular paragraph 39.1, the content hereof is denied or can be ignored on the basis that it misconstrues the applicant's argument.

Ad paragraph 31 and 32

129. The content of these paragraphs is noted insofar as it accurately records the content of the Disaster Act.
130. These paragraphs are denied to the extent that the National Executive relies on them to argue that the institutional structure of the executive branch of our tripartite government somehow renders inappropriate a legislative framework that concretely and effectively has as its primary function the regulation of state action relating to threats and harms like COVID-19.
131. For the reasons offered in reply to Parliament's Affidavit,⁸⁰ the administrative and logistical and practical capacity of the executive branch of government will be enhanced not diminished by the concrete and effective legislation prayed for in the notice of motion.

⁸⁰ See paragraphs 103 to 106 above.

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Ad paragraphs 33 to 44

132. To the extent that these paragraphs record the historical background to the passage of the Disaster Act, its location in our constitutional framework, its internal structure, and its allocation of powers, their content is noted.
133. As important as all this might be, however, it is denied that it bears on the crisp legal issue before this Court: Do the National Executive and/or Parliament have duties to initiate, prepare and/or pass legislation that regulates concretely and effectively, that is, **in a way that is directed towards the threats and harms of COVID-19**, the state's response to these threats and harms?

Ad paragraphs 45 to 59

134. The content of these paragraphs is noted insofar as they accurately record the content of the Disaster Act.
135. Whilst formally speaking, the process delineated in these paragraphs is correct, the conclusion implicitly derived therefrom is not.
136. What the National Executive strives to derive from this formal classification process is the following conclusion: Once this formal process is followed, they suggest, the Disaster Act continues to be of force and effect for so long as these initial conditions obtain, with the National Executive and Parliament having no further law-initiating, preparing or making duties. In other words, what the National Executive argues is that **whilst before a disaster occurs these arms of government have a duty to initiate, prepare and pass concrete and effective legislation to deal with this class of threat or harm**—this is the necessary legal effect of paragraph 30 of the National Executive's Affidavit, where the deponent talks about legislative lacunae, referred to in paragraph 125 above—**once such a threat and harm has in fact appeared, then their obligation to do so is extinguished.**
137. With respect, the argument is undercut by our constitutional scheme, as well as the argument's logical endpoint – that the DMA can forever be a basis to upend the

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separation of powers and justify ongoing and potentially limitless executive law-making in the vacuum created by Parliament's abrogation of its duty.

Ad paragraphs 60 to 134 and 153

138. All these paragraphs concern the oversight apparently exercised by Parliament over the National Executive.
139. As explained above, whilst the performance of oversight functions is laudable, this has no bearing at all on the issues before this Court. In this application, this Court is called upon to decide whether the National Executive and/or Parliament have a duty to initiate, prepare and pass legislation that regulates concretely and effectively the state's response to threats posed and harm caused by COVID-19. The power to make law vests in Parliament originally. It is independent from its power to oversee executive action. So, whatever Parliament has done or not done in this regard is irrelevant to this application.
140. The above notwithstanding, several points emerging from the paragraphs are worth noting:
- 140.1 What the paragraphs demonstrate clearly is the vast gulf between law-making and oversight.
- 140.2 Indeed, the "*Oversight and Accountability Model*" makes plain that the method of oversight occurs primarily through committees rather than in the transparent and democratic hurly burly of Parliament itself.⁸¹
- 140.3 Notwithstanding lockdown, Parliament has been perfectly-equipped to perform its functions, law-making included, since at least April 2020.⁸² In fact, we are

⁸¹ Paragraphs 67 to 71 of the National Executive's Affidavit.

⁸² Paragraphs 76 and 77 of the National Executive's Affidavit.



told, Parliament never went into hiatus at all.⁸³ Given this, it is not clear why it could not and still does not function as constitutionally required, that is, why it did not immediately attend, legislatively, to the "unprecedented" circumstances in which we find ourselves.

140.4 The Disaster Act clearly does deal with disasters, but it is denied that the Act functions in the way alleged by the National Executive. It does not relieve either the National Executive or Parliament from their duties to initiate, prepare and pass concrete and effective legislation of the kind that is prayed for in the notice of motion.⁸⁴

140.5 The fact that no political parties, in committee meetings or otherwise, thought it necessary or possible to raise the issues that are the subject of this matter, does not speak against their merits.⁸⁵ Nor does it speak against the need to have these issues decided by this Court. To the contrary, it points urgently to the importance of these issues in fact being ventilated in full.

Ad paragraphs 135 and 156

141. The content hereof is denied.

Ad paragraph 139

142. The content hereof is denied.

143. The Constitutional Court order, dated 3 July 2020, had nothing to do with the merits of this application. The order was premised on the jurisdiction of that court: principally, whether it had exclusive jurisdiction. To suggest otherwise is at best misleading.

⁸³ Paragraph 84 of the National Executive's Affidavit.

⁸⁴ Paragraph 83 of the National Executive's Affidavit.

⁸⁵ Paragraph 134 of the National Executive's Affidavit.

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Ad paragraphs 142 and 173

144. As explained, the relief sought by the HSF in this application does not contemplate this Court making an order directing the National Executive or Parliament to initiate, prepare and pass that deals only with COVID-19. This is one option that will be open to these branches of government. One of many alternative possible actions would be to adopt legislation that regulates COVID-19 specifically and other matters too. All that they must do is enact constitutionally compliant concrete and effective legislation. This is the extent and limit of the relief prayed for by the HSF.

Ad paragraph 146

145. Save to note that the National Executive admits here that both it and Parliament can have a duty to initiate, prepare and/or pass legislation, the content of this paragraph is denied.

Ad paragraph 147

146. It is striking that the National Executive contests the relevance to this matter of the Constitutional Court's jurisprudence on the importance of the principles of transparent, open, deliberative, representative and participatory democracy. For why this jurisprudence and these principles are relevant, the National Executive is directed to paragraph 35 above, as well as its surrounding context.

Ad paragraph 148

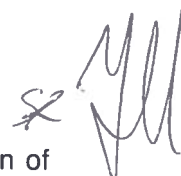
147. The content hereof is denied.

148. For reasons articulated above, this paragraph is premised on a misunderstanding of what this application is all about.

Ad paragraphs 149 to 152

149. The content hereof is denied.

150. Rather than offer any sensible, alternative reading to the HSF's characterisation of

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sections 2 and 27 of the Disaster Act, the National Executive simply denies it. This is not an acceptable strategy when pleading generally speaking, but especially so in a matter such as this.

151. Further, the fact that little is known about COVID-19 is no answer to the arguments put forward by the HSF. These epistemic deficiencies often exist, not just in relation to novel viral threats but with many social and natural ills.

152. This lack of knowledge does not preclude the creation of concrete and effective laws; it is one reason why this legislation is constitutionally required. Without a concrete and structured plan, which of course must be created through the constitutionally-defined procedure, i.e. Parliament, we are **necessarily unable to respond in a way that is constitutionally effective.**

Ad paragraph 154

153. For reasons articulated elsewhere, the content hereof is denied.

Ad paragraph 158

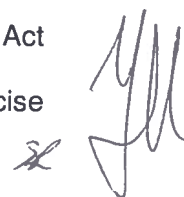
154. The HSF does not seek to impugn the "*independence and professional integrity of the Head of the NDMC*". The paragraph to which the National Executive is referring makes the point that the position is not structurally secure from external influence. The concept and importance of structural independence is well-established, derived from various decisions of the Constitutional Court.

Ad paragraphs 159 to 161

155. To the extent that these paragraphs note that the constitutionality of the Disaster Act is not in issue, the content hereof is admitted. Otherwise, they are denied.

Ad paragraph 168

156. The HSF does not assert that the Disaster Act or exercise of power under this Act has unjustifiably limited rights. The claim, which cannot be disputed, is that exercise of power under the Act limits these rights.



157. Here, I refer to what I stated in paragraph 112 above. The Minister, on behalf of the President, has already on affidavit admitted that the "*[m]easures to address the COVID-19 pandemic, including the Disaster Management Regulations, limit rights in the Bill of Rights*".

Ad paragraphs 169 and 170

158. The HSF does not place any argumentative reliance on the relation between the National Executive and Coronavirus Command Council.

159. For all the reasons articulated above and in the founding affidavit, the HSF submits that the National Executive (under whatever name), have the duties contended for in this application.

Ad paragraphs 171 and 172

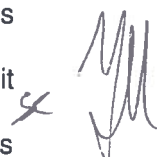
160. The word "indefinite" means "lasting for an unknown or unstated length of time". As these paragraphs themselves make plain, it is common cause that the Declaration can remain in force indefinitely (by virtue of the Minister's power unilaterally to extend the declaration).

Ad paragraphs 174 to 178

161. For all the reasons articulated in the founding affidavit and this affidavit, the content hereof is denied.

162. In particular, it is denied that anything in the nature of COVID-19 or viral threats in general excludes legislative action by Parliament. The relief that is prayed for by the HSF concerns the structure of the response, not its implementation. The failure by the Speaker and National Executive to grasp this distinction is a defect that plagues both sets of affidavits.

163. Further, what is quite remarkable in these paragraphs is that the Executive tells this Court that national legislation cannot be adopted because this would function to limit their power to access and control our country's financial resources. Not only is this



not true as a matter of legislative necessity, it is an incautious statement in light of recent revelations around corruption in the COVID-19 context.

Ad paragraph 182

164. For all the reasons articulated in the founding affidavit and this affidavit, the content hereof is denied.

Ad paragraph 184

165. The content hereof is denied.

166. As explained, this application is not concerned with the constitutionality or otherwise of the Disaster Act. It is not a case about unlawful delegation. This matter is about Parliament and the National Executive's powers and duties, ultimately, to pass law that creates a concrete and effective mechanism to regulate the state's response to COVID-19.

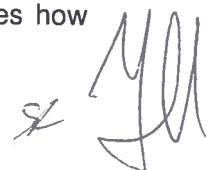
Ad paragraph 186

167. For all the reasons articulated in the founding affidavit and this affidavit, the content hereof is denied.

Ad paragraphs 187 to 193

168. For all the reasons articulated in the founding affidavit and this affidavit, the content hereof is denied.

169. The deponent to the National Executive Affidavit offers no alternative interpretation of the Disaster Act. All that is asserted here is that efficiency and epistemic reasons justify locating executive power in the Executive. The HSF agrees. What is in issue here, however, is how this power should be structured. Is a general and all-inclusive structure sufficient, or does the National Executive and/or Parliament have a duty to initiate, prepare and pass legislation that concretely and effectively regulates how we respond to these threats and harms?

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170. In its founding affidavit and in this replying affidavit, the HSF cites legislative and constitutional reasons of principle, structure, value and rights to support the relief it prays for in the notice of motion. Like the Speaker, the National Executive offers no response to these arguments. Instead, they cite undefined concerns about efficiency and knowledge. This response is inadequate for three separate reasons:
- 170.1 no evidence is presented in support of these concerns;
- 170.2 even if evidence were presented, no argument is provided for why epistemic and efficiency concerns necessarily, or at least in this instance, trump all other constitutional considerations; and
- 170.3 even if this argument were offered, no explanation is given for why legislation that regulates concretely the exercise of power relating to COVID-19 will negatively impact on the efficiency concerns articulated, nor is any explanation given for why this structure would blind the executive branch of government to new information that becomes available.
171. As explained, ultimately the problem with Parliament's and the National Executive's Affidavits is that they conflate power with licence, that is, the capacity or ability to act with the lack of a meaningful and concrete structure.. This is a mistake. Under our Constitution, all power is rooted in and emanates from law, which is to say, all power comes from concrete and, ideally, effective structures.
172. Regulation does not diminish or constrain or hobble or merely check power. Law is what brings power into being in the first place. When this law is concrete, this power is given a chance of also being effective.
- Ad paragraphs 195, 197 to 198**
173. For all the reasons articulated in the founding affidavit and this affidavit, the content hereof is denied.

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Ad paragraphs 202, 203 and 206

174. The National Executive admits here that there can be a duty to initiate, prepare and pass legislation that concretely and effectively regulates the state's power in relation to particular classes of problem. Thus, the question before this Court is whether the nature of viral pandemics, and in this case the COVID-19 pandemic contextually and in particular, calls for a concrete and effective legislative mechanism in the same way that corruption, gender-based violence and racism have rightly been judged to require precisely this form of legislative action.

Ad paragraph 204

175. It is admitted that the HSF has not alleged unconstitutional infringement of rights. It has not alleged this because this is not its case.

176. Of course, as noted in paragraph 112, there can be no dispute and the National Executive admits that:

176.1 *"The COVID-19 pandemic poses an unprecedented risk to the lives and health of everyone living in South Africa.*

176.2 *The State was, and remains, constitutionally obliged to act to prevent COVID-19 from killing hundreds of thousands of people in South Africa, and from leaving hundreds of thousands of others permanently affected by the lasting effects of SARS-CoV-2 on the human body, the full effects of which are still unknown.*

176.3 *Measures to address the COVID-19 pandemic, including the Disaster Management Regulations, limit rights in the Bill of Rights, including the rights identified by the applicants being the rights to human dignity, freedom of movement, trade and occupation, and privacy.* (Emphasis added)

Ad paragraph 209

177. The content hereof is denied.

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178. Whether legislation is required is not a "*determination that Parliament makes*". It is a determination that our Constitution makes. What Parliament decides, albeit within the limits and according to the spirit of the Constitution, is the concrete structure and content of this legislation.

Ad paragraph 210

179. For all the reasons articulated in the founding affidavit and this affidavit, the content hereof is denied.

180. Rather than seriously confronting the HSF's sustained interpretative engagement with sections 2 of the Disaster Act, read textually, contextually and purposively, the National Executive merely asserts the opposite: the Disaster Act has nothing to say, expressly or implicitly, about the general constitutional fact that power to make law lies ultimately and originally with Parliament.

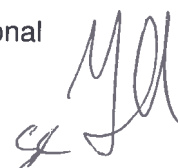
Ad paragraphs 214 and 215

181. It is admitted that Parliament passed the Disaster Act. Likewise, it is admitted that Cabinet has activated the Disaster Act.

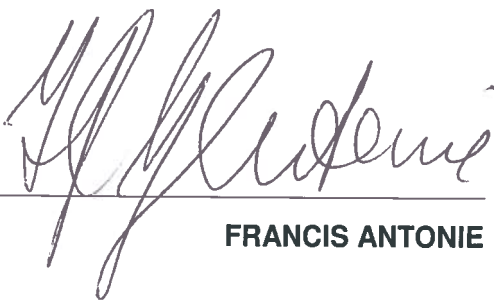
182. The issue before this Court, which the National Executive cannot avoid simply by stating these facts, is whether government has a duty to initiate, prepare and pass legislation that concretely and effectively regulates the exercise of power in the face of the threats or harms of COVID-19.

CONCLUSION

183. Near the start of this replying affidavit, it was submitted that when there is a serious threat or harm, for which no concrete and effective mechanism exists to regulate how we respond to this threat or harm, and time-sensitive considerations preclude reliance on constitutionally-defined procedures (i.e. Parliament) for our creating new concrete mechanisms to structure effectively our response, a serious constitutional question arises. That question presents a choice:

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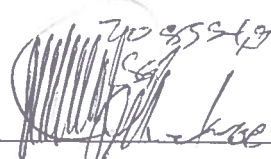
- 183.1 is this the end of the matter both indefinitely and ongoingly, meaning does the Disaster Act continue to be of force and effect until such time as the threat and harm is vanquished, tamed or no longer serious; or
- 183.2 do the National Executive and Parliament have duties to initiate, prepare and pass legislation that regulates concretely and effectively the state's continued and future exercise of power in response to the threat or harm?
184. In the founding affidavit and this reply, the HSF has advanced reasons grounded in legislative interpretation and constitutional principle, structure, values and rights to support the latter conclusion.
185. The National Executive and Parliament do not respond to any of these arguments. Instead, they stipulate that efficiency and epistemic considerations trump all. These arguments are bad in fact and in law and lack all constitutional firmity. They cannot be sustained.
186. Wherefore, the HSF continues to pray for the relief that is sought in the notice of motion to which the founding affidavit is attached.



FRANCIS ANTONIE

The deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn to before me at *Johnannesburg* on this the *20* day of *August* 2020, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

CA

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CS


COMMISSIONER OF OATHS

Full names: *SANKHLENI MHLASE*

Business address: *15 STURDIE AVENUE, ROSEBANK*

Designation: *SAPS*

Capacity: *SAT*

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From: Jessica du Toit
To: "SChothia@justice.gov.za"; "nagonggo@justice.gov.za"
Cc: [Matthew Kruger](#); [Vlad Movshovich](#); [Pooja Dela](#); [Dylan Cron](#); [Daniel Rafferty](#)
Bcc: "3041349 Pro Bono HSF Lockdown Litigation Email"
Subject: Urgent: Helen Suzman Foundation // The Speaker of The National Assembly and Others [IWOV-WS_JHB.FID2250830]
Date: 20 August 2020 15:34:20
Attachments: [20200820 Replying Affidavit \(signed\).pdf](#)
[image001.jpg](#)

Dear Sirs

Please see attached the Applicant's composite replying affidavit, dated 20 August 2020, in the above matter which is hereby served.

Kind regards

Jessica du Toit | Candidate Attorney

T: +27115305657 | **M:** +27711761292 | jessica.dutoit@webberwentzel.com | www.webberwentzel.com

We have a dedicated [website page](#) to help our clients navigate through all of the legal & commercial challenges that arise from the COVID-19 outbreak, as well as government regulations to contain it.



African Law Firm of the Year (African Legal Awards, 2019)
Legal DealMakers of the Decade (DealMakers, 2019)
Law Firm of the Year (South African Professional Service Awards 2019/2020)

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To: ["naqongqo@justice.gov.za"](mailto:naqongqo@justice.gov.za)
Bcc: ["3041349 Pro Bono HSF Lockdown Litigation Email"](#)
Subject: FW: Urgent: Helen Suzman Foundation // The Speaker of The National Assembly and Others [IWOV-WS_JHB.FID2250830]
Date: 20 August 2020 15:38:23
Attachments: [20200820 Replying Affidavit \(signed\).pdf](#)
[image001.jpg](#)

Dear Sirs

Please see attached the Applicant's composite replying affidavit, dated 20 August 2020, in the above matter which is hereby served.

Kind regards

Jessica du Toit | Candidate Attorney

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We have a dedicated [website page](#) to help our clients navigate through all of the legal & commercial challenges that arise from the COVID-19 outbreak, as well as government regulations to contain it.



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President Cyril Ramaphosa: South Africa's response to the COVID-19 Coronavirus Pandemic

17 Jun 2020

Address by President Cyril Ramaphosa on South Africa's response to the Coronavirus Pandemic, 17 June 2020

Compatriots,

It is now just over 100 days since the first case of coronavirus was identified in South Africa.

For 100 days we have been living in the shadow of one of the greatest threats to global health in over 100 years.

The disease, and the measures we have taken to fight it, have caused massive disruption in the lives of our people, bringing our economy to a standstill and threatening the livelihoods of millions.

So far, it has cost our nation the lives of 1,674 people.

In the midst of this life-destroying pandemic, we are greatly encouraged by news this week of a breakthrough in the treatment of COVID-19.

A study by the University of Oxford in Britain found that the drug dexamethasone – which is also manufactured here in South Africa by one of our pharmaceutical companies and of which there is an ample supply – reduced deaths among patients on ventilation by a third.

The Department of Health and the Ministerial Advisory Committee has recommended that dexamethasone can be considered for use on patients on ventilators and on oxygen supply.

We believe that this will improve our management of the disease among those who are most severely affected.

Since the start of the outbreak there have been 80,412 confirmed coronavirus cases in South Africa.

Of these, 44,331 people – or around 55% – have recovered. That means there are currently 34,407 active cases in the country.

Yet, as we know, the cost in human lives could have been far higher.

We took a decision early in the development of the disease in South Africa to restrict international travel and gatherings with the declaration of a National State of Disaster and subsequently imposed a nation-wide lockdown to slow the transmission of the virus.

In doing so, we aimed to 'flatten the curve' of infection so that our health system would be better able to care for the large number of people who would be needing care.

As a result of the decisive action we took then – and particularly through your cooperation, determination and sacrifice as a nation – we succeeded in delaying the spread of the virus.

One of the ways of measuring the rate of transmission is what is called 'doubling time'. This is the number of days it takes for the total number of cases to double.

In the three weeks prior to the implementation of the nation-wide lockdown, the number of infections was doubling every 2 days.

During level 5 of the lockdown, this doubling time increased to 15 days, which meant that it took much longer for the virus to spread.

The doubling time has been at around 12 days during levels 4 and 3.

We used the time during the lockdown to prepare and enhance our health system and put in place public health measures to minimise infections.

The work to strengthen our health system – which includes establishing over 100 quarantine centres, increasing the number of intensive care units and beds in field hospitals and identifying additional health personnel – continues across all our provinces.

But while we have used the lockdown to start to flatten the curve, this task is far from complete.

Even after 100 days, we are still near the beginning of this epidemic and it will remain with us for many more months, possibly years.

The task of dealing with the coronavirus pandemic is like running a marathon race and not a sprint, and we have therefore had to shape our response according to that reality.

Over the last few weeks, the number of infections has been rising rapidly.

Nearly a third of all confirmed cases have been recorded in the last week alone and more than half of all confirmed cases have been recorded over the last two weeks.

The Western Cape has so far been hardest hit by the disease, accounting for about 60% of infections across the country.

While community transmission has remained low across most of the country for the past 9 weeks, it has been rising rapidly in that province.

There are indications that transmission in the Eastern Cape is now starting to rise and may just be a few weeks behind the Western Cape.

For many of us, what was once a distant disease is now coming much closer.

More and more of us now know someone who is infected, whether at work or school or in our church, mosque, temple or synagogue.

It may be one of our friends or a member of our family.

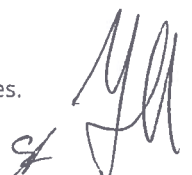
Many of you are concerned about the increase in infections and anxious for the safety and well-being of your loved ones.

You are worried about the possibility of getting infected yourself, in a taxi or on a bus, at work or at the shops, at school or university, visiting a clinic or hospital.

These concerns are understandable and reasonable.

Because as the country gradually opens up, as we resume more activities, the risk of infection inevitably increases.

Yet, even though the risk of infection is greater, it is by no means inevitable.



Through our behaviour as individuals we can reduce the likelihood that we will get infected or infect others. And it is through our personal and collective actions that we can continue to delay the rate of infection across society.

Studies show that wearing a cloth mask or similar piece of clothing that covers both your nose and mouth at all times when one is in public is one of those measures that reduces the rate of transmission of the virus.

Millions of South Africans – including small children – are now wearing cloth masks whenever they leave home.

There are, however, some South Africans who have not yet taken up the practice of wearing masks.

We would like to encourage everyone in our country to wear masks when they are in public.

Let us make sure that we do not share masks and that we wash our masks thoroughly in soap and water after each use.

The wearing of masks, however, is no substitute for regular washing of hands with soap and water or sanitiser and maintaining a distance of at least 1.5 metres from other people.

Let us all remember not to touch our faces with unwashed hands, and clean and sanitise surfaces regularly.

We should also keep in mind that social distancing is still one of the most effective ways of reducing the spread of the virus.

These basic practices are becoming even more important now as we ease the lockdown and enter a new phase in our coronavirus response.

These are still the best ways of containing the spread of the virus.

Our medical experts have advised that interventions such as setting up fumigation tunnels and body spraying should not be used as they have no proven benefit and may be harmful.

From the outset, we knew that extreme measures were needed to slow community transmission.

But we also knew that a nation-wide lockdown could not be sustained indefinitely.

With the move to alert level 3 from the 1st of June, our prevention response is now largely focused on the simple everyday things that each of us can do to protect ourselves and our communities.

It is about each of us taking personal responsibility, wherever we are and whoever we are, for curbing the spread of the disease.

The power to defeat coronavirus is in our hands.

Our response is now also more focused, on hotspot areas with the greatest rate of infection and sending multi-disciplinary health teams to contain outbreaks and ensure those with the infection get the necessary care.

At the same time, we have massively increased screening for coronavirus symptoms throughout the country, at every workplace, school, university, shopping centre, place of worship, taxi rank or other public space where people gather.

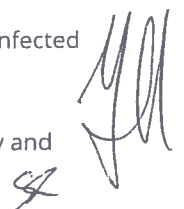
Like many other countries, South Africa has been affected by the global shortage of coronavirus test kits and other materials.

We have therefore had to become more targeted in our testing, prioritising patients in hospitals, health care workers, vulnerable people like the elderly and hotspot areas.

Although the situation is improving, we continue to experience delays in testing.

This has severe implications for effectively managing patients with the infection as well as tracing the contacts of infected people.

We are therefore using every avenue available to source the supplies we need and to increase our testing capacity and improve the turnaround time.



Among the initiatives that we have pursued together with other countries on our continent is the ground-breaking Africa Medical Supplies Portal.

This is a single continental marketplace where African countries can access critical medical supplies, such as test kits, from suppliers and manufacturers in Africa and around the world in the necessary quantities and at competitive prices.

This platform will complement the work that is being done to ensure that we have the medical equipment, personal protective equipment and hospital facilities to manage the anticipated increase in COVID-19 patients.

Fellow South Africans,

The coronavirus pandemic is not only a global health crisis. It is also a global economic crisis of ever-increasing proportion. No country, no industry and no person is unaffected.

Here in South Africa, the pandemic has severely disrupted the livelihoods of millions of people.

As you are aware many businesses that stopped operating on the 27th of March, when the lockdown came into effect, have not yet been able to re-open under current restrictions.

These include large companies with many thousands of employees and many more smaller companies with just a handful of employees.

This means that there are businesses that have not earned any revenue and individuals who have not had any income for over 80 days.

Even with the measures we put in place to support companies, employees and poor households as part of the R500 billion relief package, there is a limit to how long these businesses can be closed.

When I announced that the country would be moving to alert level 3 from the 1st of June, I said that we would be giving consideration to re-opening other sectors of the economy if the necessary safety precautions could be put in place and maintained.

Following further discussions with industry representatives on stringent prevention protocols, and after advice from scientists and consultation with Premiers, Cabinet has decided to ease restrictions on certain other economic activities.

These activities include:

Restaurants for 'sit-down' meals

Accredited and licensed accommodation, with the exception of home sharing accommodation like AirBnB.

Conferences and meetings for business purposes and in line with restrictions on public gatherings.

Cinemas and theatres, to be aligned to limitations on the gathering of people.

Casinos.

Personal care services, including hairdressers and beauty services

Non-contact sports such as golf, tennis, cricket and others. Contact sports will be allowed only for training and modified activities with restricted use of facilities.

In each instance, specific and stringent safety requirements have been agreed on and will need to be put in place before a business can re-open, and protocols will need to be strictly adhered to for businesses to remain open.

Announcements will be made in due course to detail these measures and indicate the date from which these activities will be permitted.

We have taken this decision with due care and seriousness, appreciating the risks associated with each activity and the measures needed to manage those risks.

Altogether, these industries employed over 500,000 people before the lockdown.

We have had to think about these people and those who depend on them for their livelihoods.



Through the easing of the lockdown we are continuing to balance our overriding objective of saving lives and preserving livelihoods.

It is important to remember that this is a global pandemic and that most countries are facing similar challenges and must resolve similar dilemmas.

We are therefore working closely with international agencies and other countries in responding to the coronavirus.

As Chair of the African Union, we are integrally involved in forging a common approach across the continent, ensuring that we mobilise resources and develop strategies to ensure that no country is left behind.

There are currently over 250,000 confirmed cases in Africa and there have been more than 6,700 deaths.

This is relatively low compared to the global number of cases – which has now passed 8 million – largely because African countries acted swiftly to implement national lockdowns.

However, we can expect infections in Africa to rise as countries ease restrictions in the face of severe economic pressures and we are working together as a continent to meet that challenge.

It has been particularly important for us to open up personal care services, because this is an industry that predominantly employs women.

The last three months have been particularly difficult for the millions of women who work as hairdressers, in spas, as therapists and technicians.

Many of these businesses are owned by women and a source of income in the informal sector.

Giving women the necessary support to become financially independent is the greatest of priorities, especially now.

It is with the heaviest of hearts that I stand before the women and girls of South Africa this evening to talk about another pandemic that is raging in our country – the killing of women and children by the men of our country.

As a man, as a husband and as a father, I am appalled at what is no less than a war being waged against the women and children of our country.

At a time when the pandemic has left us all feeling vulnerable and uncertain, violence is being unleashed on women and children with a brutality that defies comprehension.

These rapists and killers walk among us. They are in our communities.

They are our fathers, our brothers, our sons and our friends; violent men with utterly no regard for the sanctity of human life.

Over the past few weeks no fewer than 21 women and children have been murdered. Their killers thought they could silence them.

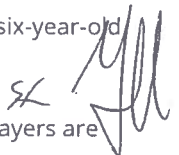
But we will not forget them and we will speak for them where they cannot.

We will speak for Tshegofatso Pule, Naledi Phangindawo, Nompumelelo Tshaka, Nomfazi Gabada, Nwabisa Mgwandela, Altecia Kortjie and Lindelwa Peni, all young women who were killed by men.

We will speak for the 89-year-old grandmother who was killed in an old age home in Queenstown, the 79-year-old grandmother who was killed in Brakpan and the elderly woman who was raped in KwaSwayimane in KwaZulu-Natal.

We will speak for the innocent souls of Tshegofatso Pule's unborn daughter who had already been given a name, six-year-old Raynecia Kotjie and the six-year-old child found dead in the veld in KwaZulu-Natal.

They are not just statistics. They have names and they had families and friends. This evening, our thoughts and prayers are with them.



I want to commend the South African Police Service for their excellent work in arresting almost all of the alleged perpetrators.

As these suspects make bail applications this week, I have the utmost confidence that our courts will send the strongest of signals that such violence has no place in society.

At a joint sitting of Parliament in September last year, I announced an Emergency Response Plan to combat gender-based violence and femicide and that R1.6 billion in government funding would be reprioritised to support its implementation until the end of the financial year.

We now have a National Strategic Plan to guide our country's national effort against gender-based violence.

During the lockdown period we have ensured that survivors of gender-based violence have access to support and services, including the GBV hotline, shelters and centres providing support to victims of sexual violence.

Since December last year, 10 government-owned buildings have been handed over to the Department of Social Development to be used as shelters, addressing one of the biggest challenges facing survivors who want to leave abusive relationships.

Over the last 18 months, we have made demonstrable progress in broadening access to support for survivors.

Thirteen regional courts have been upgraded into sexual offences courts.

To support the work of law-enforcement, 7,000 evidence collection kits have been distributed regularly to every police station in the country and there are now over 1,000 survivor friendly rooms at police stations.

Many police, prosecutors, magistrates and policymakers have undergone sensitivity and awareness training, and over 3,000 government employees who work with children and mentally disabled persons have been checked against the National Register of Sex Offenders.

Legislative amendments have been prepared around, among other things, minimum sentencing in cases of gender-based violence, bail conditions for suspects, and greater protection for women who are victims of intimate partner violence.

I urge our lawmakers in Parliament to process them without delay.

Our courts have been firm in dealing with cases of gender-based violence even during the lockdown period, handing down life sentences and multiple life sentences to perpetrators.

I want to assure the women and children of South Africa that our criminal justice system will remain focused on gender-based violence cases and that we can expect more arrests and more prosecutions against perpetrators to follow.

The perpetrators of violence against women and children must receive sentences that fit the horrific crimes they commit.

It is deeply disturbing that the spike in crimes against women and children has coincided with the easing of the coronavirus lockdown.

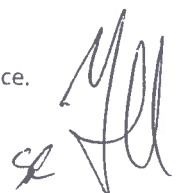
According to the police, violent crime – especially murders and attempted murders – has increased since alert level 3 took effect on 1 June.

Cases of abuse of women and children have also increased dramatically. We need to ask some very difficult questions of ourselves as a society.

In particular, we need to examine the effect of alcohol abuse not only on levels of violence, but also on road accidents and reckless behaviour.

Several international and domestic studies show clear linkages between alcohol abuse and gender-based violence.

Of course, it is not alcohol that rapes or kills a woman or a child. Rather, it is the actions of violent men.



But if alcohol intoxication is contributing to these crimes, then it must be addressed with urgency.

We need to draw the lessons from this lockdown and decide how we can protect our society from the abuse of alcohol.

Certainly, we need to provide greater support to people with drinking problems, including through rehabilitation and treatment.

We need to encourage responsible drinking, especially among young people.

We need to be tough on liquor outlets that violate the terms of their licenses and who sell alcohol to those under-age.

But we will also need to look at further, more drastic measures to curb the abuse of alcohol.

Ultimately, the success of our fight to end gender-based violence will require the involvement and support of our entire society.

If we are serious about ending these crimes, we cannot remain silent any longer. These perpetrators are known to us and our communities.

By looking away, by discouraging victims from laying charges, by shaming women for their lifestyle choices or their style of dress, we become complicit in these crimes.

I once again call on every single South African listening this evening to consider the consequence of their silence.

As a country, we find ourselves in the midst of not one, but two, devastating epidemics.

Although very different in their nature and cause, they can both be overcome – if we work together, if we each take personal responsibility for our actions and if we each take care of each other.

The road ahead will be long and difficult. The task of recovery will be considerable.

But if there is anything that we have learnt in the last 100 days, it is that we are a resilient, resourceful and determined people.

We shall overcome.

May God bless South Africa and protect her people. I thank you.

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More on: [Coronavirus](#)



TRANSLATIONS

English

Afrikaans

isiNdebele

isiXhosa

isiZulu

Sesotho

Sepedi

Setswana

Siswati

Rob Rose Editor, Financial Mail

OPINION

ROB ROSE: Heat rises, as Dlamini Zuma hits out at 'unqualified' Basson

Simply lifting the ban won't shield Dlamini Zuma or the government from accounting for exactly how this decision was

14 AUGUST 2020 - 06:00



Whitey Basson and Nkosazana Dlamini Zuma. Picture: TYRONE ARTHUR/SIMPLI LIVE/IKWALI

Even though the government seems to be on the verge of scrapping its booze ban, the heat is rising between affairs minister Nkosazana Dlamini Zuma and former Shoprite CEO Whitey Basson ahead of a court clash next

On Tuesday, the High Court in Pretoria will hear an application by 120 wine farms, led by the nonprofit South African Wine Producers' Association, to declare the ban unlawful. Basson, as the owner of one farm, Klein DasBosch, argues that the prohibition will leave the majority of wine farms and licensed restaurants.

This is no theoretical concern. The wine industry, which includes 2,873 grape producers and 542 cellars, contains thousands of the 300,000 people who work in the industry have already lost their jobs due to the lockdown.

ADVERTISING



But in a new 86-page replying affidavit, Dlamini Zuma not only argues that she had no duty to consult with an but bluntly dismisses Basson's arguments as "simply baseless".

He "ventures other opinions for which he is plainly not qualified", she says. At best, she argues, Basson "has ex [but] is not an expert relating to the exigencies of governance during a pandemic".

However, in a surprisingly inflammatory statement, Dlamini Zuma rubbished his argument that alcohol could Covid-19 has retreated.

"Dr Basson refers to 'cool green spots' as if certain parts of this country live and operate in silos ... the burden and less affluent areas. Planning by government is not done as it was under apartheid."

This clearly got under Basson's skin. On Thursday, he filed a new 10-page affidavit, in which he says it is "outrageous for Dlamini Zuma to suggest he wanted the government to conduct its planning "as it was under apartheid".

"My business philosophies and [ethos] have not been informed, influenced or shaped by the principles of apartheid government, and was never a member of the National Party or a supporter of the apartheid regime. My whole

life is dedicated to the growth of the country and the well-being of its people. He argues that, actually, he is qualified to speak, given the fact that he owns Klein DasBosch and has worked for many years as "suppliers to the retail industry including wine producers".

Basson says the idea of the "cool green spots" actually came from the government itself, which set out how to lift its initial lockdown regulations. "This is not something I thought up myself. It, however, appears that the minister's approach to this approach," he says.

In fact, he says, if you don't look to incrementally lift the ban in areas where the risk is low, it leads to a frightened country remains subjected to the ban because there are still one or more hotspots left — this will lead to economic stagnation.

Apart from her surprisingly pointed criticism of Basson, Dlamini Zuma devotes most of her affidavit to arguing that the ban was made to "reduce the potential strain on the health-care system" at a time when Covid-19 cases were three times the number of deaths.

'We didn't have to consult'

In a nutshell, her argument is that by banning alcohol, you'll keep people out of hospital trauma units, freeing up beds. She estimates that 17,100 of the 34,000 admissions to trauma units per week "are linked to alcohol consumption".

The industry's response is that first, she never considered less restrictive measures to curb alcohol-related traffic. Second, Covid-19 infections have peaked and there are now plenty of hospital beds available, there's no need to keep the ban.

Perhaps Dlamini Zuma's biggest weakness, however, is her frank admission that she didn't consult with the public before imposing the ban.

In her affidavit, she argues there was "no general obligation" to consult. "Neither cabinet, nor I, was opposed to the ban under the circumstances on the ground did not permit this. There was an urgent need to take steps that would aid the country's recovery."

And this, she says, isn't just her view — "it was shared by cabinet".

South African head Francois Rossouw, in his most recent response on Thursday, was quick to seize on this.

Rossouw says Dlamini Zuma "has effectively taken a large portion of the work of the legislator upon herself and this makes it even more imperative that she obtains input from the public while their duly elected representatives are in office."

Not only is this fundamental to a participatory democracy, he says, but the public expects this.

While Rossouw points out that hardly any other country has such a prohibition, Dlamini Zuma responds that "the circumstances", partly due to its high incidence of HIV/Aids, and spatial issues due to apartheid, which make it necessary to take such steps.

"The fact that the industry will suffer losses is regrettable. It is, however, important that financial losses are not equated to losses of life" she says.

ROB ROSE: Heat rises, as Dlamini Zuma hits out at 'unqualified' Basson

Dlamini Zuma is supported in her argument by health minister Zweli Mkhize, who filed an affidavit this week saying the ban is wrong when they contend this temporary prohibition is irrational and otherwise unlawful".

On the contrary, says Mkhize, it was implemented to ensure the government protected society.

The wine farms don't buy it. They point out that not only are doctors and scientists themselves now calling for the ban, but people are losing their jobs every day as it drags on.

As Rossouw puts it: "It does not really assist to be protected from a virus only to be faced with starvation and unemployment. Much of this dispute will become moot if the government lifts the prohibition within days — a move which insulates the economy."

Still, Rossouw tells the FM the case will go ahead regardless, even if it's no longer an urgent application. "We have to be in November and they ban alcohol again? We've got to put a peg in the ground against this sort of arbitrary and capricious action."

In other words, simply lifting the ban won't shield Dlamini Zuma or the government from accounting for exacting the economic toll.

This piece is brought to you in today's FM lockdown newsletter. To subscribe, for free, [click here](#).

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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: 5807/2020

In the matter between:

DUWAYNE ESAU	First Applicant
NEO MKWANE	Second Applicant
TAMI JACKSON	Third Applicant
LINDO KHUZWAYO	Fourth Applicant
MIKHAIL MANUEL	Fifth Applicant
RIAAN SALIE	Sixth Applicant
SCOTT ROBERTS	Seventh Applicant
MPIYAKHE DLAMINI	Eighth Applicant

and

THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	First Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE MINISTER OF TRADE, INDUSTRY AND COMPETITION	Third Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA IN HIS CAPACITY AS THE CO-CHAIRPERSON OF THE NATIONAL CORONAVIRUS COMMAND COUNCIL	Fourth Respondent
THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS IN HER CAPACITY AS THE CO-CHAIRPERSON OF THE NATIONAL CORONAVIRUS COMMAND COUNCIL	Fifth Respondent 
THE NATIONAL CORONAVIRUS COMMAND COUNCIL	Sixth Respondent

THE GOVERNMENT OF THE REPUBLIC OF
SOUTH AFRICA

Seventh Respondent

THE NATIONAL DISASTER MANAGEMENT
CENTRE

Eighth Respondent

ANSWERING AFFIDAVIT

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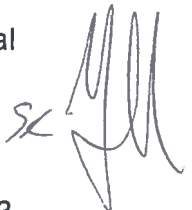
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I the undersigned

NKOSAZANA CLARICE DLAMINI-ZUMA

do hereby make oath and state that:

- 1 I am the Minister responsible for the Department of Cooperative Governance and Traditional Affairs (**the CoGTA Department**).
- 2 I depose to this affidavit on behalf of all of the first to fourth respondents (**the respondents**).
- 3 The facts contained in this affidavit are true and, save where the contrary appears from the context or is otherwise stated, are within my personal knowledge.
- 4 Where I deal with questions of law, I do so on the advice given by my legal representatives, which advice I accept to be correct.



***The Disaster Management Regulations are constitutionally compliant and lawful
(prayers 4.1 and 4.2)***

- 178 The state is required to respect, protect, promote and fulfil the rights in the Bill of Rights (section 7(2) of the Constitution).
- 179 These rights include the rights to dignity, life, to bodily and psychological integrity, and to access to health care, as well as everyone's right to an environment that is not harmful to their health or well-being.
- 180 The COVID-19 pandemic poses an unprecedented risk to the lives and health of everyone living in South Africa.
- 181 The State was, and remains, constitutionally obliged to act to prevent COVID-19 from killing hundreds of thousands of people in South Africa, and from leaving hundreds of thousands of others permanently affected by the lasting effects of SARS-CoV-2 on the human body, the full effects of which are still unknown.
- 182 Measures to address the COVID-19 pandemic, including the Disaster Management Regulations, limit rights in the Bill of Rights, including the rights identified by the applicants being the rights to human dignity, freedom of movement, trade and occupation, and privacy.
- 183 This is constitutionally permissible. Rights are subject to their own internal limitations, and to general limitation in terms of section 36 of the Constitution, provided of course that the limitations meet the standards imposed by the Constitution.

