REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 32858/2020

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

DATE **07 October 2020**

IN THE MATTER BETWEEN: -

THE 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**
CHAIRPESON OF THE NATIONAL COUNCIL OF PROVINCES	**Fourth Respondent**

THE MINISTER OF COOPERATIVE GOVERNANCE

AND TRADITIONAL AFFAIRS **Fifth Respondent**

Case Summary:

This is an application brought by the Helen Suzman Foundation, a non-governmental organisation against the government of South Africa which is represented in these proceedings by the Speaker of Parliament, the President, the Cabinet, the Chairperson of the National Council of Provinces and the Minister of Co-operative Governance and Traditional Affairs ("the Minister").

The applicant seeks a declaratory on an urgent basis that Parliament has failed to fulfil its obligations under Sections 42 (3), 44 (1), 55 (1) and 68 of the *Constitution*, to consider, initiate and prepare and pass legislation to regulate the state's response to the harm caused by the Covid-19 and that Parliament and Cabinet have failed to fulfil their obligations under Section 7 (2) of the *Constitution* to respect, protect and fulfil the rights in the *Bill of Rights* regarding their legislative responses to the impact of Covid-19.

The applicant also seeks an order directing that Cabinet exercise its power in terms of Section 5 (2) (d) by initiating Covid-19 related legislation and that Parliament pass such legislation.

Lastly, the applicant seeks an order declaring that the powers of the Minister under the *Disaster Management Act* 2002, ("the DMA") will terminate simultaneously with the passage of the legislation referred to above.

The background facts leading to the launching of the application are common cause. More specifically the applicant does not seek to challenge the constitutionality of the DMA, the regulations promulgated thereunder and the implementation thereof.

Two crisp issues arise out of the application. Firstly, accepting that it is common cause that the sections upon which the applicant relies are permissive in nature, the Court had to determine whether the facts and the context created by the onset of Covid-19 created a duty to legislate over and above what the Cabinet and Parliament had

already achieved through the DMA. Secondly, the Court had to determine whether the DMA was promulgated as a short measure to deal with Covid-19 or whether it was intended as an all-encompassing and comprehensive long-term response to Covid-19 and its consequences.

Held: That the threat caused by the pandemic to lives and well-being of the people of South Africa would indeed require a state response that was envisaged in Section 7 (2) and that what was required was the enactment of reasonable and effective measures. The Court found that such measures were to be found in the provisions of the DMA as well as the regulations issued thereunder and that since the applicants did not direct any criticism against those measures or their efficacy, there is no duty triggered for cabinet to act not for parliament to pass any further legislation.

Held: Regarding the second issue, the Court considered the key provisions of the DMA regarding disaster management and "post-disaster recovery and rehabilitation"; and found those provisions, far from defining the disaster as an occurrence of limited duration, made reference to it as being progressive and thus creating the need for continuous integrated measures and processes beyond the duration of the disaster to the post disaster recovery and rehabilitation period. As a result, the Court held that these were clearest indicators that the DMA was intended to provide for disasters of an extended duration which required continuous responses and measures which would cover even the post disaster period.

Held: That the interpretation that the DMA was intended as a short-term measure and the powers bestowed upon the Minister were intended for a limited duration only, was not sustainable.

JUDGMENT

The Court

Introduction

[1] The onset and the progression of the Covid-19 pandemic has brought with it numerous and diverse challenges to the people of South Africa, ranging from the intensely personal, the medical and the psychological, the educational and the economic and in the context of these proceedings the nature and the adequacy of the legal and regulatory response to the far reaching impact and consequences of the pandemic.

[2] These are opposed proceedings in which the Applicant seeks declaratory relief that the Respondents have failed to fulfil their constitutional obligations to initiate and pass legislation to deal with the Covid-19 pandemic as well as a mandamus directing the Respondents to fulfil these obligations by initiating and passing legislation to deal with the Covid-19 pandemic.

The parties

[3] The Applicant is the Helen Suzman Foundation ("HSF") which describes itself as a non-governmental organisation. It states that its objectives are to defend the values that underpin South Africa's liberal constitutional democracy and to promote respect for human rights.

[4] The Respondents, who collectively between them and the institutions they represent, carry the constitutional and legal responsibility to both initiate and pass legislation as contemplated in the Constitution of the Republic of South Africa. The First Respondent and the Fourth Respondents are officers of Parliament while the Second Respondent is the head of the National Executive and the Fourth Respondent, the Cabinet wherein collective Executive power is located. The Fifth Respondent is the lead cabinet minister responsible for the governmental response to the COVID-19 pandemic and is also vested with various powers and duties in this regard. All of these Respondents oppose the relief sought. They also seek a costs order against the applicant.

The relief sought

[5] In the founding affidavit, the Applicant explains the basis for the relief it seeks in the following terms: -

"Rather than passing legislation that deals with the immediate and longer term threat posed and harm caused by COVID-19, thereby fulfilling it's function under section 42(3) and (4) of the constitution "to represent the people", "ensure government by the people under the Constitution", to provide "a national forum for public consideration of issues by passing legislation and by scrutinizing and overseeing Executive action', Parliament has abandoned the power vested in it by sections 43, 44(1), 55(1) and 66 of the Constitution to the Minister, the President and Cabinet, who now more than four months on, continue to act unilaterally under section 27 of the Disaster Management Act, 2002 ("the Disaster Act") to legislate every material aspect of everyone's social, political and economic life in the Republic."

[6] The Applicant seeks by way of urgency the granting of the following relief: -

1. Directing that this matter be heard on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court, and dispensing with the forms and service provided for in those Rules;

2. Declaring that:

2.1 Parliament has failed to fulfil its obligations under sections 42(3), 44(1), 55(1) and 68 of the Constitution, to consider, initiate and prepare, and pass legislation that regulates the state's response to the threat posed and harm caused by SARS-CoV-2 and COVID-19 (together, "COVID-19");

2.2 the President, as head of the National Executive, along with the Cabinet of the Republic of South Africa, has failed to fulfil the obligation under section 85(2) of the Constitution to prepare and initiate legislation that regulates the state's response to the threat posed and the harm caused by COVID-19;

2.3 Parliament and Cabinet have failed to fulfil their obligations under section 7(2) of the Constitution, to respect, protect, promote and fulfil the rights in the Bill of Rights, insofar as their legislative and Executive responses to COVID-19 is concerned;

3. directing that:

3.1 Cabinet must without delay, exercise its power under section 85(2)(d) of the Constitution, for sake of preparing and initiating national legislation that has as it's purpose the regulation of the state's response to the threat posed and harm caused by COVlD-19;

3.2 Parliament must, without delay, exercise its powers under sections 55(l) and 68 of the Constitution, for the sake of passing legislation that has as it's purpose the regulation of the state's response to the threat posed and harm caused by COVID-19;

4. declaring that the powers pf the Minister of Co-operative Governance and Traditional Affairs under the Disaster Management Act, 2002, exercised pursuant to GN 313, 15 March 2020, will terminate simultaneously with the passage of the legislation referred to in paragraph 3."

The facts and the constitutional and legal framework

[7] The facts that have triggered these proceedings are not substantially in dispute nor are the constitutional and legal frameworks that find application in the dispute. Where the parties part ways as it were, is the interpretation they place on those frameworks and arising out of that, whether it can be said that the interpretation the Applicants contend for, lays a sustainable basis for both the declaratory and mandatory relief that it seeks.

[8] The inevitable arrival of the COVID-19 virus in South Africa in the early part of March 2020 had as its consequence soon thereafter the declaration of a national state of disaster by the Minister of Co-operative Governance and Traditional Affairs, the Fifth Respondent ('the Minister'). This declaration was made by the Minister in terms of the powers granted to her in terms Section 27(1) of the Disaster Management Act No 57 of 2002 ('the DMA')

[9] The section provides:-

"In the event of a national disaster, the Minister may, by notice in the Gazette, declare a national state of disaster if-

(a) existing legislation and contingency arrangements do not adequately provide for the National Executive to deal effectively with the disaster: or

(b) other special circumstances warrant the declaration of a national state of disaster."

[10] Section 27(2) of the DMA, also provides that, after a national state of disaster is declared, the Minister may, after consulting the responsible cabinet members, make regulations or issue directions or authorise the issuing of directions. It reads:

"If a national state of disaster has been declared in terms of subsection (f), the Minister may, subject to subsection (3), and after consulting the responsible Cabinet member make regulations or issue directions or authorise the issue of directions concerning-

(a) the release of any available resources of the national government, including stores, equipment, vehicles and facilities;
(b) the release of personnel of a national organ of state for the rendering of emergency services;
(c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;
(d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;
(e) the regulation of traffic to from or within the disaster-stricken or threatened area;
(f) the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;
(g) the control and occupancy of premises in the disaster-stricken or threatened area;
(h) the provision, control or use of temporary emergency-accommodation;

(i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster stricken or threatened area;

(j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;

(k) the dissemination of information required for dealing with the disaster;

(l) emergency procurement procedures

(m) facilitation of response and post-disaster recovery and rehabilitation;

(n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and or minimise the effects of the disaster; or

(o) steps to facilitate international assistance."

[11] It is clear that the power to make regulations and issue directions is wide ranging and extensive in dealing with the effects of a disaster but at the same time, also has the potential to have far reaching impact on the lives of ordinary South Africans. Since the declaration of the national state of disaster, there has been much regulation making over the past few months covering a wide range of issues.

[12] The wide powers granted to the Minister in terms of section 27(2) of the DMA are limited in the manner and purpose of their exercise by Section 27(3) of the DMA which provides as follows:-

"(*3) The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of-*

(a) assisting and protecting the public;

(b) providing relief to the public;

(c) protecting property;

(d) preventing or combating disruption; or

(e) dealing with the destructive and other effects of the disaster."

[13] The Applicant does not take issue with the provisions of the DMA; it does not challenge the extensive regulation making power of the Minister; it does not challenge the delegation of power by Parliament to the Minister and it does not challenge the content of any of the regulations made under the DMA. Indeed, the applicant accepts that the use of the DMA by government as a response to the COVID-19 pandemic was lawful and appropriate and that its use to date has been constitutionally compliant.

[14] What the applicant is aggrieved about however, is the continued reliance on the DMA by government as the vehicle and the legal authority for its response to COVID-19. It says the DMA was intended to operate for a short time only until Parliament and Cabinet were able to reclaim their primary executive and legislative roles. That short time the applicant contends has come and gone and that the Executive and Parliament has failed to reclaim their roles which they are constitutionally obliged to discharge, therefore justifying the bringing of these proceedings. The applicant characterises its grievance in the following terms in the founding affidavit:-

> *"…….. even more important for purposes of this application is that the Minister's exercise of legislative and Executive powers under the Disaster Act, in creating the initial Lockdown and the Risk Regulations, departs substantially from basic principles, processes and structural provisions of the Constitution. As already noted this departure from these principles, processes and structures — without any indication of when those principles, processes and structures will be restored — that is the focus of this application."*

[15] In opposing the relief the Respondents firstly dispute that the Applicant has made out a case for urgency or that it has the necessary standing to bring the application. On the merits they point out that while they have the power to initiate and pass legislation, there is no duty on them to do so in every situation and not in any event in response to COVID-19. Beyond that, they argue that the DMA is the response of the Executive and Parliament to disasters including COVID-19 and there is no need for additional or COVID-19 specific legislation. They also dispute that the DMA was only intended to be used as a short-term

stop-gap measure but rather that it represents a comprehensive legislative response in dealing with all disasters. To this end, the Respondents rely on the principle of subsidiarity in arguing that in truth and reality the source of the Applicant's discontent is the powers the DMA gives to the Executive and therefore the appropriate remedy is to challenge the DMA rather than to seek the declaratory and mandatory relief they seek in these proceedings.

Preliminary Issues

[16] Beyond opposing the relief sought on the merits, the Respondents also oppose the relief by placing in dispute the standing of the Applicant to bring these proceedings, the case advanced in support of the urgency of the application, as well as the objection that the relief sought is not competent in law on account of the operation of the principle of subsidiarity. We deal with those matters:-

Standing

[17] In its founding affidavit, and as already pointed above, the applicant describes itself as "a non-governmental organisation that exists to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights" which is concerned with the principles of democracy, rule of law and separation of powers. Using this as a basis, it submits that it must be evident to all that it has the *locus standi* to bring this application in its own interest or in the public interest in terms of Section 38 of the *Constitution*.

[18] Section 38 provides as follows: -

> *"38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—*
>
> *(a) anyone acting in their own interest;*
>
> *(b) anyone acting on behalf of another person who cannot act in their own name;*

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members."

[19] The Respondents dispute the submission that the applicant has made out a basis for its legal standing to bring this application. According to the Respondents, the Applicant has failed to identify any infringement, threat or violation of a constitutional right and that as such, the applicant fails to qualify as a person who may approach a Court on the basis of Section 38.

[20] The Respondents submit that the applicant's failure to qualify emanates from its own founding affidavit where it states that the rights have been affected by the regulations promulgated by the Minister and not by the conduct of Parliament.

[21] The Respondents submit further that the sections which applicants submit have been violated, namely Sections 42 (3), 44 (1), 55 (1) and 68 or 85 (2) of the Constitution are not rights and that reliance on Section 38 is a misdirection on the part of the applicant.

[22] Having considered the issue of standing, we are of the view that whilst accepting the permissive nature of the sections relied upon by the applicant, it is common cause that this application does concern issues that are profound and of significant importance in the context of the constitutional project such as the duties of Parliament and the Executive and the principles of accountability, transparency and participatory democracy. We have also considered that whilst a particular section may be permissive in nature, the context of a particular case may in itself trigger a duty which may compel Parliament to act in terms of a section which may be otherwise permissive in nature. See *Rail Commuters Action Group v Transnet t/a Metrorail*[1] ('Metrorail").

[1] 2005 (2) SA 359 CC

[23] In this context, therefore, we accept that applicant qualifies to bring the application on the basis of Section 38 (d) of the *Constitution*.

Urgency

[24] A further preliminary issue to be dealt with is the issue of urgency. According to the applicant, the urgency arises out of the continuing failure with regards to the separation of powers which results in decisions which are susceptible to legal challenge due to the failure by the constitutionally appointed agents to properly discharge their duties.

[25] In support of its submission the applicant makes reference to the decision in *Freedom Front Plus v President of the Republic of South Africa and Others*[2] ("Freedom Front Plus") where the Court said

> *"…the Court would be willing to regard a matter as urgent where a delay in securing a definitive ruling would prejudice the public interest or the ends of justice and good government."*

[26] This application was initially launched before the Constitutional Court on an urgent basis on the 20th of May 2020 and the Constitutional Court delivered its order dismissing it on the 3rd of July 2020 on the basis that its exclusive jurisdiction was not triggered.

[27] The Respondents have strenuously opposed the notion that this matter is urgent and the first Respondent suggests that the urgency is self-created.

[28] The Respondents submit that the three week delay after the Constitutional Court's dismissal of the initial application does not support the allegation by the Applicant that it acted as "prudently and as expeditiously as possible."

[29] In considering the submissions of both parties regarding urgency, we could not lose sight of the background to this application which finds its genesis from a declaration of a disaster which is defined in the DMA as "a progressive or sudden, widespread or localised, natural or human caused occurrence" which

[2] 2002 ZAGPPHC 266 (6 July 2020) at par 25

causes or threatens to cause death, injury or disease. The stark reality of the consequences of Covid-19 needs no emphasis. Equally, in our view, that reality does not suggest a situation where relevant issues can be dealt with in the ordinary course. This would mean, unless proved otherwise, an intrinsic sense of urgency in dealing with Covid-19 matters.

[30] The Applicant submits that apart from the pressure of a relatively short notice brought upon the Respondents, there has been no suggestion of prejudice by the Respondents. The Applicant submits that the respondents had had sight of the papers in the Constitutional Court effectively since 20 May 2020 and that the notice was not as short as the respondents suggest. We accept those submissions.

[31] Whilst it is true that this case intersects the interpretation of the Constitution as well as various constitutional principles and jurisprudence by both the Constitutional and High Courts, we do not find that the application amounts to an abuse of Rule 6 (12) of the *Uniform Rules of Court* especially having regard to the background thereof.

[32] Given the above considerations and more particularly the public interest referred to in Freedom Front Plus *(supra)* we have come to the conclusion that the application qualifies to be treated as urgent.

The principle of subsidiarity

[33] The issue of subsidiary was discussed briefly in the matter of *Mazibuko and Others v City of Johannesburg and Others*[3] where the Court stated as follows:

> *"Having abandoned the challenge, the question arises whether the applicants are nevertheless entitled to challenge the City's Free Basic Water policy that is self-evidently based on the minimum water standards set by the Minister. The answer to this raises the difficult question of the principle of constitutional subsidiarity. This Court has repeatedly held*

[3] 2010 (3) BCLR 239 (CC) para 73

that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution."

[34] The respondents submit that in the event this Court finds that Parliament has a duty to pass Covid-19 specific legislation in terms of Section 27 (2) of the *Constitution* the Court should also find that Parliament has already complied with that duty in relation to medical and health disasters such as Covid-19 through the DMA. Such a finding, they submit, would justify the application of the subsidiarity principle.

[35] The principle of subsidiarity was also discussed in the matter of *My Vote Counts NPC v Speaker of the National Assembly and Others.*[4]

[36] In *My Vote Counts* the applicant sought to rely on Section 32 (1) of the *Constitution* which provides for access to information held by the State or any other person. Section 32 (2) obliges the Legislature to enact legislation to give effect to this right.

[37] In that case, the issue was whether Parliament had neglected a duty imposed by the *Constitution* by failing to pass legislation that gives effect to the right of access to information regarding private funding of political parties.

[38] In the *My Vote Counts* the Court captures the essence of the subsidiarity debate in para [44] and [45] when it says:

"[44] The applicant claims that PAIA does not confer the right of access to information about political parties' private funding to which the Constitution entitles voters. Since the Constitution obliges Parliament to create that right of access, the applicant argues, this Court has the power to, and should, order Parliament to do so. Parliament's response is that this approach is wrong-directional. The

[4] [2015] ZACC 31 (30 September 2015) 161

correct starting point is not the Constitution, but PAIA, since Parliament enacted it expressly to give effect to the constitutional obligation in section 32(2). The result, Parliament contends, is that the applicant must first seek the right of access it asserts in PAIA.

[45] Parliament argues that PAIA in fact confers that right – in which case, there is no breach of its constitutional obligation. But, if PAIA doesn't, Parliament says the applicant's remedy is to challenge the constitutionality of PAIA in the High Court. It may not circumvent PAIA by relying directly on the constitutional provision the legislation seeks to embody. So the applicant must start again in the High Court. Parliament says the applicant finds itself in a logical trap: whether it is right or wrong about PAIA, the application must be dismissed."

[39] Parliament was successful in *My Vote Counts* in that the application was indeed dismissed.

[40] The situation in the present case is distinguishable from the *My Vote Counts* case. The submissions made by the respondents are similar to those by Parliament in the *My Vote Counts*. The distinction arises out of the fact that the genesis of PAIA is Section 32 (2) which is a peremptory section of the Constitution. On the other hand, the DMA was not the product of a peremptory section of the *Constitution*. The result is that the subsidiarity principle is not triggered and the Respondents cannot successfully raise it to bar the Applicant from proceeding with this application.

[41] The second reason is that applicant is not basing its case on an attack on the constitutional validity of the DMA. The applicant cannot be compelled by the Respondents to do so and the case has to proceed on the path chosen by the applicant, namely, by relying on the sections of the Constitution referred to above.

[42] Had the principle of subsidiarity applied, the Applicant would have been compelled to bring its attack within the ambit of the DMA or to challenge its constitutionality. That situation does not arise in the present case.

The issues for determination

a) Are the Respondents under a constitutional and legal obligation to initiate and pass legislation and in particular is the power to do so permissive or peremptory and if such a duty exists;
b) Have the Respondents failed to discharge their duty to initiate and pass legislation to deal with COVID-19 and associated therewith is the DMA the constitutionally appropriate response both in the short term as well as the long term.

Is the power to initiate and pass legislation permissive or peremptory?

a) The constitutional and the legal argument

[43] The parties accept that the principal locus of law-making is Parliament and that the Parliamentary law making process advances the principles of openness, accountability, transparency and public participation. Indeed the centrality of the participatory nature of our democratic order was affirmed by the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly and Others*[5]

> *"[115] In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the*

[5] 2006 (6) SA 416 (CC)

civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character, it acts as a counterweight to secret lobbying and influence-peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist."

[44] In this scheme of arrangement Parliament is, in the words of the Constitutional Court in *Matatiele Municipality and Others v President of the RSA and Others.*[6] *"the engine-house of our democracy"*

[45] Section 42(3) of the Constitution describes in broad terms the role of Parliament.

"The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing Executive action."

[46] Sections 43 and 44 of the Constitution in turn create and delimit the powers and duties of Parliament:

"Section 43. In the Republic the legislative authority

(a) of the national sphere of government is vested in Parliament as set out in section 44;

(b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and

[6] 2006 (5) SA 47 (CC) PARA 109

(c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156.

Section 44 (1) in turn provides that:-

'The national legislative authority as vested in Parliament—

(a) confers on the National Assembly the power-

(i) to amend the Constitution;

(ii) to pass legislation with regard to any matter including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2),

Finally Section 55 (1) provides that

'In exercising it's legislative power the National Assembly may-

(a) consider, pass, amend or reject any legislation before the Assembly; and

(b) initiate or prepare legislation except money Bills."

[47] Section 85 of the Constitution provides that :-

"(1) The Executive authority of the Republic is vested in the President.

The President exercised the Executive authority, together with the other members of the Cabinet, by –

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) developing and implementing national policy;

(c) co-ordinating the functions of the state departments and administrations;

(d) preparing and initiating legislation; and

(e) performing any other Executive function provided for in the Constitution or in national legislation."

[48] That Parliament has both the authority and the power to consider and pass legislation is not in dispute. That the Executive has the power to prepare and initiate legislation is also not in dispute. Where the parties diverge is whether the language of Section 55 and Section 85 in particular the use of the word **'may'** in Section 55 is permissive or peremptory, and whether in the context of this application it could be said that the constitutional scheme and the reality of the COVID-19 pandemic creates a duty on the part of the Executive and Parliament to respectively initiate and pass COVID-19 specific legislation.

[49] The Respondents rely on the wording of these sections which they say is permissive and not mandatory, and that interpreting these general provisions as permissive preserves Parliament's autonomy to pursue their law-making responsibilities without undue interference by courts. However, the language of Section 55 cannot be dispositive of the enquiry into whether the power to pass legislation is permissive or may be regarded as mandatory in certain circumstances, notwithstanding the permissive language used in the section.

[50] This was explained by the Appellate Division in *Schwartz v Schwartz*[7] in the following terms:

"A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying it's exercise have been satisfied. Whether an enactment should be so construed depends on inter alia the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised."

[51] Accordingly whether Section 55 is permissive or mandatory is not a question that can be determined *in vacuo* but rather one that must be determined in

[7] 1984 (4) SA 645 (AD) at 650

context considering the range of considerations the court referred to in Schwartz (supra).

[52] The Applicant however also relies on Section 7(2) of the Bill of Rights as the trigger for the obligation on the part of the Respondents to initiate and pass COVID -19 specific legislation. The First Respondent accepts that, in the context of interpreting section 7(2) in relation to a particular right/s in the Bill of Rights, that Parliament's permissive powers to enact legislation may be elevated to a duty to pass legislation. It says however, even in that instance, the duty does not emanate from the general provisions setting out Parliament's power to legislate but from the specific right/s that demand it.

[53] Section 7(2) of the Bill of Rights provides in general terms that the state must protect, respect, promote and fulfil the rights in the Bill of Rights and it has been accepted that the effect of the section is not only the creation of what is described as negative obligations not to infringe or unjustifiably limit the rights but also positive obligations.

[54] *In Rail Commuters Action Group v Transnet t/a Metrorail*[8] the Court described these positive obligations in the following terms :-

> *"[69] The rights contained in the Bill of Rights ordinarily impose, in the first instance, an obligation that requires those bound not to act in a manner which would infringe or restrict the right. So, for example, the right to freedom of expression requires those bound by it not to act in a manner which would impair freedom of expression. The obligation is in a sense a negative one, as it requires that nothing be done to infringe the rights. However, in some circumstances, the correlative obligations imposed by the rights in the Bill of Rights will require positive steps to be taken to fulfil the rights. In the case of most of the socio-economic rights in the Bill of Rights,[69] the ambit of the positive obligation that flows from the right is explicitly determined in the Bill of Rights.[70] The precise ambit of the positive obligation thus imposed has been*

[8] 2005 (2) SA 359 (CC)

discussed by the Court in several cases concerned with socio-economic rights.[71]

[70] It is clear that rights other than the social and economic rights in the Constitution do at times impose positive obligations. In S v Baloyi (Minister of Justice and Another Intervening), [72] the Court was considering a declaration of invalidity made by the High Court in respect of certain provisions of the Prevention of Family Violence Act, 133 of 1993. In considering the constitutionality of those provisions, the Court held that section 12(1)(c) read with section 7(2) –

"has to be understood as obliging the State directly to protect the right of everyone to be free from private or domestic violence."[73]

The Court emphasised the importance of this obligation in the light of our Constitution's commitment to gender equality and the rights of children and the need to take steps to ensure that women and children were provided with effective forms of relief against family violence. Thus the Court reasoned that the Prevention of Family Violence Act had to be understood in the context of the state fulfilling the positive obligations imposed upon it by the provisions of the Bill of Rights."

[55] In conclusion on this aspect both Sections 55 and 7(2) may in context and in appropriate circumstances trigger a positive obligation on the part of the Parliament and the Executive to initiate and pass legislation. Whether such a duty exists is a fact specific enquiry and will depend on a consideration of the facts and circumstances in each case.

Do the facts and context create a legal duty to legislate?

[56] This argument largely rests on two separate but related pillars. They are:-

a) That the onset and the spread of the COVID-19 pandemic has as its consequence the limitation and or the threat to a number of fundamental rights and that Parliament and the Executive have failed to discharge their

duties in terms of Section 7(2) of the Bill of Rights by not initiating and passing legislation to protect those rights and secondly;

b) That the DMA was intended to be short term measure to deal with COVID-19 and that Parliament and the Executive have failed to initiate and pass legislation to deal with COVID-19 on a longer term basis as Section 55 and 85 of the Constitution obliges them to do.

The Section 7(2) argument

[57] We proceed from the premise that a proper reading of Section 7(2) may well trigger an obligation to take positive measures to protect, promote respect and fulfil the rights in the Bill of Rights and that such measures may include legislation.

[58] In *Metrorail* the Court held that the Respondents bore a positive obligation, under the relevant legislation and the Constitution, to ensure that reasonable measures are in place to provide for the security of rail commuters and in determining what would be reasonable the Court said regard would have to be had to a number of factors.

> *"Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty -bearer - the closer they are the greater the obligation on the duty -bearer and the extent of and threat to fundamental rights should the duty not be met as well as the intensity of an harm that may result The more grave is the threat to fundamental rights the greater is the responsibility on the duty- bearer."*

[59] The Court in this case was dealing with the safety and security of rail commuters when travelling on trains under circumstances where the facts demonstrated that crime on trains was a serious problem impacting on the fundamental rights of commuters. It concluded that both Metrorail and the Commuter Corporation had a positive duty and an obligation to take measures to secure the safety of commuters.

[60] In *Glenister v The President of the Republic of South Africa and Others*[9] the court was called upon to determine the question whether the national legislation that created the Directorate for Priority Crime Investigation, known as the Hawks (DPCI), and disbanded the Directorate of Special Operations, known as the Scorpions (DSO), was constitutionally valid.

[61] The Court took the view that the Constitution imposed an obligation on the state to establish and maintain an independent body to combat corruption and organised crime. Even though it recognised that Constitution did not in express terms command that a corruption-fighting unit should be established, its scheme taken as a whole imposed a pressing duty on the state to set up a concrete, effective and independent mechanism to prevent and root out corruption.

[62] In *Women's Legal Centre Trust v The President of the Republic of South Africa and Others*[10] the Court in dealing with the existence of Muslim marriages concluded that the State had an obligation arising from Section 7(2) of the Bill of Rights to take steps in the form of initiating and passing legislation for the recognition of Muslim marriages.

[63] In the above matters the violation of the constitutional right that triggered the State duty was clear and substantial – in *Metrorail* the safety of commuters and their right to physical and bodily integrity and in *Women's Legal Centre* the right to equality and human dignity was implicated. The Court however also pointed out that Section 7(2) did not define the measures the State was required to take and concluded however that those measures should be reasonable and effective.

[64] The Applicant says that the exercise of ministerial power coupled with the issue of the various regulations from time to time continues to impact 'and will for an indefinite period continue to impact in serious and very often irremediable ways on almost every right in the Constitution'.

[9] 2011 (3) SA 347 (CC)

[10] 2018 (6) SA p598

[65] In this regard it says that the right to equality; to freedom of movement, the right to privacy, the right to political activity, the right to assemble and various other rights are limited by the State response to COVID-19 and that in itself should trigger the State obligation foreshadowed in Section 7(2) of the Bill of Rights.

[66] On the other hand it is evident that the nature of the COVID-19 pandemic and the science and research that has emerged around it from time to time has made it necessary for the State to also take measures to protect the rights in the Bill of Rights and in particular the right to health care and the right to bodily and psychological integrity. Many of those measures relate to limiting movement, contact, social, economic and other activity largely in an attempt to limit the spread of the virus.

[67] On this basis the threat posed by the pandemic would in our view have triggered the State duty in Section 7(2) to take measures in the main to protect the rights of all impacted on by the virus. It would have been unimaginable for the State to have done nothing in the face of a pandemic that medical science tells us spreads with often fatal consequences by close human contact.

[68] Ultimately the limitation of rights that has occurred has been as a consequence of the measures the State took in response to the pandemic. The State response is grounded in the DMA and in particular the powers given to the Minister in terms of the DMA. The various regulations issued which on the one hand impact on various rights, but which also have as their broad objective the protection of various rights (including the right to health care and physical integrity) is in broad terms the response of the State to the pandemic. The Applicant does not take issue with the constitutionality of that response including the exercise by the Minister of the powers in terms of the DMA as well as the content of the various regulations made under the DMA in the past few months.

[69] It is also important to point out that the regulation making power in the DMA is subject to the scrutiny and compliance with the Constitution and that the State does not enjoy carte balance to regulate as it pleases. Where the effect of the regulatory regime is to effect a limitation on rights, such a limitation must meet the test set out in the Constitution failing which the Courts may strike down the

limitation as unconstitutional. Again, it is not the case for the Applicant that the limitation of rights that has occurred is in conflict with the Constitution.

[70] In addition to the limitation test, Section 27(3) of the DMA provides that the powers of the Minister may only be exercised to the extent that it is necessary to assist the public, provide relief to it, protect property and the like. Section 27(3) therefore provides a further limitation and layer of scrutiny and compliance to the exercise of the regulatory powers of the Minister.

[71] Therefore on the Section 7(2) argument our view is that the threat caused by the pandemic to the well - being and life of the people of South Africa would have required a state response that is grounded in Section 7(2) and that what was required were measures that were reasonable and effective. Those measures are to be found in the provisions of the DMA as well as the regulations issued to date and the Applicants do not direct any criticism against either the reasonableness of those measures or their efficacy to date.

[72] The consequence of that response and in particular the limitation of rights that arises from it is the Applicant's concern. The answer to that is that any limitation is not per se objectionable but that it must meet the limitation criteria in the Constitution. If it does then the limitation is constitutionally compliant; if it does not it stands to be struck down. What the Applicant impermissibly seeks is legislation to deal with the consequences of the limitation of rights without challenging the limitation itself.

[73] In conclusion and given that Section 7(2) does not define the specificity of the measures to be taken, the measures taken by the State fulfil the constitutional obligations that Section 7(2) would have triggered are in line with the constitutional duty that Section 7(2) creates to protect, fulfil, respect and promote human rights. The argument that Section 7(2) creates an additional duty as it were for the State to legislate in response to the limitations on rights created as a result of the response to COVID-19 is not sustainable for the reasons already given.

[74] We accept that while regulation-making is an important aspect of the regulatory state, it cannot supplant the primary law-making function of Parliament. However, when Parliament properly delegates regulation making power, as in

this case, the exercise of that regulatory power fits into the broad constitutional scheme. In any event the delegation of regulatory power has also not been challenged in these proceedings.

[75] The values of transparency, accountability and openness which generally are associated with Parliamentary law-making are no doubt important and so too is the observation that legislation that is subject to the participatory process of Parliament is likely to produce better outcomes. All of this however, is only activated when there is a need for measures or for legislation – if no need for measures or legislation exists, those values cannot have the effect of compelling Parliament to embark on a law making process simply to advance those values.

[76] There must be an understanding of the difference between process and outcome and once an outcome has been identified, the values of openness, transparency and participation are harnessed to achieve and make legitimate that outcome. In these proceedings the Applicant has failed to identify the outcome that is to be achieved in the legislation it says Parliament must be compelled to pass. In our view that lacuna in the Applicant's case renders the triggering of the obligation it contends for even more unsustainable.

The DMA was not intended to be and cannot be a long term response to COVID-19

The approach to interpretation

[77] "*The general approach to interpreting legislation requires that consideration must be given to the language used, in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. The process is objective, not subjective."*[11]

[78] Moreover, arising from the supremacy of the Constitution, it is trite that courts must read the provisions of the legislation, so far as is possible, in conformity with the Constitution. As the Constitutional Court has held: *"(t]he Constitution*

[11] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values."[12]

[79] On the other hand the language used by the legislature must be respected. In *S v Zuma and Others*[13] Kentridge AJ held that:

> *"We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination. If I may again quote S v Moagi (supra) at 184, I would say that a constitution "embodying fundamental rights should as far as its language permits be given a broad construction."*

[80] In *Kubyana v Standard Bank of South Africa Ltd*[14] the Constitutional Court held that:

> *"It is well established that statutes must be interpreted with due regard to their purpose and within their context.... Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However that does not mean that ordinary meaning and clear language may be discarded for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament."*

The interpretation analysis

[81] The Applicant says that on a proper interpretation, the DMA confers only short-term powers on the Minister, and is intended only as a stop-gap measure and that it applies only for so long as the National Executive and/or Parliament cannot exercise their powers to create new, more specific legislation.

[82] In support of this they rely on the definition of "disaster" in the DMA to mean:-

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[12] Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 para 128

[13] 1995(2) SA 642 (CC)

[14] Kubyana v Standard Bank of Soth Africa Ltd 2014 (4) BCLR 400

"a progressive or sudden, widespread or localised, natural or human-caused occurrence which—

(a) causes or threatens to cause— (i) death, injury or disease; (ii) damage to property, infrastructure or the environment; or (iii) significant disruption of the life of a community; and

(b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources".

[83] The Applicant accepts that the initial appearance of COVID-19 may have been a disaster as contemplated by section 1 of the DMA that would have provided a lawful basis for the Minister's exercise of her powers under the DMA. Beyond that however, they say that is does not justify the indefinite exercise by the Minister of these powers, for so long as COVID-19 remains a threat.

[84] Finally they contend that the DMA only ever temporarily affords to the Minister these powers. Once Parliament and the National Executive take back the legislative and Executive reins —as they are constitutionally obliged to do — the Minister's powers are decommissioned.

[85] The Respondents obviously take a different view and say that there is nothing in the wording of the DMA that lends it to the interpretation that the Applicant seeks to advance and that on the contrary, the DMA read as a whole and in context does not apply as a temporary, stop gap measure pending the passage of further legislation.

[86] It may therefore be necessary to examine the DMA in order to assess whether the interpretation that the Applicant contends for is sustainable.

Some key provisions of the DMA

The definition of disaster and its management

[87] Reference has already been made to the definition of disaster which includes both, an occurrence that is sudden or a progressive occurrence and of either a localised or widespread nature.

[88] 'disaster management' means a continuous and integrated multi-sectoral, multi-disciplinary process of planning and implementation of measures aimed at-

(a) preventing or reducing the risk of disasters;

(b) mitigating the severity or consequences of disasters;

(c) emergency preparedness;

(d) a rapid and effective response to disasters; and

(e) post-disaster recovery and rehabilitation;

[89] 'post-disaster recovery and rehabilitation' means efforts, including development, aimed at creating a situation where-

(a) normality in conditions caused by a disaster is restored by the restoration, and improvement, where appropriate, of facilities, livelihoods and living conditions of disaster-affected communities, including efforts to reduce disaster risk factors;

(b) the effects of a disaster are mitigated; or

(c) circumstances are created that will reduce the risk of a similar disaster occurring*;*

[90] These provisions, far from defining a disaster as an occurrence of exclusively limited duration, make reference to it being progressive, to the need for continuous and integrated measures of response, to the process even beyond the duration of the disaster extending to the post disaster recovery and rehabilitation period.

[91] All of this are the clearest indicators that the DMA was intended to cover disasters of a progressive nature (which must read extended in duration), that it required continuous responses and measures (far removed from a once off intervention) and that it also extended to cover the post disaster period. All of this militate against an interpretation that the DMA was intended as a short term measure and that the powers it bestows on the Minister were intended to be of limited duration only.

The exceptions to the use of the DMA – the carve out provisions

[92] The Applicant places considerable reliance on Section 2(1)(b) of the DMA in support of its stance that the DMA was intended for short terms use only. The section reads as follows:-

> *"(1) This Act does not apply to an occurrence falling within the definition of 'disaster in section 1-*
>
> *(a) if, and from the date on which, a state of emergency is declared to deal with that occurrence in terms of the State of Emergency Act, 1997 (Act 64 of 1997); or*
>
> *(b) to the extent that that occurrence can be dealt with effectively in terms of other national legislation- (i) aimed at reducing the risk, and addressing the consequences, of occurrences of that nature; and (ii) identified by the Minister by notice in the Gazette."*

[93] It says that the reference to other national legislation which is referred to in Section 2(1)(b) is a clear indication that the DMA was alive to the need for additional legislation and this in turn is the trigger for creating a duty on the part of the Executive and the Legislature to initiate and pass COVID-19 specific legislation.

[94] The interpretation the Applicant places on the section is constrained and militates against the ordinary language used. What the section simply does is to exclude from the application of the DMA two sets of situations. Firstly even if an occurrence falls within the definition of a disaster the application of the DMA would be excluded if a state of emergency was declared to deal with the occurrence and secondly and in response to the Applicant's interpretation, the DMA would not apply if the occurrence could be dealt with more effectively in terms of other national legislation.

[95] The Applicant says that "*other national legislation"* refers also to envisaged as opposed to existing legislation. With respect if the test in the section is whether the occurrence can be dealt with **more effectively** in terms of other national legislation, it is difficult to conceive how the test can be applied when there is no such other national legislation in place to make the comparative assessment as the efficiency test contemplates.

[96] In our view the reference to other national legislation must therefore be to existing as opposed to contemplated legislation. In any event if the operating principle is the efficacy of other legislation, then even if that were interpreted to cover future legislation (which in our view it does not) there must at the very least be some suggestion of how that future legislation is likely to be more effective than the existing DMA. There is nothing before us on the question of efficacy – on the contrary there is no serious suggestion that the DMA has not been an efficient response to the COVID-19 pandemic.

[97] Section 2(1)(b) therefore does not support the interpretation that the Minister's powers were intended to be short term thereby activating the obligation on the part of the Executive and Parliament to initiate and pass further legislation.

The disaster management structure

[98] The DMA provides for a detailed and sophisticated structure to deal with and manage disasters and this includes an Inter-Governmental Committee on Disaster Management, a National Disaster Management Advisory Forum, a National Disaster Management Framework (including the contents of what that framework should include) and a National Disaster Management Centre.

[99] In doing so it details the extensive issues the disaster management process including disaster management plans should traverse and these would include information gathering, monitoring and evaluation the nature and adequacy of the interventions made, and the like. The structural arrangements as well as the content of the disaster management process do not suggest they are short term, stop-gap measures but rather that they would serve as a basis for intervention in disasters irrespective of their duration.

[100] Accordingly it is illogical and contrary to the provisions of the DMA to on the one hand accept the longevity of its structural and management interventions while on the other hand argue that the power of the Minister and in particular the regulatory power the DMA bestows must be short term in nature.

[101] Therefore and on this score the institutional and structural arrangements do not, for the reasons we have advanced, support the argument that the use of the DMA was intended to be limited and short term in nature.

The duration of a declaration of disaster in terms of the DMA

[102] Section 27(5) of the DMA provides as follows:-

> ***"****(5) A national state of disaster that has been declared in terms of subsection (1)-*
>
> *(a) lapses three months after it has been declared;*
>
> *(b) may be terminated by the Minister by notice in the Gazette before it lapses in terms of paragraph (a); and*
>
> *(c) may be extended by the Minister by notice in the Gazette for one month at a time before it lapses in terms of paragraph (a) or the existing extension is due to expire."*

[103] If regard is had to the clear provisions of the section then what is contemplated in Section 27(5)(c) is the monthly extension of the national state of disaster without any ceiling on the number of times it may be so extended. This is further indication that the DMA was not intended to nor can it be open to be interpreted as being a short term stop gap measure.

[104] If Parliament intended to limit the duration of the power of the Minister, it was open to it to legislate to that effect accordingly and in particular build in a limitation to the number of extensions the Minister could effect in terms of Section 27(5)(c). On the other hand the Applicant does not suggest that the section is unconstitutional or offensive in any other way and therefore on any interpretation of the section, it does not support the submission that the powers of the Minister are short term.

[105] In conclusion the DMA is not open to the interpretation the Applicant contends for and it cannot be said that the DMA creates the obligation on the part of the Executive and Parliament to initiate and pass new legislation to deal with COVID-19.

[106] The challenge based on this leg of the argument must also therefore fail.

[107] It is for these reasons that the application falls to be dismissed.

Costs

[108] The respondents have submitted that in the event that they are successful, they should be awarded costs. The second, third and the Minister, whilst conceding that the application raises constitutional issues, no infringement of constitutional rights was alleged by the applicant. These respondents submit that the application was therefore essentially misguided as to the overall applicability of the Disaster Management Act. The first respondent simply adopted the position that no constitutional issues were raised in this litigation and that for that reason costs should follow the result in the event of the dismissal of the application

[109] For this reason the respondents argue that the need for different and separate legislation to deal with the COVID19 pandemic was obviously fallacious, hence the need to mulct the applicant in costs. The view of these respondents is that the application was clearly frivolous and inappropriate and that the relief sought was also incompetent.

[110] The general principle when it comes to costs is that this is a matter within the discretion of the court which must be exercised judicially, having regard to all the relevant facts and circumstances of each case.[15] When deciding whether an order for costs should be made, the court generally has to determine whether it would be just and equitable to make a particular order of costs.

[111] A number of factors are relevant and must be taken into account when a Court considers the question of costs. These include amongst others the conduct of the parties; the conduct of the legal representatives; the nature of the litigation; the nature and complexities of the issues; whether the litigation is considered vexatious or frivolous; whether a party has had only technical success; and the manner in which the cost order could hinder or advance constitutional justice.[16]

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[15] See *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69 where Innes CJ held that:

"the rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission." See also *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) and *Motaung v Mukubela & Another NNO; Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 631A.

[16] See *Chonco v President of the RSA* 2010 4 SA 82 (CC) at para 6; *Biowatch Trust v Registrar, Genetic Resources* 2009 6 SA 232 (CC) at paras 7-9; *Ferreira v Levin NO; Vryenhoek v Powell N* 1996 1 SA 984 (CC) para 3; *De Beer*

The last factor is especially important given that in non-constitutional litigation between a private party and the State, the general rule is that the unsuccessful party should pay costs.[17]

[112] It is correct as asserted by the respondents that, where a private party in constitutional litigation seeks to vindicate a constitutionally discernible right and is unsuccessful, the so- called *Biowatch* principle comes into play. According to the Constitutional Court per Sachs J in *Biowatch Trust v Registrar, Genetic Resources and Others,* the rationale underlying the *Biowatch* principle is three-fold –

I. It diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially devastating consequences.

II. Constitutional litigation, regardless of the outcome, might bear not only on the interests of the particular litigants involved but also on the rights of all those in similar situations and contributes greatly to the general body of constitutional jurisprudence. Therefore, each constitutional case ought to be proceeded with without the fear of potential financial ruin as a result of adverse costs orders.

III. It is the State that bears primary responsibility for ensuring that both the law and State conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure.[18]

Game Lodge CC v Waterbok Bosveld Plaas CC 2010 5 BCLR 451 (CC) at paras 8-13 and *Camps Bay Ratepayers and Residents Association v Harrison* 2012 11 BCLR 1143 (CC) at para 2.

[17] See *Limpopo Legal Solutions v Vhembe District Municipality* 2017 9 BCLR 1216 (CC) at para 19.

[18] *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) at para 23. See also *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing and Another* 2015 (4) BCLR 396 (CC); *Limpopo Legal Solutions v Vhembe District Municipality* 2017 9 BCLR 1216 (CC); and *Ferguson v Rhodes University* 2018 1 BCLR 1 (CC).

[113] As such, in accordance with *Biowatch*, as a general rule, in constitutional litigation, a Court should be slow to grant costs against an applicant who acts *bona fide* to assert and preserve constitutional rights or to uphold the rule of law in any given context. Therefore, an unsuccessful litigant in proceedings against the State whose objective is to vindicate a constitutionally discernible right, should not be saddled with an adverse costs order. Where litigation arises between the State and a party seeking to assert a constitutional right, ordinarily, if the State is unsuccessful, it should pay the costs of the other side and if the State succeeds, each party should pay its own costs. In *Harrielall v University of KwaZulu-Natal*,[19] the Constitutional Court per Jafta J explained the principles underlying the *Biowatch* rule as follows:

> *"In Biowatch this Court laid down a general rule relating to costs in constitutional matters. That rule applies in every constitutional matter involving organs of State. The rule seeks to shield unsuccessful litigants from the obligation of paying costs to the State. The underlying principle is to prevent the chilling effect that adverse costs orders might have on litigants seeking to assert constitutional rights."*

[114] However, as pointed out in *Harrielall v University of Kwa Zulu-Natal*[20] *the* Biowatch rule is not a licence for litigants to institute frivolous or vexatious proceedings against the State. The operation of its shield is restricted to genuine constitutional matters. Even then, if a litigant is guilty of unacceptable behaviour in relation to how the litigation is conducted, it may be ordered to pay costs. There are therefore exceptions to the rule which justify a departure from it. In *Affordable Medicines* this Court laid down exceptions to the rule. Ngcobo J said:

> *"There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court*

[19] 2018 (1) BCLR 12 (CC).
[20] 2018 (1) BCLR 12 (CC) at paragraph 12

which may influence the Court to order an unsuccessful litigant to pay costs."[21]

[115] Having regard to the above, we find that in bringing the application, the applicant, as a non-profit public interest organization, sought to assert a constitutionally discernible right in the public interest, in terms of section 38(d) of the Constitution. It cannot be suggested that an application that is rooted in a matter that has impacted the whole nation and how Parliament and the Executive should have dealt with it, does not raise constitutional issues.

[116] The matter called for consideration of the question whether there is a duty on Parliament to pass COVID19 specific legislation as opposed to leaving things in the hands of the Executive to deal with the COVID19 disaster in terms of the DMA. Our view is that the matter raises important constitutional issues regarding the responsibilities of the legislature and the executive as well as the importance of Parliament's constitutional duty of when to legislate. Based on this, we are of the view that the matter falls squarely within the Biowatch ambit rule.

[117] Moreover, we are of the view that the applicant in launching the application was neither frivolous nor vexatious but was acting in a genuine but mistaken view of the law. This does not in our view lend itself to conduct that should be sanctioned through an adverse legal costs order. We find it appropriate that the applicant be afforded the protection provided by the *Biowatch* rule and be shielded from an adverse costs order.

Order

The following order is made: -

The Application is dismissed, each party is to pay its own costs.

[21] Id at para 11-2. In *Biowatch* Sachs J did however warn that applications that were frivolous or vexatious, or in any other way manifestly inappropriate, would get no shelter from an adverse costs orders. *Biowatch* therefore did not allow for risk-free constitutional litigation as the apex Court made it clear that the worthiness of an applicant's cause would not immunise it against an adverse costs order where such an order would be warranted.

D MLAMBO
JUDGE PRESIDENT OF THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I CONCUR.

N KOLLAPEN
JUDGE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I CONCUR.

S BAQWA
JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

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Instructed By	**:**	**The State Attorney**
Date of Hearing	**:**	**03 September 2020**
Date of Judgment	**:**	**07 October 2020**

Delivered: This judgment is handed down electronically by circulation to the Parties/their legal representatives by email. The date of handing down is deemed to be 07 October 2020.