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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	**1st Respondent**
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**2nd Respondent**
THE CABINET OF THE REPUBLIC OF SOUTH AFRICA	**3rd Respondent**
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	**4th Respondent**
THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**5th Respondent**

FILING SHEET

DOCUMENT: 2nd,3rd and 5th RESPONDENTS'HEADS OF ARGUMENT

ON ROLL : **03 SEPTEMBER 2020**

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 32858/20

In the matter between:-

HELEN SUZMAN FOUNDATION	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
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
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Fifth Respondent

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HEADS OF ARGUMENT

SECOND, THIRD AND FIFTH RESPONDENTS

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INTRODUCTION

1. The Court has been invited to answer two questions in this matter. The first is whether sections 42(3), 44(1), 55(1), 68, and 85(2)(d), read with section 7(2) of the Constitution impose an obligation on Parliament and the Executive to initiate and ultimately adopt legislation that deals specially with the state's response to the threat posed and the harm caused by the COVID-19 pandemic.[1] The second, which flows from the first, is whether Parliament and the Executive are in breach of that obligation.

2. We submit that both of these questions must be answered in the negative. There is nothing in the wording of sections 42(3), 44(1), 55(1), 68 and 85(2)(d) of the Constitution that imposes an obligation on either Parliament or the Executive to initiate, prepare and adopt legislation, whether generally or dealing specially with the state's response to the threat posed and the harm caused by the COVID-19 pandemic.

3. All the provisions on which the applicant ("HSF") relies to found an obligation on Parliament and the Executive to prepare, initiate and adopt legislation that regulates the state's response to the threat posed and the harm caused by COVID-19 are permissive and/or otherwise empowering.

    3.1. Section 42(3) posits the National Assembly as the representative of the people of South Africa. This, the National Assembly does "*by choosing the President, by providing a national forum for public*

[1] HSF Heads of argument, para 1.

consideration of issues, by passing legislation and by scrutinizing and overseeing executive action." There is nothing in this provision that explains when or under what circumstances Parliament must pass legislation. That decision is appropriately left to the National Assembly or Parliament itself. [2]

3.2. All that section 44(1) does is to empower and authorise Parliament (the National Assembly and the National Council of Provinces) to legislate, and confers on the National Assembly the power to assign its legislative powers. It makes no mention of under what circumstances the National Assembly must make laws and what laws it should make.[3] Neither does it state under what circumstaces the National Assembly may exercise its powers to assign its legislative power. The only power that it may not assign is the power to amend the Constitution.[4]

3.3. Section 55(1) does not place a positive obligation on Parliament to do anything. Rather, it permits the National Assembly, when exercising its legislative power, to: (a) consider, pass, amend or reject any legislation before it; and (b) initiate or prepare legislation, except money Bills.[5] Similarly, section 68 permits the National Council of Provinces ("NCOP"), when exercising its legislative power, to: (a) consider, pass, amend, propose amendments to or reject any legislation before it, in accordance with Chapter 4 of the Constitution;

2 Executive AA, para 18, page 161.
3 Executive AA, para 19, page 161.
4 Section 44(1)(a)(iii) of the Constitution.
5 Section 55(1)(a) and (b) of the Constitution; Executive AA, para 20, page 161.

and (b) initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation (except Money Bills) referred to in section 76 (3).[6]

4. Section 85(2)(d) does not require the Executive to initiate legislation. Through the scheme of section 85, the President of the Republic, together with the Executive are empowered to exercise executive authority. Section 85(2) gives them five options by means of which they can exercise such authority. These options are:

   (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 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.

5. There is nothing in the wording of section 85 that indicates that the five options must all be exercised in tandem. The HSF has not made out such a case or provided justification for such a reading. It is apparent that in dealing with the COVID-19 pandemic, the Executive elected to implement the Disaster Management Act 57 of 2002 ("DMA"). Sub-sections 85(2)(a) and (e) of the Constitution contemplate this.[7]

[6] Executive AA, para 21, page 161.
[7] Executive AA, para 24, page 162.

6. The HSF seems to accept the obvious – that these provisions are permissive and empowering. It argues however, that they impose an obligation on the Executive and Parliament to initiate and adopt Covid-specific legislation. The HSF locates this obligation on the impact on rights that both the virus itself and the Regulations under the DMA have had.

7. This contention must be rejected. The HSF readily accepts (as the High Court has) that to deal effectively with the spread of the coronavirus, certain rights needed to be limited so that others may be safeguarded. An impact on rights without more is in any event not the test for when government should legislate.

8. The contention must be rejected for the further reason that the test for whether the government should legislate is not based on impacts on rights, but on their limitation. The HSF's case does not engage (at all) with a limitation of rights.

9. The Executive readily accepts that there may arise circumstances that require it to initiate legislation and for Parliament to enact legislation. Those circumstances would arise where there is a lacuna in the law and the need for legislation is identified to fill that void. There is no lacuna in the law in this instance. The DMA is the legislation through which the government regulates its response to national disasters (such as COVID-19).[8] In other words, the DMA is:-

[8] Executive AA, paras 30 – 32, page 165.

"the legislation that was prepared and initiated by Cabinet and passed by Parliament that had and has as its purpose the regulation of the state's response to the threat posed and the harm caused by a national disaster such as COVID-19."[9]

10. The HSF does not challenge the constitutional validity of the DMA, nor its adequacy as the legislation through which the government responds to and deals with national disasters. On the contrary, it accepts that the DMA is a coherent and adequate vehicle for its purpose.[10]

11. In addition, the HSF does not challenge the rationality of the Executive's choice to invoke and place reliance on the DMA.[11] In other words, it identifies no problem either with the DMA itself or its implementation in response to the COVID-19 pandmic since its onset in March 2020. There is no complaint that the Regulations made under it were irrational or unlawful on any other basis.

12. The HSF's contention that the DMA was intended to be an interim stop-gap in the management of national disasters finds no support in the scheme of the Act itself, read as a whole.

9 Executive's AA, para 12, page 159.
10 HSF Heads of argument, para 11.2.
11 HSF Heads of Argument, para 10.

SECTION 7(2) IMPOSES NO OBLIGATION TO LEGISLATE

13. As foreshadowed above, the HSF accepts that sections 42(3), 44(1), 55(1), 68 and 85(2)(d) of the Constitution are permissive and empowering. However, it argues that the powers that these provisions bestow are "*coupled with a duty . . . if the requisite circumstances [are] present.*" [12]

14. The HSF argues further that the duty on Parliament and the Executive to prepare, initiate and pass legislation arises from section 7(2) of the Constitution *"which obliges the state, including Parliament and the National Executive, to respect, protect, promote and fulfil the rights in the Bill of Rights*".[13] The crux of the argument is that the Executive and Parliament must prepare and adopt legislation that deals specifically with the threat posed and the harm caused by COVID-19 because the pandemic "*has an impact on virtually every right in our Bill of Rights*".[14] It argues further that these rights continue to be threatened by the Regulations that the Executive adopts under the DMA.[15] We highlight above that the HSF does not challenge any of these Regulations.

15. The argument that the Executive and Parliament should initiate and ultimately adopt COVID-specific legislation because of section 7(2) is somewhat perplexing. Section 7(2) reads as follows:

[12] HSF Heads of Argument, para 94.
[13] HSF Heads of argument, para 94.
[14] HSF Heads of argument, para 95.
[15] HSF Heads of argument, para 101.1.

"*The state must respect, protect, promote and fulfil the rights in the Bill of Rights*". [Underlining added].

16. The state comprises three arms: the Judiciary, the Executive and the Parliament. When section 7(2) speaks of "*the state*", therefore, it means all its component parts. The HSF rightly recognises that section 7(2) requires both the Executive and Parliament (*qua* "the state") to respect, protect, promote and fulfil the rights in the Bill of Rights. The Executive is, for that reason, just as obliged to respect, protect, promote and fulfil the rights in the Bill of Rights, as Parliament is.

17. Dealing with COVID-19 will necessarily lead to a limitation of rights. This much the courts have accepted. In *Esau*, the Court stated that:[16]

> *"I accept that the measures do not satisfy everyone and there is a great deal of criticism levelled against them. The inconvenience and discontent that the regulations have caused the applicants and others have to be weighed against the urgent objective and primary Constitutional duty to save lives. That is the nature of the proportionality exercise which government has had to embark upon."*[17] [Underlining added].

18. The HSF submits unequivocally in its heads of argument that:

> *"To be clear, the HSF does not contend that these rights have been unjustifiably limited and thus infringed. That is not a necessary part of*

[16] *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* 5807/2020) [2020] ZAWCHC 56 (26 June 2020).
[17] *Esau* at para 254.

its case. It simply contends that they have been and continue to be limited and threatened – not just only by the virus itself, but by the state's executive measures".[18]

19. There is thus no claim that the Regulations that the Executive has promulgated under the DMA have led to an impermissible or unjustifiable limitation of rights. Similarly, the HSF does not mount its case on an allegation that the Executive has, in the course of dealing with the national disaster under the DMA, failed to "*respect, protect, promote and fulfil the rights in the Bill of Rights*". A limitation of rights is conceptually different from a failure to respect, protect, promote and fulfil rights.

20. The HSF also does not identify the rights in the Bill of Rights that have not been respected, protected, promoted and fulfilled as a result of the election to set in motion the DMA in response to COVID-19.[19] It merely catalogues rights that are impacted by the pandemic.[20]

21. Moreover, the HSF does not allege whether and how considerations would be different if legislation which deals specially with COVID-19 was promulgated by Parliament, as opposed to under the DMA.

22. In *Esau,* the Court found that the imposition of a curfew *"to contain the spread of the virus and save lives through limiting the movement of people"* was rationally connected to the purpose of the lockdown regulations.[21] The

[18] HSF Heads of Argument, para 108.
[19] Executive AA, para 27, page 164.
[20] FA, para 82, page 33.
[21] *Esau* at para 239.

Court applied the same principle to a broad range of containment measures, including travel restrictions and limitation of gatherings and held that:

> *"... it cannot be said that there is insufficient relationship between the objectives prescribed by section 27 and the regulations. The means used to contain the spread of the virus are also justified because it was the only known method of containment available at the time and currently there is no guaranteed method of containment free of risks in any event. The respondents have a primary Constitutional obligation to save lives and the DMA does not grant them the election to only do so once they have full and complete knowledge on how to do so".*[22] [Underlining added].

23. There is nothing in the HSF's papers to suggest that Parliament would take into account different considerations. In their answering papers, both sets of respondents set out in granular detail the National Assembly's supervision of the Regulations that the Executive adopted in response to COVID-19. And at no point did the National Assembly suggest that different considerations (that do not limit rights) ought to have been taken into account in the fight against COVID-19. In addition, the HSF does not explain why the responses to COVID-19, which are themselves not under attack, are insufficient protections of the rights that it catalogues in its founding papers.[23]

[22] *Esau* at paras 220 and 221.
[23] Executive AA, para 27, page 164.

24. As further justification for the promulgation of legislation that deals specifically with COVID-19, the HSF argues that the DMA is inadequate in the long term. A corollary of this proposition is that the DMA was intended to be a short-term response to national disasters. The HSF has not pointed to a construction of the DMA that indicates that it was intended merely as a stop-gap response to national disasters. We deal with this third aspect in greater detail below.

25. Absent these critical allegations, it is wholly unclear how the government's response to the COVID-19 pandemic gives rise to circumstances where the powers and functions in sections 42(3), 44(1), 55(1), 68 and 85(2)(d) of the Constitution become obligations for the Executive to initiate legislation, and for Parliament to adopt and pass COVID-specific legislation.

26. The Executive's case is that those powers would become obligations if there was a vacuum in the law. There is no such a vacuum. This approach is consistent with a long line of cases, where courts have required Parliament to legislate in order to protect and give effect to the rights in terms of section 7(2) of the Bill of Rights.[24] The DMA is the manner and mode whereby the government regulates its response to the threat posed and the harm caused by national disasters, which include COVID-19. As stated above, the HSF does not attack its constitutional validity. Acting on

[24] *My Vote Counts NPC v Minister Of Justice And Correctional Services and Another 2018 (5) SA* 380 (CC); *Women's Legal Centre Trust v President Of The Republic of South Africa And Others* 2018 (6) SA 598 (WCC); *Glenister v President of the RSA* 2011 (3) SA 347 (CC); *Minister of Home Affairs v Fourie (Doctors for Life Intl, Amici Curiae); Lesbian & Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC).

the basis of the DMA, the state has been able to protect rights. Where rights are limited, it is justifiable in terms of section 7(3) of the Constitution[25] and the HSF has not mounted a case to the contrary.

THE DMA IS THE ABSOLUTE RESPONSE TO NATIONAL DISASTERS

27. There is nothing in the construction of the DMA itself that indicates that it was intended to be an interim mechanism in dealing with national disasters.

28. The Constitution places the responsibility for disaster management on the government. In terms of section 41(I)(b) of the Constitution, all spheres of government are required to "*secure the well-being of the people of the Republic*". The DMA was enacted to fulfil this obligation.

29. Disaster management is listed as a functional area of concurrent national and provincial legislative competence in Part A of Schedule 4 of the Constitution. This means that both the national and provincial spheres of government are authorised to enact laws within this area and have powers and responsibilities in relation to disaster management.

30. Local government is also empowered to deal with a number of functions which are closely related to disaster management under Part B of Schedules 4 and 5 of the Constitution, such as firefighting services. In addition, section 152(I)(d) of the Constitution requires local government to promote a safe and healthy environment. The DMA gives effect to

[25] In terms of section 7(3) of the Constitution, "*The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.*"

these constitutional obligations, as well as to the rights in the Bill of Rights. In addition, Chapter 5 the DMA[26] also assigns disaster management to local government in line with section 156(1)(b) of the Constitution.

31. Both the DMA and the National Disaster Management Framework ("NDMF"), which was adopted in 2005, are the centrepiece legislation that govern the state's response to disasters.

32. The aim of the DMA is to ensure a uniform and integrated approach to disaster management and disaster risk reduction in each sphere of government and across all spheres of government involving all relevant stakeholders. In essence, the DMA focuses on four aspects:[27]

    32.1. it establishes an elaborate institutional framework for disaster management, including the establishment of disaster management centres across the three spheres of government;

    32.2. it entrenches a detailed policy development and strategic planning framework for disaster management;

    32.3. it provides for the classification and declaration of disasters; and

    32.4. it deals provisionally with the funding of post-disaster recovery and rehabilitation.

[26] Sections 42 to 55 of the DMA.
[27] Executive AA, para 42, page 168.

33. The coming into being of the DMA itself is somewhat instructive. The need for a comprehensive approach to dealing with disasters was realised in 1994, after the floods on the Cape Flats.[28] A Green Paper towards the end of putting in place an Act of Parliament that dealt comprehensively with how the state was to respond to national disasters was introduced in 1994. That document highlighted the need for a holistic mechanism for the management of disasters in South Africa.

34. The Green Paper was followed by the White Paper on Disaster Management in 1999. The White Paper had among its key policy objectives "*the need to improve South Africa's ability to manage emergencies or disasters and their consequences in an efficient and effective manner*".[29] [Underlining added].

35. The DMA was assented to in 2002, and its preamble, which encapsulates its objective reads as follows:

> "*to provide for an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post disaster recovery and rehabilitation*" [Underlining added].

[28] Executive AA, para 33, page 165.
[29] Executive AA, para 34, page 166.

36. The Act defines a national disaster as a disaster classified in terms of section 23. That provision sets out the steps that must be followed in classifying an occurrence as a disaster.

37. The DMA defines "*post-disaster recovery and rehabilitation*" to mean:-

> *"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"*

38. Section 56 provides the guiding principles regarding the funding of post-disaster recovery and rehabilitation. Subject to the provisions of the Public Management Finance Act 1 of 1999 ("PFMA"), section 56(2)(b) provides that the cost of repairing or replacing public sector infrastructure will be for the account of the state organ responsible for the maintenance of such infrastructure. This provision does not subject this to any other Act that Parliament may promulgate in dealing with a national disaster. This is so because *it* is the complete legislation for that purpose.

39. Section 57 deals with national contributions to alleviate effects of local and provincial disasters and provides as follows:

"*When a municipality or a province in the event of a local or provincial disaster requests the national government to financially contribute to post-disaster recovery and rehabilitation, the following factors may be taken into account:*

(a) whether any prevention and mitigation measures were taken or initiated by the municipality or province, and if not, the reasons for the absence of such measures;

(b) whether the disaster could have been avoided or minimised had prevention and mitigation measures been taken;

(c) whether it is reasonable to expect that prevention and mitigation measures should have been taken or initiated in the circumstances by the municipality or province;

(d) whether the damage caused by the disaster is covered by adequate insurance, and if not, the reasons for the absence or inadequacy of insurance cover; and

(e) *the magnitude and severity of the disaster and whether or not available financial resources at local level, or if it is a provincial disaster, at provincial level, are exhausted.*"

40. Again, this provision deals to finality with the issue of post-disaster rehabilitation funding, without yielding to any legislation that may be promulgated in future to deal with the national disaster.

41. In section 1 of the DMA, disaster management is defined as:

"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."

42. Moreover, the DMA contemplates a "wall-to-wall" response to disaster management and does not leave an aspect of it to any Act that Parliament may promulgate to deal with the disaster.

43. Although an occurrence qualifies as a disaster under section 1 of the DMA, it would be excluded from the purview of the DMA if it can be effectively addressed in terms of other national legislation "*aimed at reducing the risk, and addressing the consequences, of occurrences of that nature*" and if it has been so identified by the Minister in the Gazette.

44. Nothing in this provision suggests that the DMA ceases to apply in relation to a disaster at any stage during that disaster.

45. Section 4 of the DMA requires the President to establish an Intergovernmental Committee on Disaster Management. The Committee's activities include advising and making recommendations to Cabinet on:-

> "*the establishment of a national framework for disaster management aimed at ensuring an integrated and uniform approach to disaster management in the Republic by all national, provincial and municipal organs of state, statutory functionaries, non-governmental institutions involved in disaster management, the private sector, communities and individuals.*"

46. Section 6 requires the Minister to prescribe a national disaster management framework and section 7 requires that framework to "*provide a coherent, transparent and inclusive policy on disaster management*

appropriate for the Republic as a whole". In terms of section 7(2), the framework "*must reflect a proportionate emphasis on disasters of different kinds, severity and magnitude that occur or may occur in southern Africa, place emphasis on measures that reduce the vulnerability of disaster-prone areas, communities and households*."

47. Section 8 of the DMA establishes the National Disaster Management Centre ("NDMC") as an institution within the public service, whose objective is:

> "*to promote an integrated and co-ordinated system of disaster management, with special emphasis on prevention and mitigation, by national, provincial and municipal organs of state, statutory functionaries, other role-players involved in disaster management and communities*."[30]

48. The powers and duties of the NDMC are set out in section 15 of the DMA. It is specially required to have expertise "*in issues concerning disasters and disaster management*".

49. The DMA requires the establishment of a disaster management centre in every Province and in every District and Metropolitan Municipality, to coordinate disaster management in its sphere of responsibility. In addition, staff of the various Centres consist of the Head of the Centre and suitably qualified persons.

[30] Section 9 of the DMA.

50. We catalogue these provisions as illustrations that the DMA was intended not as an interim or temporary response to disasters. It is the absolute response to disasters in South Africa.

DMA AS AN ABSOLUTE RESPONSE IS CONSTITUTIONALLY COMPLIANT

51. The HSF's case is predicated upon a proposition that the DMA would be unconstitutional if it was read as the absolute response to national disasters in South Africa. For that reason, so the argument goes, it must be read restrictively. The proposed restrictive reading has the outcome that the DMA is merely an interim measure and not the complete framework within which to deal with national disasters in the Republic. Such a reading is, however unduly strained and does not accord with the text of the DMA itself.[31]

52. The principle of reading legislation in conformity with the Constitution has its genesis in section 39(2) of the Constitution, which provides that:

> "*When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*"

53. This means that all statutes must be interpreted through the prism of the Bill of Rights. In other words, the Constitution requires Courts to read and

[31] *Moyo v Minister of Justice and Constitutional Development and Others*; *Sonti v Minister of Justice and Correctional Services and Others* [2018] 3 All SA 342 (SCA) at para 34.

interpret legislation in a manner that gives effect to its fundamental values. Where the constitutional validity of legislation is in question, courts are:

> "*under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.*" [32] [Underlining added].

54. The injunction of courts then, is to prefer legislative interpretation that renders the legislation in question in conformity with the Construction.[33]

55. In *Cool Ideas*[34] the Constitutional Court again restated the position with regard to statutory interpretation. It held that:

> *"A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle . . ."*[35]

56. The three *Cool Ideas* riders are :

    56.1. that statutory provisions should always be interpreted purposively;

    56.2. the relevant statutory provision must be properly contextualised; and

    56.3. where reasonably possible, all statutes must be construed consistently with the Constitution.

[32] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at para 22.
[33] *Hyundai* at para 23.
[34] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC).
[35] *Cool Ideas* at para 28.

57. But there are limits to this interpretive injunction. These limits lie in the obligation placed on the Legislature to:-

> "*to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained.* [Underlining added].[36]

58. Similarly, in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[37], the Constitutional Court recognised the imperative of interpreting legislation in a manner that gives effect to section 39(2) of the Bill of Rights, thereby preserving its constitutional validity. It cautioned, however, that such an interpretive enterprise is "*limited to what the text is reasonably capable of meaning*."[38]

59. In *Bertie van Zyl,* the Constitutional Court stated that when giving meaning to a provision in an Act of Parliament, that provision must be read within the context of the Act as a whole, "*taking into account whether the*

[36] *Hyundai* at para 24.
[37] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).
[38] *National Coalition for Gay and Lesbian Equality* at para 24.

Preamble and the other relevant provisions in the Act support the envisaged construction."[39]

60. The HSF does not challenge the constitutional validity of the DMA. Nevertheless, in an attempt to preserve its constitutional validity, the HSF argues that a constitutionally compliant interpretation of the DMA is one that "*confers only short-term powers on the Minister, and is intended only as a stop-gap*".[40] We have submitted above that such an interpretation does not accord with the scheme of the DMA, read as a whole.

61. On the proposition that the DMA should be interpreted narrowly, *Esau* held that:

> "218. The narrow approach to the DMA is inconsistent with the purposive approach to interpretation as enunciated in **Endumeni** where the court described the approach to interpretation of contracts and statutes as follows: *"[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem the* ***apparent purpose*** *of the provision and the* ***context*** *in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences*

[39] *Bertie van Zyl (Pty) Ltd v Minister for Safety & Security* 2010 (2) SA 181 (CC) at para 32.
[40] HSF Heads of Argument, para 67.

or that ***will stultify the broader operation of the legislation*** *or contract under consideration".* (Our emphasis)"[41]

62. Section 27 of the DMA deals with the declaration of a national disaster. There are two alternative bases provided for the declaration of a national state of disaster.

63. In terms of section 27(1), the Minister of Cooperative Government and Traditional Affairs ("COGTA") may declare a national state of disaster if "*existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster*".

64. The second alternative is that the Minister may declare a national state of disaster if "*other special circumstances warrant the declaration of a national state of disaster."* This second basis does not presuppose or require any inadequacy in existing legislation. It requires only for "*special circumstances*" to necessitate a declaration of a national state of disaster.

65. The Minister declared a state of national disaster on 15 March 2020, in terms of the DMA. A copy of that Gazette is attached to these heads of argument as annexure "**X**". It is plain from the declaration that it was done in section 27(1) of the DMA:-

> "*recognising special circumstances exist to warrant the declaration of a national state of disaster*".

[41] *Esau*, para 218.

66. That the Minister is permitted to declare a national state of disaster under section 27(1)(b) clearly signals that the existence or coming into being of legislation is not a requirement.

67. The HSF rejects the wide interpretation of the DMA. It argues that interpreting the DMA so widely renders it unconstitutional because it amounts to an unlawful delegation of legislative power. The HSF merely assumes this, but without demonstrating to the Court how that would be so.

DMA DOES NOT AMOUNT TO AN UNLAWFUL DELEGATION OF POWER

68. The law permits the delegation of legislative power by Parliament. This principle was laid down by the Constitutional Court in *Executive Council, Western Cape Legislature.*[42] The Court cautioned, however, that:

> *"There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body."*[43]

69. The present case does not involve the assignment of plenary legislative power. The Ministers do not, in making regulations or issuing directions, i.e. by exercising legislative power properly delegated to them, usurp national, provincial or municipal legislative power. They make binding rules

[42] *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) at para 51.
[43] *Executive Council, Western Cape Legislature* at para 51.

authorised by law and with the force of law in the fulfilment of a national legislative purpose as set out in section 27 of the DMA.[44]

70. The present case involves the delegation of authority to make subordinate legislation.

71. Whether the delegation of such authority power is permissible or not is determined by a consideration of a number of factors. These factors are not exhaustive, and should be informed (ultimately) by the prevailing circumstances.[45]

72. In *Affordable Medicines,*[46] the Constitutional Court recognised the government's role in seeking to further the wellbeing of South Africans. In that case, the wellbeing that the government sought to further was social and economic. In the context of COVID-19, that wellbeing pertains to health.

73. In recognising the government's role, the Court cautioned against the invocation of vagueness to hamper the government's efforts in attaining its objectives.[47] By parity of reasoning, this Court should also not (as the HSF does) hasten to ascribe an interpretation to the DMA that is not supported by the scheme of the Act as a whole, including its purpose.

[44] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2006 (11) BCLR 1255 (CC) at para 49.
[45] *In re Constitutionality of the Mpumalanga Petitions Bill*, 2000 2002 (1) SA 447 at para 19.
[46] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC).
[47] *Affordable Medicines* at para 108.

74. The Constitutional Court's decision in *Affordable Medicines* came on the back of other decisions. In *R v Pretoria Timber Co (Pty) Ltd*[48], the Appellate Court (as it was then) noted that:

> *"The degree of certainty, clarity or precision that must be present in such a description as the one in question, on pain of invalidity, depends on the circumstances, including the nature of the problem to be solved by the framer of the description . . . The law requires reasonable and not perfect lucidity and the fact that cases may arise in which it would be difficult, perhaps extremely difficult, to decide whether a place falls within or outside the area is not, by itself, a reason for holding that the description is not reasonably clear".*

75. Considered through the prism of the government's objective, the Court in *Affordable Medicines* recognised that at times legislation needs to be flexible in order for it to attain its objective. It relied on a Canadian Supreme Court case, which explained the idea of flexibility in legislation thus:

> *"Indeed . . . laws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern State intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible..."*[49] [Underlining added].

[48] *R v Pretoria Timber Co (Pty) Ltd* 1950 (3) 163 (A) at para 170.
[49] *R v Nova Scotia Pharmaceutical Society* (1992) 93 DLR (4th) 36 (SCC) ((1992) 10 CRR (2d) 34) at 58 (CRR).

76. Section 27 of the DMA provides for flexibility, because some national disasters are unpredictable and their nature fleeting. The COVID-19 pandemic is a classic case in point. COVID-19 is devastating and spreading fast, requiring quick and flexible responses.

77. In the context of the DMA, and having regard to its purpose, it would not be practicable for Parliament to delegate powers to the Minister with absolute precision. Section 27(2) and 27(3) provide sufficient guidelines for, and constraints on the exercise of her powers under the Act. Both sections read together make it clear that the Ministers' delegated powers may only be exercised to the extent that it is necessary for the purposes identified in section 27(3)(a) to (e). This is justiciable and provides sufficient constraints or guidelines. Courts are able to constrain the exercise of the delegated powers for the limited purposes identified. In addition, the exercise of the delegated powers must be rational and must not unjustifiably infringe rights in the Bill of Rights.[50]

78. In the circumstances, the contention that only the narrow interpretation of the DMA that HSF advances renders it constitutionally compliant is not made out. As we highlight above, the HSF merely assumes the correctness of that contention and fails to establish it on the facts and the law.

[50] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2006 (11) BCLR 1255 (CC) para 29.

CONCLUSION

79. The HSF has not provided a plausible reason why the powers in sections 42(3), 44(1), 55(1), 68, and 85(2)(d), read with section 7 of the Constitution impose an obligation on Parliament and the Executive to initiate and ultimately adopt legislation that deals specially with the state's response to the COVID-19 pandemic.

80. It attempted to make this argument on two bases, which it could not sustain.

81. The first is that the injunction on the state in section 7(2) of the Constitution requires the Executive to initiate legislation that deals specially with the state's response to COVID-19, and for Parliament to adopt such legislation. There is nothing in section 7(2) alone that supports such a contention. Section 7(2) requires the state (which includes the Executive) to respect, protect, promote and fulfil the rights in the Bill of Rights. The HSF does not allege that by exercising powers under the DMA, the Executive failed in its mandate under section 7(2).

82. The HSF places undue reliance on the Constitutional Court's decision in *Glenister*. In *Glenister*, the Court held that corruption by its very nature is the anti-thesis of the requirement in section 7(2). It noted further that there was no effective instrument to address corruption. For that reason, the Court directed Parliament to implement legislation that addresses corruption. This approach is consistent with a number of decisions where Parliament was directed to adopt legislation – there were invariably lacunae in the law.

83. In this case, the DMA is the state's response to national disasters. It is, in other words, through the DMA that the government fulfils its obligations under section 7(2).

84. The HSF argues (secondly) that in order to be constitutionally compliant, the DMA must be interpreted restrictively as a stop-gap response to national disasters. It is an interim measure until Parliament adopts legislation (so the argument goes).

85. There is nothing in the DMA or in the law that supports this construction. The DMA is the state's absolute response to national disasters and that construction is constitutionally compliant.

86. Arguing otherwise, as the HSF does, impermissibly strains the text of the DMA read as a whole.

COSTS

87. We submit that, although this matter raises constitutional issues, the applicant should be ordered to pay costs in the event of the dismissal of the application. We say so for the reasons that follow.

88. The applicant does not allege an infringement of any of its constitutional rights. Consequently, this application does not seek to assert or vindicate any of the applicant's rights.[51]

[51] *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (10) BCLR 1014 (CC) at paras [18] & [24].

89. This application is frivolous, otiose[52] and manifestly inappropriate.

90. The relief that the applicant seeks is incompetent.[53]

91. As submitted in the main argument, the grounds upon which this application has been brought are spurious and untenable.[54] This application, we submit, is an exercise in an esoteric philosophical debate, which has no place in this difficult time of a deadly ravaging pandemic.

92. We, consequently, submit that the application stands to be dismissed with costs, such costs to include the costs of two counsel.

MTK MOERANE SC
NH MAENETJE SC
N MUVANGUA
Counsel for the 2nd, 3rd and 5th respondents
Chambers, Durban & Sandton.
28 August 2020

[52] Executive's AA, para 13, page160, see also *Biowatch* ibid. para [24].
[53] Executive's AA, para 9, page.159.
[54] See:*Affordable Medicines* ibid. at para [138].

LIST OF AUTHORITIES

1. *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2006 (11) BCLR 1255 (CC).

2. *Affordable Medicines Trust v minister of Health* 2006 (3) SA 247 (CC).
3. *Bertie van Zyl (Pty) Ltd v Minister for Safety & Security* 2010 (2) SA 181 (CC).

4. *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (10) BCLR 1014 (CC).

5. *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC).

6. *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* 5807/2020) [2020] ZAWCHC 56 (26 June 2020).

7. *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC).

8. *In re Constitutionality of the Mpumalanga Petitions Bill*, 2000 2002 (1) SA 447.

9. *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC).

10. *Minister of Home Affairs v Fourie (Doctors for Life Intl, Amici Curiae); Lesbian & Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC).

11. *Moyo v Minister of Justice and Constitutional Development and Others*;

12. *Sonti v Minister of Justice and Correctional Services and Others* [2018] 3 All SA 342 (SCA).

13. *My Vote Counts NPC v Minister Of Justice And Correctional Services and Another* 2018 (5) SA 380 (CC).

14. *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).

15. *Women's Legal Centre Trust v President of The Republic of South Africa And Others* 2018 (6) SA 598 (WCC); *Glenister v President of the RSA* 2011 (3) SA 347 (CC).

16. *R v Pretoria Timber Co (Pty) Ltd* 1950 (3) 163 (A).

17. *R v Nova Scotia Pharmaceutical Society* (1992) 93 DLR (4th) 36 (SCC) ((1992) 10 CRR (2d) 34) at 58 (CRR).

DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS

NO. 313 **15 MARCH 2020**

DISASTER MANAGEMENT ACT, 2002

DECLARATION OF A NATIONAL STATE OF DISASTER

Considering the magnitude and severity of the COVID-19 outbreak which has been declared a global pandemic by the World Health Organisation (WHO) and classified as a national disaster by the Head of the National Disaster Management Centre, and taking into account the need to augment the existing measures undertaken by organs of state to deal with the pandemic, I, Dr Nkosazana Dlamini Zuma, the Minister of Cooperative Governance and Traditional Affairs, as designated under Section 3 of the Disaster Management Act, 2002 (Act No. 57 of 2002) ("the Act"), in terms of -

1) Section 27(1) of the Act, hereby declare a national state of disaster having recognised that special circumstances exist to warrant the declaration of a national state of disaster; and

2) Section 27(2) of the Act may, when required, make regulations or issue directions or authorise the issue of directions concerning the matters listed therein, only to the extent that it is necessary for the purpose of —

   (a) assisting and protecting the public;

   (b) providing relief to the public;

   (c) protecting property;

   (d) preventing or combatting disruption; or

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

NC Zuma

DR NKOSAZANA DLAMINI ZUMA, MP

MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS

DATE: 15. 03. 2020.