IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 32858/20

In the matter between:

HELEN SUZMAN FOUNDATION	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE CABINET OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fourth Respondent
THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Fifth Respondent

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HSF'S HEADS OF ARGUMENT

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INTRODUCTION

The essence of the HSF's case

1 This application is about a narrow but fundamental question. Do Parliament and the National Executive bear an obligation to initiate, prepare and pass legislation to regulate the state's response to the threat posed and harm caused by the unprecedented COVID-19 pandemic, and, if so, have they breached that obligation?

2 The first COVID-19 case in South Africa was reported on 5 March 2020. On 15 March 2020, reacting to the threat posed by COVID-19, the Minister exercised her power under the Disaster Management Act 57 of 2002 (the "**Disaster Act**") to declare a national state of disaster.[1]

3 For the last five months, the entirety of the state's response to the COVID-19 pandemic has been through ministerial regulation and direction, within the framework of the Disaster Act.

4 The Disaster Act is not intended for this purpose – it is not intended to complete or be the state's complete response to this pandemic. Properly interpreted, it is intended to operate as a short-term, stop-gap mechanism, enabling ministerial directions only until such time that such more concrete legislation is expeditiously initiated, prepared and passed. There currently exists a gaping

[1] GN 313, 15 March 2020.

legislative lacuna in the state's response to the COVID-19 pandemic, which the Disaster Act is being used to plug.

5 The state bears a constitutional obligation to initiate, prepare and pass legislation that concretely, and in a fit-for-purpose manner, regulates the state's response to the COVID-19 pandemic. This is an obligation that is sourced in section 7(2) of the Constitution, read together with sections 42(3), 44(1), 55(1), 68 and 85(2). It is triggered by:

5.1 the unprecedented impact on and threat to rights caused both by COVID-19 itself, and the regulatory interventions under the Disaster Act;

5.2 the legislative lacuna that exists, given the generalised and short-term nature of the Disaster Act.

6 The respondents have plainly failed to comply with their constitutional obligation to enact such legislation.

7 The HSF accordingly seeks an order declaring that the respondents have breached their obligations, and directing them to comply.

What this case is <u>not</u> about

8 In their answering affidavits, the Speaker and the National Executive have avoided the proper focus of this case. They have raised various issues that have little to do with the crisp questions before this Court.

9 It is thus necessary, at the outset, to explain what this case is <u>not</u> about.

10 This case is not about the merits or otherwise of any regulations, directions, or substantive exercise of power by the Minister or the President relating to COVID-19. The HSF has explained that it respects the enormous burden that has fallen on the shoulders of the President and his government at this time.[2] Nor does the HSF attack or criticise the policy choices or value judgments embodied in the regulations made and directions issued to date.[3]

11 This application is also not an attack on the Disaster Act.[4]

11.1 On the contrary, the HSF contends that the Disaster Act can and should be interpreted in a manner that renders it constitutionally valid.

11.2 On a proper interpretation, the HSF does not criticise the coherence or the capacity of the Disaster Act to regulate the state's response to disasters, nor does it dispute the applicability or utility of the Disaster Act as a first response to the initial threat posed or harm caused by COVID-19.[5]

11.3 Moreover, properly interpreted, the Disaster Act does not indefinitely delegate the power assumed by the National Executive and Speaker in their affidavits.[6]

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2 Founding Affidavit ("**FA**") para 8, pp8-9 of the Record [pp006-8 - 006-9].

3 FA para 17, p11 of the Record [p006-6].

4 Cf Parliament's Answering Affidavit ("**PA**") paras 7.3, 44, 49, 54 and 57, pp108, 120, 122, 123-124 of the Record [pp011-448 - 011-449]; and National Executive's Answering Affidavit ("**EA**") paras 148 and 154, , pp 196 and 197 of the Record [pp011-45 and 011-46].

5 Replying Affidavit ("**RA**") para 10, pp503-504 of the Record [pp012-8 - 012-9].

6 RA para 39.6, pp514-515 of the Record [pp012-19 - 012-20].

12 Relatedly, therefore, the issue of subsidiarity simply does not arise in this case.[7]

12.1 The Constitutional Court has clarified that the principle of subsidiarity is not a hard and fast rule and typically applies only where both of the following are satisfied:

12.1.1 the Constitution imposes a specific obligation on the legislature to pass legislation to give effect to a constitutional right, such as the provisions of sections 32 and 33 of the Constitution; **and**

12.1.2 where the legislature does pass legislation to give effect to a constitutional right, it intended to completely and comprehensively give effect to that right (the legislation must be intended to "*cover the entire field*").[8]

12.2 Neither of these requirements is met in the present matter.

12.3 This case does not involve a constitutional obligation, of the kind set forth in sections 32 and 33 of the Constitution, to enact legislation to give effect to a specific constitutional right.

12.4 No legislation is at issue which is intended comprehensively to give effect to any particular constitutional right.

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[7] Cf PA paras 55 to 57, p124 of the Record [p011-449].

[8] *Pretorius and Another v Transport Pension Fund and Another* 2019 (2) SA 37 (CC) paras 50 to 52.

12.5 The legislation that is relevant in this matter is the Disaster Act. On its own terms it does not, and is not intended comprehensively to give effect to any specific constitutional right.

12.6 The HSF is, therefore, not, as in *My Vote Counts*,[9] required to challenge the Disaster Act. The HSF does not suggest that there are constitutional deficiencies with the Disaster Act. What the HSF contends is that the state has failed in its obligations under the Constitution, and that the Disaster Act is no permissible excuse or substitute for that failure.

13 This case is also not about the oversight that Parliament has exercised over the legislature.[10]

13.1 The answering affidavits spend many pages sketching the oversight role that Parliament has apparently exercised.

13.2 But this is utterly irrelevant to the issue before this Court. The issue before this Court is whether the National Executive and Parliament have a duty to initiate, prepare and pass legislation that regulates, in a concrete and effective way, the state's response to the threat posed or harm caused by COVID-19.

14 Lastly, this case is not about whether the HSF – a civil society organisation committed to upholding the Constitution and the rule of law which acts in the public interest – considers itself "*the conscience of the nation*" or has behaved

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9 *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC).

10 Cf PA paras 7.5, 7.6, 28 to 30 and 101.2, pp108, 109, 116 and 136 of the Record [pp011-433, 011-434, 011-441 and 011-461]; and EA paras 60 to 130, pp 173-193 of the Record [pp011-22 - 011-42].

as "*the fourth arm of the state*".[11] The less said about these regrettable and gratuitous remarks, the better.

The structure of these submissions

15 The remainder of these submissions are structured as follows:

15.1 First, we address the spurious objections raised by the Speaker to the HSF's standing, and on the issue of urgency.

15.2 Second, we sketch the constitutional and legislative framework within which this application falls to be determined. It is a framework in which:

15.2.1 the National Executive is tasked with preparing and initiating legislation;

15.2.2 Parliament considers the legislation prepared by the National Executive, prepares and initiates legislation itself, and passes legislation; and

15.2.3 properly interpreted, the Disaster Act has been passed only as a necessarily temporary stop-gap mechanism, enabling ministerial directions only until such limited time that more concrete legislation is expeditiously initiated, prepared and passed by the National Executive and Parliament.

15.3 Third, we demonstrate that Parliament and the National Executive bear an obligation, which arises from section 7(2) of the Constitution, to

[11] PA paras 72 to 73, pp128-129 of the Record [pp011-453 - 011-454].

initiate, prepare and pass legislation to regulate the state's response to COVID-19. This obligation is premised on:

15.3.1 the trite proposition that parliament has a duty, and not merely a power, to enact legislation to protect, promote, respect and fulfil rights in the Bill of Rights;

15.3.2 the unprecedented impact on and threat to rights occasioned by COVID-19 itself, and the state's response to the pandemic thus far; and

15.3.3 the legislative lacuna that exists, given the obdurate refusal by Parliament and the National Executive to initiate, prepare and pass concrete legislation to address COVID-19.

15.4 Fourth, we motivate for the relief that the HSF seeks, namely:

15.4.1 declaratory orders to the effect that Parliament and the National Executive are in breach of their constitutional obligations; and

15.4.2 mandatory orders, directing Parliament and the National Executive to comply with their constitutional obligations.

THE PRELIMINARY OBJECTIONS BY THE SPEAKER ARE WITHOUT MERIT

16 The Speaker has raised two technical and spurious objections to the application. She contends that HSF lacks standing[12] and she says that the matter is not urgent.[13]

17 It is only the Speaker that raises these objections. The National Executive accepts that HSF has standing and that the matter is urgent.

18 There is simply no merit to these objections. We address them only briefly.

Standing

19 The HSF explained in its founding affidavit that the nature of the legal and factual issues is such that it has standing under section 38 of the Constitution.

20 In particular, it relied on its own interest under section 38(a), and in the public interest under section 38(d), of the Constitution.

21 The HSF is a non-governmental organisation that exists to "*defend the values that underpin our liberal constitutional democracy and to promote respect for human rights*". It is concerned with the principles of democracy, rule of law and separation of powers. All these issues are implicated in this matter, in a way and intensity that has few, if any, parallels in our Constitution's history.

22 The Speaker disputes this.[14] She says that the HSF does not specify the rights in the Bill of Rights that it alleges are violated or threatened, and that it accordingly cannot rely on section 38.

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[12] PA paras 13 to 19, pp112-114 of the Record [pp011-437 - 011-439].

[13] PA paras 10 to 12, pp109-112 of the Record [pp011-434 - 011-437].

23 The HSF has made plain – and it should frankly be obvious – that COVID-19 itself, and the ministerial response to it under the Disaster Act, have fundamentally affected almost all the rights in the Constitution, for all South Africans, in a profound and unprecedented way.[15] That is the very premise of its application to compel Parliament to enact legislation to address the situation.[16]

24 This application concerns issues of profound and lasting importance. It concerns, *inter alia*, the separation of powers, the duties of Parliament and the National Executive, the principles of transparent, accountable and participatory democracy, and the rule of law.

25 It cannot seriously be suggested that the HSF lacks standing to bring this application, even acting in the public interest.

Urgency

26 There is similarly no credible basis on which to object to this application having been brought urgently. But the Speaker does so anyway.[17]

27 This case is of significant national importance, and speaks to the heart of the legal framework within which COVID-19 falls to be addressed. There is an ongoing constitutional failure pertaining to the lack of separation of powers, which – every day – has the result that certain decisions may be susceptible

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[14] PA paras 13 to 19, pp112-114 of the Record [pp011-437 - 011-439] .

[15] FA paras 12, 81, 82, 83, 86, 98, 101, 110.1.3, 111, pp10, 33, 34, 35, 36, 41, 42, 44, 45 of the Record [pp006-10, 006-33, 006-34, 006-35, 006-36, 006-41, 006-42, 006-44, 006-45]; RA paras 6.7, 6.8, 6.9.1, 6.9.2, 39.1, 48, 64, 110, 111, pp500, 501, 512, 520, 521, 523, 531 of the Record [pp012-5, 012- 6, 012-17, 012-25,012-26, 012-28, 012-36].

[16] FA para 4.3, pp7-8 of the Record [pp006-7 - 006-8].

[17] PA paras 10 to 12, pp109-112 of the Record [pp011-434 - 011-437].

to legal challenge by virtue of the failure by the constitutionally appointed agents properly to discharge their duties.[18]

28 This calls out for urgent and immediate redress. As this Court explained in *Freedom Front Plus*, "*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*."[19]

29 The HSF launched its application before the Constitutional Court on an urgent basis on 20 May 2020. The Constitutional Court delivered its order dismissing the HSF's application on 3 July 2020, on the basis that its exclusive jurisdiction was not triggered.[20]

30 The Speaker complains that the 3-week period between the dismissal of the Constitutional Court application and the institution of this application disentitles the HSF to urgent relief.[21]

31 But the HSF has acted prudently and as expeditiously as possible in preparing its papers before this Honourable Court, having regard to the importance and urgency of the matter.

32 Upon receipt of the Constitutional Court's order, the HSF immediately consulted with its legal representatives and amended its papers, to the extent necessary, to launch in this Honourable Court. It has explained that it was required to

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[18] FA paras 99 and 101, pp41 and 42 of the Record [pp006-41 and 006-42]

[19] See *Freedom Front Plus v President of the Republic of South Africa and Others* [2020] ZAGPPHC 266 (6 July 2020) (***Freedom Front Plus***) at para 25 (see also paras 22 to 30).

[20] FA para 100, pp41-42 of the Record [pp006-41 - 006-42].

[21] PA paras 10.1 to 10.3, pp109-110 of the Record [pp011-434 - 011-435].

revisit the matter with its board of trustees, which is a time-consuming process, and that it launched its application before this Court '*as soon as it was given the go-ahead from its trustees and the papers settled by its legal representatives who worked as expeditiously as possible*.'[22]

33 Notably absent from any of the Speaker's objections regarding urgency is a single suggestion of prejudice.[23] Nor could there be.

33.1 The time periods stipulated under the HSF's notice of motion were reasonable and appropriate.[24] Indeed, the respondents were afforded 15 court days (from 23 July 2020 to 14 August 2020) within which to file their answering affidavits.

33.2 Moreover, the respondents have had sight of the papers in the Constitutional Court, in effect, since 20 May 2020. The have accordingly been pre-cognised of the HSF's position and well aware of the facts and issues in this application.[25]

34 As against the absence of any prejudice to the Speaker, if this matter is not heard on an urgent basis, the HSF will not be able to obtain redress at a hearing in the ordinary course,[26] which will ultimately be to the detriment of the public interest. This is because, in the many months before such a hearing:[27]

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[22] FA para 100, pp41-42 of the Record [pp006-41 - 006-42].

[23] *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and another* 1981 4 SA 108 (C) at 112H-113A.

[24] FA para 107, p43 of the Record [p006-43].

[25] FA para 108, p43 of the Record [p006-43].

[26] FA para 105, p43 of the Record [p006-43]. See *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* 2011 JDR 1832 (GSJ) para 44.

[27] FA para 104, pp42-43 of the Record,[pp006-42 - 006-43].

34.1 There will be daily breaches of the doctrine of the separation of powers;

34.2 "Better" laws will not be made, implemented or enforced, better outcomes will not be achieved, and the more robust process of law and policy making will not be followed;

34.3 The only mechanism available to redress that aspect will be judicial review after-the-fact, which is neither appropriate nor an efficient use of judicial resources (and in this regard it is anticipated that legal challenges will only increase);[28]

34.4 Serious questions will be raised as to the legitimacy of the regulations made pertaining to COVID-19, given the absence of Parliament from this process and the concentration of immense power in the hands of a few individuals.

35 The matter is plainly urgent, and it benefits all parties that it is urgently decided.

36 In any event, the matter has been specially allocated to be heard by a full bench of this Court, with times for filing set not by the HSF but by the Acting Deputy Judge President.[29] Questions of urgency are no longer germane.[30]

THE STATE'S LAW-MAKING FUNCTION

37 South Africa is a constitutional democracy. It is a constitutional democracy founded on constitutional supremacy and the rule of law,[31] multi-party

[28] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (***Glenister II***) at para 247.

[29] See the Letter from the Acting Deputy Judge President of 29 July 2020, p98-100 of the Record.

[30] RA para 46, p520 of the Record [p012-25].

democracy,[32] representative and participatory democracy,[33] responsiveness, accountability,[34] and openness.[35]

38 Each branch of South Africa's government – Executive, Parliament and the Judiciary – possesses distinct but complementary powers and duties. While the term 'separation of powers' is never mentioned in the Constitution, the doctrine is implicit in the provisions outlining the functions and structure of the respective branches.[36]

39 This matter strikes at the heart of the respective constitutional duties of Parliament and the National Executive, the principles of transparent, accountable and participatory democracy, and the rule of law.

40 Parliament is, in the words of the Constitutional Court, "*the engine-house of our democracy*".[37] Section 42(3) of the Constitution makes plain that it is through Parliament that government by the people is ensured:

> "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."

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[31] Section 1(c) of the Constitution.

[32] Section 1(d) of the Constitution. See *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC) at paras 24 and 26.

[33] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at paras 110-7

[34] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at paras 74-6

[35] Sections 1(d), 57(1), 57(2)(b) and 195(1) of the Constitution. See *Matatiele Municipality and Others v President of the RSA and Others* 2006 (5) SA 47 (CC) at para 110, where Sachs J held that "*[i]n our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness*".

[36] *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC) para19.

[37] *Matatiele Municipality and Others v President of the RSA and Others* 2006 (5) SA 47 (CC) para 109.

41 Sections 43 and 44 of the Constitution create and delimit the powers and duties of Parliament:

"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

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

44. (1) 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), a matter within a functional area listed in Schedule 5; and

(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and

(b) confers on the National Council of Provinces the power—

(i) to participate in amending the Constitution in accordance with section 74;

(ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and

(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

(2) Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—

(a) to maintain national security;

(b) to maintain economic unity;

(c) to maintain essential national standards;

(d) to establish minimum standards required for the rendering of services; or

(e) to prevent unreasonable action taken by a province which is prejudicial to

the interests of another province or to the country as a whole.

(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule

(4) When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution." (Emphases added)

42 Section 55 of the Constitution provides as follows regarding the powers of the National Assembly:

"Powers of National Assembly [38]

55. (1) In exercising its 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.

(2) The National Assembly must provide for mechanisms—

(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and

(b) to maintain oversight of—

(i) the exercise of national executive authority, including the implementation of legislation; and

(ii) any organ of state." (Emphases added)

43 Notwithstanding the institutional separation of Parliament and the National Executive, section 85(2) provides for the involvement of the National Executive in the legislative function by empowering Cabinet members to prepare and initiate legislation.

44 Section 85 of the Constitution, which vests executive authority in the President, (to be exercised with his Cabinet), provides as follows:

[38] An equivalent provision applies in respect of the National Council of Provinces. See section 68 of the Constitution.

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

(2) The President exercises 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 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." (Emphases added)

45 At its very simplest, the scheme of law-making in our constitutional state is this. The Constitution creates Parliament and the National Executive. The National Executive prepares and initiates legislation to address specific issues. Parliament considers the legislation prepared by the National Executive, prepares and initiates legislation itself (through its members), and passes legislation. Legislation can, subject to limits,[39] delegate authority to a person, including a member of the Executive, to issue regulations.

46 It is through this law-making process that accountability, multi-party, representative, participatory, responsive, and open democracy is achieved.[40]

47 While regulation-making is an important aspect of the regulatory state, it cannot supplant the primary law-making function of Parliament. This is for various process- and outcome-related reasons, many of which have been repeatedly stressed by the Constitutional Court.

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[39] *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC) (***Executive Council Western Cape***) paras 122-124

[40] See, in particular, *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588 (CC) paras 43 – 51 and the cases referred to by the Court in those paragraphs.

48 First, enacting laws through Parliament promotes transparency, participation, openness and accountability. In *Oriani-Ambrosini*, in the context of a challenge to the rule-making processes of Parliament, Mogoeng CJ explained the significance of these goods:

> "By its very nature, representative and participatory democracy requires that a genuine platform be created, even for members of minority parties in the Assembly, to give practical expression to the aspirations of their constituencies by playing a more meaningful role in the law-making processes. . .
>
> Within the context of a law-making process, transparency would be enhanced optimally by rules that generally allow for a legislative proposal to be debated properly and in a manner that is open to the public, before its fate is decided. Further, public participation, so as to cultivate an "active, informed and engaged citizenry", is also facilitated by rules that allow even minority party members, who are not ordinarily represented in Cabinet, to initiate or prepare legislation and introduce a Bill. This is because the public can only properly hold their elected representatives accountable if they are sufficiently informed of the relative merits of issues before the Assembly."[41] (Emphases added)

49 As the Chief Justice explained in that case: "*[T]he Constitution … contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. . ."*.[42]

50 This speaks not only to the procedural and substantive desirability of laws being made through Parliament rather than by Ministers. It explains why it is not constitutionally acceptable for Parliament to be reduced, for a sustained period, to the role of merely approving, rejecting or recommending laws crafted by the Executive.

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[41] *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588 (CC) (***Oriani-Ambrosini***) at paras 63 and 64

[42] *Oriani-Ambrosini* supra at para 55.

51 Cameron and Nugent JJA explained this clearly in *King and Others v Attorneys Fidelity Fund Board of Control and Another* 2006 (4) BCLR 462 (SCA) at paras 19 to 20:

> "[19] … The Constitution requires that Parliament function in accordance with the principles of accountability, responsiveness and openness that constitute one of its founding values. That founding value, so far as it relates to the conduct of the National Assembly, finds expression in the Constitution's requirement that its rules and orders for the conduct of its business must be made with due regard not only to representative democracy but also to participative democracy. It also finds expression in the National Assembly's power to receive petitions, representations or submissions from any interested persons or institutions, its duty to facilitate public involvement in its legislative and other processes and of those of its committees, its duty generally to conduct its business in an open manner and hold its sittings and those of its committees in public, and its duty generally not to exclude the public or the media from sittings of its committees.
>
> [20] Those are all facets of a National Assembly that belongs to the people, although its formal business is conducted through their representatives, and it is to an Assembly functioning in this way that the Constitution entrusts the power to legislate. **Its antithesis is a body that separates itself from and excludes the public, is indifferent to their participation and interests, and conducts its business concealed from the public eye. Were that ever to occur it would negate one of the essential pillars of the Constitution, with fundamental implications not only for Parliament's legitimacy, but for its legislative capacity. These consequences would follow, not because Parliament has failed to fulfil a capacity-defining procedural formality, but because it has disavowed the obligations the Constitution imposes on it**." (Emphases added)

52 Second, locating power in Parliament enhances the rule of law. That is, the regulation of social or natural ills by national legislation through Parliament

makes it more likely that the preparation for and responses to these ills will be general, public, equal, clear, stable and prospective.[43]

53 Third, as explained by the Constitutional Court, when laws are made by Parliament rather than by ministerial regulation, they are likely to produce better outcomes, while minimising or removing the scope for genuine legal challenges to their content and concerns about the legitimacy of their source.[44]

54 In *Oriani-Ambrosini* the Court articulated the value of participatory democracy under section 55 of the Constitution. The Court explained, quoting from what Sachs J held in *Masondo*,[45] that it is not merely valuable for process-reasons, but also for achieving better outcomes.

> "The open and deliberative nature of the [Parliamentary] process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not towards exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, 'South Africa belongs to all who live in it . . .'" (Emphases added).[46]

55 Fourth, in addition to Parliament's processes facilitating "*better outcomes*" – that is, more effective laws, which are fit for purpose – its deliberative and participatory nature enhances social respect for and understanding of laws. The democratic and deliberative process '*contemplates a pluralistic democracy*

[43] FA para 92.3, pp38-39 of the Record [pp006-38 - 006-39].

[44] *Oriani-Ambrosini* supra at paras 44 to 47.

[45] *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) SA 413 (CC) (***Masondo***).

[46] *Oriani-Ambrosini* supra at para 47, quoting *Masondo* supra at para 43.

where continuous respect is given to the rights of all to be heard and have their views considered'.[47]

56 Fifth, and most importantly, within the scheme of our Constitution, it is Parliament that makes law, not the National Executive. Parliament's legislative authority in the national sphere is, subject to considerations of federalism which are not relevant for present purposes, exclusive. The National Executive's principal functions are to *initiate* the legislation process in Parliament, and to *implement* legislation passed by Parliament. While for practical reasons a measure of delegation of derivative regulation-making powers by Parliament is permissible, Parliament is not entitled, as a matter of constitutional principle, to divest itself of its principal and exclusive legislative authority.

57 That is so not only because of the constitutional goods already discussed above, but also to reinsert constitutional checks and balances into the law-making process. Any issue of the constitutional validity of the legislation can be examined before it becomes operative – by the President's powers under section 79 of the Constitution (if the President has reservations about the Bill's constitutionality, he may refer it back to the National Assembly for reconsideration).

58 As we demonstrate below, Parliament's law-making function has been subverted. It has been subverted not by the Disaster Act itself, but by Parliament abdicating and abandoning its legislative function to the Minister, the President and Cabinet.

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[47] *Oriani-Ambrosini* supra at para 47.

59 Importantly, Parliament's law-making functions exist alongside and in addition to its oversight role. Whatever oversight functions it might perform over the Minister's or National Executive's exercise of power, this does not relieve it of its law-making obligations.[48] It shoulders both duties.

THE DISASTER ACT

The approach to interpreting legislation

60 Central to the HSF's case is the proper interpretation of the Disaster Act.

61 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.[49] The process is objective, not subjective.[50]

62 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.[51] As the Constitutional Court has held: "*[t]he Constitution*

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[48] See our discussion below under the sub-heading **The source of the duty to legislate.**

[49] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (***Endumeni***) at para 18.

[50] *Endumeni* supra para 18. In *Marshall and Others v Commissioner, South Africa Revenue Service* 2019 (6) SA 246 (CC), para 10, the Constitutional Court emphasised that what was required was "*the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts*." For this reason, the Court found that any unilateral practice of the executive had no interpretative value.

[51] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) (***Hyundai***) at para 22.

requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values."[52]

63 This flows from section 1 of the Constitution, and the injunction in section 39(2) to promote the spirit, purport and objects of the Bill of Rights. It requires courts, where possible, to construe statutes in a manner that avoids limiting or infringing a right in the Bill of Rights.[53] This was confirmed most recently by Khampepe J in *Chisuse*, where she held that legislation must be interpreted so as to avoid "*possible constitutional concerns which may arise if a different interpretation is adopted*".[54]

64 The Constitutional Court has stressed that since all applicable laws must comply with the Constitution and be applied in conformity with its fundamental values, it is now *the Constitution*, and not the legislation, which provides the principles and values and sets the standards to be applied.[55]

65 Arising from the Constitutional Court's jurisprudence, three principles can be distilled that guide constitutional interpretation (which we give descriptive names):

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[52] *Hyundai* supra para 22.

[53] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 128; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) (***Wary***) at para 46. *Hyundai* supra at paras 21 -para 23.

[54] *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20 para 22.

[55] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 26 (per Mokgoro J for the majority):

> "Although [the National Roads Act 54 of 1971] has for nearly two decades been applied in the expropriation of property and has been regarded as the major source of expropriation law in South Africa, it is important to recognise and appreciate that, since the inception of the Constitution, all applicable laws must comply with the Constitution and be applied in conformity with its fundamental values. It is therefore now the Constitution, and not the Act, which provides the principles and values and sets the standards to be applied whenever property, which in turn is now also constitutionally protected, is expropriated. Every act of expropriation, including the compensation payable following expropriation must comply with the Constitution, including its spirit, purport and objects generally and s 25 in particular." (Emphasis added.)

65.1 First, the **constitutional compliance principle**: when a legislative provision is capable of two interpretations, if one would render that provision unconstitutional, and the other would not, then the court must adopt the interpretation that would render the provision constitutionally compliant.[56]

65.2 Second, the **better effect principle**: even where one interpretation will not necessarily lead to an infringement of the Bill of Rights, where two interpretations of legislation are possible, the Court should prefer the interpretation that best promotes the spirit, purport and objects of the Bill of Rights.[57]

65.3 Third, the **reasonable construction principle**: in applying the *constitutional compliance principle* and the *best effect principle*, an interpretation of a legislative provision may not be adopted that the words cannot reasonably bear – the interpretation must not unduly strain the language used. [58]

66 Thus, in summary, constitutional interpretation requires courts to recognise that all legislation must be interpreted not only through the lens of the Constitution, but in an endeavour to incline the legislation to the will of the Constitution, within the limits of language. Language can and must be pressed in the service of constitutional compliance and promotion, but not unduly strained or broken.

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[56] See *Hyundai* supra at paras 22-23.

[57] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) paras 46, 47, 84, and 107; *Fraser v Absa Bank Ltd* 2007 (3) SA 484 (CC) para 47; and *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) paras 87-89; *Stratford v Investec Bank Ltd* 2015 (3) SA 1 (CC) at para 36

[58] *Tshwane City v Link Africa and Others* 2015 (6) SA 440 (CC) (***Link Africa***) para 117; *Hyundai* para 24; *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) (***SAPS***) at para 22.

As the Constitutional Court explained in *SAPS*, "*[i]nterpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution*."[59]

The proper interpretation of the Disaster Act

67 HSF submits that on a proper interpretation, the Disaster Act confers only short-term powers on the Minister, and is intended only as a stop-gap. It applies only for so long as the National Executive and/or Parliament cannot exercise their powers to create new, more specific legislation.

68 The Disaster Act exists to regulate disasters. A "*disaster*" is defined to mean "*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".

69 A disaster is thus something which is either "*progressive or sudden*".

69.1 If it is progressive, it develops in a manner that is beyond our reasonable control.

[59] *SAPS* supra (per Sachs J) at para 22, emphasis added; see also *Link Africa* (per Cameron J and Froneman J) supra at para 117.

69.2 If it is sudden, it happens without warning, in a way that cannot be predicted, and for which no adequate plans can be made.

69.3 Thus, a disaster is, by definition, that which is unpredictable or which cannot be controlled, and which requires, as the Preamble to the Disaster Act explains, a "*rapid and effective response*".[60]

70 Thus, unlike other social and natural ills, by definition a disaster cannot be planned for in advance. And Parliament cannot do what it ordinarily would: adopt prior concrete, context-specific measures that eliminate or reasonably mitigate their harmful effects. The Act thus deems it necessary, in the limited context of a disaster, to vest wide-ranging power in the Minister to make regulations and issue directions.

71 What would otherwise be extremely wide Ministerial powers under the Disaster Act are limited by the definition of disaster, and particularly by the requirement that a disaster must be progressive or sudden. This definition impliedly requires that two requirements are met.

71.1 First, there must be no existing technical measures that can be implemented by organs of state that will deal adequately with the threat posed or harm caused. If such measures exist, then the occurrence will not be progressive or sudden.

71.2 Second, there must exist time-sensitive reasons that frustrate the making of new measures through regular legislative and executive processes.

[60] FA paras 66-67, p29 of the Record [p006-29].

> Again, if it is possible to make new measures in the ordinary course, then the occurrence will similarly not be progressive or sudden. [61]

72 Critically, the Minister's power only lasts for so long as both these requirements are met. If either of them is no longer present, the Disaster Act does not apply. In any event, Parliament and the National Executive cannot frustrate the fulfilment of either of the above conditions simply by failing to act in accordance with their constitutional duties to initiate, debate and pass the relevant legislation through the ordinary parliamentary process. This reflects the fact that the declaration of a disaster under the Disaster Act is an emergency, stop-gap measure, which enables an immediate and urgent response until Parliament and the National Executive have gathered themselves, such that they can reassert their ultimate legislative and executive functions.

73 The HSF accepts that the initial appearance of COVID-19 may have been a disaster as contemplated by section 1 of the Disaster Act.[62] That would have provided a lawful basis for the Minister's exercise of her powers under the Act.

74 However, this does <u>not</u> justify the indefinite exercise by the Minister of these powers, for so long as COVID-19 remains in our lives. The Disaster Act 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.[63]

75 This interpretation of the Disaster Act accords with its fundamental purpose.

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[61] FA paras 16 and 65 to 71, pp11, 29-30 of the Record [pp006-11, 006-29 - 006-30]

[62] FA para 72, pp30-31 of the Record [pp006-30 - 006-31].

[63] See section 2, 26 and 27 of the Disaster Act, and the discussion below on the proper interpretation of the Act.

75.1 The Disaster Act exists to regulate rare circumstances when new and serious threats or harms appear or manifest and Parliament and the National Executive are unable to act as they ordinarily would. The purpose of the Disaster Act is to deal with institutional lacunae at speed.

75.2 However, it is not intended to deal with gaps in our knowledge of the facts or to deal with all harmful or threatening occurrences for an indefinite period.

76 This interpretation is fortified by a reading of the Disaster Act as a whole, and particularly sections 2, 26 and 27. These provisions make clear that:

76.1 the primary locus of power for regulating the state's responses to social and natural ills is and should be Parliament;

76.2 the Act is always subject to the existence or enactment of more specific and targeted legislation, which enactment must occur without delay.

77 Section 2 of the Disaster Act provides for the scope of its application. It provides as follows:

> **"2 Application of Act**
>
> (1) This Act does <u>not</u> 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)* <u>to the extent that that occurrence can be dealt with effectively in terms of other national legislation</u>-
>
> (i) <u>aimed at reducing the risk, and addressing the consequences, of occurrences of that nature</u>; and

(ii) identified by the Minister by notice in the Gazette.

(2) The Minister may, in consultation with Cabinet members responsible for the administration of national legislation referred to in subsection (1) *(b)*, issue guidelines on the application of that subsection.

(3) Where provincial legislation regulating disaster management in a province is inconsistent with this Act, this Act prevails over the provincial legislation subject to section 146 of the Constitution."

78 Section 2(1)(b) of the Disaster Act thus provides an important exception to the application of the Act. It excludes the Minister's power to declare (or continue to declare) occurrences states of disaster, even when they may otherwise meet the definition, if those occurrences can be dealt with effectively in terms of other legislation aimed at reducing the risk and addressing the consequences.[64]

79 Section 26 provides:

"26 Responsibilities in event of national disaster

(1) The national executive is primarily responsible for the co-ordination and management of national disasters irrespective of whether a national state of disaster has been declared in terms of section 27.

(2) The national executive must deal with a national disaster-

(a) in terms of existing legislation and contingency arrangements, if a national state of disaster has not been declared in terms of section 27 (1); or

(b) in terms of existing legislation and contingency arrangements as augmented by regulations or directions made or issued in terms of section 27 (2), if a national state of disaster has been declared.

(3) This section does not preclude a provincial or municipal organ of state from providing assistance to the national executive to deal with a national disaster and its consequences, and the national executive, in exercising its primary

[64] See *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and others* [2020] ZAWCHC 56 (26 June 2020) (***Esau***) at para 34

responsibility, must act in close co-operation with the other spheres of government."

80 Section 27(1) is the provision in terms of which the Minister has declared a national state of disaster. The section also embodies a recognition of primacy of Parliament, and 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."

81 These provisions all serve to illustrate that Parliament must pass legislation that adequately empowers state institutions to deal effectively with social and natural ills, as and when they appear – including in respect of occurrences that might otherwise be disasters under the Disaster Act.

82 It is thus only unpredictable or uncontrollable occurrences that require a collective, immediate response that justify the declaration of a state of disaster, and even then not indefinitely.

83 The state of disaster must come to an end as soon as measures exist to deal adequately with the threat posed or harm caused, or as soon as there are no longer time sensitive reasons frustrating the making of new measures through regular legislative and executive processes.

84 By corollary, Parliament and the National Executive have a duty to reassert their constitutional powers by initiating and passing legislation as soon as this is practically possible.

85 Lastly, in addition to according with the text, the context and the purpose of the Disaster Act, this interpretation is also constitutionally mandated.

86 As we demonstrate below, it is *only* if the Disaster Act is understood as a necessary stop-gap measure, that it can pass constitutional muster. If it permits the indefinite declaration of a state of disaster, and thus the indefinite abdication by Parliament of its legislative duties, it would be a constitutionally impermissible delegation of powers.[65] This Court should seek to avoid that result by preferring the interpretation that retains, and gives best effect to, the constitutional structure of our government and the fundamental values of the Constitution.

The Respondents' interpretation is unsustainable

87 While the Speaker and National Executive do not credibly refute the HSF's interpretation,[66] it appears that they take the view that for as long as there are concerns about efficiency and inadequate knowledge, the operation of the Disaster Act is triggered. For example, the Speaker asserts that the Act can and should be understood to operate as lasting until COVID-19 "*no longer presents a threat*" or "*for as long as*" this threat "*persists*". Thus, on their version, once a disaster is declared,[67] the Disaster Act operates until the threat or harm is vanquished, tamed or no longer serious.

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[65] This is the basis for the Democratic Alliance's challenge to the Disaster Act. See FA paras 59 and 60, p27 of the Record [p006-27].

[66] See PA paras 36, 38 to 40 and 50 to 53, pp118, 119, 122-123 of the Record [pp011-443, 011-444, 011-447, 011-448]; and EA paras 150, 151, 165, 166 and 210, pp197, 200 and 209 of the Record [pp011-46, 011-49 and 011-58].

[67] For example, see PA para 34, p118 of the Record [p011-443] and EA paras 45 to 57 and 163, pp169 to 172 of the Record [pp011-18 - 011-21 and 011-48].

88 This view is unsustainable.

89 First, it does not accord with the language of the Act. The mere fact that an occurrence continues to pose a threat is not sufficient to bring it within the definition of a ‘disaster’ under the Act. The continued existence of a threat certainly does not render the occurrence ‘sudden or progressive’, or continue to justify the wholesale and ongoing abrogation of Parliament’s legislative duty.

90 Second, this interpretation subverts the purpose of the Act. It turns what is plainly intended to be a temporary, stopgap measure into an evergreen source of Ministerial decree.

91 Third, this interpretation would give rise to an unconstitutional reading and should for that reason be rejected.

91.1 On the interpretation advanced by the HSF, the Disaster Act, while an important stopgap measure, ceases to apply as soon as there is no time sensitive reason for Parliament and the National Executive not to enact measures in the ordinary course. Any delegation of power under it is therefore duly limited in time and scope. There is no unconstitutional delegation of power.

91.2 But if the interpretation advanced by the Speaker and National Executive were to be accepted, it would provide for the extraordinary delegation of wide powers for an indefinite period. In short:

91.2.1 Section 27(2) empowers the Minister to make regulations or issue directions or authorise the issuing of directions on an extremely wide array of issues, including a catch all provision

to take '*other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster*'.

91.2.2 Section 27(5), which regulates the lifespan of a declaration of a national state of disaster by providing that it *lapses three months after it has been declared, but* may be extended by the Minister by notice in the Gazette for one month at a time. On the respondents' version, not only does the Minister have these extraordinarily wide powers, but she can simply continue extending the period indefinitely.

91.2.3 Section 59(1)(a) provides that the Minister has the authority to make any regulation concerning any matter that is necessary for the effective carrying out of the objects of the Act.

91.3 This would plainly exceed the bounds of lawful delegation laid down by the Constitutional Court.[68]

91.3.1 The Court has held on separate occasions that the competence of Parliament to delegate its law-making function depends on various factors, including the nature, ambit and degree of the delegation, the identity of the person or institution to whom the power is delegated, the subject matter

[68] See *Executive Council Western Cape* supra.

of the delegated power and the control and supervision retained and exercisable by the delegator over the delegate.[69]

91.3.2 As Chaskalson P explained, while delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made is permissible, assigning "*plenary legislative power*" to another body is not, as it subverts the manner and form provisions of the Constitution.[70]

91.3.3 The principles regarding the lawful limits of delegation were confirmed more recently in *JASA*.[71] Affirming Chaskalson P's concern in *Executive Council of the Western Cape Legislature* that Parliament should not assign "*plenary legislative power*" to another body, the Court held that Parliament "*may not ordinarily delegate its essential legislative functions*." [72]

91.4 In addition to being an unconstitutional delegation *per se*, the precise *manner* in which the Disaster Act delegates power would, on the respondents' interpretation, also render the Act unconstitutional.

91.4.1 This is because, as the Constitutional Court made clear in *Dawood*,[73] it is unconstitutional, and contrary to the separation

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[69] *Constitutionality of the Mpumalanga Petitions Bill, 2000* 2002 (1) SA 447 (CC) para 19; *Executive Council, Western Cape Legislature,* para 136 (judgment of Mohamed DP).

[70] *Executive Council Western Cape* supra at para 64.

[71] *Justice Alliance of South Africa v President of the Republic of South Africa and Others, Freedom Under Law v Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC).

[72] Para 65.

[73] *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936.

of powers, for the legislature to assign wide discretionary, plenary legislative power (including, in the Disaster Act, in relation to '*any matter that…is necessary to prescribe for the effective carrying out of the objects of the Act'*), without any guidelines to shape the exercise of that discretionary power, and in circumstances where the constitutional rights of citizens are affected.

91.4.2 As O'Regan J explained, in the first instance, *'[i]t is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable*' and that "*[a]ffording the Executive a power to regulate such matters is <u>not</u> sufficient. The Legislature must take steps where the limitation of rights is at risk to ensure that appropriate guidance is given.*"[74]

91.5 In short, the exceptional allocation of powers under the Disaster Act is only constitutionally permissible if: (a) it applies in exceptional circumstances – when unpredictable or uncontrollable occurrences arise that require a collective, immediate response, and (b) if it ceases to apply when those circumstances no longer pertain.

92 To be clear, it is not our argument that Parliament has in fact unconstitutionally delegated law-making power to the National Executive. Properly interpreted, the Disaster Act does no such thing. Why? Because the Disaster Act is

[74] Para 49 and fn 74.

predicated on Parliament and the National Executive fulfilling their constitutional obligations, as soon as they are reasonably able, to initiate, prepare and pass legislation to regulate the state's response to the COVID-19 pandemic. Had this occurred, the Disaster Act on its own terms would have brought to an end the Minister's and the Executive's power under the Act to regulate the response to the COVID-19 pandemic. Through the failure and refusal to enact legislation to address COVID-19, Parliament has unconstitutionally *abdicated* its law-making responsibility to the National Executive.

THE RESPONDENTS BEAR A DUTY TO INITIATE, PREPARE AND PASS LEGISLATION TO ADDRESS COVID-19

The source of the duty to legislate

93 While the respondents accept that they have the power to prepare, initiate and pass legislation, they contend that the power is permissive and discretionary,[75] that it is a "*prerogative*",[76] or that it does not apply "*in these circumstances*".[77] Parliament contends that it "*retains the discretion to determine when it is appropriate to initiate and pass legislation*".[78]

94 This is mistaken. The respondents do not have entirely discretionary legislative powers. They have what the Constitutional Court has described in other

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[75] PA paras 7.2, 24 to 26 and 44, pp107-108, 115-116 and 120 of the Record [pp011-432 - 011-433, 011-440 - 011-441, 011-445]; EA paras 17, 22 to 25, 28, 154, 175, 182 and 21, pp160, 162-163, 164, 197, 202, 203, 161 of the Record [pp011-9, 011-11, 011-12, 011-13, 011-46, 011-51, 011-52, 011-10]

[76] PA para 44, p120 of the Record [p011-445].

[77] EA paras 146 and 154, pp196 and 197 of the Record [pp011-45 and 011-46].

[78] PA para 26, pp115-116 of the Record [pp011-440 - 011-441].

contexts as "*a power coupled with a duty to use it if the requisite circumstances were present.*"[79] The requisite circumstances are plainly present in this case.

95 The source of the respondents' duty is in 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. COVID-19 has an impact on virtually every right in our Bill of Rights.[80] There is unquestionably a corollary duty to create, openly, accountably, and in a participatory fashion, a comprehensive legislative response.

96 The Constitutional Court explained in *Metrorail*[81] that the state bears a positive obligation to act reasonably to promote, protect and fulfil rights.

96.1 In that case, O'Regan J held, with reference to the specific rights implicated, as well as the provisions of section 7(2), 8(1) and 239 of the Constitution, that the Bill of Rights does not merely impose negative obligations not to infringe or restrict rights; it also imposes positive obligations.[82]

96.2 She 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. The

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79 *SAPS* supra at para 15; *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) para 181; *Democratic Alliance v Public Protector; Council for the Advancement of the Constitution v Public Protector* [2019] 3 All SA 127 (GP) paras 104-105.

80 FA paras 12, 81, 82, 83, 86, 98, 101, 110.1.3, 111, pp10, 33, 34, 35, 36, 41, 42, 44, 45 of the Record [pp 006-10, 006-33, 006-34, 006-35, 006-36, 006-41, 006-42, 006-45]; RA paras 6.7, 6.8, 6.9.1, 6.9.2, 39.1, 48, 64, 110, 111, pp500, 501, 512, 520-521, 523, 531 of the Record [pp012-5, 012-6, 012-17, 012-25 - 012-26, 012-28, 012-36].

81 *Rail Commuters* supra.

82 Paras 66 to 72.

general principle that emerges is that "*the Court requires the bearer of constitutional obligations to perform them in a manner which is reasonable*".[83]

96.3 What constitutes reasonable measures will always be circumstance-dependent. O'Regan J enumerated various factors which bear on this analysis:[84]

> "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 any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer. Thus, an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb. A final consideration will be the relevant human and financial resource constraints that may hamper the organ of State in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of State will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities." (Emphases added)

[83] Para 87.

[84] Para 88.

97 Applying these factors to the present case, it is clear that the respondents' obdurate failure to enact legislation to address COVID-19 is not reasonable.

97.1 The nature of the duty is one of the most fundamental conceivable: law-making. It goes to the heart of our constitutional democracy.

97.2 The duty could not be more closely related to the core activities of Parliament. Parliament, the legislative branch of government, has no duty more closely related to its core activities than the making of law.

97.3 The threat to fundamental rights is palpable. As we demonstrate below, COVID-19 poses a direct threat, quite literally, to 'life and limb'. Indeed, it is precisely because of this threat that a state of disaster was declared and a raft of regulations was published.[85]

97.4 For these reasons, there can be no suggestion that the respondents have acted reasonably in not enacting legislation to address COVID-19. Their conduct has been manifestly unreasonable.

98 Another highly instructive decision is *Glenister II,* where the Constitutional Court held that the unique nature and deleterious effects of corruption – a pervasive, enduring social disease – is such that a general policing unit was not adequate to respond to the threat and harm caused by corruption. This duty was articulated by the majority of the Constitutional Court in *Glenister II* as follows:

> "The Constitution is the primal source for the duty of the state to fight corruption. It does not in express terms command that a corruption-fighting unit should be established. Nor

[85] See *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) , noting that the Disaster Act was enacted based on a recognition that '*the distress occasioned by natural disasters that pose a threat to life, health and safety or result in forced removals from disaster-stricken areas*.'

does it prescribe operational and other attributes, should one be established. There is however no doubt that its scheme taken as a whole imposes a pressing duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices. As we have seen, corruption has deleterious effects on the foundations of our constitutional democracy and on the full enjoyment of fundamental rights and freedoms. It disenables the state from respecting, protecting, promoting and fulfilling them as required by section 7(2) of the Constitution."[86] (Emphases added)

99 Just as the state, through Parliament and the Executive, had a pressing duty to set up a concrete and effective mechanism to prevent and root out corruption, so too does the state, through Parliament and the Executive, have a duty to set up concrete and effective mechanisms to respond reasonably to the deleterious and disabling effects of COVID-19.

100 Similarly, in the context of discrimination against same-sex life partners, the Constitutional Court held that "*[t]he State is required by s 7(2) of the Constitution to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. And, by s 8(1) of the Constitution, '(t)he Bill of Rights . . . binds the Legislature, the Executive, the Judiciary and all organs of State'.* ***The Executive and Legislature are therefore obliged to deal comprehensively and timeously*** *with existing unfair discrimination against gays and lesbians.*[87]

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[86] *Glenister II* supra at para 175.

[87] Original footnote retained: "See the remarks of Madala J in *Satchwell v President of the Republic of South Africa and Another* [2002 (6) SA 1 (CC)]…para [29], and of Skweyiya AJ in…*Du Toit* [2003 (2) SA 198 (CC) para 32]. Numerous European countries have passed comprehensive legislation granting legal recognition to same-sex partnerships. Denmark was the pioneer in this area, passing the first law permitting same-sex couples to legally register their partnerships in 1989, Registered Partnership Act, 7 June 1989, No 372. Several other Scandinavian countries have followed suit and passed legislation based on Denmark's example. See Registered Partnership Act, 30 April 1993, No 40 (Norway); Registered Partnership Act, 23 June 1994, SFS 1994:1117 (Sweden); Confirmed Cohabitation Act, 12 June 1996, No 87 (Iceland). More recently, Germany joined this trend passing the Law of 16 February 2001 on Ending Discrimination Against Same-Sex Associations: Life Partnerships, [2001] 9 Bundesgesetzblatt 266. In addition to establishing a separate legal category for same-sex partnerships, as these countries have done, Belgium has passed legislation offering the status of legal marriage to same-sex couples: Act of 13 February 2003, Moniteur Belge, Ed 3 at 9880. The Netherlands has achieved the same result in a series of statutes: Act of 21 December 2000 authorising marriage for same-sex partners, Staatsblad 2001, No 9; Act of 21 December 2000 on adoption by same-sex partners, Staatsblad 2001, No 10; Act of 13 December 2000 on various matters including the further equality between marriage and partnership registration, Staatsblad 2001, No 11;

Moreover, Courts considering unfair discrimination cases of this sort need carefully to evaluate the context and nature of the discrimination and, where unfair discrimination is found, remedies must be carefully tailored to that context."[88]

101 In the present case, we submit that there are two principal factors that justify the existence of the respondents' specific duty, arising from section 7(2) of the Constitution, read with sections 42(3), 44(1), 55(1), 68 and 85(2), to prepare, initiate and pass legislation to address COVID-19.

101.1 The first is the unprecedented and ongoing threat to a panoply of constitutional rights posed by the COVID-19 pandemic – 'to life and limb' – as well as by the regulations made pursuant to the exercise of power under the Disaster Act. This fact alone means that section 7(2) plainly applies.

101.2 The second is the inadequacy of the Disaster Act – which provides merely a generalised, short-term and stop-gap mechanism – and that evinces the existence, therefore, of a legislative lacuna in the response to COVID-19. The state's response must, *inter alia*, comprise appropriate primary legislation, enacted pursuant to section 7(2), read with the other relevant provisions, of the Constitution.

102 And, in accordance with section 237 of the Constitution, the state's obligation must be performed "*diligently*" and "*without delay*".

Act of 8 March 2001 adjusting various other laws as a result of authorising marriage and adoption, Staatsblad 2001, No 128."

[88] *J and Another v Director-General, Dept of Home Affairs* 2003 (5) SA 621 (CC) para 25, emphasis added.

The impact on rights

103 The COVID-19 pandemic presented and presents a novel threat. It poses an unprecedented threat to an array of constitutional rights, including to the lives, livelihoods and health of millions of South Africans. The Minister has said so herself, on affidavit,[89] in *Esau,*[90] where she explained:

> *"178 The state is required to respect, protect, promote and fulfil the rights in the Bill of Rights (section 7(2) of the Constitution).*
>
> *179 These rights include the rights to dignity, life, to bodily and psychological integrity, and to access to health care, as well as everyone's right to an environment that is not harmful to their health or well-being.*
>
> *180 The COVID-19 pandemic poses an unprecedented risk to the lives and health of everyone living in South Africa.*
>
> *181 The State was, and remains, constitutionally obliged to act to prevent COVID-19 from killing hundreds of thousands of people in South Africa, and from leaving hundreds of thousands of others permanently affected by the lasting effects of SARS-CoV-2 on the human body, the full effects of which are still unknown.*"

104 The Minister has accordingly acknowledged that COVID-19 poses an unprecedented risk to lives and health, and that this triggers the state's duties under section 7(2) of the Constitution. Indeed, this is axiomatic.

105 In addition to the impact of COVID-19 itself, the swathe of regulations and directives issued by the National Executive in order to meet the threat of COVID has impacted and will for an indefinite period continue to impact almost every right in the Constitution, including the rights to equality, life, dignity, bodily and psychological integrity, privacy, religion, expression, assembly, association, making political choices, movement, labour rights, an environment that is not

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89 "**RA3**" pp560-563 of the Record [pp012-65 - 012-68].

90 *Esau* supra.

harmful to health or wellbeing, children's right, participation in the cultural life of one's choosing, and access to court.[91]

106 The impact on rights caused by these measures was confirmed by a Full Court of this Court in *Freedom Front Plus*,[92] where it was held that:

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

107 The Speaker complains that the HSF has not produced the necessary evidence to show a violation of these rights and that the HSF has not identified violations of constitutional rights flowing from the exercise of power under the Disaster Act.[93] But it cannot seriously be disputed that:[94]

107.1 the regulations under the Disaster Act dealing with COVID-19 severely curtail constitutional rights (whether or not such limitation may be justified under section 36 of the Constitution);

107.2 the COVID-19 pandemic itself impacts on constitutional rights; and

107.3 the state (that is Parliament and the Executive) bears a constitutional obligation to implement legislative measures to address the COVID pandemic, in terms of section 7(2) of the Constitution.

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91 See FA paras 40 and 82, pp18-19, 33-35 of the Record [pp006-18 - 006-19, 006-33 - 006-35].

92 *Freedom Front Plus* supra at para 3.

93 PA paras 7.2, 13 to 19 and 87, pp107-108, 112-114 and 132 of the Record [pp011-432 - 011-433, 011-437 - 011-439 and 011-457]; EA paras 27 and 204, pp164 and 208of the Record [pp011-13 and 011-57].

94 RA para 111, p531 of the Record [p012-36].

108 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 its case. It simply contends that they have been and continue to be limited and threatened – not only by the virus itself, but by the state's executive measures.[95]

109 That much is surely common cause; again, the Speaker said as much in her affidavit in *Esau:*[96]

> "182 Measures to address the COVID-19 pandemic, including the Disaster Management Regulations, limit rights in the Bill of Rights, including the rights identified by the applicants being the rights to human dignity, freedom of movement, trade and occupation, and privacy.
>
> 183 This is constitutionally permissible. Rights are subject to their own internal limitations, and to general limitation in terms of section 36 of the Constitution, provided of course that the limitations meet the standards imposed by the Constitution." (Emphases added)

110 The threats to, and limitation of rights by the virus is plainly sufficient in itself to trigger the state's obligation in section 7(2) of the Constitution to implement legislative measures to deal with the COVID pandemic. But the need to do so urgently is compounded by the fact that presently a series of fundamental rights are being limited by ministerial decree, and that any legislative response must represent a careful balancing of competing rights and interests which are best suited to a deliberative and participative body like Parliament. Indeed, it is for this reason that section 36 of the Constitution provides that a right can only be limited (in a reasonable and justifiable manner) by a law of general application.

111 We now turn to consider the respondents' argument that the Disaster Act constitutes a sufficient mechanism to meet the constitutional obligations.

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95 RA paras 175 and 176, p554 of the Record [p012-49].

96 "**RA3**" pp560-563 of the Record [pp012-65 - 012-68]; *Esau supra at* para 3.

The lacuna

112 The Minister readily accepts that where a lacuna exists, Parliament "*would clearly have to legislate*".[97] But she denies that there is a lacuna. This is, in essence, because she says that COVID-19 is a disaster, the Disaster Act is the legislative tool for dealing with disasters, and, therefore, Parliament has responded.[98]

113 Indeed, the state's legislative and executive response to COVID-19 has been sourced entirely in the Disaster Act.

113.1 On 18 March 2020, the Minister issued regulations under section 27(2) of the Disaster Act (GN 318), which regulations were amended on 25 March 2020 (GN 398), 26 March 2020 (GN 419), 2 April 2020 (GN 446), 16 April 2020 (GN 465) and 20 April 2020 (GN 471).[99]

113.2 On 29 April 2020, the Minister issued regulations under section 27(2) of the Disaster Act (GN 480), which replaced the Initial Lockdown Regulations. At the time of deposing to this affidavit, the Risk Regulations are in full force and effect, albeit, as I explain below, subject to a stream of (often contradictory) amendments.[100]

114 Parliament has made clear that it has no intention of enacting purpose-built legislation to address COVID-19. Remarkably, it has stated publicly that "*[i]t is*

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[97] EA para 30, p165 of the Record, [p011-14].

[98] PA para 7.1, p107 of the Record [p011-432]; and EA paras 12, 154, 170 and 197, pp159-160, 197, 201 and 206 of the Record [pp011-8 - 011-9, 011-46, 011-50 and 011-55].

[99] FA para 40.1, p18 of the Record [p006-18].

[100] FA para 40.2, p19 of the Record [p006-19].

the Executive's responsibility to ensure that it safeguards the rights of individuals during these difficult times and for Parliament to oversee delivery of services needed to relieve the burden of the COVID-19 pandemic on the public," and that "*Parliament must not be seen as interfering with the responsibility of the Executive to implement measures for which the National State of Disaster has been declared*".[101]

115 These remarks confirm – on its own version – a total abdication of Parliament's legislative duties under the Constitution.

116 But the Disaster Act is a constitutionally inadequate framework for dealing with COVID-19 on an ongoing basis. This is for two reasons.

117 *First*, properly interpreted, the Disaster Act should no longer apply to the COVID-19 pandemic, because, by now, the National Executive and Parliament were constitutionally obligated to have initiated and enacted specific legislation to address the COVID pandemic.

117.1 Although the *initial* appearance of COVID-19 may have satisfied the requirements for the Disaster Act to apply, and although the Disaster Act was legitimate or appropriate when this novel threat initially appeared, this does not warrant its continuation without more.[102]

117.2 Instead, as explained above, it is a requirement of the Disaster Act itself that when the National Executive and Parliament have gathered

[101] FA para 47, p21 of the Record [p006-21] ; "**FA5**", p89 of the Record [p006-89].

[102] FA para 72, pp30-31 of the Record [pp006-30 - 006-31].

themselves to reassert their basic legislative and executive functions, the Minister's extensive power under the Act is exhausted.

118 *Second*, the powers under the Disaster Act, including but not limited to those in section 27(2) of the Disaster Act, are general and insufficiently targeted. Because the Act is designed to deal with *all disasters*, and on an *emergency* basis, it lacks the concrete, directed focus that is necessary to address the particular problem that is COVID-19.

118.1 To respond effectively to COVID-19, there is a need for a legislative mechanism that is sufficiently concrete and fit for purpose. As the Constitutional Court made clear in *Glenister II,* state action can only ever be "*effective*" if the law empowering it is sufficiently concrete, that is, if the "*structure [is] designed to secure*" the particular good or bad that it is meant to facilitate or frustrate.[103]

118.2 The Disaster Act is inadequate to address the response to COVID-19 effectively for sustained periods of time. The reason for this is that its generality renders it singularly unfit for dealing with known, enduring problems. On a proper interpretation of that Act, it was never meant, ongoingly, to apply to such problems, or represent Parliament's complete response thereto.

118.3 COVID-19 must now, more than five months later, be understood and grappled with by our lawmakers in the same way that we do other known problems.

[103] *Glenister II* supra at para 231.

118.3.1 For example, while gender-based violence,[104] corruption[105] and racism[106] have been described as pandemics and as scourges that call for an urgent and rapid response from government, we do not afford the National Executive indefinite, wholesale power to fix the state's response to these real, immediate and entrenched problems.

118.3.2 Instead, Parliament makes law: the Domestic Violence Act, 1998, the Prevention and Combating of Corrupt Activities Act, 2004, or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, and so on, depending on the nature of the specific ill.[107]

118.3.3 This is how the state deals with our various, manifold, historically-given and new problems, both social and natural: through Parliament's democratic, deliberative, transparent, open and accountable structures.

118.3.4 This is necessary to ensure that the state's response (as it must always be) is best designed to fulfil the Constitution's purpose to respect, protect, promote and fulfil all South

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[104] RA para 26.1, p508 of the Record [p012-13]; "**RA1**", pp550-556 of the Record [pp012-55 - 012-61]

[105] RA para 26.2, p508 of the Record [p012-13]; *Glenister II* supra at para 85.

[106] RA para 26.3, p508 of the Record [p012-13]. See *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 (1) SA 549 (CC) at para 2; *Duncanmec (Pty) Limited v Gaylard NO and Others* 2018 (6) SA 335 (CC) at para 9; *Manong and Associates (Pty) Ltd v City of Cape Town* 2011 (2) SA 90 (SCA) at para 2.

[107] RA para 29, pp509-510 of the Record [pp012-14 - 012-15].

Africans' rights and interests, in the face of the threat that is COVID-19.

Summation

119 Parliament and the National Executive have a duty arising from section 7(2) of the Constitution, read with other provisions of the Constitution, to prepare, initiate and pass legislation in order to respect, protect, promote and fulfil rights in the Bill of Rights.

120 The COVID-19 pandemic, as well as the response to it, presents a novel and unprecedented threat to an array of constitutional rights.

121 On its own terms, the Disaster Act is not designed or intended to protect, promote and fulfil the constitutional rights at stake on an enduring, let alone indefinite or infinite basis, as suggested by the respondents. It is a generalised and emergency measure, intended only as a stop-gap.

122 The upshot is that:

122.1 there exists a legislative lacuna, in that the National Executive has not prepared or initiated and Parliament has not considered, prepared, initiated and passed legislation that has as its purpose the regulation of the response to COVID-19; and

122.2 instead, more than five months after the Declaration, the National Executive is exercising power, through the National Coronavirus Command Council, an *ad hoc* disaster response mechanism that was

established "*to coordinate all aspects of [government's] extraordinary emergency response*" to COVID-19.[108]

123 It thus follows as a matter of logic that these branches of government must act to remedy the lacunae without delay. They must initiate, prepare and pass concrete and effective legislation to address COVID-19.

RELIEF

124 The state appears to resist the idea that this court can grant HSF's relief.

125 It is thus important to reiterate certain fundamental aspects of this court's remedial powers, in the context of this case. We stress that the Constitutional Court has recognised separation of powers as a founding principle of the Constitution, and confirmed that such principle is no less justiciable than express provisions in the Bill of Rights. See *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC):

> "[25] The separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures. Although parliament has a wide power to delegate legislative authority to the executive, there are limits to that power. Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.

[108] FA para 43, p19 of the Record [p006-19].

[26] The separation required by the Constitution between the legislature and executive on the one hand, and the courts on the other, must be upheld otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights, and other provisions of the Constitution, will be undermined. The Constitution recognises this and imposes a positive obligation on the state to ensure that this is done."

126 It is not just a competence of the court – it is also a duty. See *Glenister v President of the Republic of South Africa and Others* 2009 (2) BCLR 136 (CC), at para 33:

"The courts not only have the right but a duty to intervene and prevent violation of the Constitution. As the 'ultimate guardians of the Constitution', the courts have an 'obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds".

Declaratory relief

127 In Prayers 2.1 to 2.3 of its notice of motion, the HSF seeks orders declaring that:

127.1 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 COVID-19;

127.2 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;

127.3 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 are concerned.

128 Once it is accepted that the respondents bear a constitutional obligation to prepare, initiate and pass legislation to regulate the state's response to the threat posed and harm caused by COVID-19, and that they have breached this obligation, declaratory relief follows axiomatically.

129 This being a constitutional matter, the Court must approach the relief through the prism of section 172 of the Constitution. In terms of section 172(1)(a) of the Constitution, when a court considers remedy, the starting point, as a matter of constitutional principle, is that (i) all conduct which is inconsistent with the Constitution is invalid; and ii) invalid conduct must be declared unlawful – '*there is no shying away from it'*.[109]

130 As the Court held in *Treatment Action Campaign (No2):*

> Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can affect their policy and may well

[109] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) para 25. See also *Economic Freedom Fighters and Others v Speaker of the National Assembly and Anothe*r 2018 (2) SA 571 (CC) (***EFF***) para 209; and *Ngomane and Others v Johannesburg (City) and Another* 2020 (1) SA 52 (SCA) paras 21-22, 27.

have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so.[110]

131 In *Metrorail*, O'Regan J explained that whatever other relief might be granted – such as mandatory or prohibitory orders – where the state has breached its obligations because it denies that it has such obligations, then a declaratory order to that effect is manifestly appropriate. In particular, declaratory orders '*assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values'*.[111]

132 As she explained, "*from their affidavits and their argument to this Court, it was clear that neither Metrorail nor the Commuter Corporation considered that they bore any obligation in relation to the security of rail commuters, and that they did not interpret the void as something they had to fill*".[112] Because the respondents had in error denied that they bore obligations to protect the security of rail commuters, the Court held:

> "Given the importance of that obligation in the context of public rail commuter services, it is important that this court issue a declaratory order to that effect"[113]

Mandamus

133 If the Court finds that there is an obligation to enact legislation to address the COVID-19 pandemic, and it finds that the obligation has been breached, then the mandamus compelling Parliament and the National Executive to act must follow as a matter of course.

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[110] *Minister of Health and Others v Treatment Action Campaign and Others (No2)* 2002 (5) SA 721 (CC) para 99.

[111] *Rail Commuters* supra at para 107.

[112] *Metrorail* supra at para 92, our emphasis.

[113] *Metrorail* supra at para 109, and see the order at para 111, with the declarator in subparagraph 3.

134 As the Constitutional Court held in *EFF*, the court's remedial power "*is not limited to declarations of invalidity. It is much wider. Without any restrictions or conditions, section 172(1)(b) empowers courts to make any order that is just and equitable*."[114]

135 The Court in that case accordingly held that it was "*just and equitable to direct the Assembly to perform its constitutional obligations*."[115] Notwithstanding that the Speaker's evidence was that the process of making the relevant rules was at an advanced stage, the Court held that the special circumstances of the case – the nature of impeachment complaints – "*demand that the Assembly be directed to fulfil its constitutional obligations without delay"*.[116]

136 In fact, unlike in *EFF,* the respondents have made it abundantly clear that they have no intention of enacting legislation unless compelled to do so.

137 For five months, Parliament has abdicated its key constitutional function. Quite clearly, more than sufficient time has passed for Parliament and the National Executive to gather themselves, for the sake of performing their original, constitutional functions.[117] Parliament does not deny that it is fully operational and carries on its legislative agenda; the same is true of the National Executive. There is no good reason why they cannot act. Their failure to do so is manifestly unreasonable, particularly in the light of the constitutional injunction in section 237.

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[114] *EFF* supra para 210.

[115] Para 212.

[116] Para 215.

[117] FA paras 43 and 113, pp19 and 45 of the Record [pp006-19 and 006-45]; RA para 6.5, p500 of the Record [p012-5].

138 This continued state of affairs is constitutionally unacceptable. Both branches of government have failed in their constitutional obligations. Moreover, it is plain that they have no intention to remedy the situation, making a mandamus manifestly appropriate. That is clear from –

138.1 Various public statements by the Executive, for example that the Disaster Act is the "*basis for all the regulations promulgated under the national state of disaster we declared to combat coronavirus*", with the Initial Lockdown and Risk Regulations being "*our national coronavirus response*".[118] There is accordingly every reason to believe that the Declaration will be further extended for the foreseeable future, one month at a time.

138.2 The fact that the Risk Regulations have no sunset clause and are structured on the assumption that they will endure for an indefinite period.[119] Indeed, they rest on a policy document[120] that ties the life and operation of the state's disaster response to the existence and transmission of COVID-19, facts that the National Executive has stated will exist for many months, if not years, to come.

138.3 The fact that Parliament went into a three-week recess following the Declaration, exactly at the time that when it was needed most; and to date no COVID-19 legislation is intended despite having returned from its recess in mid-April and starting business on its legislative programme. It

[118] FA para 44, p20 of the Record [p006-20].

[119] FA para 45, p20 of the Record [p006-20].

[120] FA para 45.3, p20 of the Record [p006-20].

has done nothing specific to consider, initiate or prepare legislation that will regulate, at a general but targeted or concrete level, the state's response to COVID-19.[121]

138.4 Parliament's statement on 5 April 2020 to the effect that *'[i]t is the Executive's responsibility to ensure that it safeguards the rights of individuals during these difficult times*' and that '*Parliament must not be seen as interfering with the responsibility of the Executive to implement measures for which the National State of Disaster has been declared'*.[122]

139 In short, the National Executive and Parliament have made plain that they will not go the legislative route, despite having had more than 5 months to do so, and despite ample notice of the launching of the HSF's case, already in May, in the Constitutional Court. This Court must accordingly direct them to do so. Such an order does not breach the separation of powers; on the contrary, the relief seeks precisely to uphold the separation of powers.

140 The HSF does not seek a prescriptive mandamus. That is, it does not seek an order directing that legislation with any particular content be passed. That is for Parliament to determine. But Parliament must be compelled to act.

CONCLUSION AND COSTS

141 For the reasons set out above, the HSF seeks an order in terms of its notice of motion.

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[121] FA para 46, p20 of the Record [p006-20].

[122] FA para 47, p21 of the Record [p006-21].

142 We submit that, if the application succeeds, the respondents should be ordered to pay the HSF's costs, including the costs of two counsel.

143 However, if the application is dismissed, then, in accordance with the *Biowatch*[123] principle, no costs order should be made against the HSF. The HSF is a non-profit public interest body, acting in the public interest in these proceedings, in the pursuit of matters of important constitutional principle. It has not acted vexatiously, frivolously or unprofessionally.

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24 August 2020

[123] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).