

IN THE SUPREME COURT OF APPEAL
BLOEMFONTEIN

SCA CASE NO: 01/2021
GP CASE NO: 32858/2020

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

REPLYING AFFIDAVIT

I, the undersigned,

FRANCIS ANTONIE

do hereby make oath and state that:

1. I am an adult male director of the applicant, the Helen Suzman Foundation ("**HSF**"). I deposed to the affidavit in support of the HSF's application for leave to appeal to this Honourable Court ("**the appeal affidavit**"), and I remain duly authorised to depose to this affidavit on behalf of HSF.
2. The facts contained herein are within my personal knowledge and belief, unless the context indicates otherwise, and are both true and correct. Where I make legal submissions, I do this on the strength of the advice of my legal representatives, which advice I accept as being correct.



OVERVIEW

3. This is a consolidated reply to the first respondent's ("**the Speaker's**") answering affidavit and the second, third and fifth respondents' ("**the Executive's**") answering affidavit.
4. The Speaker and the Executive in their answering affidavits place significant store on this Court's judgment in *Women's Legal Centre*¹ ("**WLC**"). These *dicta*, the two sets of respondents claim, constitute a repudiation of the argument advanced by the HSF in the Full Court and in its appeal affidavit that:
 - 4.1 COVID's serious, ongoing threat to life, well-being and rights of all South African triggers the state's section 7(2) duties;
 - 4.2 these duties can only be fulfilled through the adoption of reasonable, concrete and effective measures;
 - 4.3 the Disaster Management Act, 2005 ("**the Disaster Act**") does not purport to be, and cannot reasonably be read to purport to be, such a measure; and
 - 4.4 since the Disaster Act does not purport to be a comprehensive response to all novel and serious threats and harms, ongoingly and forever, Parliament is under an obligation to pass legislation that is fit-for-purpose in dealing with the novel, ongoing threats and harms presented by COVID.
5. The structure of this argument, the respondents claim in their answering affidavits, "*has been pertinently, comprehensively and authoritatively*" rejected by this Court in *WLC*.²
6. I am advised that whilst this is primarily an issue for legal argument, this description of the meaning and significance of *WLC* for HSF's argument in this case is mistaken. The substance of the Speaker

¹ *President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others* [2020] ZASCA 177

² Speaker AA para 11 and Executive AA para 13



and Executive's affidavits opposing the application for leave to appeal, I am advised, suffer from the same error. Thus, it is convenient to start this replying affidavit in a thematic fashion by distinguishing this application from *WLC*.

THE IMPORT OF *WLC*

7. This Court in *WLC* was primarily concerned with articulating, demarcating and doing justice to the doctrine of the separation of powers, reaffirming that this doctrine is "*crucial to our democracy*".³ HSF's argument, in every affidavit and at all stages of this application, is likewise ultimately concerned with this doctrine. Rather than upholding this doctrine, contrarily, the Speaker and Executive ignore it. From this fundamental constitutional error, the Speaker's and Executive's opposition to this application proceeds.
8. In *WLC*, this Court was faced with two pieces of legislation, the Marriage Act⁴ and the Divorce Act,⁵ which the parties ultimately agreed were unconstitutional as a result of the exclusionary and discriminatory manner in which they regulated (or failed to regulate) Muslim marriages.
9. The issue before this Court in *WLC* thus concerned legislation that purported to perform a specific function, comprehensively and ongoingly, but was substantively defective.
10. So, what remained in issue was the appropriate constitutional relief. The Women's Legal Centre proposed alternative forms of declaratory relief:
 - 10.1 a declarator that the state had a duty to prepare, initiate, introduce and bring into operation legislation recognising Muslim marriages, and that the President and Cabinet had failed to fulfil this obligation; or
 - 10.2 a declarator that the Marriage Act and Divorce Act, as well as specific provisions thereof, are declared unconstitutional to the extent that they fail to recognise and provide for Muslim

³ *WLC* judgment at para 35.

⁴ 25 of 1961.

⁵ 70 of 1979.

marriages.⁶

11. This Court rejected the first declarator and endorsed the second, citing the doctrine of the separation of powers. This Court did not conclude, as the Speaker and Executive contend, that the state cannot be ordered to prepare, initiate, consider and pass legislation that regulates particular issues or classes thereof. Rather, it held, just as the Constitutional Court held in *Glenister II*, that courts cannot direct the state to situate a response in one legislative instrument rather than another.
12. In *Glenister II*, the Constitutional Court had likewise held legislation unconstitutional. It also refused to direct Parliament to locate the mechanisms necessary to ensure structural independence in a new legislative instrument rather than the South African Police Service Act, 1995. There were two legislative options: the legislation required by section 7(2) in that case could be housed in existing but defective legislation, or it could be housed in a new legislative instrument. The choice where to house the independence-ensuring laws required by section 7(2), however, was left to Parliament, as required by the doctrine of the separation of powers.
13. So clarified, I am advised, the distinction between *WLC* and this application is plain. In this application, it is not argued that there is any existing legislation that purports to regulate a particular issue - as there were already laws regulating the exercise of police power in *Glenister II* and marriage and divorces in *WLC*.
14. The Disaster Act does not purport to be a comprehensive response to all novel and serious threats and harms, ongoingly and forever. If it purported to do this, then the HSF would indeed, as the Full Court held and the Speaker and Executive both argue, be required to challenge its constitutionality. But the HSF does not rely on this interpretation of the Disaster Act.
15. Whilst in *WLC* the parties agreed that the relevant legislation was unconstitutional, in this application the parties agree that the Disaster Act is constitutional. The only debate is over its purpose and



⁶ WLC judgment at para 8

meaning:

- 15.1 For their part, the Speaker and Executive argue that the Disaster Act, though not designed to deal with particular problems but sudden and progressive threats in general, must be treated as the state's comprehensive, final and ongoing section 7(2) response to the threat and harm presented by COVID. Implicit in their characterisation of the Disaster Act, as a "one size fits all", "wall to wall" response to any disaster, is a concession that the Act cannot necessarily be concrete and fit-for-purpose for a pandemic which will be with us for years to come.
- 15.2 Whereas, the HSF contends that the Disaster Act functions as a stop-gap measure. Faced with a threat that existing institutional tools cannot adequately manage, the Disaster Act affords to the Executive emergency legislative powers, pending Parliament reclaiming its original legislative power to regulate life in a way that respects, protects, promotes and fulfils the rights in the Bill of Rights. So, it is temporary not because the threat or harm contemplated by the Act is of short duration, but because the Act is meant to provide emergency legislative powers only until Parliament can gather itself and continue exercising its law-making powers.
16. The substance of this application, therefore, is unlike *WLC*.
17. The issue is not about what should be done when Parliament discharges its law-making duties defectively, but what is required by the Executive and by Parliament when the state fails to legislate at all. There is no debate that the state has not legislated in respect of the pandemic.
18. The HSF, in full recognition of the doctrine of the separation of powers, does not ask the courts for a declarator as to how Parliament must legislate: whether in content or by stipulating a precise location for the required legislative response. As this Court held in *WLC*, "[i]t is for Parliament to make legislative choices provided that they are rational and constitutionally compliant. And if they are not, the court must act in terms of section 172 of the Constitution".⁷




⁷ *WLC* judgment at para 43.

19. All that the HSF seeks by way of relief is a declarator that Parliament legislate *simpliciter*, however it chooses, provided its choices are consistent with its section 7(2) duty to pass reasonable, concrete and effective measures. Only once it passes this legislation, I am advised, will the facts be analogous to *WLC*, because only then will there be legislation that purports to regulate a particular issue or class of issues, in a manner that is either constitutional or not.
20. I am advised that the HSF's argument, therefore, conforms to the principles that were established in *Glenister II* and confirmed in *WLC*:
- 20.1 When section 7(2) is triggered, the state has a duty to take measures that are reasonable, concrete and effective.
- 20.2 Absent existing measures that are fit-for-purpose, the state has an obligation to create new measures.
- 20.3 To respect the separation of powers, the courts must not direct Parliament on the form and location of these measures.
21. Thus, I am advised, *WLC* did not "*pertinently, comprehensively and authoritatively*" reject or repudiate the structure of the HSF's argument. On the contrary, it reaffirmed its essential correctness.
22. As explained above, what is at issue between the parties is the proper interpretation of the Disaster Act, namely whether it is:
- 22.1 a comprehensive, final and ongoing response to all novel threats and harm, as the Speaker and Executive argue; or
- 22.2 an emergency allocation of legislative power pending Parliament's reassertion of constitutional role as original legislator, as the HSF argues.
23. If the second interpretation is correct, then the HSF's appeal must succeed, as Parliament has repeatedly stated that it refuses to exercise its legislative powers to deal with COVID.



24. The Speaker and the Executive, however, have persistently conflated the distinction between these two interpretations. In doing this, they neglect the substantive issues that form the heart of this application.

THEMATIC RESPONSE

25. Below, I provide a thematic overview of the HSF's core responses to the Speaker's and the Executive's answering affidavits, as opposed to dealing with each and every paragraph therein on a *seriatim* basis. To the extent that I do not expressly admit or deny any allegation, or to the extent that an allegation is inconsistent with this replying affidavit or the appeal affidavit, it is denied.
26. I am advised that the nature of the powers in sections 42, 44(1)(b) and 55(1) of the Constitution is an issue for legal argument. That said, I am advised that the answering affidavits, in addressing these sections, conflate the distinction between two issues:
- 26.1 the exercise of power, which is mandatory in circumstances contemplated by section 7(2) of the Constitution, and is therefore liable to declaratory orders in the event of its non-exercise; and
- 26.2 the content and outcome of the exercise of this power, which is open-ended or discretionary, in the sense that is contemplated by the doctrine of the separation of powers.
27. COVID first requires the former, being the exercise of legislative power. This power is what the Minister of Cooperative Governance and Traditional Affairs ("**the Minister**") has been exercising since March 2020. The only issue in dispute is who should exercise these powers: the Minister indefinitely, or the body constitutionally assigned this function?
28. The text, context and purpose of the Disaster Act all make plain that it is designed to afford emergency legislative power to the Executive in circumstances when there is no existing measure that can adequately deal with the threat or harm. The Disaster Act does not purport to construct a framework that deals indefinitely with every new serious threat or harm, for so long as this threat or harm exists, as determined by the Minister. It functions to fill an institutional lacuna by allocating to the Executive
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the powers of Parliament, pending Parliament's reclaiming of these powers through its passage of fit-for-purpose laws that deal with this threat or harm or class of threats or harms. To interpret the Disaster Act otherwise, I am advised, does violence to the doctrine of the separation of powers resolutely affirmed by this Court in *WLC*. It would, contrary to our constitutional framework, permit the indefinite dislocation of legislative power from Parliament to the Executive. No measure of oversight, I am advised, can cure this impermissible state of affairs.

29. This appeal thus concerns, in essence, Parliament's abdication of its legislative power. That abdication has been concretised through Parliament's interpretation that the Disaster Act can be read as permitting excessive and ongoing delegation of legislative power to the executive. The HSF accepts that emergency legislative powers are sometimes necessary. For this reason, properly interpreted, the Disaster Act is legitimate. The exercise of this power might be required for a terminable and immediate response to a disaster. The length of that power's exercise will be in direct proportion to the nature of the threat or harm posed by the disaster which has disabled Parliament from performing its fundamental role as the engine house of our democracy. This is why the Disaster Act contemplates extensions. It is also why the HSF cannot specify a "cut-off point". But objectively, that cut-off point is reached when Parliament has been able to regain its constitutional composure. In this case, the evidence shows that Parliament has regained its composure, but nevertheless has refused to take back the legislative reins from the Minister.
30. No proper interpretation of the Disaster Act could permit this power to be utilised ongoingly and indefinitely by the state, potentially for years in relation to the same "disaster". Parliament must, and should long ago have, reassert[ed] its legislative power in response to COVID. This is its duty.
31. This duty is housed not within the Disaster Act but rather section 7 of the Constitution. Whilst the interpretation of section 7(2) of the Constitution is ultimately an issue for legal argument, I am advised that it is contrary to established precedent to say that this section is concerned only with unjustifiable limitations of rights. The section is concerned with respecting, protecting, promoting and fulfilling



rights. The state thus has a positive duty under this section, which extends well beyond safeguarding against unjustifiable limitations.

32. I note that the Executive admits that section 7(2) of the Constitution requires not just reasonable and effective measures, but also concrete ones. It asserts that this duty is met by the dozens of regulations decreed by the Minister and announced by the President. I am advised that once it is admitted that concrete legislative measures are required, and can in fact meaningfully be designed, it follows as a matter of constitutional necessity that Parliament, vested as it is with original legislative authority, is the proper branch of government for designing these measures.
33. Every serious threat and harm faced by South Africans is dynamic. None are static. They all exist in a state of flux, their details always mutating. To assert, therefore, as the respondents do, that the Executive can on this basis alone forever exercise legislative power, is to use COVID (and the next disaster, in whatever form) to extinguish the doctrine of the separation of powers. That cannot be so.
34. Instead, in fulfilling its constitutional duty, Parliament must design a tool that is fit-for-purpose as our country's response to COVID through a legislative process that entails all the usual transparency and accountability features attendant to legislation-making. It cannot be permitted to remain silent by relying on a general disaster framework that by its nature is designed to deal with the unknown.

CONDONATION

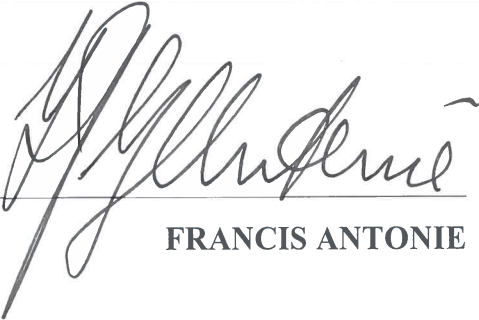
35. The reply to the Speaker's affidavit was due on 11 February 2021, whereas the reply to the Executive's affidavit was only due on 17 February 2021. Given that the answers overlapped to a significant extent, it was considered that a consolidated reply would be appropriate, of more use to the Court and avoid unnecessary repetition and prolixity.
36. However, in order to properly take account of the Executive's affidavit in this consolidated replying affidavit, it was only possible to finalise and file the consolidated reply shortly after the due date that would have applied had a separate replying affidavit been filed in response only to the Speaker's affidavit. This is an important matter not only for the parties involved, but indeed for the Republic.



All facts and arguments should, it is respectfully submitted, be ventilated. Moreover, the delay is minimal (and there is only a delay in relation to replying to the Speaker), no hearing date or processes are jeopardised and the delay occasions no prejudice to any party.

37. In the circumstances, to the extent necessary, it is prayed that the late reply to the Speaker be condoned.

WHEREFORE it is prayed that leave to appeal be granted.



FRANCIS ANTONIE

The deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn to before me at Rosebank on this the 12th day of February 2021, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

Full names: Maburek Malore

Business address: 15 Sturdee Avenue

Designation: Sgt

Capacity: VSPol.

