

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

CASE NO: 21542 / 2020

In the matter between:

REYNO DAWID DE BEER

1ST APPLICANT

LIBERTY FIGHTERS NETWORK

2ND APPLICANT

And

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

RESPONDENT

FILING NOTICE

DOCUMENTS: RESPONDENT'S ANSWERING AFFIDAVIT

ON THE ROLL: 28 MAY 2020

DATED and SIGNED at PRETORIA on the 26th day of MAY 2020.



**RESPONDENT ATTORNEYS
STATE ATTORNEY PRETORIA
GROUND FLOOR, SALU BUILDING
316 THABO SEHUME & FRANCIS
BAARD STREETS**

PRETORIA
PRIVATE BAG X91
PRETORIA, 0001
Ref: **SZULU/2020/Z76**
Tel: (012) 309-1528
Fax: (086) 406 6194
EMAIL: SZulu@justice.gov.za
Enq: MR S ZULU

**TO: THE REGISTRAR OF THE HIGH
COURT PRETORIA**

AND TO:

APPLICANT'S ATTORNEYS

ZEHIR OMAR ATTORNEYS

95 7TH STREET

SPRINGS

TEL: (011) 815 1720

FAX: (011) 362 5588

C/O FRIEDLAND HART SOLOMON

NICHOLSON ATTORNEYS

4-301 MONUMENT OFFICE PARK

79 STEENBOK AVENUE

MONUMENT PARK

PRETORIA

REF: T VAN STADEN

EMAIL: yasminomar@vodamail.co.za / yasmin@zehiromarlaw.co.za

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LIBERTY FIGHTERS NETWORK

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and

**MINISTER OF COOPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS**

Respondent

RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

AVRIL WILLIAMSON

Do hereby declare under oath as follows:

- 1. I am an adult female, the Director-General of the Department of Cooperative Governance (DCoG), under the Executive Authority of the respondent, the Minister of Cooperative Governance and Traditional Affairs ("the Minister") of the Republic of South Africa with address at Union Buildings, Avenue East Wing 1st floor, 87 HAMILTON STREET, ARCADIA, PRETORIA, GAUTENG PROVINCE.**

- 2. The facts contained in this affidavit fall within my personal knowledge, unless indicated otherwise by the context and are, furthermore, to the best of my belief both true and correct.**

- 3. To the extent that some of the information does not fall within my personal knowledge, I have relied on the records of the Department, information furnished to me by other officials of government, most of this information is in the public domain, and is publicly available through reports in the media and through government briefings in the media.**

- 4. I am authorised to depose to this affidavit on behalf of the Minister of COGTA and to oppose the relief sought in this application.**

5. Elsewhere in this affidavit, where I make legal submissions, I do so on advice of the Minister's legal representatives, which I accept to be correct.
6. As the Director-General, I am a member of the National Joint Committee which makes recommendations on all the regulations submitted to the National Coronavirus Command Council (NCCC).
7. I have read the applicants' application and wish to respond thereto as follows:
 - 7.1. I will not respond to each and every contention of fact or law contained in the applicants' founding affidavit. Instead, I will confine my response to the issues that I consider material and relevant to assist the court in the resolution of the dispute.
8. Furthermore, any allegation of fact or law contained in the applicants' founding affidavit which is at variance with the averments I have made in this affidavit are denied.



9. Before I respond to the merits of this application, I wish to raise this preliminary point:

LACK OF URGENCY

10. The applicants launched this application on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court. In terms of this rule, the applicants are required to set out in the affidavit the circumstances which rendered this matter urgent and furnish reasons why they aver that they will not obtain the relief in due course.

11. I am advised that urgency is not a matter of form but substance. The applicants' grounds of urgency as set out on page 33 on paragraph 13 of the founding affidavit are not sufficient to render this matter urgent for the following reasons:

- (a) The fact that the Lockdown causes an inconvenience to everyone is not a justification to treat this matter as urgent, more so if one has regard to the main orders sought in this application;

- (b) There is no explanation provided in the founding affidavit as to the reasons why the applicants and their members cannot benefit from the relief measures that the government has put in place to alleviate the hardship created by lockdown;
- (c) The hardships created by the lockdown are endured by the South African society in general and are temporary in nature. The benefits of lockdown outweigh the inconvenience and the hardships created by the lockdown;
- (d) The applicants do not furnish explanation why their members cannot benefit from payment holidays, that has been implemented in a number of sectors including, inter alia, repayments mortgage bond, bank loans;
- (e) If regard is to the prayer 3 of the Notice of Motion, I am advised that the issue raised fall under the Promotion of Administrative Act, 2000, review rubric and not declaration and cannot be dealt with on an urgent basis;¹ and

¹ Act No. 3 of 2000. Hereafter referred to as "PAJA".



(f) The grounds of urgency set out in the founding affidavit are general in nature. Consequently, they do not justify the departure from the timeframes and notices set out in the rules.

(g) Further argument will be presented at the hearing of this application.

12. I submit with respect that this application should be struck from the roll on the ground of lack of urgency.

THE PRAYERS SOUGHT IN THE NOTICE OF MOTION

13. It is apparent from the Notice of Motion that the applicants seek in the main that the decision to declare a national state of disaster in terms of section 27(1) of the Disaster Management Act, 2002² as proclaimed in the Government Notice of the 18th of March 2020 be declared unconstitutional, unlawful and invalid. (prayer 3)

² Act No. 57 of 2002. Hereafter referred to as "the DMA".



14. Further that the regulations promulgated in terms of section 27(2) of the DMA be declare unconstitutional, unlawful and invalid. (prayer 4)
15. The applicants contend that the decision to declare the national state of disaster is irrational and based on incorrect advice and/or reaction to unconfirmed and/or otherwise unreliable international and national medical and health results; and not taking our country's unique socio-economic conditions into consideration. (page 10 para 3.4 of the founding affidavit).
16. The applicants' challenge to the disaster management regulations ("lockdown regulations") is based on several legal grounds, in the main that the regulations deal with matters falling under schedule 5 of the Constitution, and the National Council of Provinces (NCOP) should have approved these regulations as required by section 146(6) of the Constitution, thus the mandatory requirements have not been complied with, thus these regulations are unconstitutional and unlawful. (pages 9 and 10 of the founding affidavit)

17. Further, that the lockdown regulations are unconstitutional because they violate section 14(1) of the Regulations of Gatherings Act, 1993.³ (page 11 of the founding affidavit)
18. Finally, the applicants contend that the decision to utilise the DMA to manage COVID-19 is unlawful, as the International Health Regulations Act, 1974⁴ adequately caters for the management of COVID-19 as contemplated by section 27(1)(a) of the DMA. (page 12 of the founding affidavit)
19. For the convenience of the Court, I will respond to the contentions raised in the following sequence:
- 19.1. Firstly, I will deal with the DMA and its provisions;
- 19.2. Secondly, I will deal with notorious fact about COVID 19 pandemic;
- 19.3. Thirdly, I will provide explanation why the decision to declare the national disaster is an appropriate and justified decision;

³ Act No. 205 of 1993. Hereafter referred to as "the Gatherings Act Regulations".

⁴ Act No. 28 of 1974. Hereafter referred to as "the IHRA".



- 19.4. Fourthly, I will deal with the regulations promulgated in terms of section 27(2) and their application;
- 19.5. Fifthly, I will provide explanation why the applicants' challenge to the regulation is without merit;
- 19.6. Sixthly, I will with the Minister's contention that the regulations pass muster (section 36 of the Constitution);and
- 19.7. Finally, I will respond to the applicants' allegations in the founding affidavit to the extent it is necessary.

THE DISASTER MANAGEMENT ACT AND ITS PROVISIONS

20. The DMA's objective is to provide for:

"An integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risks of disasters, mitigating the severity of the disasters, emergency preparedness, rapid and effective response to the disasters and post-disaster recovery; the establishment of national, provincial and municipal disaster

management centres; disaster management volunteers; and matters incidental thereto”.

21. Section 1 of the DMA defines disaster as follows:

“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) disruption of the life of a community; and

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

22. Section 1 of the DMA defines disaster management as:

“A continuous and integrated multi-sectoral, multi-disciplinary process of planning and implementation of measures aimed at –

(a) preventing or reducing the risk of disasters;

(b) mitigating the severity or consequences of disasters;

(c) emergency preparedness;

- (d) a rapid and effective response to the disasters ; and*
- (e) post-disaster recovery and rehabilitation”.*

23. Section 2(1) of the DMA provides that:

“This Act does not apply to an occurrence falling within the definition of disaster in section 1-

- (a) If, and from the date on which, a state of emergency is declared to deal with that occurrence in terms of the State of Emergency, Act, 1997 (Act no: 64 of 1097); or*
- (b) To the extent that that occurrence can be dealt with effectively in terms of other national legislation-*
 - (i) aimed at reducing the risk, and addressing the consequences, of occurrences of that nature; and*
 - (ii) identified by the Minister by notice in the Gazette”.*

24. Section 27(1) of the DMA provides that:

“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”.*

25. The declaration of a national state of disaster permits the formulation of regulations or issuance of direction concerning matters contemplated in paragraphs (a) to (o) of section 27(2) of the DMA, *inter alia*: the release of any available resources of the national government, including stores, equipment, vehicles and facilities.

NOTORIOUS FACTS ABOUT COVID-19

26. The COVID-19 is a respiratory disease caused by a novel strain of the coronavirus.⁵ Its symptoms include, amongst others, fever, coughing and shortness of breath. It has virulent effects if left untreated, as it can cause pneumonia or breathing difficulties in fatal cases. In some cases,

⁵ UNICEF “Coronavirus disease (COVID-19): What parents should know” (2020). Available at <https://www.unicef.org/stories/novel-coronavirus-outbreak-what-parents-should-know> last accessed on 23 May 2020.

it can be asymptomatic (showing no signs of fever, coughing or shortness of breath) in the early days of infection, and thus, a person may be infected but not show any physical signs of infection, resulting in the spread of the virus to other people without knowing.⁶

27. COVID-19 is easily transmissible from people who are asymptomatic, pre-symptomatic or mildly symptomatic. It can be transmitted from one person to the other through fluids droplets excreted from the mouth, nose or eyes of an infected person. As it is an airborne disease, it can be in the air and on a surface for hours or days where the fluids droplets of the infected person have been transferred through touch, coughing or sneezing. This disease posed a unique challenge in that the carrier of this disease may not be aware that he or she is infected.

28. Due to its virulence nature, it has the potential to infect a large number of people in a short space of time and therefore, its rate of infection is exponential. Currently, there is no known and approved vaccine available, efficacious treatment or cure.

⁶ All information on the COVID-19 pandemic has been taken from the United Nations Children's Fund (UNICEF) and the World Health Organisation (WHO).

29. COVID-19 affects all regardless of race, age, religion, qualification, background and standing in the society. The elderly and people with pre-existing health conditions are the most vulnerable.
30. On the 30th of January 2020, the World Health Organisation (WHO) declared the outbreak of the disease a public health emergency of international concern. On 11th of March 2020, the WHO declared the COVID-19 a pandemic.⁷
31. As the infection rates rose exponentially, countries around the world saw their healthcare systems overwhelmed by infected people overnight in need of hospitalisation, intensive care and respiratory support for prolonged periods of time. The death toll in some of the countries rose significantly, for example, in Italy and Spain.⁸
32. In early March 2020, when the first COVID-19 case was confirmed in the Republic of South Africa, it became clear that the South African

⁷ The World Health Organisation "Events as they Happen: Rolling updates on coronavirus disease (COVID-19)" (Last updated on 19 May 2020). Available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> last accessed on 23 May 2020.

⁸ The World Health Organisation "Coronavirus disease 2019: Coronavirus disease (COVID-19) outbreak situation" (Last updated on 23 May 2020). Available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> last accessed 23 May 2020.



population would be affected. There was a high probability that some individuals would be infected by the coronavirus as evidenced by the events in China and other countries. Given South Africa's unique challenges relating to the provision of public healthcare, *inter alia* socio-economic challenges, we feared the worst and the government had to be proactive in putting plans in motion to manage the COVID-19 outbreak as soon as possible.

33. The government sought medical advice from medical and scientific experts (National Coronai Task Team) to prepare in order to manage and minimise the risk of infection and slow the rate of infection to prevent the overwhelming of the public healthcare facilities. There is no existing legislation and contingency arrangements to adequately manage COVID-19.

34. The WHO also issued guidelines as to how counties can slow the rate of infection and prevent many deaths. The government also learnt from other countries which were already grappling with the measures to contain the disease.



35. An effective means to slow the rate of infection and “flatten the curve” was to employ measures to manage the COVID-19 by ensuring a coordinated response and putting the South African national resources of the national government together to deal with this pandemic.
36. There were no effective measures to manage the risk of infection or prevent infection and to ensure that the government was prepared to deal with COVID-19 pandemic. The government had to consider placing measures to deal with the outbreak, considering the consequences of those measures on the South African population and economy.
37. The purpose of curbing the spread of the COVID-19 disease was to save lives. After consultation with the Minister of Health and Cabinet, it was agreed that the most effective measures to manage COVID-19 and the consequences of this disease on the society and the economy, was to declare a national state of disaster in terms of section 27(1) of the DMA. Thus, on the 15th March 2020, the Minister declared a national state of disaster.

38. I submit that the requirements in section 27(1)(a) and (b) of the DMA for declaration of a national state of disaster are satisfied.
39. I have to pause to mention that the disaster management falls under schedule 4 of the Constitution and is the domain of both the National and Provincial legislative competence.
40. The declaration of a national state of disaster was an appropriate measure to deal with the novel coronavirus since there is no legislation and contingency measures for the national executive to deal effectively with this disease. The fact that the provincial governments would not have been able to manage this pandemic on their own, is a special circumstance warranting the declaration of the national state of disaster as contemplated by section 27(1)(b) of the DMA.
41. The conditions posed by the COVID-19 warranted the decision to declare a national state of disaster because the human and financial cost associated with the management of the disease was expected to be overwhelming. The state had to release the national government



resources to coordinate the response in order to slow down the rate of infection in order to prepare to deal an increase of infections.

42. I am advised that in determining whether the decision of a functionary is rational, the test is objective and is whether the means justify the ends. Thus, I submit, with respect, that under the circumstances, the means justified the ends.

43. The applicants' contention that the decision to declare a national state of disaster was based on unconfirmed, unverified and incorrect medical advice is unsustainable.

44. When the national state of disaster was declared, other countries such as Italy, Spain and France were already struggling to contain the disease. The WHO collates the infection rates and updating the statistics and disseminating the information to the whole world.⁹

⁹ The World Health Organisation "Coronavirus disease 2019: Coronavirus disease (COVID-19) outbreak situation" (Last updated on 23 May 2020). Available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> last accessed 23 May 2020.



45. The applicants' argument that the decision to declare the national state of disaster is irrational because the IHRA provides adequate measures to effectively manage the COVID-19 is without foundation.
46. The fact is that some of the people who have the virus may not show symptoms and may not be aware that they are carriers of this virus, makes it difficult to prevent infection.
47. If the IHRA offered a solution to the COVID-19 disease and its effects, the WHO would have probably advised countries to make use of the IHRA and its provisions.
48. Due to the fact that this legislation was promulgated in 1974, it may have been overtaken by the technological advancements and scientific developments.

THE REGULATIONS

49. Section 27(2) of the DMA reads –

"If a national state of disaster has been declared in terms of subsection (1), the Minister, subject to subsection (3) and after consulting the responsible Cabinet member, make regulations or issue directions or authorise the issue of directions concerning:-

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



- (g) the control and occupancy of premises in the disaster-stricken or threatened area*
- (h) the provision, control or use of temporary emergency accommodation;*
- (i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;*
- (j) the maintenance or installation of temporary lines of communication to, from or within the disaster,*
- (k) the dissemination of information required for dealing with the disaster;*
- (l) emergency procurement procedures;*
- (m) the facilitation of response and post-disaster recovery and rehabilitation;*
- (n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimize the effects of the disaster; or*
- (o) steps to facilitate international assistance”.*

50. Section 27(3) sets the limit to the powers that the Minister have in dealing with the regulations under subsection (2). Subsection (3) reads:

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

(a) assisting and protecting the public;

(b) providing relief to the public;

(c) protecting property;

(d) preventing or combating disruption: or

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

51. Regulation 27(4) reads, "*Regulations made in terms of subsection (2) may include Regulations prescribing penalties for any contravention of the Regulations*".

52. It is apparent from section 27(2) of the DMA that the lockdown regulations the Minister has promulgated, regulates matters prescribed in this section. The legality of the lockdown regulations can only be determined with reference to section 27(2)(a) to (o).and subsection (3) of the DMA.

53. Furthermore, the powers exercised in the COVID-19 regulations are exercise only to the extent that is necessary to achieve matters set out in subsection (3).
54. It has to be borne in mind that subsection (3) serves as a safeguard to ensure that the powers derived from the regulations are not abused or used to achieve other objectives than the ones prescribed by the section 27(3).
55. I submit with respect that the powers the Minister exercised in the regulations were necessary to assist and protect the public. The objective of the lockdown is to save lives and to provide relief to the public. The powers exercised under lockdown regulations are for public good. Therefore, the standard is not breached.
56. Sections of section 27(2) mandates the Minister to consult with the relevant Cabinet Member prior to making the regulations. In compliance with section 27(2), the Minister consulted the Minister of Health, Cabinet and the National Coronavirus Command Council (NCCC).

57. The applicants' other contention that these regulations should have been approved by the NCOP is incorrect. The regulations that are subjected to the approval of the NCOP are regulations made under section 59(1) of the DMA. This section reads:

"The Minister may make regulations not inconsistent with this Act –

(a) concerning any matter that:-

(i) may or must be prescribed in terms of a provision of this Act;

or

(ii) is necessary to prescribe for the effective carrying out of the objects of this Act; and

(b) providing for the payment, out of moneys appropriated by Parliament for this purpose, of compensation to any person, or the dependents of any person whose death, bodily injury or disablement results from any event occurring in the course of the performance of any function entrusted to such person in terms of this Act".

58. To further clarify my point, section 59(4) reads:

"Any regulations made by the Minister in terms of subsection (1) must be referred to the National Council of Provinces for purposes of section 146(6) of the Constitution".

59. Section 146 of the Constitution deals with conflicts between the national and provincial legislation in matters falling under Schedules 4 of the Constitution. Subsection (6) reads:

“A law made in terms of an Act of parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces”(NCOP).

60. As evidence shows, the lockdown regulations are not in conflict with any provincial legislation. Therefore, the applicants' contention that the lockdown regulations are unconstitutional for want of compliance with section 146(6) of the Constitution is without a legal or factual foundation.

61. The applicants' contention that the lockdown regulations are unconstitutional, invalid and unlawful because they are in conflict with the Regulation of Gatherings Act is also unsustainable.

62. The Gathering Act does not guarantee anyone a right to gather or assemble. Instead, it regulates the holding of public gatherings and

demonstrations at certain places. The right to assemble, demonstrate, picket and petition is guaranteed in section 17 of the Constitution.

SECTION 36 OF THE CONSTITUTION

63. It is obvious fact that the lockdown regulations limit the constitutional rights contained in chapter 2 of the Constitution. The issue is whether the limitation passes muster set out in section 36 of the Constitution.

64. I submit with respect that the limitation is reasonable and justifiable taking into account all the relevant factors, including:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

65. It is conceivable that the lockdown regulations limit the rights *inter alia*, to freedom of movement, trade, to demonstrate and to assemble, the mention a few.

66. The purpose of the limitation is to save lives. It is a notorious fact that the COVID-19 disease is spreading rapidly, and it is transmissible from one person to another. It was, therefore, imperative to limit the freedom of movement of people to reduce the rate of infection. I have mentioned in this affidavit that if the rate of infection increased exponentially, public healthcare facilities would be overwhelmed and it would lead to a collapse of the system and both COVID 19 patients and other ordinary patients who suffered from other types of maladies will not receive medical attention or adequate medical attention. Consequently, deaths will be inevitable
67. I have to interpose and state that the Constitution enjoins the State to respect, protect, promote and to fulfil the rights in the Constitution. The right to life, the right to have access to health care and the environment that is not harmful, are implicated.
68. The consequences of the lockdown is that people are restricted to their places of residence, and they can leave their residence only if it is necessary for example to seek medical attention or to purchase food or perform essential service, the lockdown measures are reasonable and

justifiable to protect public good. Thus the extent of the limitation is necessary to reduce the rate of infection and protect their lives.

69. Without the restricting or prohibiting of public gatherings, it would have been virtually impossible to reduce the rate of infection because it is conceivable that in large public gatherings for example soccer or rugby matches it would be impossible for the spectators to maintain a recommended social distancing of 1 and half meter. As COVID-19 can be transmitted through passing fluids droplets by coughing, sneezing or touching, it will be challenging maintain the recommended distance.

70. There is a close connection between the limitation and its purpose. If free movement and congregations is minimised, the rate of infection will be reduced. If people keep social distancing, the rate of infection will be slower. If people are confined to their homes, the risk of infection is reduced. I have said in the paragraph *supra*, people may carry this virus without showing any symptoms. The scientific evidence locally and abroad indicates that one infected person may infect two or three people. The purpose of the limitation cannot be over emphasised. It is to save lives. Saving lives takes precedence over freedom of movement and the right to assemble or demonstrate.

71. It is evident from other countries such as the United Kingdom, United States of America, Russia, Italy just to mention a few, that it became practically difficult to reduce the rate of infection without implementing the lockdown. The lockdown measures employed were the less restrictive measures to achieve the governmental purpose of saving lives of the South African population and use state resources where most needed.
72. I submit with respect that there were no less restrictive means to achieve the purpose of curbing the wide-spread of the disease at a fast rate other than limit these rights. I submit further that this limitation is reasonable and justifiable. The public healthcare facilities will be able to deal with few COVID 19 cases as oppose to many case.
73. In the matter of *Muhammed Bin Hassim Mohamed and Others v President of the Republic of South Africa and the Minister of Cooperative*

Governance and Traditional Affairs,¹⁰ decided on 30th the of April 2020, the court said the following:

“To the extent that the Government has put together its Task Team, has consulted exhaustively with them to ensure the safety of its citizens in order to “flatten the curve” and prevent an already fragile health system from being overwhelmed, I cannot find that the restrictions imposed are either unreasonable or unjustifiable and thus the application must fail”.

74. The court reached this conclusion after dealing with the reasonable and justifiable limitation of the rights in the Bill of Rights in terms of section 36 of the Constitution. I submit with respect that the Court’s finding is correct. I am advised that this Court can only depart from the earlier finding if it satisfied that the Muhammed Hassim was wrongly decided.

75. I submit with respect that the regulations are constitutionally compliant.

¹⁰ *Muhammed Bin Hassim Mohamed and Others v President of the Republic of South Africa and the Minister of Cooperative Governance and Traditional Affairs* (Case No. 21402/2020) [2020] ZAGPPHC 120. Hereafter referred to as, “*Muhammed v the President & Minister of Cooperative Governance*” or “*the Muhammed Bin Hassim case*”.

76. The applicants' contention that the Minister has declared certain businesses as essential services to the exclusion of others is without a foundation. It is apparent from **Annexure D** of the amended regulations of the 29th April 2020 makes reference to section 213 of the Labour Relations Act, 1995¹¹ This section defines "essential service".

77. I will now respond to allegations in the founding affidavit to the extent that is necessary.

AD PARAGRAPH 1 THEREOF

78. Save to deny that the averments contained in the founding affidavit are true and correct and further, the application is based on good merits, the balance of averments herein are noted.

79. I have shown in the paragraph *supra* that the applicants' contentions are based on the misunderstanding of the applicable law, including the Constitution.

¹¹ Act No. 66 of 1995. Hereafter referred to as "the Labour Relations Act or the LRA".

80. I, therefore, submit with respect that the principles in the Biowatch principle¹² is not applicable and as a consequence, there is no reason why the cost should not follow the cause.

AD PARAGRAPH 2 THEREOF

81. I admit the averments herein.

AD PARAGRAPH 3 THEREOF

82. I have dealt *supra* with averments in this paragraph. Therefore, I do not deem it necessary to repeat my submissions in total.

83. I am advised that in the review based on rationality, the test is objective and the question is whether the exercise of power is in consonant with the purpose for which that power was given.

¹² *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (Decided on 3 June 2009). Hereafter referred to as "the *Biowatch Trust v Registrar Genetic Resources and Others* case".



84. I submit with respect that based on the scientific evidence, the decision to declare a national state of disaster as opposed to a national state of emergency, is rationally connected to the authorised power and the purpose or objective of the Act.

AD PARAGRAPH 4 THEREOF

85. I take note of the issues raised in this paragraph in the main that the lockdown has and is still causing hardships on the people in South Africa in general and to the economy.

86. One can easily perceive from the consequent effects of the lockdown that due to the COVID-19 pandemic, the South African population has to make a sacrifice between the crippling of the economy and loss of lives. It is with that acknowledgment that the government has embarked on various programs to minimize the risk, and the consequences of the lockdown on the people and the economy, in general. The government took the decision based on scientific and medical advice that opening the doors of the economy abruptly might create the resurgent of the spread of COVID-19.

87. I submit that the mere fact that the lockdown has created a financial constrain on both natural and juristic persons in South Africa, does not mean that the lockdown regulations are unjustifiable, unreasonable or unlawful. They cannot, therefore, be set aside on the basis that they are causing economic hardship, as saving lives, should take precedence over freedom of movement and to earn a living.

AD PARAGRAPH 5 THEREOF

88. I deny that the making and promulgation of the regulations was irrational on the basis that the Minister bypassed parliamentary approval. It is clear from section 27(2) of the DMA that in the making and promulgation of the regulations, the Minister must consult a member of the Cabinet. The Minister of Health and the National Coronavirus Task Team were consulted. The lockdown regulations deal with the matters or issues prescribed in paragraph (a) to (o) of section 27 and the exercise of the power to make the lockdown regulations achieved the objectives set out in section 27(3) of the DMA.

89. As I pointed out in the paragraph above, the matters dealt with in the regulations are prescribed by law.

AD PARAGRAPH 6 THEREOF

90. I deny that the declaration of national state of disaster as opposed to the state of emergency is irrational. I have explained in the paragraph *supra* why the declaration of the national state of disaster is more appropriate than the declaration of state of emergency. I do not see the need to deal with the issues I have already addressed. In addition, I mentioned that the challenges posed by COVID-19 are more appropriately dealt with under the national state of disaster rather than the state of emergency.

91. The argument that there was unverifiable evidence or incorrect advice from the expert to justify the declaration of national state of disaster, is incorrect. It is a notorious fact that the whole world is grappling with the coronavirus. There is evidence on the print and electronic media where many countries such as the United Kingdom, Italy, Russia, Unites States of America, China, just to mention a few, have suffered the devastating consequences of the COVID-19 pandemic, in particular, many lives



were lost and the country's economy collapsed. Therefore, for the applicants to suggest that there was insufficient evidence to even declare a national state of emergency, is without foundation.

AD PARAGRAPH 7 THEREOF

92. I deny that the regulations 3 and 23 of the amended regulations of the 29th of April 2020 that prohibit gathering were designed to frustrate the protests or objections against the state. There is simply no basis to draw such a conclusion.

AD PARAGRAPH 8 THEREOF

93. I deny that the IHRA provides sufficient measures to deal with the COVID-19 pandemic. There is no evidence to support this conclusion. The WHO makes no reference to the IHRA in relation to COVID-19.

AD PARAGRAPH 9 THEREOF

94. The contention that the Minister determined the essential services without the involvement of the Essential Services Committee is not sustainable.

95. The Minister did not declare any service as an essential service contrary to the legislation. It is clear from the regulation promulgated on the 29th of April 2020 what “essential services” are. They are, “The services as defined in section 213 of the LRA and as well as designated in section 71(8) of the latter Act”. Annexure D to the regulations lists essential services are from paragraph 1 to 8 as provided for by section 213 of LRA. The argument that the Minister designated certain services as essential services contrary to the provisions of the LRA and the Essential Services Committee, is factually flawed.

AD PARAGRAPH 10 THEREOF

96. I take note of the averments herein.

AD PARAGRAPH 11 THEREOF

A handwritten signature in black ink, consisting of a stylized 'J' or 'D' shape followed by a horizontal line and a small flourish.

97. I deny that the applicants raised exceptional constitutional merits in this application. It is clear from the contention raised that the application is caused by the misunderstanding of the law.

98. I accept that the applicants, through their Attorney, wrote a letter on the 11th of May 2020 requesting answers from the Minister. According to the letter, the Minister's response was due on the next day, the 12th of May 2020. While the letter was still being considered, the applicants served this application.

AD PARAGRAPH 12 THEREOF

99. I deny that justice will be served from this application.

AD PARAGRAPH 13 THEREOF

100. I deny that this matter is urgent. I have explained the reasons why this matter is not urgent.

101. I submit that the applicants have not satisfied the requirement of urgency.

AD PARAGRAPH 14 THEREOF

102. I deny that there is any basis to not grant costs in the event that the application fails.

103. It is clear from the applicants' application that there are no justifiable grounds not to award costs against the applicants in the event the application is dismissed. This application is not based in the public interest principle as set out in the *Biowatch Trust v Registrar Genetic Resources and Others* matter. On the contrary, this application is frivolous and its objective is to place the lives of millions of the South Africans at risk of the COVID-19 infection by frustrating the measures put in place to manage the outbreak.

The applicants repeat the same arguments made in the Muhammed matter referred *supra*. I am advised that the applicants are represented by the same attorney who represented Muhammed and another.

A handwritten signature in black ink, appearing to be 'J. M.' or similar, located in the bottom right corner of the page.

104. I submit with respect that there is no merit to this application.

Consequently, it falls to be dismissed with costs.



DEPONENT

THUS, SIGNED AND SWORN TO BEFORE ME AT PRETORIA ON THIS THE 26TH DAY OF MAY 2020 BY THE DEPONENT HAVING ACKNOWLEDGED THAT SHE KNOWS, UNDERSTANDS AND HAS NO OBJECTIONS TO THE CONTENTS OF THIS AFFIDAVIT. SHE CONSIDERS IT TO BE CORRECT, TRUE AND BINDING TO HER CONSCIENCE.



COMMISSIONER OF OATHS

FULL NAMES:

MOSISANAGAE MAROLIS MARE

DESIGNATION:

COLONEL

FULL BUSINESS ADDRESS:

255 PAIKWALLEN STREET
3RD PRETORIA BUILDING
PRETORIA
0002.

SUID-AFRIKAANSE POLISIEDIENS

AFDELING: SIGBARE POLISIERING

2020 -05- 26

DIVISION: VISIBLE POLICING

SOUTH AFRICAN POLICE SERVICE

DESIGNATION AREA:

342 PRESIDENTIA BUILDING

PRETORIA

0002

COLONEL