IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA

(GAUTENG PROVINCIAL DIVISION, PRETORIA)

CASE NUMBER: 21542 **/2020**

In the matter between:-

REYNO DAWID DE BEER	1st Applicant
LIBERTY FIGHTERS NETWORK	2nd Applicant

AND

MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Respondent

REPLYING AFFIDAVIT

I, the undersigned,

REYNO DAWID DE BEER

Declare under oath as follows:

1.

1.1 I am a major male, South African citizen and registered to vote during any election, the 1st Applicant and also member and the President of **LIBERTY FIGHTERS NETWORK (LFN)** the 2nd Applicant, both of business address Plot 473 Dewar Street, Derdepoort, Pretoria which is also the *domicilium citandi et executandi* for both Applicants.

1.1.1 Where I attach any annexure, I humbly request that the Court reads its content in with this Affidavit as if done so under oath.

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1.1.2 Additional argument will be presented to the Court relating to each point raised herein which have not been fully described for brevity purposes, as far as it is necessary, at the hearing.

1.2 The facts contained in this affidavit are, to the best of my knowledge and belief, both true and correct.

1.3 I have read the Answering Affidavit of the Respondent deposed to by Ms. **AVRIL WILLIAMSON** and would like to reply to it as follows.

1.4 Where I don't reply to any specific paragraph thereof, such paragraph is admitted in so far it is not irreconcilable with any point raised in the Founding Affidavit and Annexures to it, and in such event the applicable point is denied and the Respondent set to the proof which will be properly highlighted during argument.

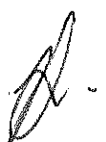
1.5 The Applicants humbly submit that most of the answers provided by the Respondent are matters to be argued and therefore only few paragraphs thereof justify a reply.

2.

LATE FILING OF ANSWERING AFFIDAVIT

2.1 Before continuing, first we would like to bring it to the attention of the Court that the Respondent failed to submit her Answering Affidavit in time and further failed to file after sufficient additional time was provided until Wednesday 20 May 2020 to have done so. The Respondent even further failed to state the reasons for filing her Answering Affidavit late which should be regarded as serious and a total deviance to this Court and its rules, especially for the fact that she holds a fiduciary position as a senior member of Cabinet.

2.2 The late filing of the Answering Affidavit has indeed inconvenienced both the Court and the Applicants and specifically disrupted the urgency of this matter to such extent that the Applicants had to wait more than a week for their matter to finally be heard suffering even

M.L 

more discomfort and violation to their basic human rights as stated in the Founding Affidavit and elsewhere.

2.3 However, as Justice Davis rightfully stated per directive on Monday 25 May 2020 that this is indeed a matter where the Answering Affidavit was crucial and the Court could not have simply continued in default as the practice is, in the interest of justice the Applicants will not be contesting the late filing thereof but would like the Court to take this unacceptable contempt by the Respondent towards this Court and the frustration caused to the Applicants into consideration when considering costs.

3.

***AD* PARAGRAPH 6 THEREOF:-**

3.1 The Applicants emphatically deny that the Respondent have to report to this so called National Coronavirus Command Council (NCCC), where this structure is not only unknown in whichever legal entity format it functions, but also no law makes any provision for this structure's existence or to be of such importance to seemingly approve the ***DMA Regulations***. There is simply no reason in law to justify that the ***DMA Regulations*** must be submitted for any reason whatsoever to this unknown NCCC and we set the Respondent to the proof.

3.2 For the Respondent to even mention this in an affidavit, is simply frightening to say the least where this unknown structure in facts mimics some sort of State Capture entity which seriously needs to be investigated by all relevant authorities as a matter of urgency.

3.3 The Applicants humbly submit that the Respondent by law is only obliged to report to the Cabinet and Parliament and no other structure and this clearly emphasizes recklessness and irrationality.

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AD **LACK OF URGENCY (PARAGRAPHS 10 TO 12 THEREOF):-**

4.1 The content is denied and the Respondent set to the proof.

4.2 The question of urgency must be considered in the appropriate context. Although the National State of Disaster declared under the ***DMA*** endures for a period of three months, it may be extended thereafter on a month-to-month basis.

4.3 It is simply unknown for how long the present state of disaster will endure. I am advised that for as long as a vaccine for SARS-Cov-2 is not discovered, be it in few months or three years, the state of disaster will possibly be extended.

4.4 An important question regarding urgency is whether or not the Applicants may be afforded redress in the ordinary course.

4.5 If the state of disaster is not extended in two months' time, this application will be rendered moot. Similarly, if the state of disaster is extended and endures, hypothetically, for the next year, and the application heard in four months' time, and is successful, irreparable and incalculable harm to people and an already ailing economy may have occurred.

4.6 While the Respondent was taking her time to file her Answering Affidavit, the NICD again published yet another devastating report on 10 May 2020 (freely available now in the public and accessible to all on the Internet) which confirms the irrationality of the decisions made by the Respondent where it highlighted in its "Impact of COVID-19 intervention on TB testing in South Africa" report, *inter alia*, that there were 301000 cases of TB during 2018 which have contributed to the death of 63000 of our people that same year. Extracts of this report is attached as Annexure "**AB**".

4.7 Adding to these devastating figures, comparing to the relatively low COVID-19 cases, the NICD has established that *"...The peak of [TB] tests in the week during the non-intervention period was 58 742 and dropped to 15 991 in the last week of this analysis in the intervention*

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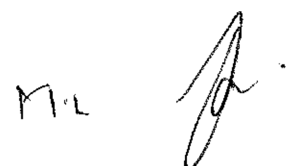
period. The number of Xpert positive tests exceeded 3000 in all the non-intervention weeks and dropped to a low of 1826 during the national lockdown. The average test volumes during the non-intervention period was 47 520 per week while it was 24 574 during the lockdown period which was a 48% decline…" The impact on untested and untreated TB cases could be devastating.

4.8 Although I am neither a user of liquor nor a smoker, we are much concerned how millions of our people have been forced into compulsory rehabilitation by the Respondent where any proper medical practitioner, like the Respondent herself, knows too well that rehabilitation of addicts on that massive scale must be done under strict medical supervision.

4.9 The Court has ruled before that economical and financial losses of a significant nature may also be dealt with on an urgent basis, where the financial loss to the Applicants, and those they represent, as well as to our own economy are so devastating where the Lockdown could be characterized as a policy-induced reduction in household capabilities.

4.10 The damages may be unquantifiable and people may die, not from COVID-19 but from stress and other ailments related to the suffering caused by the present state of disaster and regulations put into effect.

4.11 In addition, other applicants who have launched urgent applications regarding the regulations in terms of the ***DMA*** are faced with the difficulty of rapidly changing regulations. Regulations are changing faster than Courts may hear applications, escaping scrutiny by the Court. In effect the goalpost is shifting so rapidly that if this application were to be heard in the ordinary course, the country will be run by a few members of the executive and the NCCC, without transparency or constitutional oversight, affording them immunity to judicial scrutiny.



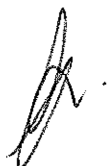
4.12 Despite the overwhelming evidence of irrationality present in the regulations and arbitrary deprivation of fundamental rights, the Respondent has glossed over the harms caused by the state of disaster and regulations as a mere "inconvenience" for everyone.

4.13 The Respondent has suggested that hardships inflicted consistently constitute a ground of justification and breathe lawfulness into an otherwise unlawful act by a member of the executive. The decorum of the continued infringement of fundamental rights such as rights to trade, freedom of movement and human dignity, on an unprecedented scale where poorer South Africans assisted by the Applicants will suffer greater, possibly irreversible harm than others, must be considered as a matter of urgency.

4.14 The fact that the decision to declare a state of disaster and the regulations promulgated were made without constitutional process or parliamentary oversight must result in this Court itself hearing the matter urgently to scrutinize the decision by the Respondent and the regulations.

4.15 In the *Khosa matter*, Justice Fabricius remarked that the present lockdown measures will result in massive unemployment with all its consequences relating to the inability to provide each particular family with sustenance and an income. He continues that it is clear that thousands of small businesses have been adversely affected and many of them will probably never be re-established.

4.16 Further, considering the applicability of Section 38 of the ***Constitution*** in this matter, this court is called upon to grant appropriate relief. If the application is heard in the ordinary course, the Court may be unable to grant appropriate relief. in *Hoffman v SAA 2001 SA1 CC*, the court held that appropriate relief is determined through a balancing process which includes: addressing the role occasioned by the infringement of the constitutional right; deterring future infringements; making an order that can be complied with; fairness of all those that might be effected by the relief. If this application is heard in the ordinary course, it may be impossible for the Court to conduct this balancing act.

MTL 

4.17 The Respondent's contention in paragraph 11 (e) that a declaration in terms of section 172 is inappropriate was dealt with by Fabricius J in paragraph 77 to 81 of the *Khosa* judgement.

4.18 The Respondent suggests that because the lockdown yields benefits which allegedly outweigh the hardships, this matter is not urgent. Rationality is part of the rule of law requirement. It is viewed objectivity and it is irrelevant that a decision was made in good faith or mistakenly for that matter. See *Pharmaceutical manufacturers association of SA and another in re: President of the Republic of South Africa and others 2000 (2) SA 674 cc* at par 20.

4.19 Similarly, partial financial relief from the department of Labour is available for employees who are registered for UIF. Self-employed, non-registered individuals may secure grants of R350 per month. On the Respondents own version, the state of disaster has evolved society into beggars and borrowers, who may die from COVID-19, hunger and stress.

4.20 Having lived through several weeks under a state of disaster, now more than ever, the decision to declare a state of disaster must be scrutinized by this Court urgently. It is in the interest of justice that this matter be heard urgently.

4.21 In the event this Court might find that urgency is not present, the Applicants respectfully submit that the decision of Justice Fabricius in the *Khosa matter* should be followed where this Court proceeds in the interest of justice to hear this application as it clearly is in national importance and public interest.

5.

***AD* NOTORIOUS FACTS (PARAGRAPHS 26 TO 48 THEREOF):-**

5.1 The Applicants have noted the reference to "notorious facts" and wish to point out that the Respondent herself is failing to establish scientific facts, because what is well-know is not necessarily scientifically correct.

5.2 The Applicants have also noticed that the Respondent refers to authority in footnote 5 (paragraph 26 thereof) which alleges that the Coronavirus is spread through contact through "respiratory droplets rather than through the air", but in paragraph 27 thereof the Respondent suddenly states that COVID-19 is an airborne disease which is clearly contradictory to the authority and therefore irrational. The relevance is that the claimed airborne nature is cited as one of the main reasons for the Lockdown and "flattening of the curve". The relevant extract of this authority relied on is attached as Annexure "**AC**".

6.

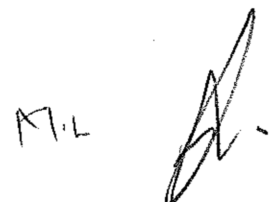
***AD* PARAGRAPH 55 THEREOF:-**

The Applicants have noted that the Respondent alleged in paragraph 35 that the sole aim of "flattening the curve" was to slow the rate of infection *via* the measures (Lockdown) deployed. Now she submits that the objective of the Lockdown was to save lives without submitting any proof to substantiate this averment. Paragraph 66 thereof also states that the purpose of the Lockdown was to save lives and the Respondent is not taking this Court into her confidence to explain how "flattening the curve" results in saving lives.

7.

***AD* PARAGRAPH 93 THEREOF:-**

7.1 The Applicants categorically deny that the IHR were not meant for COVID-19 as its purpose is to fight all diseases, current and future.



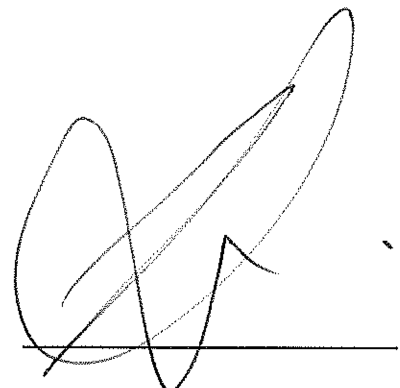
7.2 Not only does Section 27(1) of the ***DMA*** direct that it is only applicable in circumstances where the President and Cabinet can't react to such emergency through legislation, the ***IHRA*** specifically authorises the President to enact regulations in the event an international health emergency is declared by the WHO and the President has also been granted the authority to incorporate the latest IHR by a mere proclamation.

7.3 If this ***IHRA*** was utilised, as it was supposed to be, Article 3 of the IHR specifically states that "*The implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.*"

7.4 We resultantly submit that the irrational direction taken by Government to have utilised the ***DMA*** at the expense of the ***IHRA*** has effectively contributed to mass human rights violations in total contradiction to what the ***IHRA*** could have achieved.

WHEREFORE we pray for this Court to grant us an order in terms of the Notice of Motion in this Court.

THUS signed at **PRETORIA** on this 27th day of **MAY 2020**.



REYNO DAWID DE BEER

Deponent

THUS DEPOSED TO AND SWORN TO BEFORE ME AT KAMEELDRIFT ON THIS 27 DAY OF MAY 2020, THE DEPONENT HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS DECLARATION, THAT HE HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH AND THAT HE ACCEPTS SUCH OATH TO BE BINDING ON HIS CONSCIENCE. AFTER ESTABLISHING THIS, I PLACED THE DEPONENT UNDER OATH BY CAUSING THE DEPONENT TO DECLARE THE FOLLOWING: -

"I SWEAR THAT THE CONTENTS OF THIS DECLARATION ARE TRUE AND CORRECT SO HELP ME GOD."

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M MONATE CST

COMMISSIONER OF OATHS

FULL NAMES: MMULE LEAH MONATE

DESIGNATION: CONSTABLE

FULL BUSINESS ADDRESS: PLOT 650 MOLOTO ROAD

DESIGNATION AREA: KAMEELDRIFT

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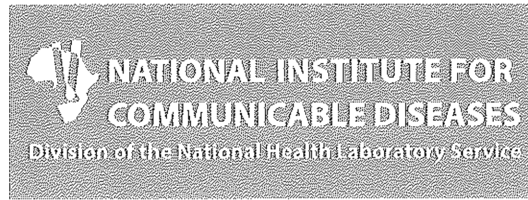

Impact of COVID-19 intervention on TB testing in South Africa

10 May 2020

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BACKGROUND

South Africa carries a disproportionate burden of tuberculosis (TB) per capita and is listed in all three categories of priority countries by the World Health Organization (TB, TB/HIV and RR-MDR-TB). The estimated number of incident TB cases in SA for 2018 was 301 000 while the estimated number of deaths due to TB in the same year was 63 000[1]. Significant progress has been made in improving the diagnosis of TB in the country with universal testing of all individuals with symptoms suggestive of TB (cough, fever etc.) using Xpert MTB/RIF Ultra (Xpert) assay with > 2 million individuals tested annually in South Africa[2]. This assay is highly sensitive in detecting TB and also tests for rifampicin resistant TB. The introduction of new and re-purposed drugs to treat drug resistant TB has had significant impact on improving outcomes and reducing mortality due to drug resistant TB. Overall the burden of TB and drug resistant TB has shown positive signs with annual decline in incidence observed[3].

The novel SARS-CoV-2 virus is the causative agent for Coronavirus disease first diagnosed in 2019 (COVID-19). The first laboratory case of COVID-19 in South Africa was on confirmed on the 5th of March 2020 and the number of cases have continued to increase with the total number of new infections over 10 000 as of 10 May 2020[4]. The concerns of excess mortality and potential impact on overwhelming health capacity in a very short time has led to introduction of various measures to reduce the transmission of this disease. Social distancing measures were announced by the President of South Africa on Sunday 15th March with restrictions on international travel, school closures (18th March), and mass gatherings. The national lockdown (level 5 restrictions) commenced on Friday, the 27th of March[5]. Level 4 restrictions commenced on 1 May 2020[6].

We analyse the changes in TB testing volumes, number of cases detected and positivity in relation to the measures introduced to curb the spread of COVID-19 in South Africa.

METHODS

Data was extracted for the period 3 February 2020 to 3 May 2020 from the surveillance data warehouse (SDW) at the National Institute for Communicable Diseases a division of the National Health Laboratory Services. The data extracted was restricted to the Xpert MTB/RIF Ultra assay as this is the primary diagnostic tool widely used in South Africa. This test data included, the tests conducted, results of the tests and date when the test were registered in the laboratory. Aggregation of the data to a national level and, by day, and week was undertaken. The analysis was primarily descriptive in nature and included a 7 day historical moving average. The positivity rate was calculated as the number of positive tests over the total number of tests. For this analysis the test data were not de-duplicated. Analysis was conducted using STATA version 15.

RESULTS

Over the period a total of 511 708 Xpert tests were conducted and 41 432 were positive for Mycobacterium tuberculosis complex. The period covered 6 weeks before the interventions were introduced, and subsequent periods of interventions: social distancing (2 weeks) and lock down (5 weeks).

The daily testing volumes are shown below. The social distancing measures implemented from 16th-27th March resulted in a decline in daily testing volumes compared to the preceding week. Daily testing volumes declined sharply after commencement of the national lockdown on the 27thof March and have continued to decline.

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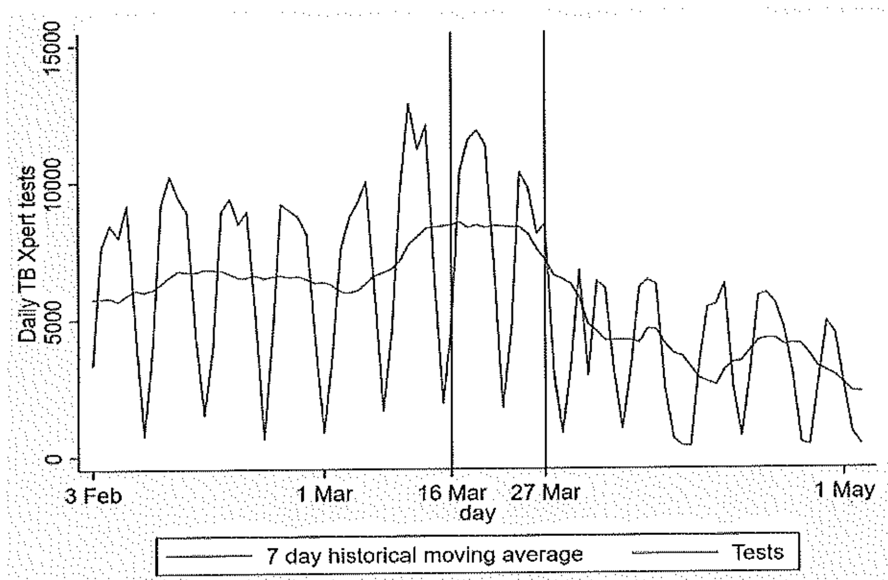


Red line indicates the start of the interventions: 16 March 2020 social distancing and 27 March 2020 lockdown.

Figure 1. Trends in daily Xpert tests between 3 February 2020 to 3 May 2020, N=511 708.

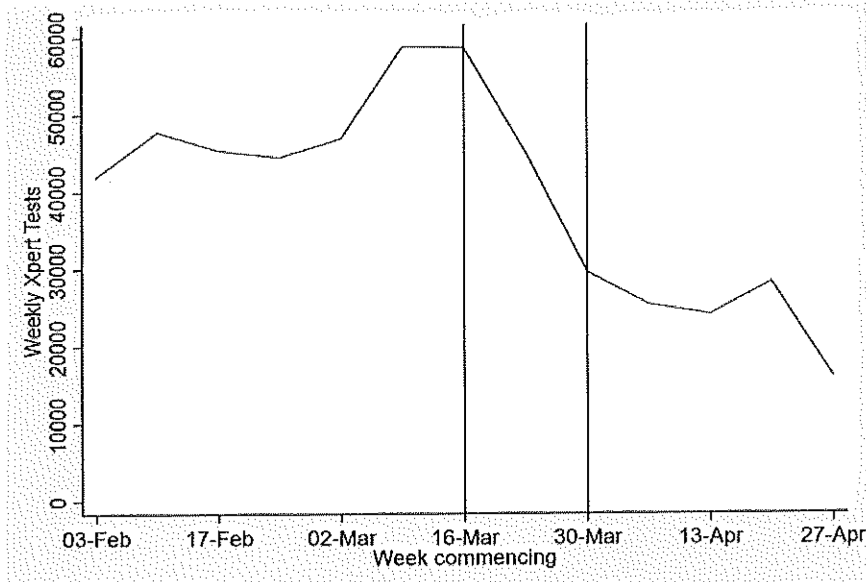
Weekly testing volumes, positive tests and positivity rates are provided in the table below. Testing volumes declined more rapidly than the TB cases detected resulting in an increase in the weekly positivity rate during the lockdown period. The peak of tests in the week during the non-intervention period was 58 742 and dropped to 15 991 in the last week of this analysis in the intervention period. The number of Xpert positive tests exceeded 3000 in all the non-intervention weeks and dropped to a low of 1826 during the national lockdown. The average test volumes during the non-intervention period was 47 520 per week while it was 24 574 during the lockdown period which was a 48% decline. A similar but less dramatic decline was observed for Xpert positive tests, the average test positive per week during the non-intervention period was 3710 while it was 2473 during the lockdown period which was a 33% decline.

Table 1. Weekly volumes of Xpert tests, positive tests and positivity stratified by COVID-19 interventions.

Week commencing	COVID-intervention	Positive Xpert tests	Total Tests	Positivity Rate
03-Feb-20	None	3 600	41 937	8.6%
10-Feb-20	None	3 974	47 738	8.3%
17-Feb-20	None	3 730	45 366	8.2%
24-Feb-20	None	3 640	44 463	8.2%
02-Mar-20	None	3 412	46 873	7.3%
09-Mar-20	None	3 903	58 742	6.6%
16-Mar-20	Social distancing	3 692	58 639	6.3%
23-Mar-20	Social distancing/Lockdown	3 167	45 082	7.0%
30-Mar-20	Lockdown	2 482	29 310	8.5%
06-Apr-20	Lockdown	2 386	25 345	9.4%
13-Apr-20	Lockdown	2 778	24 006	11.6%
20-Apr-20	Lockdown	2 842	28 216	10.1%
27-Apr-20	Lockdown	1 826	15 991	11.4%

The data in the table is shown graphically in Figures 2a,b,c.

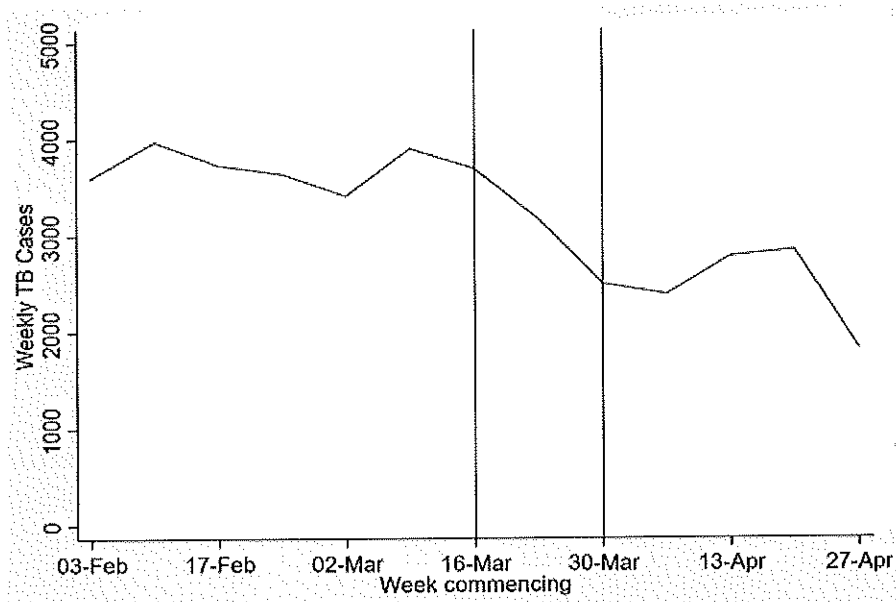
Weekly TB Tests



Red line indicates the start of the interventions: 16 March 2020 social distancing and 27 March 2020 lockdown.

Figure 2a. Trends in weekly Xpert tests between 3 February 2020 to 3 May 2020, N=511 708.

Weekly TB Positive Tests



Red line indicates the start of the interventions: 16 March 2020 social distancing and 27 March 2020 lockdown.

Figure 2b. Trends in weekly positive Xpert TB tests between 3 February 2020 to 3 May 2020, N=41 432.

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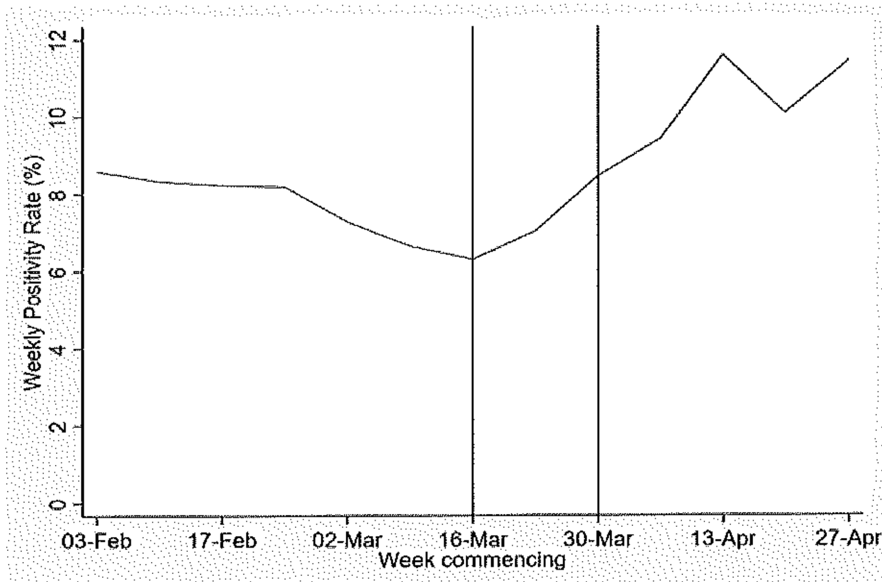
Weekly TB positivity Rate



Red line indicates the start of the interventions: 16 March 2020 social distancing and 27 March 2020 lockdown.

Figure 2c. Trends in weekly Xpert TB positivity rate between 3 February 2020 to 3 May 2020, N=41 432.

Weekly testing volumes are shown below with the social distancing week (16th March 2020) in yellow, the social distancing-lockdown week of the 23rd in orange and the three lockdown weeks in red.

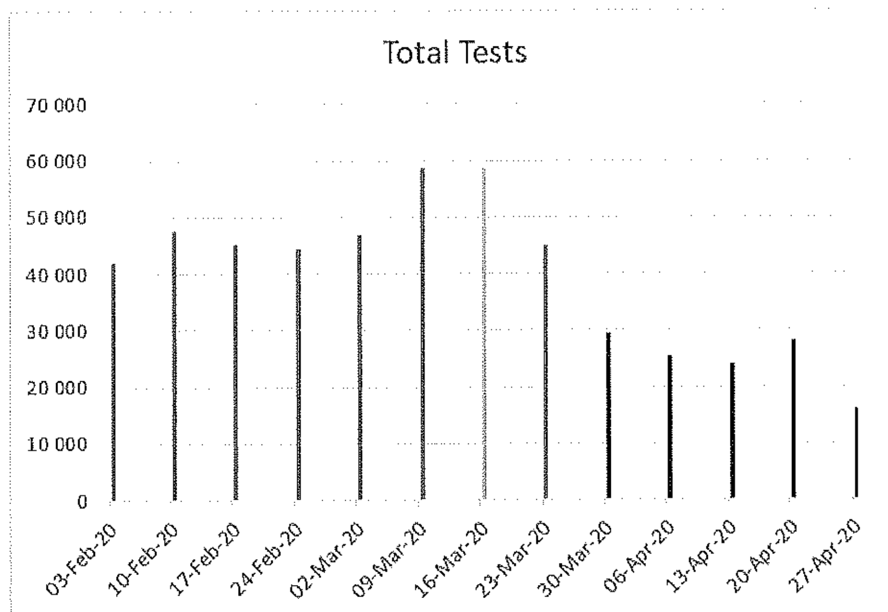


Figure 3. Weekly testing volumes stratified by social distancing intervention.

CONCLUSION

The COVID-19 level 5 restrictions has resulted in a ~ 48% average weekly decrease in TB Xpert testing volumes while, the number of TB positive declined by 33%. The relative difference resulted in a higher weekly positivity rate during the lockdown period. These unintended consequences will have a negative impact on efforts to control TB which remains the leading infectious disease cause of death in South Africa currently[7].

The dramatic declines in tests conducted for TB investigations are not explained by reduced testing capacity nor health service availability for TB as these were available and operational during the intervention period. The primary factor is restrictions introduced limiting movement and thereby access to services. During the lockdown period availability of public transport was severely limited. Individual motivation to seek care is another factor in the face of the restrictions and it is possible that only those more with advanced TB would seek care. This may explain the increase in positivity during the lockdown period.

The implications of undiagnosed TB are serious and will compromise past successes in reducing the burden and mortality associated with TB and DR-TB. As both TB and COVID-19 share similar clinical presentation (cough, fever, shortness of breath etc.) and are transmitted through respiratory droplets and aerosols, a combined strategy needs to be applied. This would utilise resources effectively while providing both short term and long term benefits.

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7. STATSSA. Mortality and causes of death in South Africa: Findings from death notification, 2017. 2020; Available from: http://www.statssa.gov.za/publications/P03093/P030932017.pdf.

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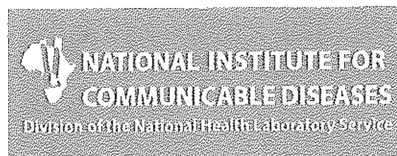
Data Source

National Institute for Communicable Diseases, Centre for Tuberculosis

Contact

Prof Nazir Ismail:
naziri@nicd.ac.za

Dr Harry Moultrie:
harrym@nicd.ac.za



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Extract:

Source 5: Answering Affidavit by Respondent

Case No:21542 / 2020

www.unicef.org / stories / novel-coronavirus-outbreak-what-parents-should-know. Accessed on May 27, 2020

How does the COVID-19 virus spread?

The virus is transmitted through direct contact with respiratory droplets of an infected person (generated through coughing and sneezing), and touching surfaces contaminated with the virus. The COVID-19 virus may survive on surfaces for a few hours to several days, but simple disinfectants can kill it. Studies to date suggest that the virus that causes COVID-19 is mainly transmitted through contact with respiratory droplets, rather than through the air.

COVID-19 has been described as a pandemic by the World Health Organization. What does that mean?

Characterizing COVID-19 as a pandemic is not an indication that the virus has become deadlier. Rather, it's an acknowledgement of the disease's geographical spread.

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