

- 3.3 In addition to the foregoing, any regulations promulgated under the *DMA* must comply with Section 146(6) of the *Constitution*³ read with Section 59(4) of the *DMA*⁴ which prescribe the process to *inter alia* refer the new regulations to the National Council of Provinces (NCOP). This process was not followed by the *CoGTA Minister* thus rendering her own promulgations unlawful.⁵ See paragraph 5 *infra* for further details.
- 3.4 We respectfully submit further that the National State of Disaster, also known generally as the "Lockdown" amongst the population, declared by the *CoGTA Minister* in terms of Section 27(1) of the *DMA*⁶ on 15 March 2020 was irrational and based on incorrect advice and/or reaction to unconfirmed and/or otherwise unreliable international and national medical and health results; not taking our country's unique socio-economic conditions into consideration. See paragraph 6 *infra* for further details.
- 3.5 In the alternative and/or in addition to the foregoing, that the prohibition on gatherings in terms of Regulation 23⁷, as defined in terms of Regulation 1 of GN No. R480 GG No. 43258

³Section 146(6) of the *Constitution*: 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.

⁴Section 59 (4) of the *DMA*: 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*.

⁵Also see Section 1 of the *DMA* where "prescribe" means prescribe by regulation in terms of section 59, and also "this Act" includes any regulations made in terms of section 59. Thus, the regulations mentioned in Section 27(2) should respectfully be construed as regulations in terms of Section 59 which effectively must comply to the provisions of Section 59(4) before it becomes valid. Also see further Section 17 of the Interpretation Act, 1957 (Act No. 33 of 1957): "When the President, a Minister or the Premier or a member of the Executive Council of a province is by any law authorized to make rules or regulations for any purpose in such law stated, notwithstanding the provisions of any law to the contrary, a list of the proclamations, government notices and provincial notices under which such rules or regulations were published in the Gazette during the period covered in the list, stating in each case the number, date and title of the proclamation, government notice or provincial notice and the number and date of the Gazette in which it was published, shall be submitted to Parliament or the provincial legislature concerned, as the case may be, within fourteen days after the publication of the rules or regulations in the Gazette."

⁶Section 27(1) of the *DMA*: 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.

⁷Regulation 23: (1) All gatherings are banned, except- (a) for funerals; (b) when at a workplace; or (c) when buying or obtaining goods and services, as allowed in Table 1. (2) An enforcement officer must, where a gathering takes place-

(a) order the persons at the gathering to disperse immediately; and (b) if the persons refuse to disperse, take appropriate action, which may subject to the Criminal Procedure Act, include arrest and detention.

dated 29 April 2020⁹ – hereafter referred to as the “*New Regulations*” – is invalid as it is in direct violation of the absolute limitation contained in Section 14(1)⁹ of the Regulation of Gatherings Act, 1993 (Act No. 205 of 1993) – hereafter referred to as the “*Gatherings Act*”. This is irrespective of the Limitation of Rights set out in Section 36¹⁰ of the *Constitution*. The current regulations therefore conflict with legislation enacted by Parliament which is permitting gatherings of people. The current regulations effectively prevent any protest against the actions of Government in relation to the declaration of a National State of Disaster.¹¹ See paragraph 7 *infra* for further details.

3.6 In addition to the foregoing, the decision to utilise the *DMA* to manage the current COVID-19 crisis is unlawful. We say so for the following reasons: Section 27(1) of the *DMA* provides that a National State of Disaster may be declared only if –

- 3.6.1 existing legislation or other contingency arrangements do not cater adequately for dealing with the disaster effectively; or
- 3.6.2 there are special circumstances that warrant the declaration of a National State of Disaster.

⁹Regulation 1: ‘gathering’ means any assembly, concourse or procession in or on- (a) any public road, as defined in the National Road Traffic Act, 1996 (Act No. 93 of 1996); or (b) any other building, place or premises, including wholly or partly in the open air, and including, but not limited to, any premises or place used for any sporting, entertainment, funeral, recreational, religious, or cultural purposes; but excludes a workplace and a place of residence for those persons ordinarily residing at the residence;

⁹Section 14(1) of *Gatherings Act*: In the case of a conflict between the provisions of this Act and any other law applicable in the area of jurisdiction of any local authority the provisions of this Act shall prevail.

¹⁰Section 36 of the *Constitution*: (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all 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. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

¹¹Section 1 of the *Gatherings Act*: ‘gathering’ means any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air- (a) at which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or (b) held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution.

There, in fact, exists a piece of legislation, in force and known as the International Health Regulations Act, 1974 (Act No. 28 of 1974) – hereinafter referred to as the “*IHRA*” – that adequately provides for dealing with COVID-19 under which the President could have enacted proper regulations which would have been overseen by Parliament and the NCOP. The *IHRA* lists a whole range of infectious diseases that are subject to its regulations and it also sets out guidelines for the management of such diseases. The *IHRA* was resorted to in treating a host of infectious diseases in South Africa for many decades. There is no reason why government resorted to the draconian *DMA* Regulations promulgated by the *CoGTA Minister* when, in fact, legislation existed that provided a less restrictive mechanism to deal with the COVID-19 pandemic properly controlled by the President, Parliament and the NCOP. See paragraph 8 *infra* for further details.

- 3.7 In addition to the foregoing, Applicants submit that restrictions introduced by the *DMA* Regulations are unlawful and unconstitutional as the country is not in a State of Emergency. The only foreseeable circumstances when according to Section 37 of the *Constitution*, Government may be permitted to infringe upon the Bill of Rights, to the extent set out in the *DMA* Regulations, is in the event of the declaration of a State of Emergency. See paragraph 8 *infra* as well for further details.
- 3.8 In the further alternative and/or addition to *supra*, the declarations of additional essential services contained in Paragraph B Annexure B of the *DMA* Regulations prior to the *New Regulations* – hereafter referred to as the “*Old Regulations*” – and subsequently confirmed in the *New Regulations*¹² were irrational, *ultra vires* and resultantly invalid in that the declaration of essential services is the exclusive responsibility of the Essential Services Committee (ESC)¹³ established in terms of Section 70 of the Labour Relations

¹²Regulation 1 of the *New Regulations*. ‘essential services’ means the services listed in Annexure D.

¹³Section 70(2) of the *LRA*: The functions of the essential services committee are- (a) to conduct investigations as to whether or not the whole or a part of any service is an essential service, and then to decide whether or not to designate the whole or a part of that service as an essential service; (b) to determine disputes as to whether or not

Act, 1995 (Act No. 66 of 1995) – hereafter referred to as the “*LRA*” – and not that of the *CoGTA Minister*. Section 210 of the *LRA*¹⁴ also provides for an absolute limitation that the processes set in identifying essential services¹⁵ must be established in terms of the *LRA*. Section 210 of the *LRA* provides that in the event of a conflict between the provisions of the *LRA* and any other law, the provisions of the *LRA* shall prevail. The *DMA* Regulations are in conflict with the *LRA* and are therefore unlawful and must be set aside. See paragraph 9 *infra* for further details.

- 3.9 In the further alternative and/or addition to *supra*, to have allowed *inter alia* the mining sector to have operated as an essential service not having been declared as such by the ESC was hypocritical, unreasonable and irrational as this decision has put mineworkers who work in a health high-risk employment sector, as recognised by the National Institute for Communicable Diseases (NICD) of South Africa, in harm’s way under the current circumstances. Also see paragraph 9 *infra* for further details.
- 3.10 In the further alternative and/or addition to the foregoing, to have not allowed *inter alia* the full vehicle, financial and property industries and hair and beauty salons as essential services within the process of decision-making in respect to other decisions made by the *CoGTA Minister*, was unreasonable, irrational and therefore unlawful. Also see paragraph 9 *infra* for further details.
- 3.11 In general, these regulations have violated almost all clauses in the Bill of Rights of most of our citizens. In that process, the *CoGTA Minister* has especially humiliated and trampled upon the dignity of mostly the vulnerable low-to-medium income earners of our country and

the whole or a part of any service is an essential service; and (c) to determine whether or not the whole or a part of any service is a maintenance service.

¹⁴Section 210 of the *LRA*: If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any act expressly amending this Act, the provisions of this Act will prevail.


¹⁵Section 213 of the *LRA*: “essential service” means – (a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population; (b) the Parliamentary service; (c) the South African Police Services;

our foreign guests, who rely on informal trade, tips, commissions, day wages, *ad hoc* labour, and begging to survive. See paragraph 10 *infra* for further details.

- 3.12 Each one of these constitutional and other legality issues are best suited to legal argument, but I have for the benefit of this Court, summarised these issues hereunder. I will, having regard to the fact that this matter will be heard by an urgent Court, attempt to keep the contents of this affidavit as succinct as possible and to the point.

4.

ESSENTIAL FACTS

- 4.1 Since the Lockdown started, *LFN* has been inundated beyond our resources with complaints from our members and the public in relation to their inability to pay rentals. People complained that their landlords all over the country have started to resort to self-help remedies like illegal disconnections of electricity/water, locking out tenants, intimidation, and illegal evictions without Court orders. Since the Lockdown started, we have handled more than 2,000 of these complaints. The *CoGTA Minister* on the other hand, took into account ca. 2,000 of approximately 70,000 email opinions by members of the public, who suggested to her some of the content of the next amendments to the *Regulations*, to overturn the President's announcement to uplift the ban on tobacco products. Having regard to the 2,000 responders to one organisation, *LFN*, the *CoGTA Minister* must realise the seriousness of not acting rationally in this matter.
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- 4.2 Notwithstanding that the Constitutional Court already ruled that *inter alia* disconnection of electricity and water constitutes an eviction¹⁶, and the *Old and New Regulations* making evictions without Court Orders also illegal and criminal¹⁷, the law is increasingly disregarded in this context. In addition, *LFN* and I myself have experienced a massive lack of assistance and compassion from the side of the Police to come to the assistance of all the affected people leaving many of them without the use of electricity and water or evicted. It appears to us that the Police are primarily occupied with the duties imposed upon them under these *DMA* Regulations and that only very limited contingency provisions are in place to accommodate for other duties. These artificially created shortcomings we view as a further sign of the *CoGTA Minister* having acted irrationally by imposing the *DMA* Regulations. Kindly find attached as Annexure "B" only a tiny number of these complaints.
- 4.3 In an attempt to assist and give support to all these sufferers under the Lockdown, where voluntary associations like ours are not entitled to receive funding from Government to assist us during this time, *LFN* has, for example, created a group on a social media platform where it can advise tenants of their rights. Same was in such demand with active cases that it reached its technical limit within two days. *LFN* then created a second group to accommodate even more participants which again has reached it's technical limit. This poses a heavy burden on *LFN* as an association not for gain as we only rely on voluntary donations from our members and supporters, many of whom are now becoming more and

¹⁶*Motswagae and Others v Rustenburg Local Municipality and Another* (CCT 42/12) [2013] ZACC 1; 2013 (3) BCLR 271 (CC); 2013 (2) SA 613 (CC) (7 February 2013) para. 12: "The first question to be answered is whether section 26(3) of the Constitution is sufficiently wide to ensure protection of the applicants in their occupation of their homes. In my view, it does: its provisions would be pointless and afford no protection at all if municipalities and other owners were permitted to disturb occupiers in their peaceful occupation of their homes without a court order. Section 26(3), by necessary implication, guarantees to any occupier peaceful and undisturbed occupation of their homes unless a court order authorises interference. The idea that owners are able to do so without offending the provisions of section 26(3) need simply be stated to be rejected. The underlying point is that an eviction does not have to consist solely in the expulsion of someone from their home. It can also consist in the attenuation or obliteration of the incidents of occupation."

¹⁷Regulations 11CA & 11G(b) *Old Regulations* and Regulations 19 & 31(2) *New Regulations*. Also see Section 8(1) & (3) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act No. 19 of 1998).

more financially destitute under Lockdown and Alert Level 4. As a result, *LFN*'s members and supporters are no longer in a position to make voluntary donations and effectively, *LFN* is thus no longer able to cover its expenses to provide a sufficient service to those in need. Consequently, the most vulnerable people are, again, suffering the most.

- 4.4 As a full-time officer of *LFN*, my voluntary remuneration is also dependent on the donations received. I am also a victim of the Lockdown. I am often unable to sufficiently buy food for my family, pay my own landlord and other necessary expenses. I find myself in the same position as many *LFN* members and members of the general public who we are trying to assist.
- 4.5 Above others, *LFN* also now represents a group of 90 employees out of a total of 347 employees as our signed up members of a hair and beauty salon known as Bob Cuts Hair Salon (Pty.) Ltd. where the company refused to pay their salaries on 31 March 2020. However, this employer – like others that we are aware of – never submitted UIF contributions, leaving these employees, mostly single mothers, without any income. We have been unable to follow the usual procedure, namely to submit complaints with the CCMA and Department of Employment and Labour on their behalf due to these entities being not operational. They are only expected to return to work on Level 1 which could be in eight to ten months from now, if not longer, we don't know. In that time, employees remain the victims of abuse without any of the redress options to which they are normally entitled. I have added some of their testimonies in Annexure "B" from paragraph 16 thereof.
- 4.6 The *CoGTA Minister* also fails to give sufficient consideration to the usual progress of matters that, as the Lockdown continues, peoples' monies and resources become more and more exhausted. In addition, their resources to follow news about where and how to claim possible grants or to get assistance, evaporate. People are told to home-school their children using data. Many of those households do not even have money for food. So the



CoGTA Minister failed to consider how, without work, people are supposed to get an income, to buy data to keep up with the news and the repeated changes of the regulations and to educate their children. In earnest, where there is not enough money for food, expenses to purchase cellular data are no priority. *LFN* members and complainants have even had to resort to selling their televisions, phones and radios to get money for food. In some cases, landlords have taken televisions and other valuables of tenants *in lieu* of partial rental fees. Even the R350 per month promised by Government cannot easily be accessed. Government deployed a WhatsApp system 0600123456 for registrations for this grant. The WhatsApp number temporarily worked well for new registrations but soon after initial announcement, become defunct.

- 4.7 The way and method the *CoGTA Minister* regulated the distribution of emergency food parcels was also poorly handled where mostly African National Congress (ANC) branches literally hijacked the distribution thereof to their own supporters or connections leaving those in real need facing starvation. I attach as Annexure "C" an article in the Daily Maverick dated 22 April 2020 where this problem has been cited as well as a WhatsApp screenshot of a report that I received on 16 April 2020 where the ANC Parliamentary Constituency (PCO) Office in Johannesburg South was accused by community members of engaging in this behaviour, as Annexure "D".
- 4.8 Not only have our members and supporters, together with my family and myself, suffered humiliation and treatment in an undignified way as a result of the conduct by the *CoGTA Minister* having violated our freedoms of movement, residence and to earn an income to survive. In addition, our right to be treated equally and to have the same benefits of the law are being trampled upon. For example, my two minor daughters are now also losing out a lot on their school work and the Governing Body has now also arbitrarily put me on terms to pay the full outstanding amount for my younger daughter (age 5 years) which I am



unable to do under the current Lockdown. In the result, she is going to be deregistered as a pupil. This is infringing on her right to have proper school care and education while I will have to make alternative arrangements to accommodate her needs. I am also working from home – while there is no plan by government to provide further subsidies or other support to parents like me.

- 4.9 Especially the property industry, which is the main focus of *LFN*, has been hit hard, where there is a silent war, for lack of a better word, raging between tenants who are unable to pay their rentals due to them being victims of the Lockdown, and those many landlords who have either no sympathy for their tenant's current circumstances or demand rental payments from their tenants due to their own financial circumstances. Either way, the net result is that very many tenants are forced to take out micro loans or to sacrifice their belongings under the constant threat of illegal action, where the Police either have no knowledge of correct procedure or simply take the side of the landlord and even disallowing tenants to open a criminal docket for investigation. We have stacks and stacks of proof to this effect which we can show to both the Court and the *CoGTA Minister* at the hearing for inspection to illustrate what hardships have been exposed on social level during the Lockdown.
- 4.10 Based on the foregoing and as an expert in my field I am highly concerned that, if the Lockdown does not urgently come to an end, it is inevitable that the already tight tensions between tenants and landlords will spark into a fully fledged conflict. Even the already volatile land redistribution issue in our country could become entangled in the current crisis. There is a potential loss of lives, injury to people and other damages that could by far outnumber all negative effects the COVID-19 disease is claimed to have. See in this regard also an article in the American Jesuit Review dated 28 April 2020 where the fear of starvation outnumbers the fears of contracting the SARS-Cov-2 virus, as Annexure "E".



RE PARAGRAPHS 3.1 TO 3.3: LEGALITY

- 5.1 It is clear that the *CoGTA Minister* has, on several grounds, irrationally bypassed stipulations set in the *Constitution* and other laws, including the *DMA* itself, in promulgating the Regulations. The *CoGTA Minister* has failed to follow the laws of the Republic including the normal legislative processes in passing law. Had the *CoGTA Minister* followed the lawful process, all the necessary checks and balances would have been in place to prevent human rights violations.
- 5.2 The *CoGTA Minister* dealt with the COVID-19 crisis as if she were declaring a State of Emergency in terms of Section 37 of the *Constitution*. I say this because the *CoGTA Minister* simply promulgated regulations without any oversight or involvement of the Legislature. The *CoGTA Minister* effectively bypassed Parliament and the NCOP in the process in promulgating the regulations mentioned in these papers.
- 5.3 If Section 27(2) of the *DMA* indeed implies that the *CoGTA Minister* had the authority to create delegated legislation which violates the Bill of Rights falling within the allowed limitations set in Section 36 of the *Constitution* – which we specifically deny – we explicitly submit that such a right should have been applied for emergency purposes only and for such period as would reasonably be required for the Parliament and NCOP to convene and to create more suitable and reasonable legislation which would provide for an alignment with the Bill of Rights in particular.
- 