IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 5807/2020

In the matter between:

DUWAYNE ESAU	First Applicant
NEO MKWANE	Second Applicant
TAMI JACKSON	Third Applicant
LINDO KHUZWAYO	Fourth Applicant
MIKHAIL MANUEL	Fifth Applicant
RIAAN SALIE	Sixth Applicant
SCOTT ROBERTS	Seventh Applicant
MPIYAKHE DLAMINI	Eighth Applicant

and

THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	First Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE MINISTER OF TRADE, INDUSTRY AND COMPETITION	Third Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA IN HIS CAPACITY AS THE CO-CHAIRPERSON OF THE NATIONAL CORONAVIRUS COMMAND COUNCIL	Fourth Respondent
THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS IN HER CAPACITY AS THE CO-CHAIRPERSON OF THE NATIONAL CORONAVIRUS COMMAND COUNCIL	Fifth Respondent
THE NATIONAL CORONAVIRUS COMMAND COUNCIL	Sixth Respondent

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Seventh Respondent

THE NATIONAL DISASTER MANAGEMENT CENTRE Eighth Respondent

RESPONDENTS' WRITTEN SUBMISSIONS

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INTRODUCTION

1 This application invites the Court to invalidate the heart of the measures taken by the national executive to combat the COVID-19 pandemic. Firstly, it invites the Court to declare invalid the structure established to respond quickly, efficiently and in a coordinated fashion to the pandemic, being the National Coronavirus Command Council (**the NCCC**). Secondly, it invites the Court on procedural and substantive grounds to invalidate the national lockdown that is required to slow the transmission of COVID-19.

2 Neither invitation should be accepted by the Court. As we elaborate, the President and Cabinet are vested with the executive authority of the Republic. Pursuant to that executive authority, The President and Cabinet may organise Cabinet as considered appropriate and efficient, and may determine whether it acts only in a plenary session or also through committees or other structures comprising only some Ministers. It is for the President and Cabinet to determine how to organise the affairs of Cabinet. They have done so, and established the NCCC. This is a constitutionally permitted manner to organise Cabinet.

3 Nor should the Court invalidate the lockdown. The first respondent (**the CoGTA Minister**) shows in her answering affidavit the extraordinary lengths to which her Department, and the Centre facilitated input from Cabinet, NATJOINTS, the Provinces, Municipalities, and established bodies for organised labour, civil society, and business on the Lockdown Regulations, which formed the substantive framework for the subsequently published Disaster Management Regulations. As such, by the time the CoGTA Minister called for public comment, she had already followed a process that would render the publication of the Disaster management Regulations procedurally rational.

4 Nevertheless, the CoGTA Minister called for public comment, and followed a rational process by which members of the public could also comment. The process was carried out under enormous time pressures. That was to be expected, as there was a general sentiment that the lockdown had to be eased, and running a lengthy process would have been inappropriate given the restrictions imposed by the Lockdown Regulations. The Minister could never have, even with months to run a process, considered each representation received. Instead, as is appropriate for a Cabinet member, she relied upon teams to assess the comments received, and to incorporate those comments into a report. The report was then used by the team drafting the specifics of the Disaster Management Regulations to revise the draft. Again, this is entirely appropriate. Cabinet members do not draft, they make political decisions. The report was also reported on to NATJOINTS so that it could inform political decision making. Following this, revised Regulations were published by the CoGTA Minister. This is a rational process, appropriate to the exigencies facing the Minister at the time.

5 The Disaster Management Regulations are also compliant with the Constitution. They protect a constitutionally sound purpose – saving hundreds of thousands of lives by reducing dramatically the transmission rate of COVID-19 for long enough for the healthcare system to prepare for those afflicted by the virus. Whilst the Regulations do, regrettably, limit rights in the Bill of Rights, those limitations satisfy the requirements of section 36 of the Constitution.

6 Finally, the issues in relation to the Clothing Directions are moot. Alert Level 4 has ceased, and, together with it, the Clothing Directions. The dtic Minister published on 11 June 2020 amendments of regulations and withdrawal of directions, in which he recorded formally that the Clothing Directions are no longer of force and effect. Should Alert Level 4 be activated again, new Directions would have to be issued, if any, and would have to be informed by circumstances prevailing at the time. If, however, the Court is minded to consider the issue, the Clothing Directions were a permissible exercise of the dtic Minister's powers to publish directions, done in response to requests from industry, and following a rational process.

THE CORRECT STANDARD OF REVIEW IS LEGALITY AND NOT PAJA

7 There can be no debate that the establishment and operation of the NCCC constitutes executive and not administrative action. The Promotion of Administrative Justice Act 3 of 2000 (**PAJA**) expressly excludes from the definition of "administrative action" the "executive powers or functions of the National Executive…". The President and Cabinet's internal functioning and procedures are plainly functions performed by the national executive.

8 With respect to the promulgation of the Disaster Management Regulations pursuant to section 27(2) of the DMA, we respectfully submit that the Minister's decision is executive action, and is subject only to legality review.[1]

9 The Constitutional Court in *Motau* expressed the difference between executive and administrative action as follows:

> "*In summary, the important question in this context is whether the power is more closely related to the formulation of policy, which would render it executive in nature, or the implementation of legislation, which would make it administrative. Underpinning this enquiry is the question whether it is appropriate to subject the power to the more rigorous, administrative-law review standard.*"[2]

10 The promulgation of regulations in terms of section 27(2) is more closely related to the formulation of policy,[3] rather than the implementation of legislation.[4] We say so for the following reasons:

10.1 The DMA itself makes the response to disasters an executive function. Section 26(1) provides that –

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

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1 *Notyawa v Makana Municipality and Others* 2020 (2) BCLR 136 (CC) at para 38.

2 *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) ("*Motau*"); 2014 (8) BCLR 930 (CC) at para 44.

3 *Motau* at para 38.

4 *Motau* at para 44.

10.2 Further, the promulgation of regulations aimed at combatting a pandemic of a new disease, and minimising its effects, concerns polycentric matters of high policy.

10.3 The Minister is tasked with making regulations to contain the effects of that disease, and ensuring that it does not overwhelm our public health system.

10.4 The Minister's task involves striking a balance between a number of complicated economic, medical and social considerations, so as to protect the public from the devastating effects of the pandemic. This entails making policy choices on the basis of specialist knowledge.

10.5 The promulgation of the regulations in issue is thus a matter that resides in the heartland of national executive function.[5]

10.6 As such, we submit that it would not be appropriate to subject the exercise of this power to the more rigorous administrative law standard.[6]

THE NCCC IS LAWFUL

11 In this section, we detail Cabinet's constitutional authority to regulate its own decision-making processes, in particular its power to establish committees

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5 See *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) ("*ITAC*"); 2010 (5) BCLR 457 (CC) at para 101, in relation to interference with executive decision-making by way of interim interdict.

6 *Motau* at para 44.

including the NCCC. Against that backdrop, the applicants' concerns with the NCCC are, with respect, misplaced.

The NCCC is a constitutionally permissible structure

12 Chapter 5 of the Constitution contains the provisions vesting the President with his powers as Head of State and head of the national executive, as well as provisions establishing and empowering Cabinet.

13 Section 85 of the Constitution provides:

"*Executive authority of the Republic*

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

(2) The President exercises the executive authority, together with the other members of the Cabinet, by-

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) developing and implementing national policy;

(c) co-ordinating the functions of state departments and administrations;

(d) preparing and initiating legislation; and

(e) performing any other executive function provided for in the Constitution or in national legislation."

14 Section 85 vests the President with the executive authority of the Republic, and provides that he must exercise that executive authority together with other

Cabinet members by performing the functions provided for in section 85(2)(a) to (e).

15 Section 85 is the empowering provision that allows Cabinet to organise itself as it sees fit, including stipulating its own rules, procedures, and, significantly, internal structures including committees. In this regard, the eighth applicant's search for some further statutory or constitutional provision empowering Cabinet to establish the NCCC is misguided. Cabinet's power to regulate its own affairs is inherent in it being vested with the executive authority of the Republic.

16 The Constitution does not address the *minutiae* of how Cabinet is to organise itself. It does not, for instance, provide that Cabinet meetings may be called, what the quorum (if any) of such meetings should be, how decisions should be taken (whether, for instance, by consensus, vote, or final decision by the President), whether agendas should be circulated, whether committees may be established, what the composition of such committees should be, and whether and to what extent these committees may make decisions that would otherwise be made by Cabinet. These are all organisational decisions to be made by the President and Cabinet, sourced in their executive authority.

17 The lack of specific provisions regulating and constraining the President and Cabinet in how Cabinet's internal affairs are managed is intentional. Cabinet's deliberative and decision-making procedures are inherently political choices which will vary between governments, and when circumstances change. This is well captured by Murray and Stacey in their chapter on "The President and the National Executive" in *Constitutional Law of South Africa* where they record:

"*How the Cabinet operates will depend largely on the style of the President and the political context. The President is at liberty to decide what matters should be discussed by Cabinet as a whole, what can be dealt with in Cabinet committees and what matters need not come to Cabinet at all. The South African Manual on Executive Acts of the President captures this well. It says that the requirement that the President must act 'together with the Cabinet*

> *'implies that the president takes his decisions in accordance with the 'way of working together' that the Cabinet and President have determined….[The] phrase captures the idea of collective responsibility but allows the Cabinet and the President to determine the way and procedure by which they work together, including leaving certain matters or kinds of matters to be dealt with by a single member of the Cabinet.*

The Manual states that the current way of working in the Cabinet is that consultation is not needed on all matters but that

> *'matters of substance — whether ministerial or Presidential should be brought to Cabinet. Accordingly, if a matter is not routine . . . it must first be referred to Cabinet as must all matters that Cabinet itself has decided should come to it…. Whether a matter was routine or not is a question for the Minister's judgement. . . . [B]oth the President and individual Ministers are duty-bound to take to the Cabinet issues of policy, significant decisions, decisions with financial consequences outside a department's approved budget and any matter the Cabinet has referred to it.*

The Manual suggests that a failure to take such decisions to Cabinet could undermine their validity. But, as we have already noted, the Final Constitution does not specify what procedures are necessary for the 'collaborative' exercise of Cabinet government in South Africa. This omission is surely deliberate. Different Presidents may run their cabinets in different ways while complying with the constitutional imperative that executive decisions should be made together with Cabinet. This view is consistent with the framework of

parliamentary government with which FC s 85 must be read. The appropriate remedy for the President when he or she believes that a Minister is not pursuing the government's policy or has failed to consult Cabinet when he or she ought to have done so is to dismiss that Minister. Thus, the decision in Eisenberg is wrong. There HJ Erasmus J set aside regulations made by the Minister of Home Affairs under the Immigration Act 13 of 2002 in part because he found that making such regulations, involving matters of national policy, was a matter of collective responsibility and thus required Cabinet approval, which had not been secured. Again it misunderstands parliamentary government to read the Final Constitution as identifying which decisions must be taken to Cabinet and which may be taken without a full meeting of Cabinet."[7]

Our emphasis.

18 The lack of any provisions in Chapter 5 of the Constitution detailing how Cabinet is to be structured may be contrasted with the detailed provisions that were stipulated to address the Government of National Unity. To elaborate:

18.1 The Transitional Arrangements to the Constitution (Schedule 6) provide in item 9 that until 30 April 1999, sections 84, 89, 90, 91, 93 and 96 of the Constitution [being *inter alia* sections dealing with the national executive] were to be read as set out in Annexure B to Schedule 6 of the Constitution.

18.2 Annexure B to Schedule 6 stipulates in close detail, for instance: (i) that the President would be required to consult the Executive Deputy Presidents in relation to various functions including the management of

[7] Murray and Stacey "The President and the National Executive" *Constitutional Law of South Africa* OS 06-08, chapter 18 page 36

Cabinet; (ii) that Cabinet should have no more than 27 ministers; (iii) which political parties would be entitled to Executive Deputy President positions on the Cabinet; (iii) who must be appointed Cabinet portfolios and how this was to be decided; (iv) how meetings of Cabinet are to be presided over (by the President); and (v) that consensus seeking by cabinet would be required.

18.3 No such equivalent or detailed provisions exist in Chapter 5 of the Final Constitution. This can only be intentional – having prepared such provisions for the Government of National Unity, the constitutional framers were aware that, in the absence of such stipulations, it would be for the President and Cabinet to make such decisions.

19 The lack of detailed constitutional provisions regulating the procedure by which Cabinet organises itself or makes decisions is not unusual in countries with cabinets. As Rautenbach and Malherbe note in *Constitutional Law* 4th Edition:

"*Usually, cabinet procedure, for instance in respect of decision-making, is not described in constitutions or other laws.*

The German Constitution is an exception. It provides that the functions of the cabinet are performed under the direction of the Chancellor (the head of government), in accordance with the rules of procedure by the President (the head of state). These rules of procedure, inter alia, provide that decisions must be taken by majority vote.

Blondel states in general: "Constitutions are less precise… on the organisation of cabinets – it is said that decisions are expected to be taken collectively while some superior role is sometimes recognised to the Prime Minister with individual ministers sometimes fully responsible with respect to the operation

of their departments. What this suggests is that constitutions at best recognise a problem rather than provide a solution – this problem being that there has to be a leader – but also that the cabinet deserves its name only if the major decisions are taken collectively, while further difficulty arises from the fact that ministers are responsible for particular sectors of government."

The South African Constitution does not contain provisions on cabinet procedure."

Our underlining. Bold in the original.

20 Given the President and Cabinet's executive authority, the establishment by Cabinet of a committee, the NCCC is unexceptional. Cabinet has a number of committees (sometimes called "clusters").[8] As explained by Murray and Stacey:

"*Modern Cabinets rely on Cabinet (or ministerial) committees to enable them to handle the large volume of work they must do, to facilitate coordination amongst government departments and to give ministers who must work together, but who may disagree, an opportunity to resolve their disagreements properly. In 1998, the Report of the Presidential Review Commission identified poor coordination of government activities and policy as a significant problem. In response to this report, the existing, relatively small Cabinet committee system was transformed into what is now commonly referred to as the system of 'Cabinet clusters'. The clusters consist of six Cabinet committees that draw together related departments and parallel clusters of departmental directors general. According to the Presidency, 'Cabinet Committees meet to discuss areas of work, facilitate collaborative decision-making, and make recommendations to Cabinet'. The Cabinet committees are chaired by the President or the Deputy President. They are large — for instance the Committee for the Social Sector has twenty members — and many ministers*

[8] AA p [7] para 17. Annexure NZ7 is an example of one such cluster, the Economic Cluster, which was consulted by the CoGTA Minister when developing the Alert Level approach to the lockdown. See AA p [33] para 85.2.

serve on a number of the committees: The Minister of Education serves on five of the six committees."[9]

21 The establishment of cabinet committees and their use in cabinet decision making is not unusual. Cabinet committees were employed before democracy under the Apartheid regime,[10] and are a common practice in other jurisdictions.

22 The Westminster system, from which South Africa inherits its mixed-cabinet system, illustrates the use and importance of cabinet committees well. In Colin et al *British Government and the Constitution: Text and Materials (Law in Context)*, the authors explain:

"*Much of the work on government policy that was formerly the business of the Cabinet is now carried out in Cabinet committees (ministerial committees of the Cabinet). Such committees have existed since the early nineteenth century, but a fully organised committee system became established as a normal part of Cabinet government only after the Second World War. Cabinet committees deal with matters of continuing governmental concern such as economy policy, home and social affairs, energy, defence and foreign policy, and the EU… Ad hoc committees or sub-committees may be appointed to deal with specific and immediate issues of policy and are wound up when the work entrusted to them has been completed.*"[11]

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9 Murray and Stacey "The President and the National Executive" *Constitutional Law of South Africa* OS 06-08, chapter 18 page

10 See, for instance, Boulle, Harris and Hoexter *Constitutional and Administrative Law* 1st edition 1989 at p 195: "[t]he establishment of ad hoc committees of a small number of cabinet members to deal with particular issues is a well-known feature of government…". The authors note the existence then of the four standing committees dealing with constitutional, economic, social welfare, and national security matters, and criticise the over reliance on the State Security Council.

11 Colin et al *British Government and the Constitution: Text and Materials (Law in Context)* 7th edition loc 12958-12964.

23 The authors explain further that: "*the committees are empowered, like Cabinet itself, to take binding decisions on behalf of government. These decisions are often of considerable importance. For instance, it was a ministerial committee that made the decision, in 1980, to acquire the Trident nuclear missile system. Cabinet committees, it is stated on the Cabinet Office website, 'reduce the burden on Cabinet by enabling collective decisions to be taken by a small group of ministers.'*"[12]

24 The use of committees is generally recognised as a welcome and necessary feature for cabinets:

24.1 Loveland in *Constitutional Law: A Critical Introduction* discusses the increasing use of smaller cabinet committees by the British government, and comments thereon by stating: "*There are undoubtedly sound justifications for a drift away from a fully collegiate model of Cabinet decision-making. As the government's workload has grown, so it has come increasingly implausible to expect all members of the Cabinet to have either the time or expertise to comment usefully on all areas of government activity.*"[13]

24.2 De Smith in *Constitutional and Administrative Law* discusses the use of committees to make decisions by the British cabinet and states: "*The*

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12 Colin et al *British Government and the Constitution: Text and Materials (Law in Context)* 7th edition loc 12980-12986.

13 Ian Loveland *Constitutional Law: A Critical Introduction* 1996 p 357.

Cabinet committee system is clearly of first class importance in the machinery of central government."[14]

25 The drafters of the Constitution would have been aware that Cabinet would be likely to employ committees and, given the functioning of the modern state, would rely on committees extensively to function effectively and responsibly. If the Constitution was intended to limit the President and Cabinet's powers to exercise their executive authority by prohibiting them from establishing and using committees, it would have stated as much expressly.

The NCCC's establishment and functions

26 Once it is recognised that the Cabinet has the power to organise its own affairs, and may conduct its business through committees, the applicants concerns with the NCCC may be easily answered. The CoGTA Minister's affidavit explains the identity and establishment of the NCCC as follows:

"*To address the pandemic, which was and continues to change rapidly, the President and Cabinet had to act with alacrity, meeting with greater frequency than would ordinarily be the case, with meetings and agendas dedicated to the COVID-19 pandemic, and with secretarial support focused and designed to facilitate an effective and coordinated national response to the pandemic. To this end, the Cabinet established the National Coronavirus Command Council* ***(the NCCC)*** *to address specifically Cabinet's response to the COVID-19 pandemic. The NCCC is a structure of Cabinet comprising only Cabinet members, although it receives inputs and reports from the National Joint Intelligence and Operational Structure* ***(NAT JOINTS).*** *It acts as a forum for discussion and debate on COVID-19 related issues, and through the NCCC*

[14] De Smith *Constitutional and Administrative Law* 4th edition, edited by Street & Brazier p 181

(and, of course, outside of it) Cabinet members are able to consult each other and raise concerns and difficulties that are being encountered with the measures taken to address COVID-19.

… Aside from its membership, which has since early on in the COVID-19 pandemic included all members of Cabinet, the NCCC was established as a subcommittee of Cabinet dedicated to dealing with COVID-19, chaired by the President."[15]

27 The CoGTA Minister then devotes a series of paragraphs in her affidavit detailing the history of the establishment of the NCCC, its functioning, the manner it deliberates, and, as significantly, the importance of distinguishing it from the specific powers exercised by particulars Ministers.[16]

28 The applicants devote much of their affidavits seeking to find contradictions between statements of the CoGTA Minister and the President on the NCCC's composition, what the NCCC is or is not doing, and what its decision-making powers are. These enquiries are arid:

28.1 The governmental response to the COVID-19 pandemic has been dynamic. The NCCC was initially composed on 15 March 2020 as a sub-set of Ministers. The NCCC's composition was expanded on 20 March 2020 when the President requested that all other Cabinet ministers participate in the NCCC.

28.2 The NCCC's meetings cover a wide range of policy issues that must be deliberated on and decided upon, ranging from discussing the shortages

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15 AA p [6] paras 16-17.

16 The discussion is at AA p [47] para 114 onwards and AA p [59] para 143 onwards.

of PPEs, to working out the appropriate policy approach to moving South Africa from the lockdown. The interchangeable language used by the national executive between "the NCCC" and "Cabinet" is to be expected in this context. Sometimes Cabinet is acting when sitting formally as Cabinet, and sometimes it is acting through the NCCC.

28.3 The interchangeable language is constitutionally innocuous. The NCCC is a committee of Cabinet, comprising only ministers. Its actions and functions are the actions and functions of Cabinet. Nothing prevents Cabinet from making decisions at the NCCC level, or elevating decisions to a formal Cabinet (rather than NCCC) meeting, or for that matter making the decision at a meeting of the NCCC and then confirming that decision in a formal cabinet meeting. It would appear from the CoGTA Minister's affidavit and from Presidential statements and the like that some decisions are, indeed, being escalated to a formal Cabinet level.

28.4 What may not happen is for the NCCC to take decisions that are reserved by statute or regulation to particular ministers. The NCCC has not done so, and the CoGTA Minister and others are correct to state that the NCCC does not have such decision-making powers.

The NCCC has not usurped the Centre's role

29 The applicants do not persist in their written submissions with the allegation made in their affidavits that the NCCC has usurped the Centre's role under the DMA. The allegation is, we respectfully submit, addressed fully in CoGTA's

Minister's affidavit at page 62 paragraph 158 onwards, as well as in the affidavit of Dr Tau, who is the Head of the Centre. We do not repeat what is stated there.

Conclusion in respect of the NCCC and Cabinet

30 The President and Cabinet are empowered by section 85 to exercise the executive authority of the Republic. To this end, Cabinet may fix its own procedures, including establishing its own committees through which it exercises its executive authority. The NCCC is no more than a committee of Cabinet. On some occasions, it is taking decisions relating to COVID-19, and on other occasions those are being escalated to formal Cabinet meetings. In either event, such decisions are decisions of Cabinet, and are constitutionally compliant.

Remedy

31 If the Court is against the respondents, it is respectfully submitted that the relief in the notice of motion is overly broad. It is customarily appropriate when it is held that an office is being unlawfully occupied to declare the appointment of that person invalid, but to leave intact decisions made by that person, and that such an order falls within the Court's remedial powers to declare conduct invalid but to grant a just and equitable order including refusing to recognise any further consequences arising from the invalidity.[17]

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17 See, e.g., *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23 at para 68 onwards.

32 A similar approach should be adopted here. Decisions that have been taken by Cabinet sitting as the NCCC can then be set aside on a case-by-case basis and with regard to the merits of each decision.

RULE OF LAW IN STATES OF DISASTER

33 'Disaster' is defined in section 1 of the DMA to mean 'a progressive or sudden, widespread or localised, natural or human caused occurrence which causes or threatens to cause: death, injury or disease; (…) or disruption of the life of a community; and is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources'.

34 The DMA also does not apply if the disaster can be 'dealt with effectively in terms of other national legislation (…) aimed at reducing the risk, and addressing the consequences, of occurrences of that nature: and (…) identified by the Minister by notice in the Gazette.'[18]

35 Section 27 of the DMA bridges the gap between disasters, the management of which is adequately provided for in existing legislation, and the rather more serious states of disaster, which allow derogations from certain constitutional rights in certain circumstances. The DMA foresees some form of intervention more extensive than merely enforcing existing legislation.

36 In cases of natural disaster, it is to be expected that the Minister empowered by the DMA will be making decisions in a climate of uncertainty and urgency. Where regulations are promulgated under these constraints, the executive must be

[18] DMA s2(1)(b).

given a certain degree of latitude and flexibility in order to allow it to promptly and effectively manage the disaster.

37 In a recent opinion of the Supreme Court of the United States of America[19], which dealt with regulations relating to the COVID-19 pandemic and the attendance of religious services, Chief Justice Roberts confirmed the opinion in *Marshall v United States[20]:*

> '*When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, arguendo, that judges with more direct exposure to the problem might make wiser choices.*'[21]

38 Roberts C.J. goes on to hold that this '*is especially true where (…) a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is "indisputably clear" that the Government's limitations are unconstitutional seems quite improbable.*'[22]

39 The comments of Roberts C.J. resonate in this matter where the evidence shows that the CoGTA Minister has been actively amending regulations in response to public and internal comment, changing facts on the ground and developing knowledge of the virus.

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19 *South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor Of California, et al,.* 590 U.S. _ (2020).
20 *Marshall v United States*, 414 U. S. 417, 427 (1974)
21 *Marshall v United States*, 414 U. S. 417, 427 (1974)
22 *South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor Of California, et al.,* 590 U.S. _ (2020)

THE APPLICANTS' NEW ATTACKS ON THE REGULATIONS SHOULD NOT BE PERMITTED

40 The first applicant's heads of argument advance a series of new challenges to the Disaster Management Regulations that were not pleaded in the founding affidavits, and were only mentioned in reply. These include:

40.1 The submission that the Disaster Management Regulations are *ultra vires* as a whole because the CoGTA Minister was not "guided" by the principles that a narrow interpretation must be given to the DMA,[23] or her duty to only "augment" existing legislation with regulations to address the disaster.[24]

40.2 The related submissions that the Disaster Management Regulations conflict with *inter alia* the Children's Act 38 of 2005 (**the Children's Act**), the Prevention of Illegal Evictions and Unlawful Occupation of Land Act 19 of 1998 (**the PIE Act**), the Legal Practice Act 28 of 2014 (**the LPA**) and the Architectural Profession Act 44 of 2000 (**the APA**).[25]

40.3 The submission that the creation of criminal offences in terms of the Disaster Management Regulations is unconstitutional.[26]

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23 First applicant's heads of argument p 12 para 47 onwards.

24 First applicant's heads of argument p 14 para 57 onwards.

25 First applicant's heads of argument p 15 paras 64 to 65 and onwards, as well as p 31 paras 161 to 165.

26 First applicant's heads of argument p 38-39 paras 204-201.

The principles regulating the pleadings in motion proceedings

41 In motion proceedings, the parties' affidavits constitute both their pleadings and their evidence.[27] The affidavits must set out the applicant's entire cause of action with such clarity as is reasonably necessary to alert the respondent to the case it has to meet. A litigant who fails to do so may not thereafter advance a contention of law or fact if its determination may depend on evidence which his or her opponent has failed to place before the Court because he or she was not sufficiently alerted to its relevance.[28]

42 These principles apply *a fortiori* where an applicant alleges that a provision is *ultra vires*. This is not a mere conclusion of law. It may be vitally dependent on evidence of fact and the respondent must be afforded an opportunity to explain why it is not *ultra vires*.

43 The obligation on a party to make out its case in its founding papers is well established. In *Betlane v Shelly Court CC*,[29] the Constitutional Court stated:

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27 *Triomf Kunsmis v AE&CI* 1984 (2) SA 261 (W) 269; *Johannesburg City Council v Bruma Thirty-Two* 1984 (4) SA 87 (T) 92; *Radebe v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) 793; *Aetiology Today v Van Aswegen* 1992 (1) SA 807 (W) 824; *Commissioner of Customs and Excise v Bank of Lisbon* 1994 (1) SA 205 (N) 225; *Prokuruersorde van Transvaal v Kleynhans* 1995 (1) SA839 (T) 848*; International Executive Communications v Turnley* 1996 (3) SA 1043 (W) 1050

28 *Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) 285E-H; *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A) 195F-196D; *Imprefed v National Transport Commission* 1993 (3) SA 94 (A); *Angus v Kosviner* 1996 (3) SA 215 (W) 222 G-I; *Government of the Province of KwaZulu-Natal v Ngwane* 1996 (4) SA 943 (A) 949C to 950A; *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) 899D-E; *Naude v Fraser* 1998 (4) SA 539 (SCA) 558A-D; *NDPP v Phillips* 2002 4 SA 60 (W) para 36.

29 2011 (1) SA 388 (CC).

"*It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. A case cannot be made out in the replying affidavit for the first time.*"[30]

44 The rationale for this trite principle is set out in *Director of Hospital Services v Mistry*[31] where the Appellate Division stated:

"*When . . . proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustees v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases:*

> "'*. . . an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, <u>because those are the facts which the respondent is called upon either to affirm or deny</u>*'."

45 The Constitutional Court supplemented this rationale in *SATAWU and Another v Garvas and Others*[32] where it stated:

"*Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded.*"

46 In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others*[33] the Constitutional Court stressed that: "*it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their*

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30 Ibid paragraph 29.

31 1979 (1) SA 626 (AD) at 635H-636B.

32 2013 (1) SA 83 (CC) para 114.

33 2004 (4) SA 490 (CC) at para 27.

cause of action, and the legal basis of their cause of action." This principle of pleading would apply equally to challenges based on the principle of legality.

The manifest prejudice to the respondents

47 The new attacks belatedly advanced by the applicants on the Disaster Management Regulations severely prejudice the respondents and persons not before the Court.

48 These new attacks turn on questions of fact. For instance, the word "augmented" or any of its cognates appears only once in the founding affidavits, when the applicants quote section 26(2)(b) of the DMA. The CoGTA Minister was not forewarned that she had to place before the Court evidence as to whether or not she considered her obligation to augment existing statutes. There have, however, been a score of national executive measures taken pursuant both to the Disaster Management Regulation's power for other Ministers to publish directions and the like, as well as pursuant to other statutes.[34] The CoGTA Minister has been denied the opportunity of placing this evidence before the Court, and indicating where she or others in the national executive took steps to augment existing statutory measures, and why further steps in the Disaster Management Regulations were necessary.

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[34] LexisNexis has collected directions, measures, notices and other instruments issued by Basic Education, Environment, Forestry and Fisheries, Communications and Digital Technology, Higher Education, Science and Innovation, Home Affairs, Employment and Labour, Health, Finance, Mineral Resources and Energy, Justice and Correctional Services, Office of the Chief Justice, Small Business Development, Social Development, Trade Industry and Competition, Sports, Art and Culture, Tourism, Transport, and Water and Sanitation.

49 These new attacks also implicate parties not before the Court. The consistency or inconsistency of the Disaster Management Regulations cannot be decided without the joinder of the Ministers responsible for the statutes that are allegedly in conflict with the Disaster Management Regulations.

50 None of these issues were ventilated in the Rule 16A notice published by the applicants when they commenced these proceedings. Other third parties potentially affected by the challenges now raised have not been given notice of these challenges, and this Court may make findings or rulings adversely affecting unknown third parties (such as, persons whose evictions have been stayed).

51 The imputation that the Disaster Management Regulations created offences that are *ultra vires* should similarly require the joinder of the Minister of Justice, the National Prosecuting Authority, the Minister of Safety and Security, and the National Police Service.

52 The notice of motion does not even attack the regulations in the Disaster Management Act that create the criminal provisions. This, presumably, is why the applicants allege that the offences created by the regulations vitiate the regulations as a whole, when if the applicants are correct (which is denied), this would affect only the sections creating criminal offences.

53 There will have been less than a week from the date that the first applicant's replying affidavit is filed to when this matter is heard. This is inadequate time to take instructions from the respondents, or for that matter for due consideration to be given and submissions made on what are relatively new issues.

54 Some of these issues are presently pending before other courts. For instance, in the African Black Lawyers Foundation's urgent application, launched in the High Court in Johannesburg under case number 11313/2020, and meant to be heard last week (which we understand from colleagues has been postponed), will require government answering the charge that it "*failed to accommodate tenants who are at risk of eviction and who are facing penalties due to their inability to pay their rent as a direct result of the lock down. This, the applicants argued, is a violation of their constitutional obligations.*"[35]

The responses to the new attacks

55 As indicated, we have not yet had an opportunity to consult with our clients on these new attacks on the regulations. We respectfully submit that the Court should decline to consider these attacks. If, however, the Court holds it may and should consider those attacks, we submit that the challenges should be dismissed on the grounds that follow.

<u>The Minister has augmented existing legislation and contingency arrangements</u>

56 Section 27 of the DMA, being the section that empowered the CoGTA Minister to publish the Disaster Management Regulations, does not provide that the regulations or directions published must only be published where necessary to "augment" existing statutes. The applicants are reading into section 27 substantive jurisdictional considerations that do not exist.

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35 AA p 56-57 para 137.4.7.

57 Section 26(2)(b) of the DMA in its plain and ordinary terms does not impose a limitation on the CoGTA Minister's power. Rather, it creates an obligation on the national executive to deal with the national disaster both in terms of existing legislation and contingency arrangements **as well as** the regulations or directions made under section 27(2), if any.

58 In any event, section 26 is directed at imposing on the national executive the obligation to deal with the national disaster using existing legislation that provides for dealing with the national disasters, and is not imposing a general obligation to apply existing legislation. The legislation which must apparently be "augmented" by the Disaster Management Regulations is not disaster or emergency legislation.

There is no inconsistency

59 There is also no inconsistency between the Acts identified by the applicants and the Disaster Management Regulations:

59.1 The Disaster Management Regulations may be read consistently with each of the statutes identified by the applicants.

59.2 Regulation 17 of the Disaster Management Regulations expressly recognises the rights of co-holders of parental responsibilities or rights and caregivers under the Children's Act, and makes provision for how those rights are to be exercised during Alert Level 4.

59.3 Regulation 19 of the Disaster Management Regulations allows courts to grant orders for evictions under PIE (and also the Extension of Security

of Tenure Act 62 of 1997), but provides that the order should be stayed until after Alert Level 4, provided further that the Court still has a discretion to order otherwise when it would be just and equitable not to stay the eviction.

59.4 Neither the LPA nor the APA purport to establish a right to practise those professions which immunises those professions from complying with other laws and regulations, including the regulations issued under the DMA. Lawyers and architects may, when it is possible, practise from home. However, even when they cannot, this is a permissible limitation on their rights to practise their profession. Neither Act excludes the operation of other legislative measures which have the direct or indirect effect of stipulating conditions under which those professions may be engaged in.

<u>If there is inconsistency, this is permissible</u>

60 If, however, the Court holds that there are irreconcilable conflicts between the Disaster Management Regulations and one or more of these Acts, then (if they were still in operation) the Disaster Management Regulations would prevail for the period of the national disaster.

61 Whilst the applicants are correct that the Constitutional Court, and this Court have held that ordinarily plenary legislative powers cannot be granted to the executive, this principle does not apply to the Disaster Management Act:

61.1 The Minister's regulations and directions are operative for only so long as there is a national state of disaster, and national states of disaster last for only three months, and thereafter only when extended on a month-by-month basis. The Minister does not enjoy general legislative powers to repeal legislation.

61.2 The power to issue regulations and directions is circumscribed under section 27(2) in terms of content, and under section 27(3) in terms of purpose, and is accordingly not an unfettered plenary legislative power. Any suspension of national legislation must be consistent with these substantive requirements.

62 However, even if the DMA has impermissibly granted the CoGTA Minister plenary legislative powers, then the applicants must challenge the DMA, which they have not done.

63 We would stress that this is a complicated issue, and the Courts have not confronted the force of quasi-plenary legislative clauses in the context of emergency or disaster legislation. This would not be the appropriate time to do so, and especially without hearing the views of Parliament.

<u>The Minister was empowered to create offences</u>

64 The DMA provides expressly in section 27(4) that regulations made under section 27(2) may include regulations prescribing penalties for any contravention of the regulations.

65 The offences created by the Disaster Management Regulations are valid exercises of this powers.

66 Indeed, the creation of offences is appropriate to operationalise such penalties – the CoGTA Minister (or for that matter, the Centre) is not the appropriate body to enforce penalties. This should be done by the police and by the National Prosecuting Authority, which have appropriate powers and procedures regulating their operations. Those who are accused of contravening the Disaster Management Act are then afforded all of the protections vested in accused persons under the Constitution, including fair trial rights and other constitutional protections.

Conclusion on the new issues made in reply

67 The Court should, with respect, decline to hear the new attacks on the Disaster Management Regulations raised in reply by the applicants. If, however, it considers those issues then it should dismiss them.

THE DISASTER MANAGEMENT REGULATIONS

68 We now turn to address the first to seventh applicants' attacks on the Disaster Management Regulations.

69 Before we do so, it is necessary to correct the allegations as to onus made in the heads of argument. It is correct that if an applicant establishes a constitutional limitation, then it is for the State to justify the limitation. However, an applicant seeking to impugn an executive or administrative decision under, respectively, the principle of legality or PAJA, bears the ordinary civil onus of proving its case,

and in accordance with the normal rules in *Plascon Evans* and the exceptions thereto.

The Disaster Management Regulations were published following a procedurally rational process

70 The only consultation required when regulations are promulgated under section 27(2) is consultation with the "responsible Cabinet Minister". Public consultation is not required by the DMA at all. This is in contrast to other exercises of powers in the Act, where public participation is specifically required. For instance:

70.1 In terms of section 6(2) of the DMA, before the national disaster management framework is prescribed or amended, the Minister must publish particulars of the framework or amendment in the Gazette for public comment.

70.2 In terms of section 28(3)(b) of the DMA, before a provincial disaster management framework is prescribed or amended, the Minister must publish particulars of the framework or amendment in the Gazette for public comment.

71 Where the Act requires public participation, it specifies this. No such requirement appears in section 27(2) of the DMA, and the applicants have not challenged the constitutionality of section 27(2).

72 Instead, the applicants submit that the decision made must nevertheless be procedurally rational. This is correct. The publication of the Disaster Management Regulations was procedurally rational.

73 In *Albutt*[36], the Constitutional Court had to determine whether procedural rationality required the president to consult with victims of political crimes before considering whether to pardon the perpetrators of those crimes in terms of a special presidential dispensation process. In the majority judgment per Ngcobo CJ, the court held that:

> "*Courts may not interfere with the means selected [to achieve the executive's constitutionally permissible objectives] simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved.*"[37]
>
> Our emphasis.

74 The Minister has outlined in her answering affidavit that consultation took place prior to the publication of the Lockdown Regulations. Cabinet was consulted, including individual Ministers and the President. The Centre was consulted. Experts were consulted, both from within CoGTA and externally. All these individuals and entities were in turn consulting with their respective stakeholders so that these views could be fed into the decision-making process. Importantly,

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[36] *Albutt v Centre for the Study of Violence and Reconciliation and Others* (CCT 54/09) [2010] ZACC 4 (23 February 2010).

[37] *Albutt v Centre for the Study of Violence and Reconciliation and Others* (CCT 54/09) [2010] ZACC 4 (23 February 2010) para 51.

the Minister has clearly stated that widespread public consultations were not possible given the need to act quickly and decisively.[38]

75 After the lockdown was announced and the Lockdown Regulations were published, the public feedback process only escalated. In her answering affidavit, the CoGTA Minister details chapter and verse how from the outset of the lockdown she was receiving feedback and comment from a wide array of stakeholders, through formal state structures, through established bodies that interact with business, organised labour and civil society, and through other Departments and Ministers. The public was, of course, also directing comments, support, criticisms and there were a number of legal challenges, including even issuing letters of demand and initiating litigation.

76 The Lockdown Regulations were being severely tested. The CoGTA Minister was receiving this feedback on an ongoing basis. As such, even before she announced a public participation process, the CoGTA Minister had a rational basis upon which to publish the Disaster Management Regulations, and could have acted rationally without following any consultation process whatsoever.

77 The Court in *Albutt* further held that:

> '*To pass constitutional muster […], the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the*

38 AA p23 para 66.

process. If it is not, it falls short of the standard that is demanded by the Constitution.'[39]

78 Against this standard, the CoGTA Minister's decision to follow a truncated public participation process was warranted in order to ensure that the Disaster Regulations would be as efficient as possible. The Minister did not have the luxury of time given the realities of the pandemic and the economic and social costs of the lockdown. Features of the Lockdown Regulations needed to be eased with alacrity. There was broad public consensus that this was the case. The public participation procedure employed by the Minister had to be proportionate to this broad recognition.

79 *Kyalami Ridge*[40] illustrates this proposition in the context of procedural fairness. In that matter, the Constitutional Court was asked to rule on the South African government's decision to establish on state-owned land a 'transit camp' for indigent flood victims, in the absence of consultation with nearby property owners. This was a case where procedural fairness was at issue because the government's decision was held to constitute administrative action.

80 The court held that the urgent need of the flood victims required a swift decision and prompt implementation of that decision, which would have been hampered were the government to embark on a lengthy consultation process.[41]

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[39] *Albutt v Centre for the Study of Violence and Reconciliation and Others* (CCT 54/09) [2010] ZACC 4 (23 February 2010) para 50.

[40] *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* (CCT 55/00) [2001] ZACC 19 (29 May 2001).

[41] *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* (CCT 55/00) [2001] ZACC 19 (29 May 2001) paras 104-5.

81 The court held that the Kyalami residents had rights in law to challenge the implementation of the government's decision, but that the decision could not be set aside merely due to a lack of consultation prior to making and implementing the decision. In short, as long as the decisions were implemented lawfully, the residents would have no right to object merely on the basis of a lack of prior consultation.[42]

82 The reasoning in *Kyalami Ridge* would apply with even greater force in the context of procedural rationality. Procedural rationality requires that the process adopted must be rational given the nature of the decision to be taken. If consultation would defeat or undermine the purpose of exercising the primary power, or if lengthy or onerous consultation requirements would prejudice the decision, then those procedures would themselves be irrational.

83 In *Democratic Alliance*, the court held that:

> '*The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred.*'[43]

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[42] *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* (CCT 55/00) [2001] ZACC 19 (29 May 2001) paras 106 and 109.

[43] *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24 (5 October 2012) para 36.

84 In determining whether the process is rational one must consider the '*process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality*.'[44]

85 When regulations are promulgated under section 27(2) of the DMA, the only consultation required is with '*the responsible Cabinet Minister*'. Public consultation is not required by the statute.[45] Where no statutory or other provision has been expressly made for consultation, the principles set out inter alia in *Albutt*[46] and *Democratic Alliance*[47] apply in respect of determining procedural rationality.[48]

86 The applicants allege that the public participation process initiated by the Minister on 25 April 2020 was unfair, irrational, and non-compliant with administrative justice.[49] The reasons for this allegation appear to be that:

86.1 interested parties were afforded only 48 hours to consider and respond to the 22-page Draft Schedule[50];

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44 *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24 (5 October 2012) para 37.
45 AA p 68 para 170.
46 *Albutt v Centre for the Study of Violence and Reconciliation and Others* (CCT 54/09) [2010] ZACC 4 (23 February 2010).
47 *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24 (5 October 2012).
48 *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* (CCT140/16; CCT141/16; CCT145/16) [2017] ZACC 17 (8 June 2017) para 67.
49 FA p43 para 125.
50 FA p43 para 125.1.

86.2 interested parties were not able to make representations in relation to the 'operative provisions' of the regulations[51];

86.3 it was not possible for the Minister to receive and collate the representations within the 48 hours before the Disaster Regulations were promulgated on 29 April 2020[52];

86.4 and that the minister allegedly did not in fact consider the substance of the submissions made[53].

87 These arm-chair criticisms of the process do not vitiate the rationality of the process:[54]

87.1 The 48-hour time period to respond was acceptable in the circumstances. The public had not waited for the announcement to give input on the lockdown. It is difficult to imagine a more hotly debated issue. The public was already, prior to the call, commenting on the lockdown measures.

87.2 Within this context, it would not have been onerous to prepare representations. This is especially so given that the draft schedule was not onerous to read and digest, especially since it was divided clearly into sections specific to particular persons or industries and the public was invited to focus their comments on the Alert Level 4 considerations. The public was also given simple instructions to make submissions, and

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51 FA p43 para 125.2.

52 FA p44 para 125.3.

53 FA p44 para 125.5.

54 See AA p 70 para 176 onwards.

provided with both the presentation to Cabinet and a further explanatory presentation.

87.3 The public did not confine itself to the Draft Schedule, but commented more broadly, and those comments were taken into account.

87.4 There is nothing sinister with the Minister not considering the representations personally, but instead relying on the ministry teams to prepare reports, and to feed comments into the draft regulations. Given, especially, the exigencies of the case, this was a procedurally rational way for public contributions to be incorporated. In *New Clicks*[55] the Constitutional Court confirmed this approach as appropriate and adequate in the context of procedural fairness. It must be more so in the context of procedural rationality.

87.5 The report was, in any event, submitted both to NATJOINTS and reported on to the NCCC.

88 In the language of procedural rationality, the CoGTA Minister's reliance on the ministry teams was rational given the pressing need to begin easing the lockdown.

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[55] Minister of Health and Another v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae) 2006 (1) BCLR 1 (CC) para 158:
This does not mean that the Minister who makes the regulations has to study thousands of pages received from the general public and respond to them. The analysis of these responses can be left to officials whose responsibility it is to consider the comments received and to report to the Minister on them."

The Disaster Management Regulations comply with the Constitution

89 We now turn to address the applicants' attack on the Disaster Management Regulations on the basis that the regulations limit the rights to dignity and to trade, occupation and profession.

90 We do not contest the applicants' allegations that these rights are important and weighty (albeit that dignity is of far greater constitutional significance than the right to trade, occupation and profession). Nor do we suggest that these rights are not limited or that the lockdown did not impose significant limitations on those rights.

91 This matter turns on whether the regulations nevertheless survive scrutiny under section 36 of the Constitution given the importance of their purpose – being to save hundreds of thousands of lives – and the effectiveness of the means chosen to pursue that purpose – being the lockdown imposed by the impugned regulations.

92 The South African state is not alone in imposing a lockdown. Professor Karim reports that some 86 countries have imposed some form of lockdown.[56] The CoGTA Minister notes that when the decision was taken to go into lockdown, there was already a growing international consensus that a lockdown was the appropriate response to the COVID-19 pandemic.[57] There can be no question that the lockdown is a measure that is "*reasonable and justifiable in an open and*

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56 Karim p 11 para 34.

57 AA p 21 para 60.

democratic society based on human dignity, equality and freedom" as required by section 36 of the Constitution.

The importance of the lockdown's purpose

93 COVID-19 threatens to kill hundreds of thousands of South Africans, and to leave many others scarred by the long-term effects of the virus.[58]

94 When a person cannot be given a bed or a ventilator because the healthcare system has reached its maximum capacity, and is left to die or to recover without palliative treatment for the virus' terrible effects, especially on those with comorbidities, that person's constitutional rights are severely breached.

95 The purpose of the lockdown is to minimise these threats, and in so doing respect, protect, promote and fulfil the rights to dignity,[59] life,[60] bodily and psychological integrity[61] and access to health care,[62] and to an environment that is not harmful to health or well-being.[63]

96 These are foundational rights to human flourishing. As it notes in its pre-amble, one of the aims of the Constitution's adoption was to "*improve the quality of life of all citizens and free the potential of each person*".

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58 AA p 72 para 181.

59 Section 10 of the Constitution.

60 Section 11 of the Constitution.

61 Section 12(2) of the Constitution.

62 Section 27(1)(a) of the Constitution.

63 Section 24(a) of the Constitution. AA p [72] para 179.

97 As Chaskalson P notes in *Makwanyane*:

> "*The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.*"[64]

98 In his concurrence in *Soobramoney*,[65] Justice Madala observes that "*The State undoubtedly has a strong interest in protecting and preserving the life and health of its citizens and to that end must do all in its power to protect and preserve life.*"[66]

99 The impugned regulations' purpose of preventing the unmanageable spread of COVID-19 is, we respectfully submit, not only constitutionally permitted but constitutionally mandated.

The relationship between the lockdown and saving lives

100 The lockdown is an essential tool in the State's fight against the COVID-19 pandemic.

101 In its starkest terms, the lockdown measures slow the rate of transmission of the virus, which has slowed the rate of increase of the total volume of people infected with COVID-19. The lockdown has and continues to "*flatten the curve*". This, Professor Karim explains, has allowed South Africa to buy time to: "*slow community transmission; expand health care capacity, including setting up field*

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64 *S v Makwanyane* 1995 (3) SA 391 (CC) para 144

65 *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC).

66 *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) para 39.

hospitals in major centres; prepare and equip health care facilities, including providing PPE for health care workers; and scale up testing and prevention programmes."[67]

102 The detail of how the curve is flattened, and its importance to preparing the healthcare system and ensuring that the healthcare remains able to cope, is set out at length in the CoGTA Minister's affidavit,[68] the expert affidavit of Professor Karim,[69] and the dtic Minister's affidavit.[70]

103 The applicants accept that it is necessary to flatten the curve. However, the applicants contend that the lockdown measures do not flatten the curve.

104 For instance, the applicants contend that COVID-19 is not spread by any of the forms of movement prohibited by regulation 16(1) to 16(4). This argument is facile. Individuals, of course, do not catch COVID-19 when they leave their houses. They catch COVID-19 when they come into contact with infected persons and surfaces. The more people there are in public, and the longer they remain in public, the more likely it will be that those infected with the virus will contaminate surfaces, or expose others to the virus.[71]

105 The applicants contend that allowing some economic activities (such as the sale of uncooked chicken or winter clothing) but not others makes no difference to the

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67 Karim p 12 para 37.

68 AA p [14] para 42 to p 15 para 46; p [17] para 52 to p [21] para 62; p [72] para 178 to p 79 para 203.

69 Karim p [4] para 9 to p 12 para 38.

70 Patel paras 10-15, 30-50.

71 AA p 75 para 191; Karim p 10 para 29.

spread of COVID-19. Again, this argument is facile. The prospect of one person infecting another person is, in most retail transactions,[72] presumably equal irrespective of the nature of the transaction. The list of activities in Table 1 to the Disaster Management Regulations is, in that sense, "*arbitrary*" – the list cannot be entirely justified on the basis that those activities pose less of a risk than the activities not listed.

106 That, however, is not the purpose of or justification for the listing of some economic activities but not others in Table 1. The purpose is to reduce the total number of people interacting in public with each other and with potentially infected surfaces. If the objective is reducing the <u>total number of opportunities for transmission</u>, then some activities necessarily have to be allowed while others cannot be allowed.

107 As the CoGTA Minister explains:

> "*194 Permitting all activities that arguably affect or give full effect to various rights in the Bill of Rights would collapse the lockdown. Regrettably, it is impossible to craft Regulations that reduce the risk of transmission at any given point in time to acceptable levels without permitting some public activities and refusing other activities that may appear similarly important. As such, lines that may appear arbitrary between one activity and another activity must be drawn to achieve an acceptably low level of transmission.*"[73]

108 The drive to reduce opportunities for transmission applies even at the level of individual stores. As explained by Minister Patel, it was necessary to reduce foot

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72 Certain activities are clearly riskier, such as hair and beauty treatments, gym attendances, and the like.

73 AA p [75] para 191 to 194.

traffic in stores, and to reduce the number of surfaces in stores and fitting rooms that could be viral vectors for COVID-19.[74] This would also allow retailers to reduce their staffing contingent in the stores, who according to the dtic's data collection are ten times as likely to be infected with COVID-19.[75]

109 The problems faced by government in balancing conflicting rights, and in making difficult and polycentric choices are well known, and the Constitutional Court has recognised that, provided the state has acted reasonably, its choices should be respected.

110 To illustrate, in *Soobramoney*, Mr Soobramoney required access to a dialysis machine to stay alive. In refusing him relief, Chaskalson P explained that

> "*[T]he State's resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme. Unfortunately, this is true not only of the appellant but of many others who need access to renal dialysis units or to other health services. There are also those who need access to housing, food and water, employment opportunities, and social security. These too are aspects of the right to*
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> > `*. . . human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity*'.
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> *The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt an holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society*."[76]

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74 Patel para 78.8.

75 Patel para 78.8-78.9.

76 *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) para 9.

111 Similarly, in *Grootboom*[77] Justice Yacoob for the Constitutional Court devotes much of his judgment to analysing the different considerations that must go into determining whether the state had taken reasonable legislative and other measures to achieve progressively the right to adequate housing, including the government's resource constraints and its other constitutional obligations.

112 The COVID-19 pandemic confronts the State with a similarly complicated and unavoidable set of trade-offs. The limitations analysis under section 36 of the Constitution (or, for that matter, the requirement of "necessity" under the DMA) must be informed by the fact that any response to the pandemic may require choosing between a number of different and unpalatable options.

113 We would also note that the applicant's example of cooked food is also poorly chosen. Cooked food was causing individuals to spend more time in close proximity, either to eat the cooked food or at counters waiting for the food to be prepared.[78] It was rational (and also fair, but that is a different issue) to prohibit the sale of cooked food but not the sale of uncooked food.

The less restrictive means

114 The applicants submit that there are less restrictive means to flatten the curve, being the measures generally applicable to the public interactions allowed under the Disaster Management Regulations such as wearing face masks, requiring

77 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

78 AA p [30] para 79.

retailers to retain adequate social distancing, providing hand sanitisers and the like.

115 These are, unquestionably, tools that must be used to combat the transmission of the COVID-19. They are, however, inadequate to the task of flattening the curve. Even while under lockdown and with the use of these measures, infections have risen, albeit at a vastly lower rate, and as lockdown has been eased the rate of infection has risen.[79]

116 To implement a rapid reduction of the transmission rate, a lockdown was required in addition to the other behavioural tools provided for in the Disaster Management Regulations. As Professor Karim explains in his affidavit:

> "*To prevent a potentially catastrophic rapid increase in Covid-19 cases, the most effective and immediate way to regulate the public's behaviour is by implementing a 'lockdown'. The purpose of a lockdown is to minimise interpersonal transmission of SARS-CoV- 2 by limiting the movement of individuals. It rapidly raises awareness of the threat posed by SARS-CoV-2 and creates a platform to effectively promote the other available Covid-19 prevention measures…When people stay at home and only enter public spaces infrequently and for short periods of time, the transmission rate of SARS-CoV-2 is reduced as the virus is not transmitted from infected people to uninfected people due to lack of interaction and proximity. There are simply fewer opportunities for the virus to be spread from an infected person to an uninfected person... Unless the immediacy and magnitude of the threat is conveyed rapidly, starkly and decisively, it would take a long time for people to change their behaviour by taking up infection prevention practices, due to*

[79] AA p [5] para 11; p 31 para 81. Karim p 11-12 para 36.

difficulty and inconvenience in having to comply with new behavioural norms such as not shaking hands."

117 The applicants also repeatedly assert that if the risk of transmission when using the prescribed safety precautions is acceptably low for some activities then it must be acceptable for all activities. This is nonsense. The risk of transmission is not acceptably low. It remains too high. But some essential activities are unavoidable, and so the risk of transmission must be tolerated for those activities. That is no reason to increase the opportunities for the virus to spread by allowing non-essential activities.

118 It is also not the case, as the applicants repeatedly emphasise, that the virus is particularly likely to be transmitted in certain hours. The restrictions on exercise and the curfew were, however, motivated by policing constraints. As the CoGTA Minister explains, key feedback she received from other spheres of government was that there was a need for more effective policing of the lockdown.[80] To this end, limiting the hours in which the public could move around eased the burden on the police of ensuring that people were only in public for permitted reasons.[81]

The allegations of arbitrariness

119 The applicants argue that the distinctions drawn between some activities and not others are arbitrary, and assert even that the Minister has accepted that the distinctions are irrational.[82]

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80 AA p 25 para 72.

81 AA p 44 para 103; p 77 para 197.3; p 81-82 para 207-209.

82 First applicant's heads of argument p 36 para 187.

120 There is, of course, no admission by the Minister that the distinctions between activities are irrational. Quite to the contrary, the Minister goes to great lengths to explain that, to reduce the risk of transmission, the total number of opportunities for transmission must be reduced. This requires an unavoidable decision between allowing some activities that pose a risk of transmission but not others. The process of deciding between those activities must still be rational but it is not simply a case of asking whether both activities, for instance, limit a person's dignity – virtually all activities engaged in by South Africans at some level engage their dignity.

121 To this extent, the distinctions are "*arbitrary*" in the benign sense. To illustrate, it is arbitrary whether the law requires everyone to drive on the left-hand side or the right-hand side. What matters is that the law clearly states which side must be driven on by drivers. It is similarly arbitrary whether the procurement laws provide for an 80/20 weighting between price and BBBEE preference, or, for instance, a 75/25 weighting, or a 90/10 weighting. There is no "*right answer*" in fixing this ratio, and government was required to fix a level that was commensurate given the various different considerations at play (promoting transformation, ensuring government gets the lowest prices available, etc).

122 The fixing of which activities are permitted, and which are not permitted is similarly "*arbitrary*". The total rate of infection must be pushed below an acceptable amount, but selecting which public activities must cease and which may continue requires a value judgment that involves weighing up a multitude of considerations. The CoGTA Minister explains in her affidavit the difficult value judgments that had to be made at each stage of the lockdown, from the Initial

Lockdown (which permitted only essential goods and services), to the Disaster Management Regulations (which allowed essential goods and services and also permitted further activities), to the Alert Level 3 Regulations (which allow all activities except those specifically prohibited).[83] These judgments required drawing lines between activities that appeared facially similar, or which might have an equal bearing on a person's constitutional rights (such as attending a funeral or visiting a sick relative). The justification for those distinctions is not by reference to the extent to which they pose a danger of infection (although that might occasionally be relevant) but is rather related to the purpose of reducing total transmissions, and making tough value judgments around the relative merits of the activities in question.

The cogency of the respondents' evidence

123 Finally, we must address the suggestion by the applicants that the respondents have not put up the necessary evidentiary material before the Court to justify the regulations.

124 In this regard, the applicants allege that Professor Karim's evidence is inadequate because it does not "*comment on whether the government measures adopted are necessary or likely to reduce the spread of Covid-19*."[84]

125 This claim is incorrect for a series of reasons:

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83 See AA p 75-78 para 189-199.

84 First applicant's heads of argument p 40 para 212.

125.1 Firstly, Professor Karim's evidence is unequivocal as to the epidemiological basis for the lockdown, and on it having achieved its intended consequence of flattening the curve.[85]

125.2 Secondly, it is not for an expert to comment on legal conclusions that are to be made by the Court. Had Professor Karim done so, he would have been correctly criticized for straying beyond his role.

125.3 Thirdly, Professor Karim's affidavit is only one part of the considerations relevant to determining the necessity of the impugned regulations. The expert evidence available said it was necessary to minimise social contact. Policy choices then needed to be made by the executive, more especially the CoGTA Minister, on how to give effect to that advice whilst balancing countervailing rights and interests, and factoring in the State's resource constraints. Even if it was permissible for him to do so, Professor Karim could not have commented on whether the regulations were "*necessary*" as the full ambit of the considerations relevant to that exercise fall outside of his expertise.

Conclusion with respect to the limitation analysis

126 It is respectfully submitted that the impugned regulations are compliant with section 36 of the Constitution. Whilst the regulations impose significant

[85] See, e.g. Karim p 11-12 para 36 where Professor Karim details how on the available data South Africa flattened the curve.

restrictions on people's movement, dignity, trade and occupation, the prevention of hundreds of thousands of deaths warranted these incursions.

The necessity of the Disaster Management Regulations

127 Section 27(3) of the DMA provides that the powers in section 27(2), *inter alia,* to publish regulations 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 combatting disruption; or*
>
> *e. Dealing with the destructive and other effects of the disaster*".

128 We have addressed above why the Disaster Management Regulations were required. In brief, the lockdown is tailored to "*assisting and protecting*" the public by ensuring that time is generated in order to prepare the healthcare system to cope with the enormous numbers of people anticipated to be infected with COVID-19.

129 The applicants' approach to necessity is to suggest that the purpose of the lockdown could have been achieved through different methods, namely the through the behaviour changes such as wearing masks, and using hand sanitisers. We have addressed this above. The lockdown was, and remained, necessary.

130 The applicant's approach is, in any event, not the appropriate approach given the nature of the DMA legislation. There will often be a range of different options to address the effects of a disaster, which in differing combinations can ameliorate or address the effects of the disaster. There is no single "*necessary*" response, and the Court avoid, with respect, applying to strict a requirement of necessity when assessing compliance with section 27.

THE CLOTHING DIRECTIONS WERE LAWUL AND COMPLIANT WITH THE CONSTITUTION

131 As part of the relief, the applicants seek from this Court an order invalidating those directions "*regarding the sale of clothing, footwear and bedding during alert level 4 of the Covid-19 national state of disaster"*, that were published by the Minister of the dtic.[86]

132 The Court has been provided with no proper justification for that relief.

133 Firstly, the challenge to the clothing directions is completely moot. In his answering affidavit, the Minister of dtic makes plain that these directions are no longer in force. They came to an end when the Alert Level 3 Disaster Management Regulations became effective.[87] These directions would not resurrect, even if the country or parts of it were to return to Alert Level 4. This is

86 NOM, para 7, page 4. Reasons for seeking this order ae set out in paragraphs 157 – 159; page 56 of the founding affidavit.

87 Patel affidavit, para 16.

so because rationality would require a consideration of the circumstances that are prevalent at that time.[88]

134 Secondly, the applicants incorrectly argue that the clothing directions were not authorised by regulation 4(10) of the Disaster Management Regulations.[89] Regulation 4(10) permits Cabinet members to issue directions on a subject matter that is aimed at preventing, and combatting the spread of covid-19. There is no close list of what Ministers can issue directions on; the language of regulation 4(10) is clear and not ambiguous in this regard.[90] The use of the word "*including*" indicates that the list provided in the regulation is not exhaustive.

135 The clothing directions give effect to the Disaster Management Regulations. Their purpose is to "*provide direction on the type of clothing, footwear and bedding which may be sold by retailers during Alert Level 4 in terms of Part E of Table 1 of the Regulations.*"[91]

136 Thirdly, there is a rational link between the restriction of clothing items that people could purchase under Alert Level 4 on the one hand, and curbing the spread of COVID-19 on the other hand. Limiting the list of permitted products would reduce the trips that people would make to the stores, and also the amount of time that

88 Patel affidavit, paras 17 – 21.

89 First – Seventh applicants' heads of argument, pages 40 – 45.

90 For as long as whatever the subject matter of the directions is ordinarily within the relevant Cabinet member's mandate.

91 Patel affidavit, paras 81 – 84.

people would spend in stores. This in turn would reduce crowds congregating in stores or shopping centres.[92]

137 The dtic Minister explains that in arriving at the decision to permit a limited offering of clothing items, he was alive to the fact that permitting a longer list would allow retailers to provide a fuller product offering. But the downside of a greater product offering would translate into: (a) the opening of the entire value chain, such as sourcing operations (for example the spinning, weaving and finishing of textile products, buttons, zips etc.)[93]; and (b) a greater number of people moving about and thereby possibly transporting the virus.[94]

138 Professor Karim explains in his expert affidavit that the rate of transmission of the virus is reduced when people enter public spaces for infrequently and for limited periods of time.[95]

139 A lot of South Africans rely on various forms of public transport. This would have had a further effect on the increased demand for public transportation[96] during a time when the government needed to restrict the movement of people.

140 Directions relating to clothing came about as a result of public participation[97], which indicates clearly that the dtic Minister was responsive. The clothing

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92 Patel affidavit, para 44.3.

93 In paragraph 47 of his affidavit, Minister Patel explains that according to research that was commissioned by the government, there are about 450 000 people in the formal and informal CTFL manufacturing sectors, as well as in associated retail.

94 Patel affidavit, para 44.5 – 44.6.

95 Prof Karim affidavit, para 30.

96 Patel affidavit, para 48.

97 Patel affidavit, paras 53 – 67. See also Dlamini-Zuma affidavit, para 201.

industry itself invited limitation on the offering that clothing retailers could have.[98] The National Clothing Retail Federation ("NCFR") proposed that even the concept of "*winter clothing*" should be defined in the Disaster Management Regulations.[99]

REMEDY

141 If the Court is against the respondents, and declares any of the impugned regulations invalid, it should suspend the declaration of invalidity to permit an opportunity for the Minister to rectify any deficiencies identified. It is respectfully submitted that a 30-day period is an appropriate period of time for which to suspend any declaration of invalidity.

CONDONATION

142 The respondents seek condonation for the late filing of their answering papers. The answering papers were filed two days out of time.

143 On 28 May 2020, the respondents' attorneys of record – the State Attorney requested that the respondents be permitted to file their answering papers on 5 June 2020. That offer was not accepted. There was then an informal agreement between the parties' senior counsel that the respondents would file their papers on 3 June 2020. Although every effort was made, it was impossible for the respondents to meet that deadline.[100]

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98 Patel affidavit, para 52.

99 Patel affidavit, para 53.

100 Dlamini-Zuma affidavit, para 130 – 133.

144 The principles relating to condonation are settled. In deciding whether to grant condonation, a court will consider: the period of delay; reasons for the delay; prejudice to the other party; and prospects of success.[101]

145 The respondents' answering papers were two days out of time and the reasons for the delay are fully explained in the affidavit deposed to by the CoGTA Minister.[102]

146 The applicants do not oppose the filing of the answering affidavits, and have not alleged any prejudice.

147 The hearing will be proceeding on the date agreed on between the parties, 15 June 2020.

CONCLUSION AND PRAYER

148 The respondents ask that this application be dismissed.

MTK MOERANE SC

NH MAENETJE SC

N MUVANGUA

D WATSON

Counsel for the first to fourth respondents

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101 *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* 2017 (6) SA 90 (SCA); *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA); *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* 2013 (2) All SA 251 (SCA).

102 Dlamini-Zuma affidavit, para 137.