REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 22939/2020

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

Date: 06 July 2020 .....

In the matter between:

FREEDOM FRONT PLUS Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

THE MINISTER FOR COOPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS Second Respondent

SPEAKER OF THE NATIONAL ASSEMBLY Third Respondent

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES Fourth Respondent

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J U D G M E N T

THE COURT

INTRODUCTION

1. In this application, this Court is once again called upon to rule on the legality of the state's response to the Covid-19 crisis. SARS-CoV-2 is a member of the coronavirus family. It is commonly referred to as Covid-19. Since early 2020 the virus has caused a pandemic around the world. South Africa has not been spared. Like all countries, our government has had to adopt measures to deal with the epidemic as its effects have manifested in South Africa.

2. To this end, the government declared a national state of disaster under the Disaster Management Act (DMA).[1] It has promulgated regulations which put in place measures to deal with the epidemic. These measures have progressed over time as knowledge of the virus has developed. For a brief period, at the initial stage, government introduced mild measures to deal with the threat posed when the virus was first detected in South Africa. However, as more knowledge was gained, South Africa moved to a phase of strict lockdown, under stringent regulations. Since then, the stringent lockdown measures have been eased progressively over time.

3. The measures adopted under the DMA have been as far-reaching as the threat posed by the virus. They have affected every aspect of the lives of the populace and the economy. As befits our constitutional democracy, the government has not been spared a range of constitutional challenges to the decisions and regulations made under the DMA. In this particular application, the applicant challenges, among other things, the constitutional validity of the DMA itself.

[1] 57 of 2002.

THE PARTIES

4. The applicant is the Freedom Front Plus. It is a registered political party with seats in the National and Provincial Legislatures. It brings the application in the interest of its members as well as in the public interest in terms of section 38(d) of the Constitution.

5. The first respondent is the President of the Republic of South Africa, in his capacity as Head of State and of the National Executive. The second respondent is the Minister of Cooperative Governance and Traditional Affairs. She is the Cabinet member who is designated under s3 of the DMA to administer that Act. The third respondent is the Speaker of the National Assembly. The fourth respondent is the Chairperson of the National Council of Provinces. The latter two respondents are joined insofar as they may have an interest in the application and the relief sought.

6. The first and second respondents oppose the application. The second respondent filed an answering affidavit in support of their opposition. The third and fourth respondents filed a notice to abide the decision of the Court. However, they filed an explanatory affidavit to assist the Court as regards certain factual issues that fall within their knowledge.

7. For ease of reference, and unless the context indicates otherwise, when we refer to "the respondents" we mean the opposing respondents, i.e. the first and second respondents.

THE FACTUAL CONTEXT

8. South Africa recorded its first case of Covid-19 on 5 March 2020. On 15 March, acting under s3, read with s27 of the DMA, the second respondent declared a national state of disaster. The declaration was made:

> "Considering the magnitude and severity of the COVID-19 outbreak which has been declared a global pandemic by the World Health Organisation (WHO) and classified as a national disaster by the Head of the National Disaster Management Centre, and taking into account the need to augment the existing measures undertaken by organs of state to deal with the pandemic …".[2]

9. The first respondent addressed the nation, announcing that extraordinary measures would be needed to curb the spread of infections. He announced that the government would encourage social distancing by, among other things, prohibiting gatherings of more than 100 people; and closing schools from 18 March until the Easter weekend. The first respondent also called on all South Africans to adopt good hygiene measures to prevent the spread of infection.

10. The first set of regulations under the DMA was published on 18 March.[3] On 23 March the first respondent addressed the nation yet again. This time, he announced a strict national lockdown with effect from midnight on 26 March. The first respondent stated in his address that:

> "It is clear from the development of the disease in other countries and from our own modelling that immediate, swift and extraordinary action is required if we are to prevent a human catastrophe of enormous proportions in our country.
>
> …
>
> I am concerned that a rapid rise in infections will stretch our health services beyond what we can manage and many people will not be able to access the care they need.
>
> We must therefore do everything within our means to reduce the overall number of infections and to delay the spread of infection over a longer period - what is known as flattening the curve of infections.
>
> …
>
> While this measure will have a considerable impact on people's livelihoods, on the life of our society and on our economy, the human cost of delaying this action would be far, far greater."

[2] GN 313, GG 43096, 15 March 2020.
[3] GN 318, GG 43107, 18 March 2020.

11. The first respondent announced a number of lockdown measures including:

11.1. A prohibition against anyone, except key workers, leaving their homes, save under strictly controlled circumstances.

11.2. The closure of all shops and businesses except for those conducting services.

11.3. The deployment of the South African National Defence Force to support the South African Police Service in ensuring the enforcement of the lockdown measures.

12. The strict lockdown measures were promulgated in the regulations of 25 March.[4] The initial period of the lockdown was 21 days. It was extended for a further two weeks until 30 April 2020. On 29 April 2020 a new set of regulations[5] was promulgated. These described 5 different alert levels for regulating measures to deal with the epidemic.

13. Chapter 3 of the 29 April regulations declared that level 4 would be applicable from 1 May 2020 nationwide. The regulations contained in that chapter determined what restrictions would be in place in terms of, among other things, the movement of people. Under regulation 16, people were confined to their places of residence, but were permitted to leave for identified reasons. These included the need to perform an essential or permitted service; to go to work as permitted; to buy permitted goods; to obtain permitted services; to move children as permitted; and to exercise between the hours of 6h00 to 9h00. A nationwide curfew was imposed between 8pm and 6am.

[4] GN 398, GG 43148, 25 March 2020.
[5] GN 480, GG 43258, 29 April 2020.

14. The sectors of economic and industrial activities permitted under level 4 were set out in Table 1.[6] The table is very detailed and it is unnecessary to discuss it in any depth. The level 4 restrictions permitted the re-opening of the economy to a substantially greater degree relative to what was permitted under the strict lockdown (level 5). For example, restaurants could once again prepare and sell hot, cooked food for home delivery; engineering, construction and related services for public works could be resumed; and manufacturing of all wholesale and retail products permitted to be sold under alert level 4 could resume.

15. This application was launched as a matter of urgency on 26 May 2020, shortly before the third respondent's declaration that the country would move to alert level 3, which was made on 29 May 2020.

THE RELIEF SOUGHT

16. The application was launched as a matter of urgency. We deal with the aspect of urgency shortly, as it requires specific attention. In addition to the usual prayer for condonation in urgent application, the applicant's Notice of Motion includes a complicated list of prayers for substantive relief:

    16.1. In prayer 2.1, the applicant seeks an order declaring that s23(8) and/or s26(2) and/or s27 of the DMA is inconsistent with the Constitution and invalid insofar as these sections do not make provision for various safeguards that are to be found in s37 of the Constitution, which deals with states of emergency.

    16.2. In the alternative, in prayer 2.2, the applicant seeks a declaration that the same sections are unconstitutional and invalid "*insofar as a national disaster*

[6] Read with regulation 28.

such as the Covid-19 pandemic is declared and managed in terms of the DMA, imposing a national lockdown and consequent restrictions and specifically insofar as the aforesaid sections do not provide for …". Here the applicant goes on to list the same safeguards referred to in prayer 2.1.

16.3. Prayer 3 asks that the declaration made in prayer 2 be suspended pending confirmation by the Constitutional Court.

16.4. In prayer 4.1 the applicant seeks a declaration that "*the decision taken by the second respondent on 15 March 2020 to declare a national state of disaster to augment measures already taken by other organs of state to deal with the Covid-19 pandemic*" to be inconsistent with the Constitution and invalid.

16.5. In the alternative, in prayer 4.2 the applicant seeks an order declaring that:

> "[T]he conduct by the Second Respondent pursuant to the decision taken on 15 March 2020 to declare a national state of disaster to deal with the COVID-19 pandemic by means of action and conduct consistent with a state of emergency without the constitutional safeguards attendant to a state of emergency, inconsistent with the Constitution of the Republic of South Africa, therefore unconstitutional and invalid."

16.6. Prayer 5.1 requests the court to review and set aside the decision by the second respondent on 15 March 2020 to declare a national state of disaster to augment measures already taken by other organs of state to deal with Covid-19.

16.7. Alternatively, in prayer 5.2, the applicant seeks an order reviewing and setting aside the decision to declare a state of disaster.

16.8. Prayer 5.3 is either an alternative to prayer 5.2, or is to be granted in conjunction with it (the applicant uses "and/or" between prayers 5.2 and

5.3). It is not clear from its terms precisely what the applicant seeks, but it reads as follows:

> "That the failure by the Second Respondent, pursuant to the decision taken on 15 March 2020 to declare a national state of disaster to deal with the COVID-19 pandemic by means of action and conduct consistent with a state of emergency without the constitutional safeguards attendant to a state of emergency, to immediately make a decision to terminate the state of disaster and refer the matter to the First Respondent without delay for further action, be reviewed and set aside".

16.9. Prayer 6 seeks an order reviewing and setting aside the respondents' decision to extend the lockdown on 13 May 2020. There is an alternative to this prayer. However, for reasons that will become apparent shortly, we do not need to consider it.

16.10. In prayer 7, and pursuant to the relief under prayers 5 and 6, the applicant wants the Court to direct the first respondent to summon the National Assembly in terms of s84(2)(d) of the Constitution to an extraordinary sitting to publicly debate how the Covid-19 pandemic must be dealt with going forward. Certain consequent relief is also sought in this regard, with which we do not need to concern ourselves.

17. The application was launched under the ambit of Rule 53. The Notice of Motion calls on the respondents to dispatch the record of proceedings leading to various decisions related to the relief sought. They include: the decision to declare a national disaster; the decision to declare a nationwide lockdown; the decision to issue the restrictions included in the regulations; the decision to extend the initial 21-day lockdown to the end of April 2020; the decision to extend the lockdown after 30 April 2020; and the "decision to extend the lockdown and to ease the lockdown in Alert Levels 5 to 1".

18. In the Notice of Motion, the applicant gave the respondents until 1 June 2020 to produce the record requested. This severely truncated the usual time period for the production of the record under Rule 53. The respondents' attorneys advised the applicant that it would be impossible to comply with this demand. Correspondence ensued between the parties, leading to a further complication. For present purposes it is necessary to record that it is common cause that the relief sought in prayers 6, 7 and 8 are to be postponed pending the production of the record. The further complication relates to the status of prayers 4 and 5. The parties cannot agree on whether this Court must determine either, or both, or neither of the relief sought in those prayers. We discuss this issue further below.

19. The respondents termed the relief in prayer 2 of the Notice of Motion as being premised on "the attack on the DMA". They termed the relief sought in prayer 4 and 5 as being "the attack against the disaster decision". We find it useful to adopt this descriptive terminology.

20. The essence of the attack on the DMA is that it is unconstitutional in that it permits a state of disaster to be imposed by the executive without the same safeguards that apply in a state of emergency, which is governed by s37 of the Constitution. To this extent, the relief sought in prayers 4.2 and 5.3 cited above, overlaps with the constitutional attack against the DMA.

21. We deal first with two preliminary issues. The first is that of urgency. The second relates to the complication mentioned earlier. The question is to what extent this Court may consider the relief sought in prayers 4 and 5 in the absence of the production of the record. The applicant take the view that prayers 4 and 5 cannot be determined in the absence of the record. It says that these prayers are based on a judicial review of the decision of the second respondent to declare the state of

disaster, and that this Court may not make any determination until the record is produced. The respondents dispute this.

PRELIMINARY ISSUES

Urgency

22. The case advanced by the applicant in support of urgency is that while it supported the declaration of a state of disaster on 15 March 2020 it did so in the belief that it was necessary and in the interests of the country to do so. It hoped that the state of disaster would endure for a limited time and in any event, for not more than 21 days. Its stance is that it became concerned on 13 May 2020 when it was announced by the first respondent that even though there would be an easing of the lockdown, many of the lockdown measures already in place would be extended for a further period, albeit with some adjustment. On that basis, and given its concerns about both the unconstitutionality of certain provisions of the DMA, as well as the ongoing restrictions that the lockdown measures visited upon South Africans, it was constrained to launch these proceedings.

23. It argues further that the nature of the issues raised, located as they are in ensuring compliance with the Constitution and observing the human rights of citizens, render the matter urgent and that if the matter is not heard on an urgent basis they will not be able to obtain substantial redress in the ordinary course.

24. The respondents place urgency in issue and in particular, argue that the applicant not only supported the enactment of the DMA, but also supported the declaration of the state of disaster on the 15 March 2020 and the various measures taken by the respondents since then. In addition, they say that the leader of the applicant was part of the various briefings that the first respondent from time to time held with

leaders of political parties and expressed public support for the measures adopted. They also criticise the applicant for bringing the application on very short time frames.

25. The question of urgency must be considered within a range of factors. They include the extent of the abridgment of the rules the applicant seeks and the delay, if any, in bringing the proceedings. However, these are not necessarily dispositive of the question of urgency. In *Transvaal Agricultural Union v Minister of Land Affairs*[7] the Constitutional Court expressed the view that the Court would be willing to regard a matter as urgent where a delay in securing a definitive ruling would prejudice the public interest or the ends of justice and good government.

26. In these proceedings it cannot follow that even if the applicant consented to the enactment of the DMA, and subsequently supported the declaration of disaster by the second respondent on 15 March 2020 and the subsequent lockdown regulations, it could be said that it waived its right to subsequently challenge the constitutionality of the DMA or the declaration of a disaster. Its prior conduct could not be dispositive of its ongoing right to launch a constitutional challenge of the kind that this application does.

27. Leaving aside the merits of the challenge the applicant brings, the nature of the relief it seeks - triggering questions that relate to compliance with the Constitution and its supremacy and the respect for human rights – this must, in our view, move us in the direction of concluding that the matter is indeed urgent.

28. The legal and regulatory response by government has seen numerous challenges brought before our Courts with regard to the legality and rationality of many of those

[7] 1997(2) SA 621 (CC) at para 19.

measures. It is a matter that has evoked considerable public interest and public debate. It is also for those reasons that we are of the view that the matter should enjoy the urgent attention of this Court.

29. Finally, and in the light of the applicant's assertions that the impugned decisions result in a continuing violation of human rights, it is evident that if the applicant was compelled to follow the ordinary rules pertaining to the issue of applications and the time frames associated therewith, it may not be able to obtain substantial redress in due course to the extent that the unsatisfactory state of affairs that it is aggrieved about will continue until then.

30. We are accordingly satisfied that the matter is urgent.

The review and declaratory relief

31. The relief sought by the applicant may be divided into declaratory relief and review relief. In relation to the review relief, the Notice of Motion called upon the respondents to file a record that informed the decisions that related to the review relief.

32. The nature of the record that the respondents were required to compile is substantial. The State attorney, on behalf of the respondents, indicated that it would require more time than was provided for to do that. The result was that the matter would not have been ripe for hearing, at least in so far as it related to the review relief.

33. Arising out of that, the applicant proposed that the matter proceed in terms of the relief sought in paragraphs 1 to 4 of the Notice of Motion and that the other relief ought to be postponed, subject to an agreed timetable for the filing of the record and further affidavits. It appears that no agreement was reached between the parties

on this issue and when the matter came before us the disagreement as to how the review relief would be required to be dealt with continued.

34. In argument it became apparent that the relief sought in paragraphs 1 and 2 of the Notice of Motion could be dealt with on the papers and were advanced on common cause facts and legal argument. To that extent, the furnishing of the record was not a condition precedent for the consideration of such relief.

35. The relief sought in paragraphs 4.2 and 5.3 of the Notice of Motion overlap with the constitutional challenge and, in our view, can and should also be dealt with on the papers. That distinction aside, the applicant accordingly persisted in its stance that absent the record, the review relief would have to be postponed while the first and the second respondents took the position that having elected to proceed with the hearing of the matter, the Court should consider the merits of all the relief sought save for that in prayers 6 and 7.

36. The applicant called for the production of the record in the Notice of Motion and never abandoned that request at any stage. Its election to have the matter proceed cannot be interpreted as a decision that the review could proceed absent the record. It was rather, in its view, a practical approach that would enable those heads of relief that were capable of being adjudicated upon to be dealt with and the others postponed.

37. In this regard the purpose and the relevance of the record in Rule 53 proceedings was explained by the Constitutional Court in *Helen Suzman Foundation v Judicial Service Commission*[8] in the following terms:

> "The purpose of rule 53 is to 'facilitate and regulate applications for review'. The requirement in rule 53(1)(b) that the decision-maker file the record of decision is

[8] 2018 (4) SA 1 (CC) at paras 13-5.

> primarily intended to operate in favour of the applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.
>
> … 'Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.'
>
> "The filing of the full records furthers an applicant's right of access to court by ensuring both that the court has relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at the substantial disadvantage vis-à-vis their opponents…".

38. Accordingly, it would be unfair to deprive the applicant of the opportunity of fully advancing its case for the review relief if this Court were to deal with and finalise the review relief without the record.

39. In the circumstances and largely on account of the circumstances that relate to the filing of the record, we are of the view that the review relief should be postponed but that the relief sought in prayers 1, 2, 3, 4.2 and 5.3 be dealt with on the papers before us. We intend making such an order.

THE STATUTORY FRAMEWORK

States of disaster

40. The Constitution does not deal with states of disaster. They are dealt with under the DMA. The Act defines a disaster as meaning:

> "[A] progressive or sudden, widespread or localised, natural or human-caused occurrence which-
> (a) causes or threatens to cause-
> (i) death, injury or disease;
> (ii) damage to property, infrastructure or the environment; or
> (iii) significant disruption of the life of a community; and

(b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources."[9]

41. The DMA does not apply to disasters if a state of emergency is declared to deal with the occurrence in terms of the State of Emergency Act.[10] The DMA will also not apply to the extent that the occurrence can be dealt with effectively in terms of national legislation.[11]

42. The Act is administered by a Minister designated by the President.[12] The second respondent is that Minister. The National Disaster Management Centre classifies disasters according to whether they are local, provincial or national.[13] Under s23(6), a disaster will be a national disaster if it affects more than one province, or a single province which is unable to deal with it. Section 26(8), which is one of the sections challenged by the applicant, provides that:

> "The classification of a disaster in terms of this section designates primary responsibility to a particular sphere of government for the co-ordination and management of the disaster, but an organ of state in another sphere may assist the sphere having primary responsibility to deal with the disaster and its consequences."

43. In the event of a national disaster, the national executive is primarily responsible for co-ordination and management.[14] Section 26(2) is also challenged by the applicant. It provides:

> "The national executive must deal with a national disaster-
>
> (a) in terms of existing legislation and contingency arrangements, if a national state of disaster has not been declared in terms of section 27 (1); or
>
> (b) in terms of existing legislation and contingency arrangements as augmented by regulations or directions made or issued in terms of section 27 (2), if a national state of disaster has been declared."

[9] Section 1.
[10] Section 2(1)(a).
[11] Section 2(1)(b).
[12] Section 3.
[13] Section 26(1).
[14] Section 26(1).

44. Section 27 deals with the declaration of a national state of disaster. It permits the second respondent to declare a national state of disaster if existing legislation or other contingency arrangements do not adequately provide for the executive to deal with the disaster. Alternatively, if there are other special circumstances that warrant the declaration of a national state of disaster.[15]

45. Under s27(2), the second respondent is empowered to make regulations or issue directions concerning a range of matters. They include the release of available resources of national government to manage the disaster;[16] the regulation of traffic;[17] and movement of people and goods;[18] the suspension of the sale or transportation of alcoholic beverages;[19] or "*other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster.*"[20]

46. Section 27(3), which is challenged, sets out when the power to make regulations and issue directions may be exercised. It says:

> "The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of -
> (a) assisting and protecting the public;
> (b) providing relief to the public;
> (c) protecting property;
> (d) preventing or combating disruption; or
> (e) dealing with the destructive and other effects of the disaster."

47. Finally, s27(5) deals with the period for which a national disaster may endure. A national disaster lapses three months after it has been declared, but may be extended by the second respondent for one month at a time.

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[15] Section 27(1)(a) & (b).
[16] Section 27(2)(a).
[17] Section 27(2)(e).
[18] Section 27(2)(f).
[19] Section 27(2)(i).
[20] Section 27(2)(n).

States of emergency

48. Unlike states of disaster, the Constitution itself deals with states of emergency in s37. The judicial requirements for the declaration of a state of emergency are prescribed in s37(1):

> "A state of emergency may be declared only in terms of an Act of Parliament. and only when-
>
> (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and
>
> (b) the declaration is necessary to restore peace and order."

49. Subsection (2) provides that a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only prospectively,[21] and for no more than 21 days from the date of the declaration, "unless the National Assembly resolves to extend the declaration."[22] The National Assembly may extend the declaration of a state of emergency for no more than three months at a time, with prescriptions as to the voting required for the first and subsequent extensions.

50. Section 37(3) provides that:

> "Any competent court may decide on the validity of-
>
> (a) a declaration of a state of emergency;
>
> (b) any extension of a declaration of a state of emergency; or
>
> (c) any legislation enacted, or other action taken, in consequence of a state of emergency."

[21] Section 37(2)(a).
[22] Section 37(2)(b).

51. Of particular significance is s37(4), which deals with derogation from the Bill of Rights. It says that:

> "Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that-
>
> (a) the derogation is strictly required by the emergency; and
>
> (b) the legislation-
>
> (i) is consistent with the Republic's obligations under international law applicable to states of emergency;
>
> (ii) conforms to subsection (5); and
>
> (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted."

52. Subsection (5) places an outer limit on the extent of the state's powers under a state of emergency. It provides that the state may not:

52.1. indemnify the state or any person for any unlawful act;

52.2. derogate from ss(5); and

52.3. effect a derogation from the non-derogable rights set out in the Table included under s37(5)(c). The Table of non-derogable rights identifies only the right to human dignity, and the right to life as being non-derogable in their entirety.

53. The applicant highlights what it says are important safeguards built into s37, as regards states of emergency, which are absent from the DMA. In particular, the applicant says that Parliament exercises crucial oversight over states of emergency, and yet it has no role to play when it comes to national disasters. This means that the executive has free rein in a national disaster even though the regulations and directions issued by the executive may have far-reaching effects on fundamental rights. The applicant points to the Covid-19 national disaster as an example. On

this basis, it says that the DMA, and the declaration of the state of disaster to deal with Covid-19, are unconstitutional.

THE ATTACK ON THE DMA

54. The starting point of the applicant's challenge to the constitutionality of the DMA is what it calls the drastic and severe restrictions on an array of rights contained in the Bill of Rights. The applicant acknowledges that the easing of lockdown will have a mitigating impact, but says that even under lower alert levels, fundamental rights will remain restricted.

55. The applicant points out that under a state of emergency the Constitution builds in safeguards to the exercise of executive power precisely because of the severe restriction on fundamental rights inherent in a state of emergency. The applicant's complaint is that the DMA does not do so. It says that:

55.1. A state of emergency may only be extended after debate in the National Assembly, whereas under the DMA, the second respondent may simply extend a state of national disaster, and she may do so unilaterally.

55.2. A competent court may decide on the validity of a declaration of a state of emergency or action taken under it. However, there is no similar provision pertaining to the declaration of a state of disaster.

55.3. The derogation of rights under a state of emergency may only be effected to the extent that it is strictly required by the emergency, and any legislation enacted under a state of emergency must be consistent with South Africa's obligations under International Law. Further, the powers of indemnity are removed. The applicant says that all of these safeguards are missing from the DMA.

55.4. So extreme are the untrammeled powers of the second respondent under the DMA that the second respondent is more powerful than the President would be under a state of emergency.

56. The applicant says that the absence of these safeguards has the effect that the DMA does not withstand constitutional scrutiny. In its founding affidavit, it sums up its attack as follows:

> "I respectfully submit that sections 23(8) and/or 26(2) and/or 27 is unconstitutional insofar as the declaration of the state of disaster *in casu*; the issuing of Regulations and Directions as well as extensions of the state of disaster were and are not subject to oversight of the National Assembly or for that matter judicial oversight. No restraints similar to those imposed by section 37 which would safeguard the rights of the citizens of the Republic of South Africa in the case where human rights are limited and abrogated exists or are catered for by the DMA. There is also no guarantee for rationality similar to that found in section 37."

57. And further:

> "Insofar as the DMA provides that the designated Minister, *in casu* the second respondent, may unilaterally and without any form of oversight promulgate and enforce Regulations that abrogate human rights and restricts liberties, the same is unconstitutional, as should the issuing of the Regulations and directions be."

58. In their opposition to the application, the respondents say that the applicant's case is based on a fundamental misconception, viz. that a state of disaster is more or less the same as a state of emergency. Critically, the applicant assumes that the same derogation of rights may occur under a state of disaster as under a state of emergency. It is on this basis that the applicant contends that the DMA is unconstitutional, because it does not have the same safeguards as s37 provides for in the case of states of emergency.

59. That states of emergency and states of disaster are fundamentally different legal animals is patently clear. The jurisdictional requirements of states of emergency

spell this out. A state of emergency is limited to the direst of circumstances. It may only be declared when the "life of the nation" is under threat. Additionally, it must be necessary to restore "peace and order". Unless these requirements are met, the declaration of a state of emergency would be unlawful.

60. States of disaster, on the other hand, cover a wide range of different circumstances. This is apparent from the definition of a disaster. While a disaster may take many forms, and may threaten lives and the well-being of communities, it does not involve a threat to the life of the nation, nor does it disrupt peace and order.

61. The justification for the inclusion of provisions dealing with states of emergency in a Constitution like ours has been explained as follows:

> "In contemporary terms, the justification is this: observation of the rights and protections provided by modern constitutions in situations of emergency can prevent the government from responding efficiently and energetically to enemies or to events that would destroy those rights and, perhaps, even the constitutional order itself."[23]

62. In other words, in the direst circumstances, where the life of the nation, and the constitutional order itself may be under threat, it may be necessary in the short term to suspend the normal constitutional protections in order, ultimately, to restore the constitutional state. It is for this reason that some modern constitutions permit the suspension or derogation from fundamental rights during states of emergency. It is undoubtedly an extraordinary constitutional measure, and not one that is intended to be used lightly. This is why the jurisdictional requirements under s37(1) are so strict.

63. It is also why the safeguards in s37 are built in. The very purpose of a state of emergency is to permit a suspension of the normal constitutional order. The

[23] N Fritz in Woolman et al, *Constitutional Law of South Africa*, OS 03-07, ch61 at pg5.

suspension or derogation of rights does not simply mean the limitation of rights. A limitation of rights is permitted in the ordinary course, even in the absence of a declaration of a state of disaster, provided the limitation complies with s36 of the Constitution. However, under states of emergency, the Constitution actually permits all rights to be suspended, save for the prescripts in the Table of Non-Derogable Rights. In other words, absent the safeguards in s37, an individual could not go to court to pursue the protection of her fundamental rights. Under s37(3), courts still have the power to determine the validity of the declaration of the state of emergency itself, or any legislation enacted thereunder.

64. Properly understood, s37 does not provide additional safeguards in respect of fundamental rights. The safeguards it provides are simply those that are necessary to make up for the permissible deviation from the normal constitutional order permitted by s37 itself. One cannot understand the safeguards in s37 without understanding that the section legitimises a drastic reduction in constitutional protections in the first place.

65. The same simply cannot be said for states of disaster as regulated under the DMA. The DMA does not permit a deviation from the normal constitutional order. It permits the executive to enact regulations or issue directions. It may well be that these regulations will limit fundamental rights. But the fundamental rights remain intact in the sense that any limitation is still subject to being tested against s36 of the Constitution. For this simple reason, it is not for the DMA to include a specific provision preserving the competence of courts to rule on the validity of regulations. Under states of disaster, this competence remains intact: It is never removed or suspended to begin with.

66. The courts may review a declaration of a state of disaster, any extension of a state of disaster, and any regulations enacted under a state of disaster under their ordinary powers to review the exercise of any public power. This power may be exercised under the principle of the rule of law entrenched in section 1(c) of the Constitution, and all the provisions of the Bill of Rights, including section 33 read with the Promotion of Administrative Justice Act.[24] The courts' powers of review accordingly remain entirely unimpaired under a national state of disaster. The same holds true for the safeguard provided in s37(5) of the Constitution, which prohibits the state from granting indemnities in respect of unlawful acts.

67. The applicant made much of the fact that s37 provides for parliamentary oversight where a state of emergency is declared. On the other hand, it says, the DMA places power in the hands of the executive and, in particular, the second respondent. According to the applicant, in this respect, the DMA ignores the fundamental constitutional prescript that the will of the people should be respected. The applicant points out that the current state of national disaster has been extended more than once without any parliamentary debate.

68. Once the fundamental distinction between a state of emergency and a state of disaster is understood, this complaint loses its force. It is because of the constitutional deviations that are permitted under a state of emergency that parliamentary oversight is expressly included in s37. Where no such deviation is permitted, it is not necessary to make special provision for parliamentary oversight. That oversight is a normal component of our constitutional framework:

[24] 3 of 2000.

68.1. Section 42(3) of the Constitution stipulates that one of the roles of the National Assembly is to scrutinise and oversee executive action.

68.2. Section 55(2)(b)(i) tasks the National Assembly with providing mechanisms to maintain oversight of, among others, national executive authority.

68.3. Section 92(2) provides that members of the executive are responsible individually and collectively to Parliament.

69. The national state of disaster does not render these provisions inoperable. The explanatory affidavit filed by the third and fourth respondents records that during the current state of national disaster, Parliamentary oversight has been exercised through the various portfolio committees of the National Assembly, as well as through the various select committees of the National Council of Provinces. The affidavit sets out details of the engagements that have taken place between these legislative bodies and members of the executive. If the applicant is of the view that either Parliament or the executive is not complying with its constitutional obligations in this regard, it may review that conduct. But that is a separate challenge. It does not make the DMA unconstitutional.

70. For all of these reasons we agree with the submission made by the respondents that the applicant's attack on the DMA is founded on a misconception and is fundamentally flawed. Both the main relief sought in prayer 2.1, as well as the alternative relief sought in prayer 2.2 must be refused.

THE ATTACK ON THE DISASTER DECLARATION

71. As we indicated earlier, the parties are not *ad idem* as to whether prayers 4 and 5 should be determined by this Court without the benefit of the record which is demanded in the Notice of Motion. The manner in which we intend to deal with this

dispute is to limit our determination of the attack on the disaster declaration only to those aspects of it that overlap with the attack on the DMA, or which stand on a legal footing, without the necessity to consider the record of the decision. Read with the prayers set out in the Notice of Motion, the relevant prayer is the alternative relief set out in prayers 4.2 and 5.3.

72. It is somewhat difficult to discern precisely what is the nature of the attack on the disaster declaration is in this regard. It seems to us that it has two components:

72.1. The applicant suggests that the decision to declare a national state of disaster instead of a state of emergency is unconstitutional. This is because the state of disaster impairs fundamental rights without the benefit of the safeguards that would have been in place had the respondents declared a state of emergency instead.

72.2. The second component of the applicant's case is that the declaration of a state of disaster did not comply with the principle of legality. This is because under s27(1)(a) of the DMA, the second respondent may declare a disaster if existing legislation does not adequately provide for the national executive to deal with the disaster. The applicant says that this requirement was not met in that the International Health Regulations Act[25] already provides an adequate legislative basis upon which to manage the Covid-19 epidemic.

73. The first component of the challenge overlaps to a substantial degree with the attack on the DMA. It assumes that the s37 safeguards are necessary to protect the infringement of fundamental rights brought about by the regulations enacted and the directions issued under the declaration of the national state of disaster. The

[25] 28 of 1974.

applicant argues that because of this, and because of the absence of these safeguards under the DMA, the second respondent ought to have declared a state of emergency. Her declaration of a state of disaster instead was to this extent unconstitutional.

74. This argument is tainted by the same flaw as the attack on the DMA. If the DMA is constitutionally sound without the incorporation of the s37 safeguards, as we have found it to be, then the applicant's attack on this leg must fail.

75. There is a further reason why it must fail. This is because, as we have discussed, a state of emergency has particular jurisdictional requirements limiting the circumstances in which the power may be exercised. There is no suggestion on the papers, nor was there in argument by the applicant, that the life of the nation is under threat from Covid-19, or that peace and security need to be restored. This being the case, if the second respondent had indeed declared a state of emergency, rather than a state of disaster, she would have found herself in court probably far more quickly. It would have been an obviously irrational and illegal act for her to have done so.

76. The second respondent's powers to declare a state of disaster under the DMA are wide and flexible. This is fitting, given the various guises that disasters may assume. Should the state unjustifiably limit fundamental rights by the measures it adopts to deal with the Covid-19 disaster, the courts may step in. Similarly, the courts may review any action under the state of disaster on the part of the executive that is found to be irrational or unconstitutional in any other respect. These safeguards are in place under the state of disaster, and there was no constitutional imperative on the part of the second respondent to declare a state of emergency in order to give effect to them.

77. For these reasons, the first leg of the attack on the disaster declaration must fail.

78. The second aspect of the attack may be dispensed with briefly. The applicant says that the International Health Regulations Act is an existing legislative mechanism that may adequately be used to deal with the Covid-19 epidemic. As such, it says that the second respondent exceeded her powers under s27(1)(a) in resorting instead to the declaration of a state of disaster.

79. The second respondent points out in her answering affidavit that this Act is wholly inadequate to deal effectively with the Covid-19 disaster. Its purpose is to control and contain the spread of infectious diseases between countries. It provides for specific measures to prevent the spread of health risks through international travel and cargo. It provides no assistance in containing the threat posed by virulent diseases that are transmitted within a country's borders. The applicant does not dispute the second respondent's averments in this regard. This puts an end to this leg of the attack.

80. It follows, for these reasons, that the relief sought in prayers 4.2 and 5.3 must also be denied.

COSTS

81. The respondents accepted that in the event that the Court ruled against the applicant, the principles set out in *Biowatch*[26] should apply. We agree that this is the correct approach in this matter. Accordingly, we make no order of costs against the applicant.

ORDER

[26] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

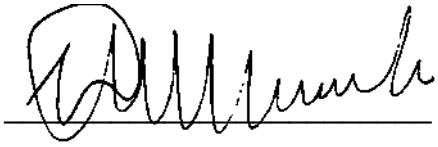
82. We make the following order:

1. Condonation is granted to the applicant for non-compliance with the Uniform Rules of court pertaining to form, process, and time periods, and this matter is enrolled for hearing as an urgent application in terms of Uniform Rule 6(12).

2. The application for the relief set out in prayers 2, 3, 4.2, and 5.3 is dismissed.

3. The remainder of the relief is postponed *sine die*.

4. No order is made as to costs.



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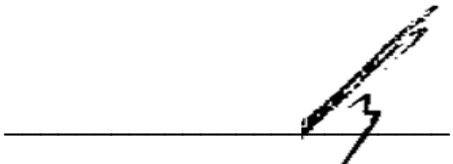
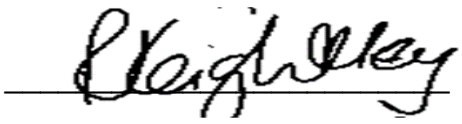
Judge President of the High Court
of the Gauteng Division



N Kollapen
Judge of the High Court
Gauteng Division



R Keightley
Judge of the High Court
Gauteng Division

Date of hearing: 26 June 2020

Date of judgment: 6 July 2020

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