IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 32858/2020

In the matter between:

HELEN SUZMAN FOUNDATION	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
CABINET OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCE	Fourth Respondent
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Fifth Respondent

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SPEAKER'S ANSWERING AFFIDAVIT

V.V TRH

TABLE OF CONTENTS

INTRODUCTION 1

THE NATURE OF THE APPLICATION 2

THE APPLICATION IS NOT URGENT 4

THE APPLICANT'S BASIS FOR STANDING IS MISCONCEIVED 7

THE APPLICATION IS MISTAKEN 9

Parliament has fulfilled its obligations. 10

The application of the Disaster Management Act 13

The principle of subsidiarity applies 19

THE RELIEF IS UNENFORCEABLE 19

COSTS 23

CONCLUSION 24

AD SERIATIM RESPONSES TO THE FOUNDING AFFIDAVIT 25

V.V TRM

I, the undersigned,

THANDI RUTH MODISE,

state under oath that:

INTRODUCTION

1 I am the first respondent: Speaker of the National Assembly. The National Assembly is one of the houses of the Parliament of the Republic of South Africa as envisaged in section 42(1)(a) of the Constitution of the Republic of South Africa, 1996 ("**Constitution**").

2 I was elected as Speaker of the National Assembly under section 52(1) to (3), read with Part A of Schedule 3, of the Constitution, with effect from 21 May 2019.

3 I depose to this affidavit in my official capacity as the Speaker and on behalf of the National Assembly in terms of section 23 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004.

4 I have personal knowledge of the facts to which I depose unless it is apparent from the context that I do not. What I say in this affidavit is true and correct, to the best of my knowledge and belief.

5 The submissions of law I make in this affidavit are made on the advice of the National Assembly's lawyers.

V.V TRM

THE NATURE OF THE APPLICATION

6 The applicant brings this application on an urgent basis for relief that is two-pronged:

6.1 First, the applicant seeks orders declaring that the respondents in their respective official capacities have failed to fulfil their constitutional obligations to initiate and pass legislation to regulate the state's response to the threat and harm caused by COVID-19; and

6.2 Second, a mandamus compelling the respondents in their respective capacities to comply with their constitutional obligations: initiate and complete the process to pass legislation to regulate the state's response to the threat and harm caused by COVID-19.

7 The relief sought is, however, mistaken as a matter of fact, and also as a matter of law. I say this for the following reasons:

7.1 The Disaster Management Act, 57 of 2002 ("**DMA**") is the legislation promulgated by Parliament to provide for the South African government's response to a National Disaster, of which the COVID-19 global pandemic is one. Parliament has complied with its obligations as contemplated in section 42(3), 44(1), 55(1) and 68.

7.2 There is no mandatory obligation upon Parliament to pass the legislation sought by the applicant. The applicants have failed to point

V.V TRM

out any specific provisions of the Constitution, which require the respondents to initiate and pass such legislation.

7.3 And to the extent that the DMA falls short of what might be constitutionally required, then, on the basis that this Court finds that there is a mandatory requirement, it should have been the DMA that was made the subject of applicant's legal attack.

7.4 In any event, an order directing Parliament to enact legislation is ineffective: a *brutum fulmen*. Even if the Court found that Parliament has failed to act in accordance with its constitutional obligations, the order the applicant seeks is impermissible because it is unenforceable.

7.5 As a matter of fact, Parliament has exercised oversight and scrutinised how the fifth respondent ("**Minister**") and the third respondent ("**Cabinet**") have responded to the COVID-19 pandemic and applied the DMA. Through its various committees, whose transcribed proceedings are publicly available and were at the applicant's disposal, Parliament has exercised its oversight functions and responsibilities, and continues to do so. In due course, I shall refer to some of the proceedings to illustrate the point.

7.6 The applicant has not placed any credible evidence to suggest that the exercise of that oversight role and responsibility was, as a fact, constitutionally insufficient. I point out that even if that were conceivably the case, a proposition which I dispute, the drastic and

V.V TRM

far-reaching remedy sought by the applicant is not a logical response to the perceived insufficiency.

7.7 Insofar as the applicant believes, rightly or wrongly, that there is a need for a special legislation to bring about the type of accountability it prefers, it is entitled, directly or through a political party of its choosing, to initiate a private member's Bill. The applicant has not explained why it has not pursued that option instead of pursuing this ill-conceived application.

8 This application is, therefore, ill-founded. The judicial intervention the applicant prays for is inappropriate and unwarranted in the circumstances. This Court should dismiss the application with costs, including the costs of two counsel.

9 I will elaborate on my reasons for saying this application is misconceived. My responses will follow the scheme of the table of contents.

THE APPLICATION IS NOT URGENT

10 The applicant brings this application on the basis of urgency. However, the applicant's conduct and the facts dispel this theory. I say so for the following reasons:

10.1 Initially, the applicant brought an application for direct access to the Constitutional Court on 20 May 2020. That application was dismissed by the Constitutional Court on 3 July 2020. The failed application was

V.V IRM

based on the same facts and legal contentions that are the same, or substantially the same as the present application. It is insufficient for the applicant to blithely state that it required time to and had to consult with its legal representatives before it launched the present application. After all, the two applications are in substance the same.

10.2 The applicant cannot therefore sensibly suggest that it required a period of three weeks between the Constitutional Court dismissing the applicant's misguided application for direct access and 24 July when the applicant finally brought this application. It was always possible that the Constitutional Court could dismiss the application for direct access, in which event the applicant would have had to approach this Court without delay, after an order of the Constitutional Court, to the extent that it considered its application to be urgent. The applicant failed to do so, and has not provided a credible and acceptable explanation for the delay. The urgency is therefore self-created.

10.3 Moreover, the applicant has failed to provide a timeline from when it consulted with the legal representatives and when its trustees approved the launching of this application. The applicant's attempt at an explanation is inadequate.

10.4 I accordingly deny that the applicant acted "*prudently and as expeditiously as possible*": it waited for three weeks.

10.5 The delay in launching this application is a result of the applicant ill-advised decision to go forum shopping. The applicant sought to

V.V TRC

apply directly to the Constitutional Court. The applicant cannot wish-away the consequences of this decision. The applicant, on a reasonable assumption, knew from 20 May 2020 that it sought to bring an application of this nature. The applicant wasted nine weeks as a result on its ill-advised expedition to the Constitutional Court. The applicant's choice to seek to overlook this Court and approach the Constitutional Court is not a basis for this application being considered urgently.

10.6 It is also unclear why the applicant waited for more than four months since the COVID-19 disaster was proclaimed on 15 March 2020, to launch this application on 24 July 2020.

10.7 I deny that the prospects of this application are strong. One need merely consider the relevant case law to realise that this application is stillborn. As I have foreshadowed, it will become apparent when I deal with the proceedings of its Committees that the National Assembly has complied with its constitutional obligations by passing legislation that provides for the management of disasters (the DMA) and has held the Minister and the Cabinet accountable by scrutinising and overseeing the manner in which the disaster is managed. More significantly, the Committees comprise multi-party representatives of political parties that are represented in Parliament.

10.8 Considering the importance of the application as professed by the applicant, the timelines are unreasonable and inappropriate. The

V.V TRM

respondents have been placed under undue pressure amid a global pandemic.

10.9 Remarkably, the applicant claims that little time is required to address the issues that arise in this application. Yet, it took the applicant three weeks to file the application after its application to the Constitutional Court. One need only repeat this proposition for its absurdity to emerge. The applicant's self-righteous and unreasonable conduct is unjustified.

10.10 The applicant has failed to demonstrate that it cannot get substantial redress in the ordinary course. This application ought to have been brought sooner than it was if indeed it was urgent. It was not.

11 I submit that this matter is not urgent at all; the purported urgency of this application is self-created, and there is no basis for imposing and inflicting that urgency upon the respondents. There is no reason why the application could not be determined in the ordinary course.

12 As a result, this application should be struck from the roll, alternatively dismissed with costs of two counsel.

THE APPLICANT'S BASIS FOR STANDING IS MISCONCEIVED

13 The applicant has not made out a basis for its legal standing to bring the present application. It seeks to rely on section 38 of the Constitution without specifying a constitutional right that has been violated or is threatened.

V.V TRM

14 In paragraph 98 of the founding affidavit, the applicant claims that its standing is "*self-evident*". It then goes on to state that it has standing because it is acting—

14.1 in its own interest in terms of section 38(a) of the Constitution; and

14.2 in the public interest in terms of section 38(d) of the Constitution.

15 I submit that section 38 of the Constitution provides for people to approach the court when they allege that a right in the Bill of Rights has been infringed or threatened.

16 The applicant has failed to succinctly allege an infringement or threat of the violation of a constitutional right. It does not, as a result, qualify as a person that may approach the court in reliance of any of the grounds provided for in section 38 of the Constitution.

17 Although the applicant refers to rights in the Bill of Rights, I do not understand the applicant's complaint to be that Parliament's conduct has violated or threatens the rights the applicant refers to in paragraphs 32.1 to 82.16 of the founding affidavit. Instead, the applicant avers that the rights have been affected by the regulations promulgated by the Minister. This does not, however, relate to the issue before this Court: whether Parliament has breached its constitutional obligations by failing to pass legislation that governs and regulates the state's response and management of the COVID-19 disaster.

V.V TRM

18 The off-handed reference to these rights in the context of the regulations does not found standing, in terms of section 38, concerning the issues that the applicant has asked this Court to determine. The applicant's reference or purported reliance on the threat to or violation of any constitutional rights relates to the function and effect of the Regulations promulgated pursuant to the DMA, and not the conduct of which the applicant complains: breach of sections 42, 43, 44 and 55 of the Constitution.

19 The applicant has failed to provide a substantive basis for its reliance and invoking of section 38 of the Constitution. The applicant's reliance on this section is misplaced, and without clearly identifying a constitutional right that it seeks to vindicate or protect the applicant cannot found its standing on the provisions of section 38.

THE APPLICATION IS MISTAKEN

20 The applicant is primarily asking this Court to intervene in parliamentary proceedings because it considers what Parliament has done (or not done on the applicant's version) to be inadequate or ineffective and not "*concrete*" enough measure for the management of COVID-19. According to the applicant, Parliament and the other respondents have failed to fulfil their constitutional obligations.

21 I disagree that Parliament has not fulfilled its constitutional obligations, below I will set out the steps taken by Parliament and demonstrate that Parliament has acted reasonably in discharging its constitutional duty.

V.V TRM

Parliament has fulfilled its obligations.

22 Section 42 specifies how the National Assembly fulfils its obligations to represent the people and ensure that the government is representative of the people by, amongst other things, passing legislation and scrutinising and overseeing executive action.

23 In terms of section 44(1)(b), the National Assembly has the power to pass legislation concerning any matter, except matters that fall within a functional area listed in Schedule 5 of the Constitution. Parliament may, only when it is necessary, intervene to pass legislation to govern matters that fall within a functional area listed in Schedule 5 of the Constitution in certain specified circumstances.

24 Section 55(1) provides that:

> *"In exercising its legislative powers, the National Assembly may—*
>
> *(a) consider, pass, amend or reject any legislation before the Assembly;*
>
> *(b) initiate or prepare legislation, except money Bills."*

25 Significantly, the wording of these sections is couched in permissive and not mandatory terms.

26 The sections are not phrased in mandatory terms; the sections merely vest the National Assembly with authority to initiate and pass legislation, unlike in instances when a section, such as sections 32 and 33 of the Constitution, provides that in as far as the right to access to information and fair administrative action is concerned, "*national legislation must be enacted to*

V.V TRM

give effect to this right . . .". The only reasonable inference is that Parliament retains the discretion to determine when it is appropriate to initiate and pass legislation.

27 I submit that, in terms of the constitutional principle of separation of powers and the autonomy of Parliament, the judiciary should not interfere in its processes unless mandated to do so by the Constitution.

28 I have noticed that the applicant does not consider whether Parliament has sought to oversee and scrutinise the Minister's action taken in terms of the DMA; and whether what Parliament did in substance and reality amount to the fulfilment of its constitutional obligations.

29 The applicant acknowledges, in paragraphs 48, 49 and 74 of the founding affidavit, some of the measures Parliament has implemented to ensure that it fulfils its obligations of holding the Executive accountable by overseeing and questioning how the relevant members of the Executive are managing the COVID-19 disaster.

30 I do not, therefore, understand this application to be a challenge about Parliament failing to hold the Minister and the Cabinet accountable and failing to oversee and scrutinise the regulation and management of the COVID-19 disaster. In a separate bundle, I annex parliamentary records of action taken by Parliament to hold the Minister and the Cabinet accountable. They are also available electronically in a link which is expressly identified in the first page of that bundle.

J.V TRM

31 I have been advised and respectfully submit that it is impermissible for the judiciary to impose a specific manner or process by which Parliament holds the Executive accountable. I submit that this is what the applicant ultimately seeks to accomplish. Admittedly, I have assumed that the applicant does not consider the measures taken by the National Assembly to be adequate or appropriate. My assumption is a result of it being unclear whether the applicant bothered to determine whether the National Assembly was exercising oversight and scrutinising the Minister and other Cabinet members during this pandemic,

32 The courts are constrained to respect the autonomy of Parliament, as an independent - and, in a parliamentary system, the only directly elected - branch of government.

33 The applicant has alluded that the DMA may have the effect of Parliament unlawfully delegating legislative power to the Minister. Although this proposition is not pursued with much vigour, I consider it necessary to point out that the scope of the delegation provided for by the DMA is entirely lawful because it is near impossible to predict the nature of a national disaster with precision and Parliament considered it necessary and reasonable that the Minister and the Cabinet or Executive have the power to respond to readily deal effectively with any such disaster when it occurs – until the disaster no longer presents a threat. And, by all accounts, a response to a state of national disaster, especially the disaster brought about by the COVID 19 pandemic, has to be immediate, swift and dynamic. Parliament does not readily have the necessary capacity and practical, logistical resources to

N.V TRM

manage this type of disaster effective and efficiently as the National Executive, through the administrative capacity established by the DMA.

34 Section 27 of the DMA appropriately and lawfully delegates Parliament's legislative power to deal with disasters such as COVID-19 comprehensively and effectively. It was competent for Parliament to do so. And section 27 is sufficiently broad to enable the Minister and the Cabinet to deal with the COVID-19 disaster. More importantly section 27(3) places appropriate constraints on the delegation by limiting the exercise of this delegation to what is absolutely necessary to contain the disaster. It is therefore unnecessary for Parliament to promulgate any further legislation.

The application of the Disaster Management Act

35 The DMA is the legislation Parliament chose to promulgate to provide for the management of and a response to all disasters in South Africa. This was a choice that Parliament exercised in compliance with its constitutional obligations. The preamble of the DMA in relevant part provides:

> *"an integrated and coordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery and rehabilitation;"*

36 The applicant avers that the DMA operates for a short period and is not meant to "*regulate the state's response to COVID-19 for any sustained period of time*". However, it is unclear what the basis for this proposition is.

V.V TRM

37 The Parliament, acting consistently with its constitutional obligations, oversees and scrutinises how the Minister and the Cabinet exercise their powers in terms of the DMA. It is, therefore, unnecessary to promulgate new legislation that deals with a specific disaster, when a general statute has been enacted.

38 The applicant also avers that sections 2(1)(b) and 27(1) should be interpreted as contemplating that legislation would be promulgated to regulate the management of a disaster.

39 I deny that the section may be interpreted that way. Such an interpretation is not sensible in the context of the DMA in general and section 2(1) specifically.

40 The section provides that the DMA does not apply if the management of the disaster can be managed in terms of a different statute. I do not understand that to mean or contemplate that there is an obligation to promulgate specific legislation instead section 2(1)(b) suggests that if legislation does exist, that legislation should be applied. It does not create an obligation to pass specific legislation at all.

41 As I have stated above, Parliament has passed the DMA as the primary legislation. It has therefore fulfilled its obligation to respond or regulate social and natural disasters. It need not pass new disaster- or social-ill-specific legislation.

V.V TRM

42 The promulgation of regulations in terms of the DMA is not in any way a departure from "*basic principles, processes and structural provisions of the Constitution*". The Constitution provides for the passing of delegated legislation, which the regulations promulgated in terms of the DMA is one.

43 There therefore is no basis for the judicial intervention the applicant seeks in terms of this application.

44 Parliament retains the prerogative of whether to pass legislation or not. Parliament chose to regulate and manage disasters in the manner contemplated in the DMA. To the extent that the applicant considers Parliament's legislative choice to be unlawful or inconsistent with the Constitution, the applicant ought to challenge the DMA. It is inappropriate for the applicant to seek to prescribe how Parliament ought to exercise its legislative choices without questioning the choices Parliament already made.

45 However, instead of challenging the DMA, the applicant avers that "*Parliament cannot constitutionally be understood to have afforded, through the [DMA], such a wide-ranging and ongoing delegation of law-making power to the Minister as the one she now exercises*" (paragraph 62). But that is what the DMA does. And it is therefore insufficient to suggest that it should be interpreted in a manner that results in Parliament being found to have failed to act, when in fact, the applicant is dissatisfied with the actions of Parliament.

V.V TRM

46 I must emphasise that I deny that the Minister and the Cabinet exercise untrammelled power in their regulation and management of the COVID-19 disaster. There has been a plethora of legal challenges whenever parties have considered the Minister to have acted beyond the ambit of her powers in the DMA; the Minister and her colleagues in Cabinet have been held accountable by Parliament, which has consistently scrutinised the measures taken. Any fear that the Minister exercises "*near total and untrammelled powers*" is unfounded and misleading.

47 The applicant's submission that Parliament should initiate a process for new legislation is not sensible when considering the process that has to be undertaken and the time that the process, when conducted properly, will consume. It is therefore unreasonable to expect that a process should be initiated and completed in the circumstances, especially when considering that the duration of a disaster in general and COVID-19 specifically is unpredictable.

48 The Minister's powers in terms of the DMA are only exhausted once a disaster has ended or the country has overcome the disaster. I disagree with the interpretation that the Minister only retains the authority to manage and regulate a disaster in terms of the DMA until Parliament step-in to pass legislation that deals with the specific disaster. There is nothing in the DMA to suggest that this is the case. The Minister is empowered to act in terms of the DMA for as long as the state of disaster or the disaster persists.

V.V TRM

49 The inescapable inference is that the applicant considers the ambit of the DMA to be constitutionally impermissible in the extent to which it empowers the Minister (and the Cabinet) to regulate and manage disasters. The applicant does not consider the DMA to be a "*concrete and effective mechanism*" for responding to, controlling and managing the COVID-19 disaster (paragraph 79). The applicant has however sought to avoid challenging the DMA and instead wishes to limit the ambit of the Act by opting for a strenuous interpretation of the DMA. This Court should not countenance this. The applicant must bring a constitutional challenge of the DMA if it indeed considers it constitutionally invalid.

50 Section 2 provides for the application of the DMA in the following terms:

> *"(1) This Act does not apply to an occurrence falling within the definition of "disaster" in section 1—*
>
> *(a) if, and from the date on which, a state of emergency is declared to deal with that occurrence in terms of the State of Emergency Act, 1997 (Act No. 64 of 1997); or*
>
> *(b) to the extent that that occurrence can be dealt with effectively in terms of other national legislation—*
>
> *(i) aimed at reducing the risk, and addressing the consequences, of occurrences of that nature: and*
>
> *(ii) identified by the Minister by notice in the Gazette."*

51 There is no suggestion that Parliament must, upon the occurrence of a disaster and a declaration of the disaster, promulgate legislation that specifically provides for the management of the Disaster. The section merely contemplates that there may be instances when a particular occurrence has been provided for in different and specific legislation, and, as a result, there

V.V TRM

would be no need for the DMA to apply. The DMA should not therefore be invoked. There thus is no recognition of a need to create legislation that regulates COVID-19, contrary to what the applicant suggests in paragraphs 88 to 90 of the founding affidavit.

52 Section 27(1) of the DMA provides:

> *"(1) In the event of a national disaster, the Minister may, by notice in the Gazette, declare a national state of disaster if—*
>
> *(a) existing legislation and contingency arrangements do not adequately provide for the national Executive to deal effectively with the disaster; or*
>
> *(b) other special circumstances warrant the declaration of a national state of disaster."*

53 This provision, too, does not recognise an obligation on Parliament to pass legislation that deals with disasters. The sections of the Constitution that empower Parliament to pass legislation are permissive. It is therefore understandable that the DMA provides for or anticipates that there may be an occurrence that may fall within the definition of a disaster for purposes of the DMA, but may not be managed in terms of the DMA because there already exists legislation that deals with the management of the disaster of that nature. The suggestion that section 27(1) recognises an obligation on Parliament is perversely strenuous of the words of section 27(1).

54 Finally, the applicant's comparison of the Parliament of South Africa with the United Kingdom's House of Commons and House of Lords and the Scottish Parliament is misplaced. South Africa, unlike the two nations, has the DMA as the legislation that generally provides for the South African government's

V.V TRAC

response to a disaster. The applicant ought to directly attack that legislation if it considers it inadequate.

The principle of subsidiarity applies

55 I understand that the effect of the applicant's argument is that the DMA does not fulfil the necessary constitutional obligations that Parliament has.

56 Absent further legislation, Parliament has failed to manage COVID-19 in the manner that is consistent with its constitutional obligations and upholds the principles of the Constitution. In support of its assertion about Parliament's obligations, the applicant purports to place reliance on sections 7(2) and 27(2) of the Constitution.

57 However, as I have asserted above, the DMA is the legislation that Parliament elected to promulgate to govern the state's response to a disaster such as COVID-19. To the extent that the applicant considers that Parliament has failed to fulfil its constitutional obligations adequately, I submit that the recognised doctrine of subsidiarity applies. The applicant ought to challenge the DMA and cannot directly rely on constitutional obligations and rights in terms of which it purports Parliament is obliged to promulgate legislation that specifically governs a disaster such as COVID-19.

THE RELIEF IS UNENFORCEABLE

58 If this Court finds that the applicant's challenge is well-founded: Parliament has failed to pass legislation to govern how COVID-19 is managed,

V.V TRM

specifically. I submit that a mandamus (prayer 3 of the Notice of Motion) is impermissible relief to grant in the circumstances.

59 While it is competent to require the Executive to introduce legislation and to require Parliament to consider it, it is not constitutionally competent to direct Parliament to enact legislation.

60 An order directing Parliament to enact legislation is ineffective: a *brutum fulmen*.

61 To pass ordinary legislation to address disaster (a matter that falls within schedule 4 of the Constitution) 50% plus one of the members of the National Assembly must be present to constitute a quorum. A majority of those present must vote in favour of it. In voting for or against any piece of legislation, members of Parliament represent their political party and the citizens who voted for that party. The Bill must be passed by the National Council of Provinces ("**NCOP**"). In the NCOP five of the nine provinces must agree to the Bill. The provinces vote in line with provincial mandates. A mediation process is envisaged where there is no agreement between the two houses of Parliament. However, it is also conceivable that there is no agreement on a version of a Bill and the Bill lapses.

62 Suppose Parliament fails to pass the legislation prayed for in this application (whether as a result of Parliament failing to attain the requisite majority or otherwise). In that case, it is unclear what recourse would be had and

V.V TRM

against whom the recourse would be had and against whom the order would be enforced. Would it be the enforced against,

62.1 Me, as the Speaker, or against the Chairperson of the NCOP?

62.2 The Committee or member of the National Assembly that proposed the Bill but could not secure a majority vote?

62.3 The governing party, which has the majority of seats in the National Assembly and the NCOP?

62.4 The Minister empowered to manage disasters in terms of the DMA?

62.5 The official opposition?

62.6 The individual members of Parliament who voted against the Bill (but might have voted for an amended version)?

63 It is also unclear what form of enforcement the order would take.

64 Ancillary to issue the enforcement of the order is the issue about the necessary parties to this application: whether the applicant ought to have joined the political parties represented in Parliament as parties with a material interest in the relief sought (the mandamus to pass legislation) in the application. The political parties may have direct and substantial interest in the subject matter of this application, which may be prejudicially affected by the order of this Court. And the failure to join the parties therefore is a non-joinder.

V.V TRM

65 On the applicant's prayers for a mandamus, I submit that contempt proceedings would be the only option. The applicant does not make any provision for alternative enforcement measures. But that would require a court to hold members of Parliament in contempt because they exercised their democratic mandate. However, such an order trenches deep into the heartland of Parliament's exclusive domain and potentially infringes on the basic premises of representative democracy. It is difficult to contemplate a court exercising contempt powers in those situations.

66 I therefore submit that because a mandamus order cannot be enforced and would not be effective, it should not be made. Granting unenforceable orders risks bringing the judiciary into disrepute.

67 The unenforceability of the relief sought betrays that the nature of this application is inappropriate and impermissible. The application should be dismissed.

68 I am aware that the Constitutional Court has declared legislation invalid, and recognised that there must be new legislation to fill a gap. The Court does not however order Parliament to pass legislation. Instead, the Court allows Parliament to act, and provides for what will happen if Parliament fails to do so. That provides both an incentive for legislative activity, and a guarantee for claimants if Parliament prevaricates.

69 Had the DMA been attacked based on subsidiarity, Parliament could have been ordered to include particular provisions to cater for the relief sought.

V.V TRAC

But that is an entirely different problem from trying to impose upon Parliament an obligation to pass a detailed piece of legislation.

70 It is also relevant to consider that the provisions in terms of which Parliament is said to have failed to fulfil are not mandatory. Unlike in instances when a section, such as sections 32 and 33 of the Constitution, provides that in as far as the right to access to information and fair administrative action is concerned, "*national legislation must be enacted to give effect to this right . . .*".

71 The applicant has not referred to any provision of the Constitution that mandates the passing of legislation of the sort the applicant prays for: to govern and manage the COVID-19 disaster.

COSTS

72 This application is nothing more than a tediously meddlesome approach initiated by an applicant that seemingly considers itself as the conscience of the nation and as the fourth arm of the state. The applicant is well aware or at least should be aware of the case law on the issues of separation of powers and the intervention of the judiciary. The issues raised in this application do not justify an invasion by the judiciary – especially when there already is legislation (the DMA). The applicant has also sought an unenforceable order in as far as it has prayed for a mandamus directing Parliament to pass legislation. Ironically claiming to uphold democracy, the

V.V TRM

applicant asks this Court to direct at least 50% plus one of the members of Parliament to vote to adopt the COVID-19 specific legislation.

73 This Court should, therefore, order the applicant to pay Parliament's costs when the application is dismissed, including the costs occasioned by the employment of two counsel.

CONCLUSION

74 This application is deficient. The applicant has brought it inexcusably late and does not provide a full and satisfactory account to explain the delay in seeking to intervene. The urgency claimed is not justified at all.

75 The applicant has dismally failed to establish a basis for asserting that Parliament has been in dereliction of any of its constitutional obligations; and that it has abdicated its constitutional duties.

76 In any event, even if the Court found that Parliament has failed to act in accordance with its constitutional obligations, the order the applicant seeks is impermissible: it is ineffective and unenforceable.

77 I therefore submit that this application is entirely without merit. The court should, accordingly, dismiss the application with costs, including the costs of two counsel.

V.V TRM

AD SERIATIM RESPONSES TO THE FOUNDING AFFIDAVIT

78 I now turn to respond to the averments in the founding affidavit, to the extent it is necessary to do so.

79 **Ad paragraph 1**

I do not dispute averments in this paragraph.

80 **Ad paragraph 2**

80.1 I do not admit that all the averments in the founding affidavit are true and correct.

80.2 I also do not admit that all the averments in the founding affidavit fall with the personal knowledge of the deponent.

80.3 Save as aforesaid, I do not dispute the rest of the averments in this paragraph.

81 **Ad paragraph 3**

I take note of the averments in this paragraph, and admit them only to the extent that they correctly reflect the law.

82 **Ad paragraphs 4 and 5**

82.1 For the reasons already set out above, I deny that the application is urgent.

N.V TRM

82.2 I also deny that there Parliament has been derelict of its duties. Regrettably, the applicant takes liberties by making this reckless allegation without a scintilla of evidence.

82.3 Based on the records which I have compiled in a separate bundle which accompanies my affidavit, I submit that the applicant's allegations are without foundation on the facts.

82.4 Save to state the above, I deny the averments in these paragraphs.

83 **Ad paragraph 6**

The Acting Deputy Judge-President of this honourable Court has now issued the relevant directions on the filing of further affidavits and heads of argument and has also directed that the matter be allocated for hearing on 3 September 2020. This affidavit will be served on the parties according to the directions so issued.

84 **Ad paragraph 7**

84.1 I do not dispute the averments in this paragraph.

84.2 I submit that what the deponent refers to in the paragraph under reply shows that the present application is unfounded.

85 **Ad paragraphs 8 and 9**

85.1 I take note of the averments in these paragraphs.

V.V TRM

85.2 I have been advised and submit that what the deponent contends in these paragraphs shows that the relief sought in the present application is mistaken.

86 **Ad paragraphs 10 and 11**

I deny the averments in these paragraphs.

87 **Ad paragraph 12**

87.1 I deny the generalisations made in this paragraph.

87.2 There is no explanation at all what specific rights have been violated as is alleged in this paragraph.

87.3 I have been informed that in constitutional litigation a litigant such as the applicant has a duty, both as a matter of pleading and fairness to the respondents, to specify the constitutional right he claims the respondents have infringed or are threatened. It also has a duty to specify the evidence on which it relies on to support the violation or infringement it asserts so that the respondents can deal with the claim and evidence, and if necessary produce evidence to show justification for the limitation of the right asserted.

87.4 Save as aforesaid, I deny the contentions made in this paragraph.

87.5 The applicant has failed to adhere to these basic legal duties it has.

87.6 I have also been advised that the applicant is not entitled to cure defects and deficiencies of its case in the replying affidavit.

V.V TRM

88 **Ad paragraph 13**

I take note of the averments in this paragraph.

89 **Ad paragraphs 14 and 15**

I deny the averments in these paragraphs.

90 **Ad paragraph 16**

I take note of the averments in this paragraph. I deny however that the state's response to the COVID-19 pandemic is in the realm of "*the subjective purview*" of the Executive. In fact, multiple litigation which served before this Court, and other Courts elsewhere, show why the applicant's contention is unfounded.

91 **Ad paragraph 17**

91.1 I deny that the present application is not about an attack on the policy choices or value judgements embodied in the Regulations promulgated in terms of the DMA.

91.2 Looked at, and considered, in its proper context, the very basis and purpose of the application is to challenge the policy choices made to respond to the pandemic, without any evidential basis for such attack.

92 **Ad paragraph 18**

I deny the averments in this paragraph.

V.V TRAC

93 **Ad paragraph 19**

I take note of the contents of this paragraph.

94 **Ad paragraph 20**

94.1 I take note of the averments in this paragraph.

94.2 I deny however that the applicant has established the requisite legal standing for the relief it seeks in the notice of motion.

95 **Ad paragraphs 21 to 26**

I do not dispute the averments in these paragraphs.

96 **Ad paragraph 27**

96.1 I take note of the averments in this paragraph.

96.2 I point out that the declaration of the national state of disaster by the National Executive was also based on scientific evidence and followed upon the declaration by the World Health Organization which declared COVID-19 pandemic as a public health disaster of international concern.

96.3 I refer to a copy of the public statement made by the President when he announced the declaration of a national state of disaster declared by the fifth respondent, which is annexed hereto and marked "**AA1**".

V.V TRM

97 **Ad paragraphs 28 to 33**

97.1 I take note of the averments in these paragraphs.

97.2 I admit them only to the extent that they correctly reflect the terms of the DMA.

98 **Ad paragraph 34**

98.1 I deny the averments in this paragraph.

98.2 The judgments of this and other Courts have made it clear the Regulations and directions made pursuant to the DMA have limits and are subject to legal scrutiny by our Courts based on well-established principles that require rational, lawful and justifiable exercise of public power.

99 **Ad paragraphs 35 to 38**

99.1 I take note of the deponent's reference to the specific provisions of the DMA.

99.2 I however deny that those provisions of the DMA have the effect alleged by the deponent.

99.3 There is no evidence advanced by the deponent to justify the effect alleged by him.

99.4 I therefore deny the generalised claim made by the deponent in paragraph 37 of the founding affidavit.

V.V TRM

100 **Ad paragraph 39**

I deny the contentions made in this paragraph.

101 **Ad paragraph 40**

101.1 I admit that the fifth respondent, the Minister, made the Regulations according to the provisions of the powers vested upon her in terms of section 27 of the DMA.

101.2 I point out that the Regulations promulgated by the Minister and actions taken by the members of Executive were subject to regular oversight of Parliament through its committees, as appear from the records included in the bundle to which I have referred.

102 **Ad paragraphs 41 and 42**

I deny the general claims made in these paragraphs.

103 **Ad paragraph 43**

103.1 I take note of the averments in this paragraph.

103.2 I point out that there is no need for special legislation to respond to the state of national disaster brought about by the COVID-19 pandemic.

103.3 The disaster caused by the COVID-19 pandemic is subject to regular review by the National Executive in terms of the provisions of the DMA, and also the review and downgrade of alert-levels having

V.V TRM

regard to the advice of medical experts and prevailing circumstances at every turn.

103.4 Oddly, the applicants do not explain how the new legislation they conceive would swiftly respond to the ever-evolving changes that the pandemic, scale of infections and recoveries present and require that they must be dealt with through the machinery provided in the DMA.

103.5 Once again, I have been advised that motion court proceedings of that the applicant has elected to pursue do not permit the drawing of inference of the kind the applicant contends in this paragraph. The applicant was required and failed to produce the relevant evidence to justify the drawing of the conclusion for which he contends. It cannot rely on inferences.

104 **Ad paragraph 44**

104.1 I accept that the state of national disaster has previously been extended, and is likely to be extended further for as long as the disaster continues.

104.2 I point out that the National Executive has always explained the basis for the extensions, and Parliament has, through its relevant committees, regularly monitored the Executive's actions.

105 **Ad paragraphs 45 and 46**

V.V TRM

I deny the inferences contended by the applicant in these paragraphs.

106 **Ad paragraphs 47 to 49**

106.1 I admit that Parliament issued the statement referred to annexure "FA5".

106.2 I deny that that statement reflects a failure to act on the part of Parliament.

106.3 The record of Parliament's committees shows that Parliament has acted.

106.4 Save as aforesaid I deny the contentions made in these paragraphs.

107 **Ad paragraph 50**

107.1 I take a note of the averments in this paragraph.

107.2 I emphasise that the Regulations referred to in this paragraph were also considered by the relevant committees of Parliament and conduct taken according to the Regulations were monitored by those committees.

107.3 The National Assembly has had sittings where COVID-19 was discussed.

108 **Ad paragraph 51**

V.V TRM

I deny the averments in this paragraph.

109 **Ad paragraphs 52 to 55**

109.1 I take note of the deponent's reference to the provisions of the Constitution.

109.2 I admit the averments in these paragraphs to the extent they accurately reflect those provisions.

109.3 I however deny the conclusion sought to be drawn by the deponent from those provisions of the Constitution.

110 **Ad paragraphs 56 to 63**

110.1 I take note of the contents of these paragraphs.

110.2 I deny that Parliament has abdicated its powers.

110.3 There is no evidence whatsoever to prove a case of abdication. The deponent's generalisation does not rise to the level of evidence required to establish a case of abdication.

111 **Ad paragraphs 64 to 75**

I deny the contentions made in these paragraphs.

112 **Ad paragraph 76**

V.V TRM

The applicant has not made out a case that imposes a duty for Parliament to enact the legislation that it claims.

113 **Ad paragraphs 77 to 81**

I deny the averments in these paragraphs.

114 **Ad paragraphs 82 to 83**

114.1 I point out that the applicant has not produced the necessary evidence to show a violation of the rights it catalogues in sub-paragraphs 82.1 to 82.16 of the Constitution. Their mere allegation of a breach is not enough.

114.2 What is clear however is that the real and not the professed concern of the applicant is the set of Regulations made by the Minister under the DMA. Its remedy lies elsewhere.

114.3 Save as aforesaid, I deny the contentions made in these paragraphs.

115 **Ad paragraphs 84 to 96**

I deny the contentions made in these paragraphs.

116 **Ad paragraphs 97 and 98**

I deny the averments in these paragraphs.

117 **Ad paragraphs 99 to 109**

V.V TRM

For the reasons advanced elsewhere in this affidavit I deny that the application is urgent.

118 **Ad paragraphs 110 to 120**

I deny the averments in these paragraphs.

WHEREFORE, I ask for an order dismissing this application with costs, including the costs of two counsel.

N.N TRM.

THANDI RUTH MODISE

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at JOHANNESBURG on this the 14 day of **AUGUST** 2020, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

COMMISSIONER OF OATHS
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STATEMENT BY PRESIDENT CYRIL RAMAPHOSA ON MEASURES TO COMBAT COVID-19 EPIDEMIC

15 MARCH 2020

Fellow South Africans,

I am addressing you this evening on a matter of great national importance.

The world is facing a medical emergency far graver than what we have experi-enced in over a century.

The World Health Organisation has declared the coronavirus outbreak as a global pandemic.

There are now more than 162 000 people who have tested positive for the coronavirus across the globe.

Given the scale and the speed at which the virus is spreading, it is now clear that no country is immune from the disease or will be spared its severe impact.

Never before in the history of our democracy has our country been confronted with such a severe situation.

From the start of the outbreak in China earlier this year, the South African gov-ernment has put in place measures to screen visitors entering the country, to contain its spread and to treat those infected.

As of now, South Africa has 61 confirmed cases of people infected with the virus, and this number is expected to rise in the coming days and weeks.

Initially, it was people who had travelled out of the country, especially from Italy, who had positively tested for the virus.

It is concerning that we are now dealing with internal transmission of the virus.

V.V TRUE

This situation calls for an extraordinary response; there can be no half-measures.

Cabinet held a special meeting earlier today.

After which, due to the serious measures we are going to announce, I have consulted the premiers.

We have decided to take urgent and drastic measures to manage the disease, protect the people of our country and reduce the impact of the virus on our society and on our economy.

We have now declared a national state of disaster in terms of the Disaster Management Act.

This will enable us to have an integrated and coordinated disaster management mechanism that will focus on preventing and reducing the outbreak of this virus.

We will also be able to set up emergency, rapid and effective response systems to mitigate the severity of its impact.

Following an extensive analysis of the progression of the disease worldwide and in South Africa, Cabinet has decided on the following measures:

Firstly, to limit contact between persons who may be infected and South African citizens

We are imposing a travel ban on foreign nationals from high-risk countries such as Italy, Iran, South Korea, Spain, Germany, the United States, the United Kingdom and China as from 18 March 2020.

We have cancelled visas to visitors from those countries from today and previously granted visas are hereby revoked.

South African citizens are advised to refrain from all forms of travel to or through the European Union, United States, United Kingdom and other identified high-risk countries such as China, Iran and South Korea.
This is effective immediately.

V.V TRM

Government will continue to regularly issue travel alerts referring to specific cities, countries or regions as the situation evolves based on the risk level.

Any foreign national who has visited high-risk countries in the past 20 days will be denied a visa.

South African citizens returning from high-risk countries will be subjected to testing and self-isolation or quarantine on return to South Africa.

Travellers from medium-risk countries - such as Portugal, Hong Kong and Singapore - will be required to undergo high intensity screening.

All travellers who have entered South Africa from high-risk countries since mid-February will be required to present themselves for testing.

We will strengthen surveillance, screening and testing measures at OR Tambo, Cape Town and King Shaka International Airports

South Africa has 72 ports of entry in the country which are land, sea and air ports.

Of the 53 land ports, 35 will be shut down with effect from Monday 16 March.

2 of the 8 sea ports will be closed for passengers and crew changes.

Effective immediately, all non-essential travel for all spheres of government outside of the Republic is prohibited

We further discourage all non-essential domestic travel, particularly by air, rail, taxis and bus.

Secondly, it is essential therefore that we minimize the risk of the spread of this virus by limiting contact amongst groups of people.

While we appreciate the economic, religious, and cultural significance of social and community gatherings, the coronavirus is spread through contact between persons.

V.Y TRM

As we have said before, the current circumstances require extraordinary measures to curb the spread of infections. Countries that have heeded the call to implement these radical measures, have fared much better than those than do not.

Therefore to encourage social distancing Cabinet has decided on these additional measures:

Gatherings of more than 100 people will be prohibited.

Mass celebrations of upcoming national days such as Human Rights Day and other large government events will be cancelled.

Where small gatherings are unavoidable, organisers will need to put in place stringent measures of prevention and control.

Schools will be closed from Wednesday, 18 March, and will remain closed until after the Easter Weekend.

To compensate, the mid-year school holidays will be shortened by a week.

Government is working closely with colleges, universities and other public facilities such as Parliament, prisons, police stations and military installations to intensify hygiene control.

Visits to all correctional centres are suspend for 30 days with immediate effect.

Government is aware of the confirmed case of a student who has tested positive for the coronavirus at Wits University.

Those who have been in contact with the student will be quarantined.

The Minister of Higher Education, Science and Innovation is consulting with vice chancellors of universities and colleges across the country and will soon be announcing measures in this regard.

We call on all businesses including mining, retail, banking, farming to ensure that they take all necessary measures to intensify hygiene control.

V.V TRM

We also call on the management of malls, entertainment centres and other places frequented by large numbers of people to bolster their hygiene control.

Thirdly, to further strengthen our health response:

Government is strengthening its surveillance and testing systems.

We are in process of identifying isolation and quarantine sites in each district and metro.

Capacity is being increased at designated hospitals in all provinces.

We are also increasing the capacity of existing contact tracing processes.

We are partnering with the private sector to set up a national tracking, tracing and monitoring system of all people infected with the coronavirus and those they have been in contact with

We are undertaking a mass communication campaign on good hygiene and effective prevention behaviour.

Therefore, we are calling on everyone to:

- Wash their hands frequently with soap and water or hand sanitisers for at least 20 seconds;
- over their nose and mouth when coughing and sneezing with tissue or flexed elbow;
- Avoid close contact with anyone with cold or flu-like symptoms.

In essence, we are calling for a change of behavior amongst all South Africans.

We must minimise physical contact with other people, and, encourage the elbow greeting rather than shaking hands.

Because of the severity of this virus and its rapid spreading, government will make funding available to capacitate the sectors dealing with the national response to the Coronavirus outbreak.

V.V TRM

Since the outbreak of this pandemic, our government's response has been led by an Inter-Ministerial Committee, chaired by the Minister of Health, Dr Zweli Mkhize.

We congratulate them on the outstanding work they have done - together with their able support teams - to steer our country through this challenging and un-certain period.

As part of the intensification of this effort, we have decided to establish a National Command Council chaired by the President.

This Command Council will include, amongst others, members of the Inter-Ministerial Committee and will meet three times a week, to coordinate all aspects of our extraordinary emergency response.

My fellow South Africans,

In addition to the impact that this pandemic will have on health and well-being of our people, and the impact it will have on the day-to-day life of our society, COVID-19 will also have a significant and potentially lasting impact on our economy.

In the last few weeks, we have seen a dramatic decline in economic activity in our major trading partners, a sudden drop in international tourism and severe instability across all global markets.

The anticipated effects of the decline in exports and tourist arrivals will be ex-acerbated by both an increase in infections and the measures we are required to take to contain the spread of the disease.

This will have a potentially severe impact on production, the viability of businesses, job retention and job creation.

Cabinet is therefore in the process of finalising a comprehensive package of interventions to mitigate the expected impact of COVID-19 on our economy.

V.V TRM

This package, which will consist of various fiscal and other measures, will be concluded following consultation with business, labour and other relevant institutions.

It is clear that this disease will be extremely disruptive.

Our priority must be to safeguard the health and well-being of all South Africans, to minimise the number of infections and to ensure all those infected get proper treatment.

While we are battling a contagious virus, perhaps the greatest dangers to our country at this time are fear and ignorance.

We must appreciate the extent of the threat that this disease presents, we must accept the anxiety that it causes, but we cannot allow ourselves to be overwhelmed by fear and panic.

We should stop spreading fake and unverified news and create further apprehension and alarm.

While we are facing a medical emergency far graver than we have experienced in recent times, we are not helpless.

We have the knowledge, the means and the resources to fight this disease.

If we act swiftly, with purpose and collectively we can limit the effects of the coronavirus on our people and our country.

Although we may be limiting physical contact, this epidemic has the potential to bring us closer together.

We are responding as a united nation to a common threat.

This national emergency demands cooperation, collaboration and common action.

More than that, it requires solidarity, understanding and compassion.

Those who have resources, those who are healthy, need to assist those who are in need and who are vulnerable.

V.V TRM

All the institutions of the state will be mobilised to lead this effort, but, if we are to succeed, every company, trade union, NGO, university, college, school, religious group and taxi association will need to play its part.

We thank those people who suspected they may have been exposed to the virus for coming forward to be tested and for taking measures - such as self-isolation - to prevent further transmission.

We thank the medical teams around the country who are leading our response and are putting the well-being of others ahead of the risks they face themselves.

On Saturday we welcomed 104 of our compatriots who were in Wuhan City, China.

We thank the repatriation team for the task they performed with pride and efficiency to return them to the country and ultimately to their families.

The repatriation has been successful and those who have returned have settled in the quarantine area.

We thank the military health officials, pilots, cabin crew and all those who participated in this exercise.

We thank the leadership and the people of Polokwane and Limpopo for warmly welcoming our fellow South Africans.

We also extend our gratitude to the staff and management of the Ranch Hotel who have accommodated our compatriots and also subjected themselves to quarantine.

We extend our appreciation too to the companies, organisations and individuals who have taken it upon themselves to disseminate information about this virus and to raise awareness.

We thank those businesses that have taken steps to protect their employees, and those unions that have taken steps to protect their members.

V.V TRM

Ministers who are at the frontline of coordinating our response to this crisis will be briefing the nation tomorrow, where they will unpack details in relation to the measures we announced tonight.

Fellow South Africans, this is the most definitive Thuma Mina moment for our country.

I have great trust that our people will respond positively to this call to common action.

Fellow South Africans,

This epidemic will pass.

But it is up to us to determine how long it will last, how damaging it will be, and how long it will take our economy and our country to recover.

It is true that we are facing a grave emergency.

But if we act together, if we act now, and if we act decisively, we will overcome it.

I thank you.

V.J TRM