

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**CASE NO:**

In the matter between:

HELEN SUZMAN FOUNDATION

Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

Second Respondent

**THE CABINET OF THE REPUBLIC OF
SOUTH AFRICA**

Third Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES**

Fourth Respondent

**THE MINISTER OF COOPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS**

Fifth Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the applicant intends to make application to this Court for an order in the following terms:

1. directing that this matter be heard on an urgent basis in terms of Rule 12 of the Rules of this Court, and dispensing with the forms and service provided for in those Rules;
2. to the extent necessary, granting the applicant direct access in terms of Rule 18 of the Rules of this Court;

3. declaring that:
 - 3.1 Parliament has failed to fulfil its obligations under sections 42(3), 44(1), 55(1) and 68 of the Constitution, to consider, initiate and prepare, and pass legislation that regulates the state's response to the threat posed and harm caused by SARS-CoV-2 and COVID-19 (together, "**COVID-19**");
 - 3.2 the President, as head of the National Executive, along with the Cabinet of the Republic of South Africa, has failed to fulfil the obligation under section 85(2) of the Constitution to prepare and initiate legislation that regulates the state's response to the threat posed and the harm caused by COVID-19;
 - 3.3 Parliament and Cabinet have failed to fulfil their obligations, under section 7(2) of the Constitution, to respect, protect, promote and fulfil the rights in the Bill of Rights, insofar as their legislative and executive responses to COVID-19 is concerned;
4. directing that:
 - 4.1 Cabinet must, without delay, exercise its power under section 85(2)(d) of the Constitution, for sake of preparing and initiating national legislation that has as its purpose the regulation of the state's response to the threat posed and harm caused by COVID-19;
 - 4.2 Parliament must, without delay, exercise its powers under sections 55(1) and 68 of the Constitution, for the sake of passing legislation that has as its purpose the regulation of the state's response to the threat posed and harm caused by COVID-19;
5. declaring that the powers of the Minister of Cooperative Governance and Traditional Affairs under the Disaster Management Act, 2002, exercised pursuant to GN 313,

15 March 2020, will terminate simultaneously with the passage of the legislation referred to in paragraph 4;

6. directing that any respondent that opposes the relief sought is ordered to pay the applicant's costs, including the costs of two counsel; and
7. granting further and/or alternative relief.

TAKE NOTICE FURTHER THAT if the respondents intend to oppose the relief sought in this application they are required, given the urgency of the matter, within five (5) days of the date of this notice of motion, to notify the Registrar of this Court and the applicant in writing of their intention to do so, and further that they are required to appoint in such notification an address at which they will accept notice and service of all documents in these proceedings.

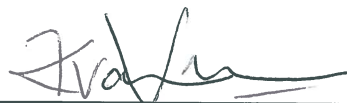
TAKE NOTICE FURTHER THAT the Court is requested to issue directions to the parties, or those that give notice to oppose, regarding:

- (i) the filing of answering and replying affidavits;
- (ii) the filing of written submissions;
- (iii) any further matters it may require to be addressed by the parties.

TAKE NOTICE FURTHER THAT the applicant has appointed the offices of its attorneys, their details having been set out below, as the address at which it will accept notice and service of all documents in these proceedings.

TAKE NOTICE FURTHER that the affidavit of **FRANCIS ANTONIE** will be used in support of this application.

DATED AT JOHANNESBURG ON THIS 20th DAY OF MAY 2020



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TO: **THE REGISTRAR OF THE ABOVE COURT**

AND TO: **THE SPEAKER OF THE NATIONAL
ASSEMBLY**

First Respondent
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AND TO: **THE PRESIDENT OF THE REPUBLIC OF
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AND TO: **CHAIRPERSON OF THE NATIONAL
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AND TO: **THE MINISTER OF COOPERATIVE
GOVERNANCE AND TRADITIONAL
AFFAIRS**
Fifth Respondent
info@cogta.gov.za;
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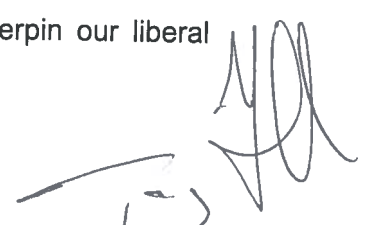
FOUNDING AFFIDAVIT

I, the undersigned,

FRANCIS ANTONIE

do hereby make oath and state that:

1. I am an adult male director of the applicant, the Helen Suzman Foundation ("HSF"), situated at 6 Sherborne Road, Parktown, Johannesburg, a non-governmental organisation whose objectives are to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights.



2. I am duly authorised to depose to this affidavit and bring this application on behalf of the HSF. The facts contained in this affidavit are to the best of my knowledge both true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge. Where I make legal submissions, I do this on the strength of the advice of my legal representatives.

INTRODUCTION

3. The Republic of South Africa is a constitutional democracy. We are one, sovereign, democratic state, founded on the supremacy of the Constitution and the rule of law.¹ The Constitution is the supreme law. Law or conduct inconsistent with it is invalid. The obligations that are imposed by it must be fulfilled.² If law or conduct is invalid, the courts must declare it so.³
4. This application is brought before this Court under:
- 4.1 section 167(4)(e) of the Constitution and Rule 11 of the Constitutional Court Rules, as a matter falling within its exclusive jurisdiction, insofar as Parliament has failed to fulfil its duties under sections 42(3), 44(1), 55(1) and 68 of the Constitution, to consider issues and initiate and prepare and pass legislation relating to the threat posed and harm caused by SARS-CoV-2 and COVID-19 (together, "**COVID-19**");
- 4.2 section 167(4)(e) of the Constitution and Rule 11 of the Constitutional Court Rules, as a matter falling within its exclusive jurisdiction, insofar as the President of the Republic, Mr Matamela Cyril Ramaphosa ("**the President**"), in his capacity as head of the National Executive, together with the Cabinet of the Republic of South Africa ("**the Cabinet**"), have failed to fulfil the duty under

¹ Section 1 of the Constitution

² Section 2 of the Constitution

³ Section 172(1)(a) of the Constitution



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section 85(2) of the Constitution to prepare and initiate legislation relating to the threat posed and harm caused by COVID-19; and

- 4.3 section 167(6)(a) of the Constitution and Rule 18 of the Constitutional Court Rules, as an application for direct access, to the extent that Parliament and Cabinet have failed to fulfil their respective constitutional duties as aforesaid, and their duties to respect, protect, promote and fulfil the rights in the Bill of Rights, per section 7(2) of the Constitution.
5. As the above suggests, this application is not about the merits or otherwise of any regulations, directions or other substantive exercise of power by the Minister of Cooperative Governance and Traditional Affairs ("**the Minister**"), the President or Cabinet, relating to COVID-19. The COVID-19 crisis has required difficult decisions and urgent responses about which reasonable people might disagree. The HSF respects the enormous burden that has fallen on the shoulders of the President and his government at this time.
6. This application is entirely and only about a narrow, but fundamental, question to do with the structure and location of power under the Constitution. The HSF approaches this Court, in other words, not because it advances a substantive view about what the state has done in response to COVID-19, but because it objects to how the state has responded—or, rather, how parts of the state have failed to respond. It is now critical that the proper location of that power be restored, not only in the present crisis (to ensure all the benefits that this Court has stressed about the importance of deliberation in the legislative process), but for the long-term importance of our constitutional project.
7. As I explain in this affidavit, Parliament and Cabinet have failed in their constitutional duties to exercise their vital and respective legislative and executive authority to deal with COVID-19.
8. Rather than passing legislation that deals with the immediate and longer term threat



posed and harm caused by COVID-19, thereby fulfilling its function under section 42(3) and (4) of the Constitution "to represent the people", "ensure government by the people under the Constitution", to provide "a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action", Parliament has abandoned the power vested in it by sections 43, 44(1), 55(1) and 68 of the Constitution to the Minister, the President and Cabinet, who now more than two months on, continue to act unilaterally under section 27 of the Disaster Management Act, 2002 ("**Disaster Act**") to legislate every material aspect of everyone's social, political and economic life in the Republic.

9. The impact has not only been on the rights of the entire populace. It has also been to the detriment of fundamental constitutional principles held to be sacrosanct by this Court, and by which our rights are ordinarily best advanced and protected. The principles are multi-party democracy,⁴ representative and participatory democracy,⁵ responsiveness, accountability,⁶ and openness.⁷
10. The Supreme Court of Appeal has held that "[o]pen and transparent government . . . concerning the affairs of the State is the lifeblood of democracy."⁸ And, in *Oriani-Ambrosini*, this Court articulated the imperative of participatory democracy under section 55 of the Constitution in these strikingly appropriate terms:

⁴ *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC) at paras 24 and 26

⁵ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at paras 110-7

⁶ *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at paras 74-6

⁷ Sections 1(d), 57(1), 57(2)(b) and 195(1) of the Constitution. See *Matatiele Municipality and Others v President of the RSA and Others* 2006 (5) SA 47 (CC) at para 110, where Sachs J held that "i]n our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness".

⁸ *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) at para 1

"[T]he Constitution ... contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. . . .

The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not towards exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, 'South Africa belongs to all who live in it . . .' (Emphases added).⁹

11. Likewise, the National Executive has failed to exercise the authority that is vested in it by section 85(1) and (2) of the Constitution, for instead of preparing and initiating legislation that deals specifically with the threat posed and harm caused by COVID-19, it has permitted a situation to endure in which the Minister, alone or together with others, continues ongoingly to exercise sweeping powers under the Disaster Act to limit and direct how persons, both natural and juristic, live or act, in almost every aspect of their daily existence.
12. These constitutional failures and the state of affairs they have brought about know no parallel in our Constitution's history.
13. The HSF's case is uncomplicated. The Disaster Act, which redirects in a wholesale way legislative and executive power to the Minister, can only operate for a very short period, namely, until Parliament and Cabinet are positioned to reclaim their primary, constitutionally-mandated legislative and executive roles. This requires both bodies actively to take steps to reach this state. What HSF fears is a misunderstanding of

⁹ *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588 (CC) at paras 45 to 47, citing *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) SA 413 (CC) at paras 42 to 43

the Disaster Act, as against the requirements of the Constitution. It is evident that Parliament and the National Executive believe that the Minister can exercise her power for as long as COVID-19 presents a threat. This could be for months or even years, meaning that the state's response to COVID-19 will remain exclusively within the subjective purview of the executive branch of government.

14. What HSF seeks, in other words, is simply the return of power to Parliament and the Executive, functioning as required by the Constitution. No attack at all, therefore, is made on the policy choices or value judgments that are embodied in the regulations made and directions issued to date.
15. Since it is the failure to exercise these legislative and executive powers, not what has been done by the Minister and others to respond to COVID-19, that informs this application, the relief the HSF seeks does not concern the validity of any positive law made or conduct taken to date. The HSF only seeks an order declaring these failures unconstitutional, along with an order requiring Parliament and the National Executive to exercise their duties to deal adequately with the threat posed and the harm caused by COVID-19, within the strictures of our carefully calibrated scheme of constitutional powers.
16. This remainder of this affidavit is structured as follows:
 - 16.1 Parties.
 - 16.2 COVID-19 and the Disaster Act.
 - 16.3 Parliament and the National Executive's failure to exercise power.
 - 16.4 COVID-19 and the duty to initiate, prepare and pass legislation.
 - 16.5 Standing, jurisdiction and urgency.
 - 16.6 Relief.

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PARTIES

17. The applicant is HSF. HSF was established in 1993, and is a non-governmental organisation that exists "*to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights*". It is primarily concerned with the fundamental principles of democracy, rule of law and separation of powers. It brings this application in its own and the public's interest.
18. The first respondent is the Speaker of the National Assembly, currently Thandi Ruth Modise, elected in terms of section 52 of the Constitution as the presiding officer of the National Assembly. Her email address is speaker@parliament.gov.za. She is cited in her official capacity, for this application concerns Parliament's powers and duties under the Constitution.
19. The second respondent is the President, currently Mr Matamela Cyril Ramaphosa, elected in terms of section 86 of the Constitution. The President's email address is presidentrsa@presidency.gov.za. He is cited in his official capacity and as head of the National Executive, as this application concerns the executive powers and duties of the President and Cabinet under the Constitution.
20. The third respondent is the Chairperson of the National Council of Provinces, now Mr Amos Nkosiyakhe Masondo, elected in terms of section 64 of the Constitution as its presiding officer. His email address is chairpersonsoffice@parliament.gov.za. He is cited in his official capacity, for this application concerns Parliament's powers and duties under the Constitution.
21. The fourth respondent is the Cabinet of the Republic of South Africa, established under section 91 of the Constitution. The Cabinet is cited because this application concerns the executive powers and duties of the Cabinet, headed by the President, under the Constitution.
22. The fifth respondent is the Minister of Cooperative Governance and Traditional Affairs. The incumbent is Dr Nkosazana Clarice Dlamini-Zuma. The Minister is cited



in her official capacity as the person responsible for implementing and exercising powers under the Disaster Act. Her email addresses are CarolineM@cogta.gov.za and info@cogta.gov.za.

23. Due to restrictions imposed as a result of COVID19, this application will be delivered electronically at the email addresses set forth above.

COVID-19 AND THE DISASTER ACT

24. The first case of COVID-19 in South Africa was reported on 5 March 2020. On 15 March 2020, reacting to the threat posed by COVID-19, the Minister exercised her power under the Disaster Act to declare a national state of disaster ("**the Declaration**").¹⁰ The Declaration was made after the classification, on 15 March 2020, of COVID-19 as a national disaster by the Head of the National Disaster Management Centre ("**the National Centre**"), a body created by the Disaster Act.¹¹ The Head's power to make the classification is created by section 23(6) of the Disaster Act, and is distinct from the Minister's power to declare a disaster.
25. Since COVID-19 was classified a national disaster, the Minister's power to declare a national state of disaster was exercised under section 27(1) of the Disaster Act. The section provides:

"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."

26. When the Minister made the Declaration, she cited "*special circumstances*", not

¹⁰ GN 313, 15 March 2020

¹¹ GN 312, 15 March 2020

inadequate legislation and contingency arrangements, as justifying her decision to declare a national state of disaster. She offered three reasons for the Declaration: (a) the World Health Organisation having declared COVID-19 a pandemic; (b) the classification of COVID-19 as a national disaster by the Head of the National Centre; and (c) the need to augment existing measures that had (by then) been taken by organs of state to deal with COVID-19.

27. Whilst this power to declare a state of disaster is subject to the Head of the National Centre's prior classification of an event as a disaster, this Head is appointed by the Minister and the security of this appointment is subject only to contractual and employment norms or laws.¹² So, the Head is not structurally independent in the exercise of this power.
28. Under section 27(2) of the Disaster Act, after a national state of disaster is declared, the Minister may, after consulting responsible Cabinet members, make regulations or issue directions or authorise the issuing of directions:

"If a national state of disaster has been declared in terms of subsection (1), the Minister may, subject to subsection (3), and after consulting the responsible Cabinet member, make regulations or issue directions or authorise the issue of directions concerning-

- (a) the release of any available resources of the national government, including stores, equipment, vehicles and facilities;*
- (b) the release of personnel of a national organ of state for the rendering of emergency services;*
- (c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;*
- (d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;*

¹² Section 10(1) of the Disaster Act

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- (e) *the regulation of traffic to, from or within the disaster-stricken or threatened area;*
- (f) *the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;*
- (g) *the control and occupancy of premises in the disaster-stricken or threatened area;*
- (h) *the provision, control or use of temporary emergency accommodation;*
- (i) *the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;*
- (j) *the maintenance or installation of temporary lines of communication to, from or within the disaster area;*
- (k) *the dissemination of information required for dealing with the disaster;*
- (l) *emergency procurement procedures;*
- (m) *the facilitation of response and post-disaster recovery and rehabilitation;*
- (n) *other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster; or*
- (o) *steps to facilitate international assistance."*

29. Apart from the wide-ranging subject matter listed in section 27(2), the catch-all clause in paragraph (n) extends regulatory authority to all "*other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster*".

30. The scope of the Minister's legislative power is further confirmed by section 59(1)(a) of the Disaster Act, which provides that the Minister has the authority to make any regulation concerning any matter that is necessary for the effective carrying out of the objects of the Act:

"The Minister may make regulations not inconsistent with this Act-

(a) concerning any matter that-




(ii) may or must be prescribed in terms of a provision of this Act; or

(ii) is necessary to prescribe for the effective carrying out of the objects of this Act."

31. For our purposes, therefore, provided the regulation or direction concerns COVID-19, the scope of what can be made or issued is effectively unlimited. Indeed, as we have seen in the months since the Declaration, the subject matter over which the Minister has power is staggering. We return to this issue later.
32. Whilst section 27(3) of the Disaster Act aims to constrain these law-making and executive powers by delimiting the purposes for which they can be exercised, the generality of the stipulated purposes means, in effect, that the constraints are extremely weak:

"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."

33. The scope and generality of these law-making and executive powers are entrenched by section 27(5), which regulates the lifespan of any declaration of an occurrence as a national state of disaster:

"A national state of disaster that has been declared in terms of subsection (1)—

(a) lapses three months after it has been declared;

(b) may be terminated by the Minister by notice in the Gazette before it lapses in terms of paragraph (a); and

(c) may be extended by the Minister by notice in the Gazette for one month at

a time before it lapses in terms of paragraph (a) or the existing extension is due to expire."

34. The effect of this subsection, in particular paragraph (c), is that for so long as the facts that justified the Declaration exist, the Minister has sole discretion to extend it. The important corollary of paragraph (c), I explain in paragraphs 60 to 71 below, is that as soon as the facts justifying the Declaration cease, the Minister must exercise her power under paragraph (b) to terminate the Declaration. Before I make the case for this purposive reading of these powers, however, it is important to identify a limit on their exercise, which limit is internal to the Disaster Act and points to the proper constitutional locus of power and control outside of the Act.
35. Section 2(1)(b) of the Disaster Act provides a very important carve out to the application of the Act:

"This Act does not apply to an occurrence falling within the definition of "disaster" in section 1—

(a) . . . ; 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."

36. In paragraphs 84 to 91 below, I shall explain that paragraph (b) above, like section 27(1) of the Disaster Act, which contemplates the existence of "*legislation and contingency arrangements*" that "*adequately provide for the national executive to deal effectively with the disaster*", is a statutory recognition of the constitutional fact that the primary, ordinary locus of power to regulate the state's response to social and natural ills is Parliament.

37. Pursuant to the Declaration, purportedly acting under the enabling provisions of the

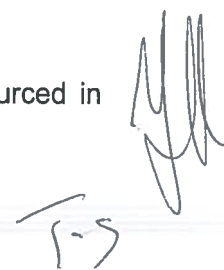
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Disaster Act, the Minister, apparently after consulting other members of Cabinet, and also these members on her authority, has issued a swathe of regulations and directions. Most significantly:

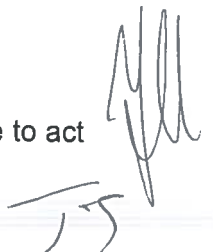
- 37.1 on 18 March 2020, the Minister issued regulations under section 27(2) of the Disaster Act (GN 318), which regulations were amended on 25 March 2020 (GN 398), 26 March 2020 (GN 419), 2 April 2020 (GN 446), 16 April 2020 (GN 465) and 20 April 2020 (GN 471) (collectively, "**the Initial Lockdown Regulations**"); and
- 37.2 on 29 April 2020, the Minister issued regulations under section 27(2) of the Disaster Act (GN 480) ("**the Risk Regulations**"), which replaced the Initial Lockdown Regulations. At the time of deposing to this affidavit, the Risk Regulations are in full force and effect.
38. Below, when I articulate the duty of Parliament and the National Executive to initiate, prepare and pass COVID-19 specific legislation, I explain that the Initial Lockdown Regulation and Risk Regulations did and do significantly limit various fundamental constitutional rights.
39. Whilst these limits are certainly important, even more important for purposes of this application is that the Minister's exercise of legislative and executive powers under the Disaster Act, in creating the Initial Lockdown and the Risk Regulations, departs substantially from basic principles, processes and structural provisions of the Constitution. As already noted, it is the departure from these principles, processes and structures—without any indication of when those principles, processes and structures will be restored—that is the focus of this application. I shall now unpack the nature of this departure.

PARLIAMENT AND CABINET: MISSING IN ACTION

40. The state's legislative and executive response to COVID-19 has been sourced in and continuously structured by the Disaster Act.

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41. The National Executive is now exercising power, through the National Coronavirus Command Council, an *ad hoc* disaster response mechanism that was established *"to coordinate all aspects of [government's] extraordinary emergency response"* to COVID-19, but it has not prepared or initiated legislation that has its purpose the regulation of this response. For this statement, see **"FA1"**.
42. Now, more than two months after the Declaration, it is reasonable to infer that the National Executive is content to respond to COVID-19 through the channels and mechanisms created by the Disaster Act.
43. This inference is strengthened when regard is had to numerous public statements by the Executive. As recently as 18 May 2020, the President said in a statement, a transcript of which is annexed hereto marked **"FA2"**, that the Disaster Act is the *"basis for all the regulations promulgated under the national state of disaster we declared to combat coronavirus"*, with the Initial Lockdown and Risk Regulations being *"our national coronavirus response"*.
44. The inference is strengthened yet further when regard is had to the fact that the Risk Regulations:
- 44.1 have no sunset clause;
- 44.2 are structured on the assumption that they will endure for an indefinite period. This is particularly clear from the definition of *"Alert level"* in regulation 1 and the perpetual movement between these alert levels, facilitated by regulation 3, according to criteria determined by the Minister of Health; and
- 44.3 rests on a policy document, a copy of which is annexed marked **"FA3"**, that ties the life and operation of the state's disaster response to the existence and transmission of COVID-19, facts that the National Executive has stated will exist for many months, if not years, to come.
45. This inference becomes ineluctable when regard is had to Parliament's failure to act



legislatively in relation to COVID-19. Extraordinarily, Parliament went into a three week recess following the Declaration, exactly at the time that when it was needed most. Despite having returned from its recess in mid-April and starting business on its legislative programme, it has done nothing specific to consider, initiate or prepare legislation that will regulate, at a general but targeted or concrete level, the state's response to COVID-19.

46. Parliament's reason for failing to act is recorded in a press release issued by it on 5 April 2020, a copy of which is annexed hereto marked "FA4":

"A National State of the Disaster is an extraordinary measure, involving matters of life and death within a country. It is the Executive's responsibility to ensure that it safeguards the rights of individuals during these difficult times and for Parliament to oversee delivery of services needed to relieve the burden of the COVID-19 pandemic on the public.

In performing its constitutional obligations during this period, Parliament must not be seen as interfering with the responsibility of the Executive to implement measures for which the National State of Disaster has been declared. It remains the responsibility of the Executive to deliver much-needed services to save the lives of individuals." (Emphases added)

47. This statement represents a total abdication of Parliament's legislative duties under the Constitution. In addition to overseeing the Executive's functions, which will sometimes require it to "interfere", Parliament's duty is to make general laws that address the threat posed and harm caused by COVID-19, to do so in a manner that vindicates this Court's description of its *Masondo* role, and which achieves the basic constitutional principles of our multi-party, representative, participatory, responsive, accountable and open democracy.
48. The legal significance of this disavowal by Parliament of its duties becomes relevant in the section on relief, but first let me articulate the content of its duty to make law, as well as the National Executive's duty to prepare and initiate it.




CONSTITUTIONAL DUTIES: PARLIAMENT AND THE NATIONAL EXECUTIVE

49. South Africa's government is a triarchy, consisting of the Executive, Parliament and the Judiciary. Each branch of this government is particular, distinct powers and duties. With this investiture and separation of power and duty, each is bound by and exists solely for the sake of performing discrete functions—but all work together, or should all work together, to achieve the Constitution's goals.
50. Sections 43 and 44 of the Constitution create and delimit the powers and duties of Parliament:

"43. In the Republic, the legislative authority-

a. of the national sphere of government is vested in Parliament, as set out in section 44;

b. of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and

c. of the local sphere of government is vested in the Municipal Councils, as set out in section 156.

44. (1) The national legislative authority as vested in Parliament—

(a) confers on the National Assembly the power—

(i) to amend the Constitution;

(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and

(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and

(b) confers on the National Council of Provinces the power—

(i) to participate in amending the Constitution in accordance with section 74;

(ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and

(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

(2) Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—

(a) to maintain national security;

(b) to maintain economic unity;

(c) to maintain essential national standards;

(d) to establish minimum standards required for the rendering of services; or

(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

(4) When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution. (Emphases added)

51. Section 85 creates and delimits the powers and duties of the Executive:

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

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

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

- b. developing and implementing national policy;*
- c. co-ordinating the functions of state departments and administrations;*
- d. preparing and initiating legislation; and*
- e. performing any other executive function provided for in the Constitution or in national legislation."* (Emphases added)

52. Therefore, whereas the National Executive can and must prepare and initiate legislation, and must implement national legislation that already exists, the ultimate authority to pass national legislation regulating state action lies exclusively and only in Parliament. It is there—and through that process—that accountability, multi-party, representative, participatory, responsive, and open democracy is achieved.

Impermissible abdication of law-making powers

53. Whilst legislative authority vests in Parliament in this way, it can be permissible for Parliament to delegate this power to others, including the Executive. The power to do this, though, is limited.¹³
54. This Court has articulated the principles according to which this law-making power may permissibly be delegated. In *Mpumalanga Petitions Bill, 2000*, this Court said the following:

*"The factors relevant to a consideration of whether the delegation of a law-making power is appropriate are many. They include the nature and ambit of the delegation, the identity of the person or institution to whom the power is delegated, and the subject matter of the delegated power."*¹⁴

55. In its application before this Court addressing the constitutionality and exercise of powers by the Minister (made public last week on 15 May 2020), the Democratic

¹³ *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC) paras 122-124

¹⁴ *Constitutionality of the Mpumalanga Petitions Bill, 2000* 2002 (1) SA 447 (CC) para 19

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Alliance rightly points to the fact that section 27 of the Disaster Act affords the Minister wide-ranging powers. She does not just fill in "*minor regulatory details*".¹⁵ She can and has in fact made laws that regulate, often rather intrusively, all aspects of social, political and economic life. For the Democratic Alliance, this constitutes an impermissible delegation of legislative power. To remedy this unconstitutionality, it proposes that Parliament be given an oversight power in relation to them. It must be empowered, they say, to approve, reject or make recommendations in relation to the Minister's exercise of power under the Act, including her power to declare a disaster and make regulations and issue directions pursuant thereto.¹⁶

56. Whilst the HSF has a great deal of sympathy with this stress on the importance of Parliamentary oversight over all exercise of public power, the solution proposed in that case is at best contingent. The role of Parliament in checking Executive power through oversight is fundamental, but this oversight function cannot replace or be at the expense of Parliament's primary constitutional function: law-making. Parliament has an original and creative function. It is that function that needs to be reinstated in full, not for form's sake, but to achieve very significant substantive and procedural advantages: including the integrity of the constitutional scheme, and to achieve the constitutional principles underlined by this Court in its multiple judgments around participatory democracy.¹⁷ The relief that is sought by the Democratic Alliance does not remedy the true constitutional defect in issue, namely, the continued improper location of legislative power and the ongoing inability to reinstate and achieve those constitutional principles.

¹⁵ *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) para 61

¹⁶ Founding Affidavit paras 65-69

¹⁷ This Court has repeatedly paid particular attention to the deliberative nature of the National Assembly and stressed the importance of deliberation in the legislative process – see *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC) at para 73; *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at paras 110 to 111; and *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) at paras 111-3.

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57. The problem in this case is less one of delegation, and rather one of abdication.
58. Indeed, even in states of emergency Parliament remains the primary law-giver. Its duty, under section 37 of the Constitution, is to declare states of emergencies and to regulate the state's response thereto. There is no constitutional basis that allows Parliament ongoingly to abdicate its legislative response to COVID-19, and its failure to do so is not properly remedied through attempts to graft safeguards from the State of Emergency Act, 1997, onto the Disaster Act. This latter Act is not meant, nor can it in a constitutionally compliant fashion be used, to regulate the state's response to COVID-19 for any sustained period of time. And, Parliament cannot constitutionally be understood to have afforded, through the Disaster Act, such a wide-ranging and ongoing delegation of law-making power to the Minister as the one that she now exercises, with no end in sight. Nor, with respect, should this Court endorse such an interpretation.
59. Accordingly, whilst the HSF supports the idea that Parliament must oversee the Minister's exercise of power under the Disaster Act, it is submitted that any relief that this Court grants must be structured around the more fundamental issue: the primary power and duty of Parliament to create law, a duty that has always inhered in it, and which must now be discharged by it. By restoring the locus of power, the integrity of Parliament's constitutional position will be achieved. It will then, after open, transparent, and robust debate, be able to consider the appropriate legislative response to COVID-19, as opposed to the default position in which South Africa now finds itself: where the Minister, under the Disaster Act, continues with near total and untrammelled powers.

A purposive reading of the Disaster Act confirms the short-term nature of the Minister's powers

60. Importantly, the HSF's focus in this case does not mean that the delegation of powers afforded to the Minister by section 27 of the Disaster Act need be judged

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impermissible. There is a way to save the Act from a finding of invalidity, through a purposive reading of its provisions, as consistent with the separation of powers, and this Court's jurisprudence on the interpretational duty—if at all possible—to read legislation consistently with the Constitution. Subject to a proper reading of the conditions or circumstances in which the Minister can lawfully exercise her powers, the delegation of these powers to her by the Act is constitutional.

61. The Disaster Act's subject matter and purpose confirm that the Minister can only declare a disaster and exercise her law-making powers under the Act when the facts justify declaration and exercise. One such fact is that there must exist a "*disaster*", as defined by section 1 of the Act:

"disaster" means 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) 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.'

62. The critical words in this definition are "*progressive or sudden*". Whereas the word progressive speaks to the lack of reasonable control over a widespread or localised, natural or human-caused, occurrence, the word sudden speaks to our being unable to predict the happening or location of the occurrence. And, by definition, a disaster is that which is unpredictable and which requires, as the Preamble to the Disaster Act explains, a "*rapid and effective response*".

63. This unpredictability or lack of reasonable control means that no general albeit problem-specific measures can be adopted prior to the occurrence to guard against or adequately respond to it. It is this practical impotence that distinguishes disasters from the manifold social and natural ills ordinarily faced by humanity, e.g. crime, erosion, homelessness or the coming of winter. With these ills, Parliament can

adopt prior concrete, context-specific measures that eliminate or reasonably mitigate their harmful effects. Not so with disastrous ones.

64. The definition of disaster limits the scope of the Minister's powers under the Disaster Act. Two requirements must be met for them to be operational. (a) the absence of existing technical measures that can implemented by organs of state that will deal adequately with the threat posed or harm caused; and (b) time-sensitive reasons that frustrate the making of new measures through regular legislative and executive processes, i.e. Parliament and the National Executive.
65. It is because a disaster by its nature constitutes a threat or causes harm for which we do not have existing adequate practical responses—either instrumental or institutional—and which, because of their magnitude and immediacy, require our efficient and urgent response, that the Disaster Act vests wide-ranging power in the Minister to make regulations and issue directions.
66. Whilst the exceptional character of disasters—occurrences that are unpredictable or beyond our reasonable control, which require immediate, urgent action—can explain the exceptional powers that the Disaster Act affords the Minister, they also point to the importance of respecting the narrow definition of disaster. The Minister's power, in other words, only lasts for so long as both requirements (a) and (b) outlined above are met.
67. For present purposes, when the measures needed to address the threat posed or harm caused by COVID-19 are already in place in primary legislation, alternatively, when Parliament and the National Executive have gathered themselves such that they can reassert their ultimate legislative and executive functions, the Minister's powers under the Disaster Act are exhausted. Thus, the extinction or termination of the Disaster Act powers would follow as a logical consequence of the passage of new, COVID-19 legislation, which would, in whatever way, govern the state's response.



68. Thus, whilst the initial appearance of COVID-19 may have been a disaster in the sense that is contemplated by section 1 of the Disaster Act, such that the Minister's exercise of her powers under the Act would have been justified, this fact does not justify the indefinite exercise of these powers by the Minister for so long as COVID-19 remains in our lives, as a substantial threat or otherwise. Once Parliament and the National Executive take back the legislative and executive reins that the Disaster Act only ever temporarily affords to the Minister, her powers under the Disaster Act are necessarily and constitutionally decommissioned.
69. If the Disaster Act is read in this way, there is no impermissible delegation of power and the legislation need not be declared unconstitutional. Rather, the issue before the Court is whether Parliament and the National Executive have properly sought to take back the legislative and executive reins.
70. Further, whilst there may still be good reasons for this Court to read into the Disaster Act a duty on Parliament to take specific oversight responsibility in relation to the Minister's implementation of the Disaster Act,¹⁸ this is not the HSF's case. Unlike the contingent oversight function suggested in the Democratic Alliance's application, which contemplates an indefinite exercise of disaster powers by the Minister, for so long as the COVID-19 threat exists and is treated as a disaster, the HSF contends that Parliament's oversight role should be limited to the very short period between the declaration of the state of disaster and Parliament's and the National Executive's reassertion of power (and the Minister's necessary, corresponding termination of the Declaration, per section 27(5)(b) of the Disaster Act).
71. An important corollary of this interpretation and argument, though, is that Parliament and the National Executive have a duty to reassert their constitutional powers as soon as this is practically possible. They cannot sit on their hands and permit the extraordinary to become ordinary—allowing the Minister to continue exercising her

¹⁸ Section 55(2) of the Constitution already creates this power and duty.

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exceptional law-making powers indefinitely. To do so, as they have done in relation to COVID-19, is to abandon their legislative and executive functions and duties, and thereby to violate their constitutional obligations, in the sense contemplated by section 167(4)(e) of the Constitution.

72. I return to section 167 of the Constitution in the section on jurisdiction below, but first I must outline and articulate the source and nature of the duty of Parliament and the National Executive to initiate, prepare or pass national legislation that deals with the threat posed and harm caused by COVID-19.

COVID-19: initiation, preparation and passage of law

73. The National Executive has a duty to prepare and initiate legislation, and Parliament has a duty to consider, initiate, prepare and then pass legislation, that regulates the state's response to COVID-19.
74. These duties are analogous to the state's duty to fight corruption, a social rather than a natural calamity. This duty was articulated by the majority of this Court in *Glenister II* as follows:

"The Constitution is the primal source for the duty of the state to fight corruption. It does not in express terms command that a corruption-fighting unit should be established. Nor does it prescribe operational and other attributes, should one be established. There is however no doubt that its scheme taken as a whole imposes a pressing duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices. As we have seen, corruption has deleterious effects on the foundations of our constitutional democracy and on the full enjoyment of fundamental rights and freedoms. It disenables the state from respecting, protecting, promoting and fulfilling them as required by section 7(2) of the Constitution."¹⁹ (Emphases added)

75. Just as there is no doubt that the state, through Parliament and the Executive, had a

¹⁹ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 175

pressing duty to set up a concrete and effective mechanism to prevent and root out corruption, arguably even more so does the state, through Parliament and the Executive, have a duty to set up concrete and effective mechanisms to respond to the deleterious and disabling effects of COVID-19.

76. The duty on the National Executive and Parliament to do this is clear from section 27(2) of the Constitution, which obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to access healthcare services.
77. Even more significant, perhaps, is that the duty to create this legislative framework can be derived independently from section 7(2) of the Constitution, which obliges the state, including Parliament and the National Executive, to respect, protect, promote and fulfil the rights in the Bill of Rights. Given COVID-19's impact on just about every imaginable right in our Bill of Rights (discussed below), the corollary duty to create, openly, accountably, and in a participatory fashion, a comprehensive legislative response is significantly accentuated.
78. This application concerns not "merely" the separation of powers, the constitutional duties of Parliament and the National Executive, the principles of transparent, accountable and participatory democracy, and the rule of law. It is presumably common cause that it also concerns the exercise of ministerial power that has impacted and will for an indefinite period continue to impact in serious and very often irremediable ways almost every right in the Constitution:
 - 78.1 the right to equality, insofar as the Initial and Risk Regulations have been accompanied by differentiation or discrimination between groups or classes of person affected by COVID-19 (section 9);
 - 78.2 the right to life and right to dignity, insofar as these regulations have been accompanied by abuses of power by the defence force and/or police services (sections 10 and 11);



- 78.3 the right to bodily and psychological integrity, insofar as regulations empower the state to compel individuals to undergo medical testing for COVID-19 (section 12(2)(b));
- 78.4 the right to privacy, insofar as state authorities are tracking the movement of persons physically or through electronic means (section 14(d));
- 78.5 the freedom of religion, insofar as persons are prohibited from gathering in religiously significant spaces (sections 15(1) and 31(1)(a));
- 78.6 the freedom of expression, insofar as the regulations criminalise certain forms of expression (section 16(1)(b) and (d));
- 78.7 the right to assemble, demonstrate and picket, insofar as public gatherings are prohibited (section 17);
- 78.8 the freedom of association, to a large extent, including insofar as people lack access to or skills needed to interact with others electronically (section 18);
- 78.9 the freedom to make political choices, insofar as regulations function to limit the capacity of persons to form a political party, participate in the activities of, or recruit members for, a political party, or to campaign for a political party; (section 19(1));
- 78.10 the freedom of movement, the right to leave the Republic and the right to enter and reside anywhere in the Republic (section 21);
- 78.11 labour rights, insofar as the regulations function to limit work and the capacity of any worker to form and join a trade union, participate in the activities and the programmes of a trade union, or strike (section 23(2));
- 78.12 the right to an environment that is not harmful to their health or wellbeing, insofar as the regulations confine persons to cramped or unhygienic spaces, with no access to natural spaces (section 24(a));



- 78.13 the rights of children to family or parental care, insofar as the regulations have functioned and still do function to prevent families from interacting in person or at all (section 28)(1)(b));
- 78.14 the right to education, to the extent that the regulations function to prevent access to forms of (quality) education that were available (section 29(1));
- 78.15 the right to participate in the cultural life of one's choosing, and the right to enjoy one's culture with the members of one's community, insofar as the regulations function to prevent this participation or enjoyment (sections 30 and 31(1)(a)); and
- 78.16 the right of access to court, insofar as the regulations prevent parties from initiating new proceedings or prosecuting ongoing proceedings, as they would otherwise do (section 34).
79. This impact of the Minister's exercise of her powers on constitutional rights makes plain the constitutional necessity for an effective and thoroughgoing legislative mechanism to respond to the threat posed and harm caused by COVID-19. For these reasons, this legislative mechanism must also be concrete and contextual, and must have its origin in the activity of the legislative not the executive branch of government.
80. Just as this Court said in *Glenister II* that the unique nature and deleterious effects of corruption, a pervasive, enduring social disease, is such that a general policing unit was not adequate to respond to the threat and harm caused by corruption, so the Disaster Act is an inadequate framework for dealing with COVID-19, in an ongoing and constitutionally permissible fashion. Its powers, like those in section 27(2) of the Act, are general and insufficiently targeted. Designed to deal with all disasters and on an emergency basis, it lacks the concrete, directed focus that is necessary to address the particular problem that is COVID-19.
81. Indeed, it seems to the HSF that recent litigation launched by members of the public



in relation to COVID-19, targeting the substance of regulations or directions, as well as other concerns about the legality of structures like the National Coronavirus Command Council, can in large part be explained by or sourced in the insufficiently focussed character of the Disaster Act and the opacity with which certain decisions have been taken thereunder.

82. To respond effectively to COVID-19, there is a need for a legislative mechanism that is sufficiently concrete, i.e. a structure that is fit for purpose. Not only is this critical to the law's legitimacy, both real and perceived, but this Court explained in *Glenister* // that state action can only ever be "effective" if the law empowering it is sufficiently concrete, that is, if the "structure [is] designed to secure" the particular good or bad that it is meant to facilitate or frustrate.²⁰ Whatever the merits of the Disaster Act for responding to unpredictable threats and harms in the short term, it is inadequate to deal with them effectively for sustained periods of time. The reason for this is that its generality renders it singularly unfit for dealing with known, enduring problems. COVID-19, as a member of a class of problems (viruses), must now, more than two months later, be understood and grappled with in the same way that we do other known problems. That is necessary to ensure that the State's response (as it must always be) is best designed to fulfil the Constitution's purpose (this purpose now, being to respect, protect, promote and fulfil all South African's rights and interests, in the face of the threat that is COVID-19).
83. In addition to the legislative mechanism having to be concrete or purpose-designed, the mechanism must have its origin in Parliament. As I explain below, this is for a number of reasons, one of which is related to the constitutional requirement that the legislative mechanism be effective.
84. Apart from the constitutional architecture, which I have outlined, that necessitates the creation of legislation that regulates the state's response to COVID-19 through

²⁰ *Glenister* loc cit para 231

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the democratic, transparent, accountable processes stipulated by the Constitution, the Disaster Act itself recognises that the primary and ordinary locus of power for regulating responses to social and natural ills is Parliament.

85. This recognition is embodied in two sections in the Disaster Act, both of which I have already quoted. First, section 2 carves out an exception to the application of the Act. In relevant part, the section provides:

"This Act does not apply to an occurrence falling within the definition of "disaster" in section 1—

- (a) . . .; 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."*

86. This section functions to exclude the Minister's power to declare occurrences states of disaster even when they may otherwise meet the definition of disaster. The reasons for this are conceptual and principled.
87. Conceptually, when legislation exists that aims at reducing the risk, and addressing the effects, of that class of occurrence, then the appearance of the occurrence is either not a disaster, as it is not sudden or progressive, in the sense contemplated by the Disaster Act; or, it does not warrant a declaration of national state of disaster, because it is just one of many social or natural ills that the state, mediated through its institutions, has a duty to tackle in the form of law and policy.
88. As a matter of constitutional principle, the primary law-making institution through which the state must tackle social and natural ills is Parliament. The power and duty to make laws vests in Parliament. This is for various reasons, many of which have been repeatedly stressed by this Court:

88.1 Unlike the unilateral process for and setting in which regulations are made, Parliament is structured and operates in a manner that by its nature promotes fundamental democratic goods: transparency, participation and accountability. In *Oriani-Ambrosini*, in the context of a challenge to the rule-making processes of Parliament, Mogoeng CJ articulated the significance of these goods:

"By its very nature, representative and participatory democracy requires that a genuine platform be created, even for members of minority parties in the Assembly, to give practical expression to the aspirations of their constituencies by playing a more meaningful role in the law-making processes. . . .

Within the context of a law-making process, transparency would be enhanced optimally by rules that generally allow for a legislative proposal to be debated properly and in a manner that is open to the public, before its fate is decided. Further, public participation, so as to cultivate an "active, informed and engaged citizenry", is also facilitated by rules that allow even minority party members, who are not ordinarily represented in Cabinet, to initiate or prepare legislation and introduce a Bill. This is because the public can only properly hold their elected representatives accountable if they are sufficiently informed of the relative merits of issues before the Assembly."²¹ (Emphases added)

88.2 The Chief Justice's emphasis on the value of allowing "*minority members . . . to initiate or prepare legislation and introduce a Bill*", and the need for debate "*before [a proposed law's] fate is decided*", speaks not only to the procedural and substantive desirability of laws being made through Parliament rather than by Ministers, it explains why it is not constitutionally acceptable for Parliament to be reduced, for a sustained period, to the role of merely approving, rejecting or recommending laws crafted by the Executive.

88.3 Locating power in Parliament also enhances the rule of law. Instead of the *ad hoc*, changing deluge of ministerial laws over the last two months, the

²¹ *Oriani-Ambrosini* loc cit paras 63 and 64

regulation of social or natural ills by national legislation through Parliament makes it more likely that the preparation for and responses to these ills will be general, public, equal, clear, stable and prospective.

- 88.4 Further, when law is made in parliamentary space rather than by ministerial regulation, the scope for genuine legal challenges to their content, and valid concerns about the legitimacy of their source, will be diminished or fall away entirely. Both points are captured well by Sachs J in two judgments written for this Court. In *Matatiele*, he said that in "*our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness*".²² And, In *Masondo*, he said:

*"The open and deliberative nature of the [Parliamentary] process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well."*²³
(Emphasis added)

- 88.5 In addition to Parliament's processes facilitating "*better outcomes*", that is, more effective laws, which are fit for purpose, its deliberative and participatory nature, affirmed by this Court in cases like *Masondo*, enhances social respect for and understanding of laws, both of which are absolutely essential in times of novel threats and enduring uncertainty.

89. Section 27(1) of the Disaster Act also embodies a recognition of the fact that the primary locus of power for regulating the state's responses to social and natural ills is and should be Parliament:

²² *Matatiele* loc cit para 110

²³ *Masondo* loc cit para 43

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"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."*

90. The powers that flow from the declaration of a disaster are not only exceptional in the constitutional sense, they must be an exception to the ordinary way of dealing with the occurrences that otherwise meet the definition of disaster.
91. Parliament, as a matter of course, has a duty to pass legislation that adequately empowers state institutions to deal effectively with social and natural ills, as and when they appear. Usually, it is only in special circumstances—when there appear true disasters, unpredictable or uncontrollable occurrences that require a collective, immediate response—that the Minister must declare a state of disaster. Only then can the Disaster Act's exceptional allocation of powers be constitutional. Beyond these circumstances, they would constitute the impermissible delegation of powers as alleged by the Democratic Alliance.
92. Despite these legislative and executive obligations, Parliament and the National Executive have taken no specific steps to initiate, prepare or pass concrete and effective national legislation that deals with the threat posed and harm caused by COVID-19. Instead, they have allowed a situation to come into being—one with no apparent end in sight—where the state's response to this social and natural problem falls ongoingly to be regulated through the Disaster Act. This continued state of affairs is simply unacceptable. Both branches of government have failed in their constitutional obligations.

STANDING, JURISDICTION AND URGENCY

93. The nature of the legal and factual issues before this Court are such that: (a) HSF




has standing under section 38 of the Constitution to bring this application; (b) this Court has exclusive jurisdiction under section 167(4)(e) of the Constitution, and, to the extent necessary, HSF should be permitted direct access this Court, per section 167(6)(a) of the Constitution; and (c) this application must be heard by this Court on an urgent basis.

HSF's standing

94. The HSF is a non-governmental organisation that exists to "*defend the values that underpin our liberal constitutional democracy and to promote respect for human rights*". It is concerned with the principles of democracy, rule of law and separation of powers. All these issues are implicated in this matter, in a way and intensity that has few, if any, parallels in our Constitution's history. As such, it is self-evident that HSF has standing to bring this application, in its own interest under section 38(a), and in the public interest under section 38(d), of the Constitution.

Exclusive jurisdiction

95. Under section 167(4)(e) of the Constitution, this Court has exclusive jurisdiction to decide certain matters:

"(4) Only the Constitutional Court may –

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation."

96. In *Economic Freedom Fighters*, this Court said the following about this section:

"Whether this Court has exclusive jurisdiction in a matter involving the President or Parliament is not a superficial function of pleadings merely alleging a failure to fulfil a constitutional obligation. The starting point is the pleadings. But much more is required. First, it must be established that a constitutional obligation that rests on the President or Parliament is the one that allegedly has not been fulfilled. Second, that obligation must be closely

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*examined to determine whether it is of the kind envisaged by section 167(4)(e)."*²⁴ (Emphases added)

97. The first stage of this test is clearly met. This application concerns Parliament's duty under section 42(3), 44(1) and 55(1) of the Constitution, and the President's duty, as the head of the National Executive, under section 85 of the Constitution, to initiate and prepare or pass legislation regulating the state's response to the threat posed and harm caused by COVID-19.
98. Regarding the second stage of the test, three factors justify the conclusion that this Court has exclusive jurisdiction:
- 98.1 First, the legislative and executive obligations of Parliament and the President are "*specifically imposed*" on them by sections 42(3) and 44(1) and section 85 of the Constitution, respectively.²⁵ These duties lie "*on these agents only, in contradistinction to constitutional duties they may bear together with other agents*".²⁶ In performing these duties, there is no fundamental collaboration. They are not dispersed among different branches of government. Legislative and executive authority are vested specifically and exclusively in Parliament and President, as head of the National Executive.
- 98.2 Second, and relatedly, this matter is essentially concerned with "*a sensitive aspect of the separation of powers*".²⁷ We are dealing here with the Minister (and, it appears, others) exercising legislative and executive functions that the Constitution specifically imposes on Parliament and the President, as the head of the National Executive.

²⁴ *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) para 16

²⁵ *Ibid* para 18

²⁶ *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) para 16

²⁷ *Economic Freedom Fighters* loc cit para 19

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98.3 Third, the decision that is reached by this Court in this application involves the "*primary obligation[s]*" of Parliament and the President,²⁸ as the head of the National Executive, not merely in some "*formal*" sense, but rather about "*what is necessary to fulfil [their] obligation*".²⁹ The resolution of this application will clearly have "*crucial and sensitive political implications*",³⁰ practical as well as institutional, both in the short term and probably for so long as our Constitution has legal existence.

99. For these reasons, it is submitted, this Court has exclusive jurisdiction to decide the issues that are the subject of this application.

Direct access and urgency

100. To the extent necessary, however, I submit that the HSF should be granted direct access to this Court. Whilst direct access is only granted in exceptional cases, this is clearly such a case.

101. This matter concerns the separation of powers, the failure of constitutional duties by two branches of our government, the principles of transparent, accountable and participatory democracy, and the rule of law. Further, the exercise of power under the Disaster Act has impacted and will for an indefinite period of time continue to impact in serious and irremediable ways on almost every right that every citizen and resident has under the Constitution. This is exactly the kind of matter for which the mechanism of direct access exists.

102. For these same reasons, the matter is self-evidently urgent.

103. Moreover, this application is concerned only with questions of constitutional principle

²⁸ *Id*

²⁹ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) paras 6 and 7

³⁰ *Economic Freedom Fighters* loc cit para 19

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and interpretation. Its resolution does not require the hearing of oral evidence, and it can be decided on the basis of common cause facts.

104. Lastly, the prospects of the HSF's success in this application are strong.

RELIEF

105. As already noted, the relief that the HSF seeks does not concern the validity of any positive law made or conduct taken to date, nor will the relief, if granted, immediately impact on the continued existence of regulations made or directions issued under the Disaster Act. In the notice of motion to which this affidavit is attached, HSF only prays for relief in the following terms:

105.1 declaring that:

105.1.1 Parliament has failed to fulfil its duty to consider, initiate and prepare and pass legislation that regulates the state's response to COVID-19;

105.1.2 the President, in his capacity as head of the National Executive, together with Cabinet, has failed to fulfil the duty to prepare and initiate legislation that regulates the state's response to COVID-19; and

105.1.3 Parliament and Cabinet have failed to fulfil their duty to respect, protect, promote and fulfil the rights in the Bill of Rights;

105.2 directing that:

105.2.1 Cabinet must, without delay, prepare and initiate national legislation that has as its purpose the regulation of the state's response to the threat posed and harm caused by COVID-19; and

105.2.2 Parliament must, without delay, pass national legislation that has as its purpose the regulation of the state's response to the threat posed and harm caused by COVID-19.

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- 105.3 declaring that the powers of the Minister under the Disaster Act, exercised pursuant to the Declaration, will terminate simultaneously with the passage of the legislation referred to in 105.2.
106. The mandamus in 105.2, it is respectfully submitted, is warranted by the exceptional circumstances of this case. Not only do the failures of Parliament and Cabinet strike at the structural heart of our constitutional order, in an area that impacts significantly and irremediably on all our basic rights, both Parliament and Cabinet appear to have consciously failed to perform their constitutional duties.
107. Cabinet has failed to exercise its power under section 85 to prepare and initiate legislation, instead contenting itself with the processes and the powers created by the Disaster Act, a structure that is inadequate, at every level, both procedural and substantive, to continue dealing with COVID-19.
108. Parliament's breach of duty is starker. As noted above, Parliament went into a three week recess following the Declaration, exactly at the time when we needed it most. Despite having returned from long recess in mid-April and starting other business, including its legislative agenda, it has done nothing specific to consider, initiate or prepare national legislation that will regulate, at a general but adequately targeted or concrete level, the state's response to COVID-19.
109. More than this, when asked to perform its oversight duties in relation to COVID-19, it replied: *"In performing its constitutional obligations during this period, Parliament must not be seen as interfering with the responsibility of the Executive to implement measures for which the National State of Disaster has been declared."* This failure of duty is pronounced.
110. Indeed, we need only look at how other, similarly-constituted Parliaments responded to the threat posed and harm caused by COVID-19, to grasp the significance of this failure. On 25 March 2020, in the space of days, the United Kingdom's House of Commons and House of Lords passed a 342 page Coronavirus Act, 2020. A week



T.S

later, on 1 April 2020, the Scottish Parliament passed an additional, supplementary Coronavirus (Scotland) Act, 2020, totalling 70 pages.

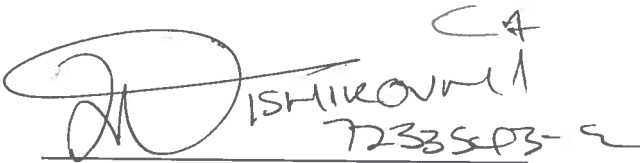
111. HSF notes the experiences and activities of other democracies not only because it lays bare the failure of Parliament to fulfil its constitutional duty to make legislation that regulates the state's response to the threat and harm caused by COVID-19, but also to pre-empt any suggestion that the exceptional circumstances created by this pandemic precludes or frustrates Parliament doing its duties. If the Parliaments of the United Kingdom and Scotland, neither of which has operated in anything like harmonious unity over the past four years, could gather themselves in just days to legislate in the face of this pandemic, there is no reason that our own Parliament cannot now (two months later) do the same.
112. The need for constitutional order and the discharge of constitutional obligations under the separation of powers is critical at all times—but it is pronounced now more than ever before in our country's democratic history. It is respectfully submitted that the exigencies of this case require this Court to order Parliament and Cabinet to perform their constitutional duties, without delay.
113. In *Economic Freedom Fighters*, Mogoeng CJ described Parliament thus:
- "[Parliament] is the embodiment of the centuries-old dreams and legitimate aspirations of all our people. It is the voice of all South Africans, especially the poor, the voiceless and the least-remembered . . . [It] is the mouthpiece, the eyes and the service-delivery-ensuring machinery of the people. No doubt, it is an irreplaceable feature of good governance in South Africa."*³¹
114. In the midst of national and global crisis, this irreplaceable voice of the people has for two months fallen silent. The time has come for it to speak again.
115. .In the circumstances, the HSF prays for the relief sought in the notice of motion.

³¹ *Economic Freedom Fighters* loc cit para 22

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FRANCIS ANTONIE

The deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn to before me at _____ on this the _____ day of _____ 2020, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.


COMMISSIONER OF OATHS

Full names: Musani, Sydney
Business address: 15 Sturdee Ave
Designation: SAPS
Capacity: Constable





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President Cyril Ramaphosa: Measures to combat Coronavirus COVID-19 epidemic

15 Mar 2020

Statement by President Cyril Ramaphosa on measures to combat COVID-19 epidemic

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 experienced 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 government 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.

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.

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.

Two 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 minimise 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.

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 that 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 suspended 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.

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;
- Cover 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 behaviour 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.

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 wellbeing 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 exacerbated 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.

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.

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.

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.

More information:

- National Institute for Communicable Diseases (NICD)
- Coronavirus COVID-19

Issued by: The Presidency

More from: The Presidency

More on: Disaster management Human and social issues



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From the desk of the President

18 May 2020

Dear Fellow South African,



We often take our healthy and robust democracy for granted. Yet it is probably our greatest asset in our momentous struggle to overcome the coronavirus pandemic.

We have among the most politically-engaged citizenry in the world. A poll in 2018 by the Pew Research Center shows South Africans are strongly inclined to take political action about issues they feel most strongly about, such as health care, education, freedom of speech and corruption.

The poll confirms much that we already know about ourselves. We enjoy nothing more than robust engagement with our government and among ourselves on the burning issues of the day. We have an active civil society ever ready to safeguard our fundamental freedoms and rights.

One of the triumphs of our democracy is that every South African believes the Constitution protects them and that the courts are a fair and impartial arbiter of their interests.

I got thinking on these matters during a recent visit to the Eastern Cape to assess the province's coronavirus state of readiness.

I was asked by a journalist whether I was concerned at the pending litigation challenging certain provisions of the Disaster Management Act. This law is the basis for all the regulations promulgated under the national state of disaster we declared to combat coronavirus.

Since the start of this crisis, a number of people have exercised their right to approach the courts. The lockdown regulations were challenged in the very first week of the lockdown by a private citizen from Mpumalanga who wanted an exemption from the travel prohibition to attend a funeral.

In the 7 weeks that have followed, there have been legal challenges from a number of individuals, religious bodies, political parties, NGOs and from business organisations against one measure or more of the lockdown provisions they were unhappy with. Some have succeeded in their legal challenges and some have not. Some had approached the courts on the basis of the urgency of their cases had their urgency arguments dismissed and others have found other avenues for the relief they sought. Others have subsequently withdrawn their applications following engagement with government.

While we would prefer to avoid the need for any legal action against government, we should accept that citizens who are unhappy with whatever action that government has decided on implementing have a right to approach our courts for any form of relief they seek. This is a normal tenet of a constitutional democracy and a perfectly acceptable practice in a country founded on the rule of law.

We have checks and balances in place to ensure that every aspect of governance is able to withstand constitutional scrutiny.

Where we are found wanting, we will be held to account by our courts and, above all, by our citizens. Besides our courts, our Chapter 9 institutions exist to advance the rights of citizens, as do the bodies tasked with oversight over the law enforcement agencies.

As I told the journalist, every South African has a right to approach the courts and even I, as President, could never stand in the way of anybody exercising that right.

There has been, and will continue to be, robust and strident critique of a number of aspects of our national response to coronavirus, from the data modelling and projections, to the economic effects of the lockdown, to the regulations. As government we have neither called for such critique to be tempered or for it to be silenced.

To the contrary, criticism, where it is constructive, helps us to adapt and to move with agility in response to changing circumstances and conditions. It enriches public debate and gives us all a broader understanding of the issues at play.

We have consistently maintained that we rely on scientific, economic and empirical data when it comes to making decisions and formulating regulations around our coronavirus response. To the greatest extent possible under these challenging circumstances, we aim for consultation and engagement. We want all South Africans to be part of this national effort. The voices of ordinary citizens must continue to be heard at a time as critical as this.

The coronavirus pandemic and the measures we have taken to combat it have taken a heavy toll on our people. It has caused huge disruption and hardship. Although we can point to the progress we have made in delaying the transmission of the virus, there is still a long way to go. The weeks and months ahead will be difficult and will demand much more from our people.

The pandemic will therefore continue to place an enormous strain on our society and our institutions. Even as we gradually open up the economy, the impact on people's material conditions will be severe. For as long as this is the case, the potential for conflict, discord and dissatisfaction will remain.

As we navigate these turbulent waters, our Constitution is our most important guide and our most valued protection. Our robust democracy provides the strength and the resilience we need to overcome this deep crisis.

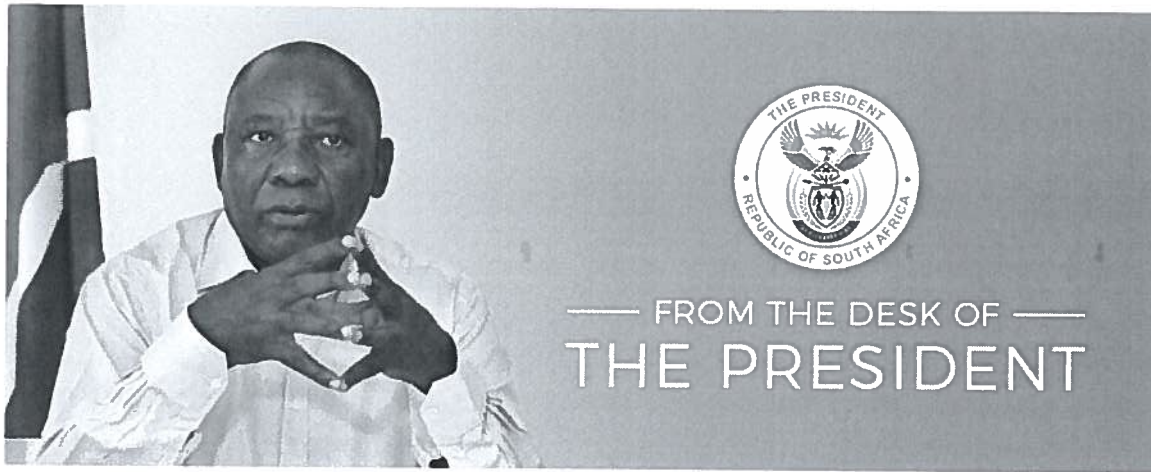
Just as government appreciates that most court applicants are motivated by the common good, so too should we recognise that the decisions taken by government are made in good faith and are meant to advance, and not to harm, the interests of South Africans.

Our foremost priority remains to save lives. Our every decision is informed by the need to advance the rights to life and dignity as set out in our Constitution.

We will continue to welcome different – even dissenting – viewpoints around our national coronavirus response. All viewpoints aid us and help us to work better and smarter.

The exercise of the fundamental freedoms of expression, association and speech is a barometer of the good health of our democracy. But much more than that, these rights are essential to the success of our national and collective struggle to overcome the coronavirus.

With best wishes,



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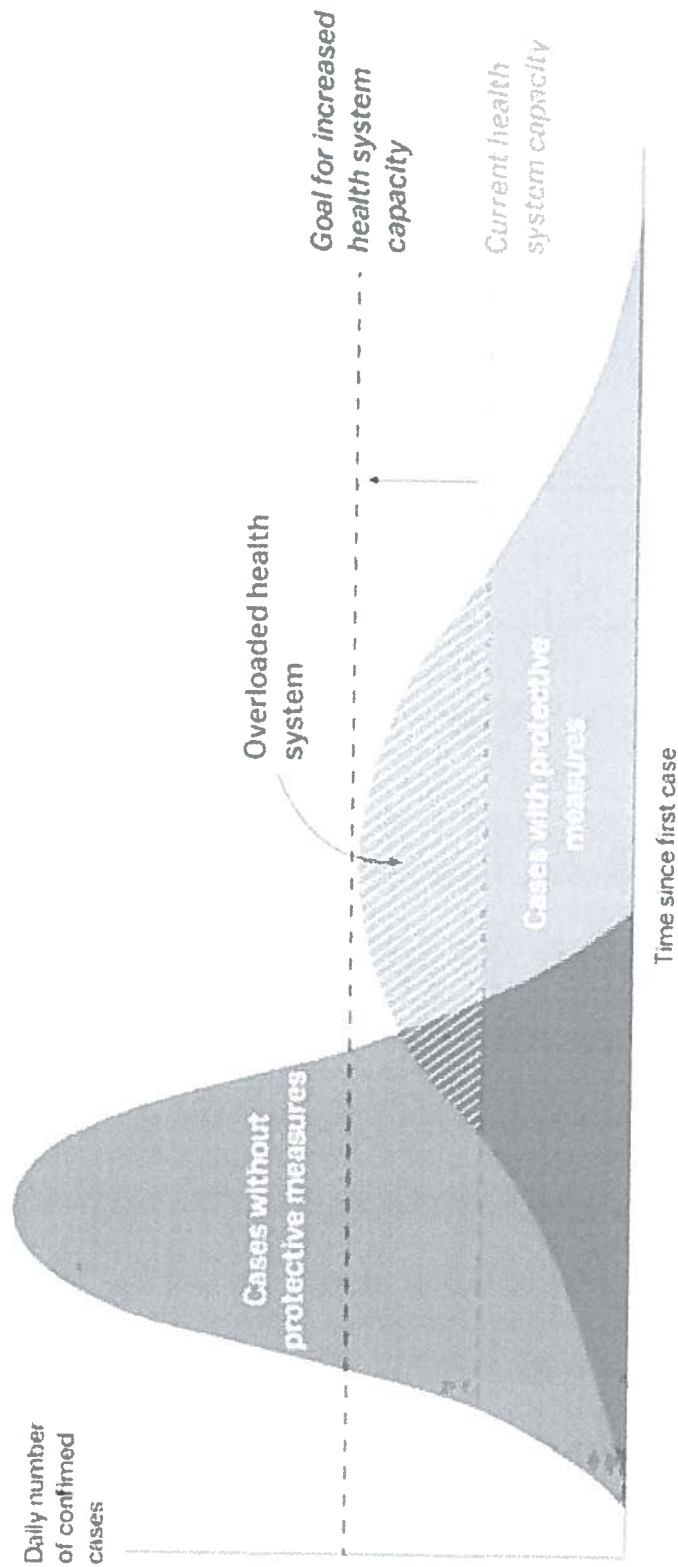
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Risk-adjusted strategy for economic activity

What we know now

There is early evidence that the full national lockdown imposed since 26 March 2020 has successfully limited the spread of the coronavirus. However, there are serious risks associated with lifting lockdown restrictions too soon, or in an unsystematic and disorderly manner.



15



Risk-adjusted strategy for economic activity

The balance between “lives” and “livelihoods”

Evidence from the Spanish Influenza pandemic of 1918 shows that the long-run economic consequences for cities experiencing a rapid infection rate and high cumulative infections were significantly worse than those for cities enduring temporary restrictions on economic activity.

"On the one hand, NPIs constrain social interactions while they are in place, and thus necessarily depress any type of economic activity that relies on such interactions. On the other hand, because the pandemic itself has severe economic consequences, by reducing the severity of the pandemic, NPIs can mitigate the most severe economic disruptions. While an interruption of economic activity may be inevitable, this interruption can be shorter-lived and less extensive with NPIs in place that solve coordination problems." (p. 17)

Pandemics Depress the Economy, Public Health
Interventions Do Not: Evidence from the 1918 Flu

Sergio Correia, Stephan Luck, and Emil Verner*



Risk-adjusted strategy for economic activity

An alert system with levels of restriction

Restrictions on economic activity need to be adapted to epidemiological trends, and may need to be relaxed and tightened in different periods. An alert system should be created with clearly defined levels of restriction that can be imposed by the National Command Council as necessary.

- If lockdown regulations are amended to allow some economic activity to resume, it is possible that the infection rate will accelerate and that the virus will resurge. In this scenario, it would be necessary to quickly revert to more stringent restrictions in order to arrest further transmission.
- An “alert system” with four to five levels would allow for flexibility and responsiveness, and would reduce the need to amend regulations in future.
- At each level restrictions would be more or less severe, and sectors and companies would know what activity is permitted depending on the level imposed at any time.
- Government would be able to switch between levels with far greater speed, and could use mass communications platforms (such as an SMS notification system) to signal this to the public.
- Different levels could be imposed in specific provinces and areas based on the risk of transmission.
- **NB: A gradual transition between alert levels can be implemented where necessary.**
- Detailed health protocols should be imposed at all levels of alert.



Risk-adjusted strategy for economic activity

An alert system with levels of restriction

Level 1	Low virus spread, high health system readiness
Level 2	Moderate virus spread, with high readiness
Level 3	Moderate virus spread, with moderate readiness
Level 4	Moderate to high virus spread, with low to moderate readiness
Level 5	High virus spread, and/or low readiness

Ongoing feedback loop informs decision to remain at a particular level, relax restrictions further, or return to a higher level of restriction.

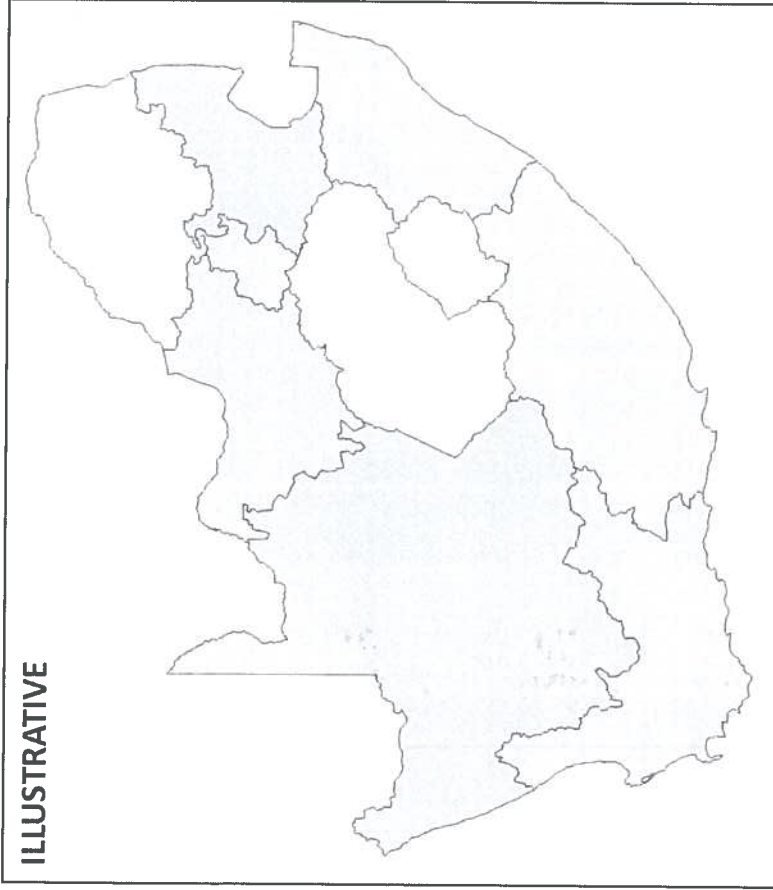
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Risk-adjusted strategy for economic activity

An alert system with levels of restriction

ILLUSTRATIVE



Different levels of alert can be declared in specific provinces and districts based on epidemiological trends and the risk of infection.

15

24



Risk-adjusted strategy for economic activity

Criteria for return to activity

To determine which sectors should be allowed gradually to resume activity, three criteria should be used:

1. *Risk of transmission (including the ease of implementing mitigation measures)*
2. *Expected impact on the sector of continued lockdown (including prior vulnerability)*
3. *Value of the sector to the economy (e.g. contribution to GDP, multiplier effects, export earnings)*

Sectors that have a low risk of transmission (or where this risk can easily be mitigated), that would suffer most acutely from a continued lockdown in terms of retrenchments, company failures, or loss of productive capacity and international market share, and that have a high value to the economy should be prioritised.

These criteria should themselves be subject to an ordinal ranking of priority. Thus, sectors with a high risk of transmission should not be allowed to resume activity until this risk is reduced, regardless of the potential impact on their sector or their value to the economy. Among those sectors with a low or manageable risk of transmission, considerations of impact and value can be used to attribute priority.

Low transmission risk AND severe impact OR high value

1.5



Risk-adjusted strategy for economic activity

Criteria for return to activity

1. Economic value at risk

- Sectoral contribution to GDP
- Employment
- Export earnings (fx)
- Prevalence of SMEs and informal sector
- Linkages to the rest of the economy
- Is it an enabling industry?

2. Transmission risks

- Nature of work
- Profile of workforce
- Geographic location of workforce
- Practical mitigation measures
- Feasibility of mitigation measures

Main considerations

3. Economic stress

- Not presently operating
- Facing imminent retrenchment
- Facing imminent firm closures
- Facing permanent and irreversible damage
- Jobs at stake

Industries that return to work first should:

1. Have acceptably *low transmission risk* (or be able to attain this through mitigation measures) *and*
2. Be of critical *value to the economy* *or*
3. Be under severe near-term *economic stress*

1-5



Risk-adjusted strategy for economic activity

Economic value of sector

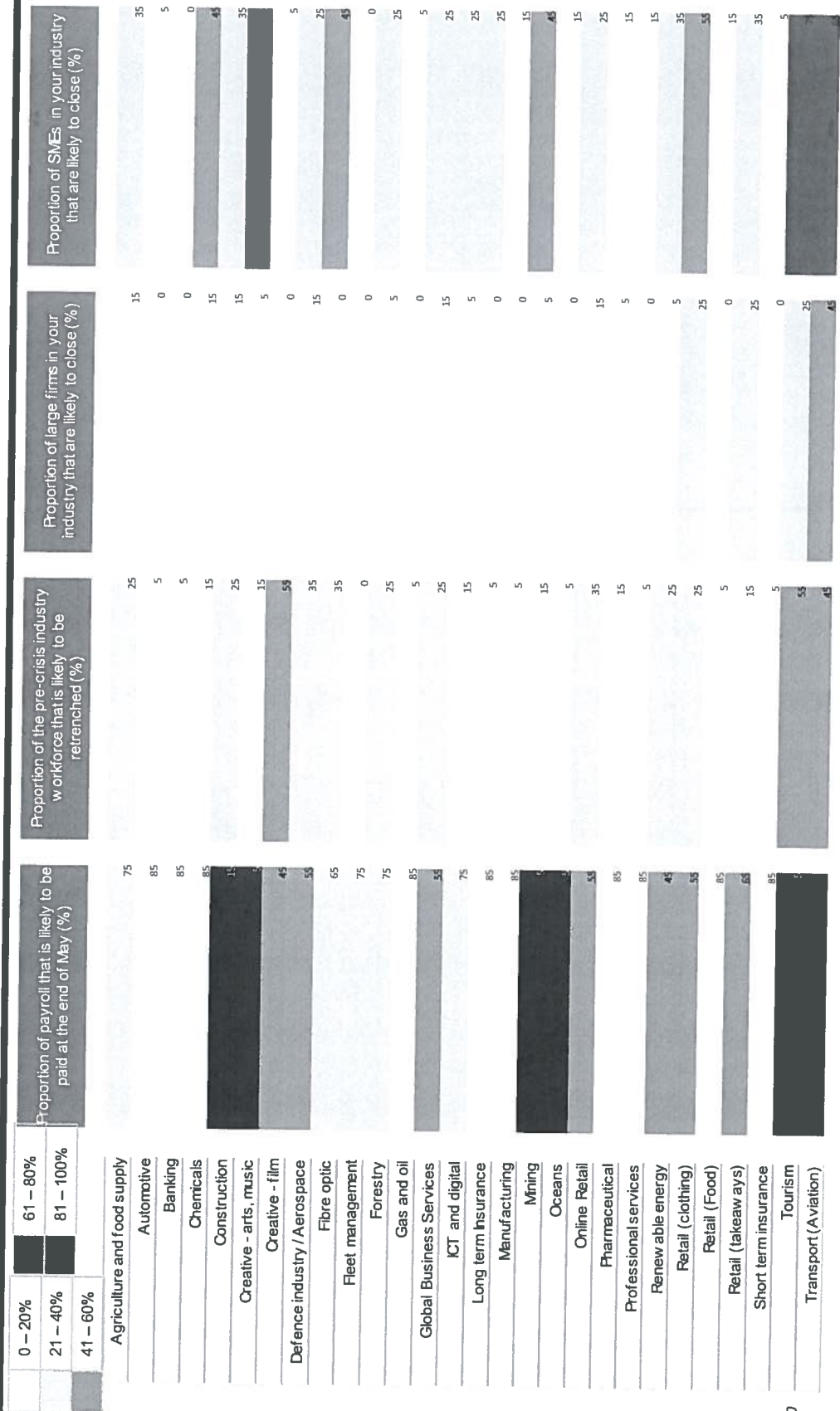
Sectors	GDP contribution (%) ¹	Employment contribution (%) ²	MSME intensity ³	Economic linkage intensity ⁴	Export exposure ⁴	% operational ⁵
Other manufacturing	11.1%	7.4%	Medium	Medium	Medium	
Wholesale & retail (includes home deliveries)	7.9%	10.8%			Low	
Agriculture & food services	7.6%	4.4%	Medium		Medium	
Mining	6.9%	7%	Low		High	
Transport	6.2%	4.6%	Medium		Medium	
Financial intermediation	5.5%	6.9%	Low	Low	Low	Unknown
Construction (includes electrical & plumbing services)	5.0%	3.1%	Medium		Low	
Professional services	4.9%	5.6%	Medium	High	Low	Unknown
Real estate	4.7%	0.8%	Medium		Low	
Automotive	4.0%	6.1%	Low	Medium	Medium	
Post & telecommunications	2.5%	1.5%	Medium	Low	Low	
Electricity	2.3%	1.6%	Low	Medium		
Health & social work	2.2%	1.9%	Medium	High	Low	Unknown
Insurance	2.1%	2.6%	Low	Low	Low	
Petroleum refineries	1.9%	1.3%	Low	Low	Medium	
Pharmaceuticals	1.6%	1.1%	Medium	Medium	Low	
Chemicals	1.3%	0.9%	Medium	Medium		
Hotels & restaurants	1.0%	0.8%	Medium	Medium	Medium	
Water	0.8%	0.4%	Low	Medium		Unknown
Recreation, cultural & sporting	0.5%	0.5%			Low	
Forestry	0.2%	0.2%	Medium	Medium	Low	
Radio, TV, communication equipment & apparatus	0.2%	0.2%	High	Medium	Medium	Unknown
Fishing	0.1%	0.1%	Low	Medium	Medium	
Sewerage & waste disposal	0.03%	0.03%	Medium	Medium		Unknown

1. GDP output at basic prices. StatsSA, Supply and Use Table, 2017. 2. StatsSA, Quarterly Labour Force Survey, 2017. 3. IFC, 2018. The Unseen Sector: A Report on the MSME Opportunity in South Africa. PPGI Industry Survey. 4. StatsSA, Supply and Use Table, 2017. 5. Self reported data from PPGI industry survey. 6. I.O. Accessed from: <https://www.bacgkocpost.com/word/1819629/africa-still-hobbled-by-abusive-legacy-of-domestic-work>



Risk-adjusted strategy for economic activity

Expected impact of continued lockdown



Source: Self-reported data from PPGI industry survey, Genesis Analytics 2020

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Risk-adjusted strategy for economic activity

Risk of transmission: matrix rationale

Risk matrix for businesses				
General Guiding Criteria	Exclusion	Medium	Low	Explanatory notes
1. Nature of business requires dense public congregation of customers				
1.1 General density of interaction (inside and outside workspace)	<2 m ² per person	2-6 m ² per person	>6 m ² per person	Certain non-essential congregation activities (mass gathering in cinemas, stadium events, large functions) per se excluded
2. Geography of workplace(s)	High risk province & urban/metro area	High risk province OR urban/metro area OR crossing borders	Low risk province & rural area & within provincial boundaries	
3. Employees can work remotely	Less than 30%	30-60%	60-100%	All workers who can continue to work remotely must do so
For % of the workforce who cannot work remotely:				
4. Travel risk of employees	60%+ use public transport OR 20%+ crossing borders	30-60% use public transport OR 10-20% crossing borders	<30% use public transport AND <10% crossing borders	
5. Ability to separate vulnerable employees / customers	Isolation for pensioners and immuno-compromised > 50 years (especially Male)	30 – 50 years	<30 years old	Most vulnerable population groups should not enter the workspace at all (both employee and customer). Instead, treated separately and/or remotely
6. Resources & capacity to implement risk mitigation measures at work	Cannot implement all mitigation measures	All those relevant, but not immediately	All those relevant, immediately	See general measures (where?)

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Risk-adjusted strategy for economic activity

Risk of transmission

	Agriculture, food, beverages & tobacco	Automotive	Chemicals	Coke oven & petroleum refineries	Construction	Electricity	Financial intermediation	Fishing	Forestry	Hotels and restaurants-tourism
% of employees can work remotely							0	1		
% of workforce that is older than 50		0			0	0	1	1		
% of workforce in geographies with high transmission (GP, KZN, WC)	0	0		1	0	0	1		0	
Ability to enforce social distancing of 2m at work	0	0		0	1	0	0	1	0	
Ability to provide masks to employees	1	0	0		1	0	0	1	0	
Ability to screen all employees		0			1	0	0	1	0	
Ability to isolate all ill employees	0	0	0		1	0	0	1	0	
% of employees who use public transport	0	1	1		1		1	2	1	
% of employees who must cross provincial border to start work	0	0	0	0			0	1	0	
SCORE	7	3			9	6	3		5	

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Risk-adjusted strategy for economic activity

Risk of transmission

	Hotels and restaurants-retail takeaways	Insurance-long-term	Insurance-short term	Mining	Other manufacturing-defence industry	Other manufacturing-manufacturing	Pharmaceuticals	Post and telecommunication-fibre optic	Post and telecommunication-ICT and Digital	Professional services
% of employees can work remotely	1	1						0	0	0
% of workforce that is older than 50				1	1		1	0	0	0
% of workforce in geographies with high transmission (GP, KZN, WC)	1	0		0		1		1	1	1
Ability to enforce social distancing of 2m at work	0	0	0	0	0		0		0	0
Ability to provide masks to employees	0	2	2	0	0		1	0	1	0
Ability to screen all employees	0	2	2	0	1			0		0
Ability to isolate all ill employees	0	0	0	0	0	0	0	0	0	0
% of employees who use public transport	0	1			0	2	1	0	0	0
% of employees who must cross provincial border to start work	0	0			0	0	1		1	1
SCORE	4	8	7	6	10	5	5	2	2	2

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Risk-adjusted strategy for economic activity

Risk of transmission

	Professional services - Global Business Services	Radio, television, communication equipment and apparatus	Real estate activities	Recreational, cultural and sporting activities	Transport - fleet management	Transport - Aviation	Wholesale & retail - Clothing	Wholesale & retail - Food	Wholesale & retail - Online Food delivery
% of employees can work remotely	1		1		1				
% of workforce that is older than 50	0	1					1	1	0
% of workforce in geographies with high transmission (GP, KZN, WC)		1	1		0		1	1	0
Ability to enforce social distancing of 2m at work	0		0				0	0	1
Ability to provide masks to employees	0	1	0		1		0	0	1
Ability to screen all employees	0	1							1
Ability to isolate all ill employees	0	1			1				1
% of employees who use public transport		1	1		1				
% of employees who must cross provincial border to start work	1	0	1		0		0	0	0
SCORE	6	10	10		10		10	10	8

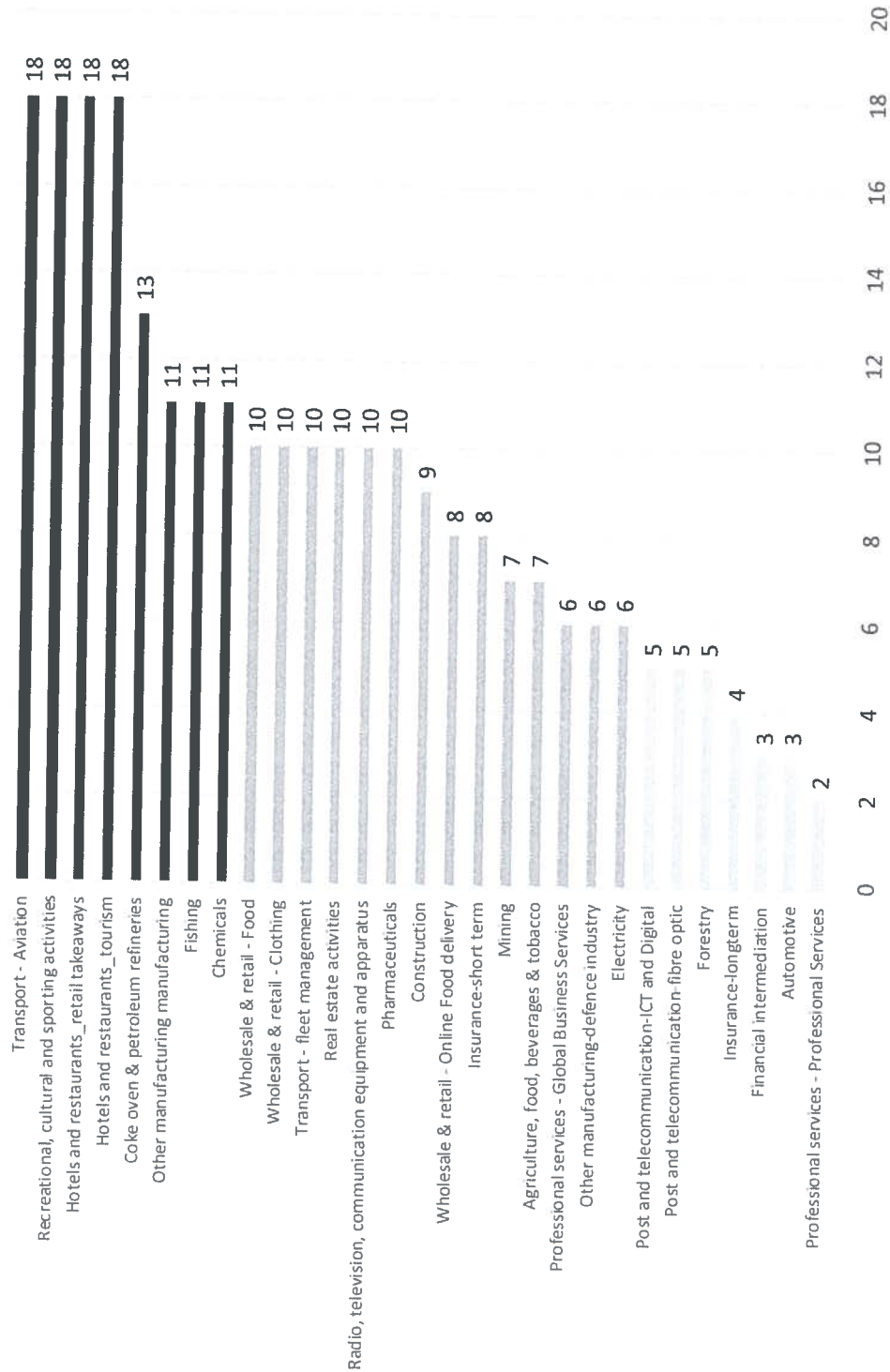
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Risk-adjusted strategy for economic activity

Risk of transmission





Risk-adjusted strategy for economic activity

Considerations for first phase of easing restrictions

Consideration	Description
Low transmission risk	Economic activity can resume with low transmission risk <i>or</i> Economic activity can resume under conditions whereby transmission risks can be effectively managed
Regulated and organised	Precedent of good compliance and enforcement of regulations in sector <i>and/or</i> Industry bodies / unions / lead firms can support coordination of sector response
Localised / low movement of people	Economic activity can resume with no/minimal movement across provincial borders and between rural and urban areas, <i>and</i> movement is limited to low risk geographies
Enabling of other sectors or essential services	Resumption of economic activity is crucial for the effective functioning of a sector that produces, distributes or sells goods / services designated as essential or other sectors prioritised for opening



Risk-adjusted strategy for economic activity

Post-lockdown: General exclusions

The following restrictions will remain in place after the national lockdown, and regardless of the level of alert at any given time:

- Sit-in restaurants and hotels
- Bars and shebeens
- Conference and convention centres
- Entertainment venues, including cinemas, theatres, and concerts
- Sporting events
- Religious, cultural and social gatherings

No gatherings of more than 10 people outside of a workplace will be permitted.

Passengers on all modes of transport must wear a cloth mask to be allowed entry into the vehicle. Hand sanitisers must be made available, and all passengers must sanitise their hands before entering. Public transport vehicles must be sanitised on a daily basis.



Risk-adjusted strategy for economic activity

Rules applicable across all levels

The following rules will be imposed across all sectors and alert levels:

- Industries are encouraged to adopt a work-from-home strategy where possible, and all staff who can work remotely must be allowed to do so.
- Workers above the age of 60, as well as workers with comorbidities identified by the Department of Health should be offered a work-from-home option or allowed to remain on leave with full pay.
- There should be workplace protocols in place that would include disease surveillance and prevention of the spread of infection.
- All employers to screen staff on a daily basis for symptoms of COVID-19, including a symptom check as well as temperature assessment.
- All employees to use a cloth mask especially where social distancing is not possible.
- Work environment to have sanitisers available or hand washing facilities with soap.
- Stringent social distancing measures should be implemented in the workplace.

The Department of Health will issue a comprehensive guidance note stipulating health and safety practices for returning to work.



Risk-adjusted strategy for economic activity

Additional rules pertaining to sectors and firms

Before any sector resumes activity, the following conditions must be in place:

- In addition to generally applicable health and safety protocols, each sector must agree upon a COVID-19 prevention and mitigation plan with the Minister of Employment and Labour, the Minister of Health and any other Minister relevant to the sector.
- Individual businesses or workplaces must have COVID-19 risk assessments and plans in place, and must conduct worker education on COVID-19 and protection measures:
 - Identification and protection of vulnerable employees
 - Safe transport of employees
 - Screening of employees on entering the workplace
 - Prevention of viral spread in the workplace:
 - Cleaning of surfaces and shared equipment
 - Good ventilation
 - Managing sick employees
- Monitoring systems must be in place to (1) ensure compliance with safety protocols and (2) identify infections among employees



Risk-adjusted strategy for economic activity

Governance framework

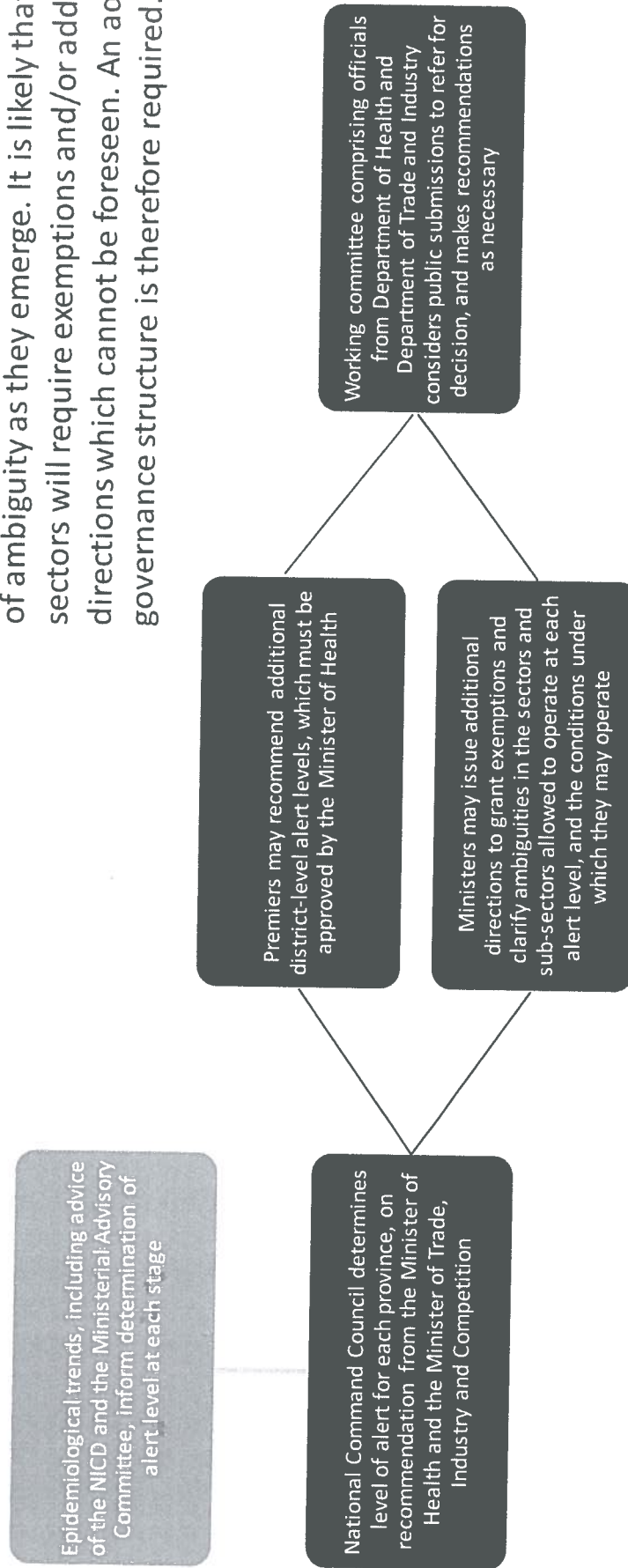
- Levels of alert (1-5) will be determined by the National Command Council at each meeting, upon a recommendation from the Minister of Health and the Minister of Trade and Industry. **A single national alert level may be determined, or an alert level may be determined for each province.**
- The highest burden of the disease is currently concentrated in Gauteng, Western Cape, KwaZulu-Natal and Eastern Cape. The remaining provinces have a limited number of cases.
- Within the provinces the infection is concentrated largely in the metro areas.
- Given the disproportionate distribution of infections there is an opportunity to have a differentiated approach to the lockdown based on the geographic distribution.
- The initial plan is to determine alert levels at a provincial level based on the number of cases in each province.
- Premiers may thereafter determine an alert level for specific districts, with the approval of the Minister of Health. Those districts with lower risk levels could in this way embark on increased levels of economic activity.
- **Individual Ministers, upon consultation with and approval from the Minister of Health, may provide for exceptions and additional directions in sectors within their domain.**
- A working committee should be established comprising officials from the Department of Health and the Department of Trade and Industry to consider changes to the sector restrictions as they are required.



Risk-adjusted strategy for economic activity

Governance framework

The framework should remain responsive to epidemiological trends as well as to problems and areas of ambiguity as they emerge. It is likely that specific sub-sectors will require exemptions and/or additional directions which cannot be foreseen. An adaptive governance structure is therefore required.



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Risk-adjusted strategy for economic activity

Alert system: Level 5

Sectors permitted	Transport restrictions	Movement restrictions
Level 5: High virus spread, and/or low health system readiness	Bus services, taxi services, e-hailing and private motor vehicles may operate at restricted times, with limitations on vehicle capacity and stringent hygiene requirements	No inter-provincial movement of people, except for transportation of goods and exceptional circumstances (e.g. funerals)

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Risk-adjusted strategy for economic activity

Alert system: Level 4

Sectors permitted	Transport restrictions	Movement restrictions
Level 4: Moderate to high virus spread, with moderate readiness <i>All essential services, plus:</i> Food retail stores already permitted to be open permitted may sell full line of products within existing stock All agriculture (horticulture, export agriculture including wool and wine, floriculture and horticulture, and related processing) Forestry, pulp and paper Mining (<i>open cast mines at 100% capacity, all other mines at 50%</i>) All financial and professional services Global business services for export markets Postal and telecommunications services Fibre optic and IT services Formal waste recycling (glass, plastic, paper and metal)	Bus services, taxi services, e-hailing and private motor vehicles may operate at all times of the day, with limitations on vehicle capacity and stringent hygiene requirements	No inter-provincial movement of people, except for transportation of goods and exceptional circumstances (e.g. funerals)

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Risk-adjusted strategy for economic activity

Alert system: Level 3

	Sectors permitted	Transport restrictions	Movement restrictions
Level 3: Moderate virus spread, with moderate readiness	Licensing and permitting services, deeds offices and other government services designated by the Minister of Public Service and Administration Take-away restaurants and online food delivery Liquor retail within restricted hours Clothing retail Hardware stores Stationery, personal electronics and office equipment production and retail Books and educational products E-commerce and delivery services Clothing and textiles manufacturing (<i>at 50% capacity</i>) Automotive manufacturing Chemicals Bottling Cement and steel Machinery and equipment Global Business Services SANRAL construction and maintenance Transnet at 100%	Bus services, taxi services, e-hailing and private motor vehicles may operate at all times of the day, with limitations on vehicle capacity and stringent hygiene requirements Limited passenger rail restored, with stringent hygiene conditions in place Limited domestic air travel, with a restriction on the number of flights per day and authorisation based on the reason for travel	No inter-provincial movement of people, except for transportation of goods and exceptional circumstances (e.g. funerals)

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Risk-adjusted strategy for economic activity

Alert system: Level 2

	Sectors permitted	Transport restrictions	Movement restrictions
Level 2: Moderate virus spread, with high readiness	Construction All other retail All other manufacturing Mining (<i>all mines at 100% capacity</i>) All government services Installation, repairs and maintenance Domestic work and cleaning services Informal waste-pickers	Domestic air travel restored Car rental services restored	Movement between provinces at Level 1 and 2 restrictions

2021-05-15



Risk-adjusted strategy for economic activity

Alert system: Level 1

Level 1: Low virus spread, high health system readiness	Sectors permitted	Transport restrictions	Movement restrictions
	All sectors	All modes of transport, with stringent hygiene conditions in place	Interprovincial movement allowed, with restrictions on international travel

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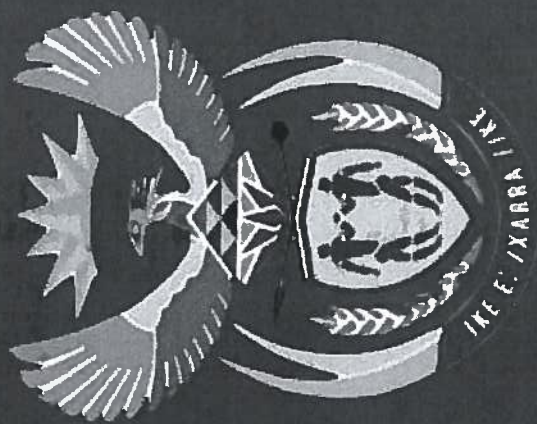


Proposal for phased economic recovery

Recommendations

- A system of “alert levels” should be adopted, and further work done to determine which sectors (and under what conditions) may operate at each level. The Department of Trade and Industry and the Department of Health should collaborate to develop this system.
- To make the determination of which sectors should be allowed to resume activity at each level of alert, three criteria should be considered:
 - Risk of transmission (including the ease of implementing mitigation measures)
 - Expected impact on the sector of continued lockdown (including prior vulnerability)
 - Value of the sector to the economy (e.g. contribution to GDP, multiplier effects, export earnings)
- A decision about whether to institute a lower alert level should be made by the National Command Council based on evidence gathered during this week about the spread of the virus.

Thank you



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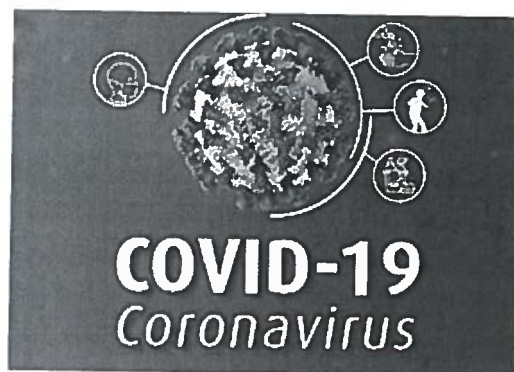
ADMINISTRATION

CONSTITUTIONAL OBLIGATIONS OF PARLIAMENT DURING COVID-19 PANDEMIC

BUSINESS OF PARLIAMENT (HTTPS://WWW.PARLIAMENT.GOV.ZA/BUSINESS-PARLIAMENT) » PRESS RELEASES

Parliament, Sunday 5 April

2020 – Parliaments all over the world are grappling with the effect of the COVID-19 pandemic on their Constitutional obligations, such as, oversight, lawmaking and public involvement.



In South Africa, the social distancing and subsequent national lockdown periods coincided with the scheduled constituency programme of Parliament, during which Members of Parliament (MPs) are required to work within their communities across the country. In terms of the national lockdown regulations, MPs fall within the category of essential services.

A National State of the Disaster is an extraordinary measure, involving matters of life and death within a country. It is the Executive's responsibility to ensure that it safeguards the rights of individuals during these difficult times and for Parliament to oversee delivery of services needed to relieve the burden of the COVID-19 pandemic on the public.

In performing its constitutional obligations during this period, Parliament must not be seen as interfering with the responsibility of the Executive to implement measures for which the National

DID YOU KNOW?

Because the members of the Joint Standing Committee on Intelligence (JSCI) deal with classified or top secret information, it is the only committee that has meetings that are usually closed to the public. The members of the JSCI have to get security clearance from the National Intelligence Agency before they can serve on that committee.

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VISIT PARLIAMENT

State of Disaster has been declared. It remains the responsibility of the Executive to deliver much-needed services to save the lives of individuals.

Parliament, whose Members are regarded as an essential service, in terms of the lockdown regulations, has the authority to execute its oversight functions during a lockdown or social distancing period.

This can be done through, for example, individual MPs carrying out constituency work in various communities and holding the Executive accountable for implementing measures designed to overcome the state of disaster. The responsibility to conduct oversight is, therefore, not limited to committee meetings.

MPs have been urged to wear protective gear to ensure protection against infection. Elderly MPs and those with underlying medical conditions have been advised not to participate in any form of physical-contact parliamentary work.

Parliament is exploring effective means for conducting virtual Parliament work, in case the need for social distancing in the country takes longer. Currently, virtual Parliamentary committee meetings are possible.

However, holding such meetings, specifically to conduct oversight over implementation of the lockdown regulations, may require the Executive to attend briefings. This could risk taking them away from their extremely critical function of managing measures to combat spread of COVID-19 and preserving life.

The State of National Disaster is a temporary measure intended to deal with a specific situation. The priority is to save lives, livelihoods and ensure effective recovery from the crisis. Committee observations, including their interventions, will be kept on record and followed up where appropriate. Parliament will still, after this period, be able to hold the Executive accountable, in the usual ways, over how it executed the State of National Disaster.

ISSUED BY THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

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