IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 32858/2020

In the matter between:

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

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SPEAKER'S HEADS OF ARGUMENT

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OVERVIEW OF THE NATURE OF THE APPLICATION

1 In relevant part, the applicant seeks the following relief against Parliament:

1.1 First, a declaration that Parliament's powers to initiate and pass legislation are mandatory – not discretionary.[1]

1.2 Second, a declaration that Parliament has failed to fulfil its mandatory constitutional obligations to initiate and pass legislation to regulate the State's response to the threat and harm caused by COVID-19;[2] and

1.3 Third, a mandamus compelling Parliament to initiate and pass legislation to regulate the State's response to the threat and harm caused by COVID-19.[3]

2 The relief sought is, respectfully, mistaken as a matter of fact and law. This is because:

2.1 Parliament's constitutional power to legislate is discretionary. The sections of the Constitution on which the applicant relies are permissive and empowering – not mandatory. In instances when Parliament is mandated to pass legislation to vindicate or protect a constitutional right, the Constitution expressly directs it to do so. The applicant has failed to identify a right that specifically mandates the COVID-19 legislation for which it asks.

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1 FA p 32, para 77 (CaseLines 006-32); Applicant's HoA paras 15.3 and 15.3.1 (CaseLines 052-8 to 9); Applicant's HoA para 94 (CaseLines 052-37 to 38).

2 NoM, prayer 2.1 p 2 (CaseLines 006-2); Applicant's HoA para 15.4.1 (CaseLines 052-9).

3 NoM, prayer 3.2 p 2 (CaseLines 006-2); Applicant's HoA para 15.4.2 (CaseLines 052-9).

2.2 In any event, Parliament exercised its powers to pass legislation that regulates the management of or response to disasters when it passed the Disaster Management Act 57 of 2002 ("**DMA**").

2.3 The DMA is an appropriate and reasonable measure through which the State has chosen to regulate its response to disasters, of which the COVID-19 global pandemic is one. Through the DMA and other related measures, the State has complied with its obligation in terms of section 7(2).

2.4 To the extent that the applicant considers the DMA to be an unreasonable or inappropriate measure for the State to comply with section 7(2), the applicant out to launch a challenge of the validity or lawfulness of the DMA.

2.5 An order directing Parliament to enact legislation in the circumstances would be ineffective. Even if this Court found that Parliament has failed to act in accordance with its constitutional obligations, the order the applicant seeks is impermissible because it is unenforceable.

2.6 Insofar as the applicant believes, rightly or wrongly, that there is a need for the special legislation it proposes, it is entitled, directly or through a political party of its choosing, to initiate a private member's Bill. The applicant has not explained why it has not pursued that option but pursued the present ill-conceived application instead.

3 This application should therefore be dismissed. The judicial intervention the applicant prays for is impermissible, unwarranted and unfounded.

4 Our submissions follow the scheme of the table of contents above.

THIS APPLICATION IS MISTAKEN

5 The crux of the applicant's case is that:

5.1 Parliament must pass the legislation as a measure to respect, protect, promote and fulfil rights in the Bill of Rights;[4]

5.2 As a result, to uphold rights, Parliament must pass legislation to govern the COVID-19 pandemic, specifically; and

5.3 Parliament has breached its constitutional obligations because it failed to pass legislation to govern the COVID-19 pandemic.

6 The applicant founds the purportedly mandatory powers for Parliament to pass the legislation in section 7(2), read with sections 42(3), 44(1), 55(1) and 68,[5] of the Constitution.[6]

7 We respectfully submit that the applicant's submissions are mistaken.

8 While it might be constitutionally permissible for Parliament to pass legislation that specifically governs COVID-19, it is not constitutionally obligatory for Parliament to do so.

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4 RA p 501, para 6.9.3 (CaseLines 012-6).

5 RA p 512, para 39.1 (CaseLines 012-17)

6 Applicant's HoA, para 101 (CaseLines 052-42)

9 Section 7(2) imposes a general duty on the State to ensure that it promotes and upholds rights in the Bill of Rights.[7] The State, when appropriate, has a positive obligation to take appropriate and reasonable measures to give effect to rights in the Bill of Rights. The measures are not however limited to legislation. The particular measure or instrument through which the State complies with its section 7(2) obligation left to its discretion – as long as the measure of its choice does not unreasonably and unjustifiably infringe any right and protects, promotes and fulfils rights.

10 However, when enacting legislation or performing its obligations,[8] Parliament must comply with its obligations as set out in section 7(2) of the Constitution.[9] Moreover, a court may be approached to determine whether the proposed legislation conforms to the Constitution.

11 Section 7(2) only specifies the nature or ambit of the duty on the State: to respect, protect, promote and fulfil rights. It does not specify the measures through which the State should fulfil this duty. As the Constitutional Court stated in *Glenister II*:

> *"[T]here are many ways in which the State can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court will not be prescriptive as to what measures the State takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt. A range of possible measures is therefore open to the State, all of which will accord with the duty the*

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7 RA p 501, para 6.9.3 (CaseLines 012-6); Applicant's HoA, para 95 (CaseLines 052-38).

8 *Glenister v President of the RSA and Others; Helen Suzman Foundation as Amicus Curiae* 2011 (7) BCLR 651 (CC) ("***Glenister II***"), para 190.

9 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC), paras 47 and 69.

> *Constitution imposes, so long as the measures taken are reasonable."*[10]

12 The obligation to proactively take legislative measures to ensure the realisation or protection of rights is found only in specific provisions of the Bill of Rights. For instance, section 9(4), section 25(5), section 26(2), section 27(2), section 32(2) and section 33(3) specifically mandate that legislation should be promulgated to give effect to the rights referred to in these sections.

13 We submit that the DMA and related regulations and policies that the State has adopted to regulate and manage COVID-19 are collectively an adequate, appropriate, reasonable and effective measure through which the State, in general, and Parliament, specifically,[11] fulfils its section 7(2) duty.

14 In what follows, we deal with the following issues:

14.1 Parliament's constitutional obligations as set out in sections 42(3), 44(1), 55(1) and 68 of the Constitution.

14.2 The nature and ambit of Parliament's constitutional obligations.

14.3 The application of section 7(2).

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[10] *Glenister II*, para 191.

[11] Section 8(1) of the Constitution.

The relevant constitutional obligations

15 In terms of section 42(1) of the Constitution, Parliament comprises of the National Assembly and the National Council of Provinces ("**NCOP**"). The National Assembly is composed and elected as prescribed in section 46.

16 Section 42(3) specifies how the National Assembly fulfils its obligations to represent the people and ensure that the government is representative of the people by, amongst other things, passing legislation and scrutinising and overseeing executive action.

17 In terms of section 44(1), the National Assembly is conferred with the power to pass legislation concerning any matter, except matters that fall within a functional area listed in Schedule 5 of the Constitution. Specifically, section 44(1) provides:

> *"(1) The national legislative authority as vested in Parliament—*
>
> *(a) confers on the National Assembly the power—*
>
> *. . .*
>
> *(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;"*

18 In terms of section 44(2), Parliament **may**, only when it is necessary, intervene to pass legislation to govern matters that fall within a functional area listed in Schedule 5 of the Constitution, including:

> *". . .*

> *(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."*

19 In *Economic Freedom Fighters v Speaker of the National Assembly*, the Constitutional Court found as follows:

> *"Both sections 42(3) and 55(2) do not define the strictures within which the National Assembly is to operate in its endeavour to fulfil its obligations. It has been given leeway to determine how best to carry out its constitutional mandate."*[12]

20 The Constitutional Court added that:

> *"The Judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government."*[13]

21 And that:

> *"It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give them, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of State in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. Furthermore, that is to determine whether what the National Assembly did does in substance and in reality amount to the fulfilment of its constitutional obligations. That is the sum-total of the constitutionally permissible judicial enquiry upon which to be embarked. Furthermore, these are some of the 'vital limits on*

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[12] *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC) ("***Nkandla***"), paras 87. See also *Mazibuko NO v Sisulu NNO* 2013 (6) SA 249 (CC), paras 91 to 95.

[13] *Nkandla*, para 92.

> *judicial authority and the Constitution's design to leave certain matters to other branches of government'. Courts should not interfere in the processes of other branches of government unless otherwise authorised by the Constitution. It is therefore not for this Court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it."*[14]

22 It would therefore be impermissible for this Court to determine the mechanism through which Parliament fulfils its obligation.

23 Section 55(1) provides that:

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

24 Significantly, the wording of these sections is couched in permissive and not mandatory terms. Interpreting these general provisions as permissive preserves Parliament's autonomy to pursue their law-making responsibilities without undue interference by courts.[15]

25 It is only in the context of interpreting section 7(2) in relation to a particular right in the Bill of Rights that Parliament's powers to enact legislation may be interpreted to mandate the passing of legislation. However, even in that instance, the duty does not emanate from the general provisions setting out Parliament's power to legislate but from the specific right that demands legislation.[16] The applicant has failed to identify or specify any right that, when

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[14] *Nkandla*, para 93.

[15] See *Glenister v President of the Republic of South Africa and Others* 2009 (2) BCLR 136 (CC), para 39.

[16] See *My Vote Counts NPC v Minister of Justice and Correctional Services* 2018 (8) BCLR 893 (CC), paras 69, 73 and 74.

considered with section 7(2), places an obligation on Parliament to enact legislation to govern the State's response to COVID-19 specifically.

The nature or ambit of Parliament's constitutional obligations

26 It is well established that when interpreting a statute, the words of the relevant section are the starting point. The words must, however, be considered in their context, the apparent purpose of the section and any relevant background material.[17] A sensible meaning should be preferred to one that leads to impractical results. Moreover, a generous and purposive interpretation that gives expression to the underlying values of the Constitution.[18]

27 In *S v Zuma*,[19] Kentridge AJ held that:

> *"We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination. If I may again quote S v Moagi (supra) at 184, I would say that a constitution*
>
> > *'embodying fundamental rights should as far as its language permits be given a broad construction.'"*[20]

28 In *Kubyana v Standard Bank of South Africa Ltd*,[21] the Constitutional Court held that:

> *"It is well established that statutes must be interpreted with due regard to their purpose and within their context. . . . Furthermore,*

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[17] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 (3) SA 242 (CC) fn 28.

[18] *Mansingh v General Council of the Bar* 2014 (2) SA 26 (CC), para 26.

[19] *S v Zuma and Others* 1995 (2) SA 642 (CC).

[20] *S v Zuma and Others*, para 17 and 18.

[21] *Kubyana v Standard Bank of South Africa Ltd* 2014 (4) BCLR 400 (CC).

> *legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However, that does not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament."*[22]

29 We submit that the use of the word "*may*" in sections 44(2), 55(1) and 68 of the Constitution only empowers Parliament to promulgate legislation, but the sections are not coupled with the duty on the Parliament to exercise the powers.

30 This was explained by the Court in *Schwartz v Schwartz* in the following terms:

> *"A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or Authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, inter alia, the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised. . . . this does not involve reading the word 'may' as meaning 'must'. As long as the English language retains its meaning 'may' can never be equivalent to 'must'. It is a question whether the grant of the permissive power also imports an obligation in certain circumstances to use the power."*[23]

31 Enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right.[24] This does not arise in this instance: sections 44(2), 55(1) and 68 do not effectuate a specific legal right.

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[22] *Kubyana v Standard Bank of South Africa Ltd*, para 18.

[23] *Schwartz v Schwartz* [1984] 4 All SA 645 (AD) at 650. See also *Van Rooyen and Others v S and Others* 2002 (8) BCLR 810 (CC).

[24] See *Noble & Barbour Appellants v South African Railways and Harbours Respondent* 1922 AD 527 at 540.

32 Accordingly, sections 44(2), 55(1) and 68 may not be interpreted to mandate Parliament to promulgate specific legislation. Parliament retains the discretion to determine the regime or procedure through which to regulate and manage COVID-19. Sections 44(2), 55(1) and 68 are only permissive or enabling in the circumstances.

33 Also relevant, for the context within which sections 44(2), 55(1) and 68 of the Constitution must be interpreted, are the sections of the Constitution that are mandatory. The sections include section 9, section 32 and section 33 of the Constitution.

33.1 Section 9 provides:

> *"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*
>
> *(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
>
> *(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth*
>
> *(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."*

33.2 Section 32 provides:

> *"(1) Everyone has the right of access to—*
>
> *(a) any information held by the State; and*
>
> *(b) any information that is held by another person and that is required for the exercise or protection of any rights.*

> *(2) National legislation **must** be enacted to give effect to this right, and **may** provide for reasonable measures to alleviate the administrative and financial burden on the State."*

33.3 Section 33 provides:

> *"(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
>
> *(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*
>
> *(3) National legislation **must** be enacted to give effect to these rights, and **must**—*
>
> *(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
>
> *(b) impose a duty on the State to give effect to the rights in subsections (1) and (2); and*
>
> *(c) promote an efficient administration."*

34 Unlike sections 44(2), 55(1) and 68, the mandatory sections (sections 9(4), 32(2) and 33(3)) expressly provide that Parliament must promulgate legislation to give effect to the rights contemplated in these sections.

35 In *Rex v Dietrich*,[25] the Court held that it is necessary to consider the context and the general provisions of the legislation in which "*may*" has been applied to determine whether the word confers a discretionary power or an obligatory duty.

36 This was reiterated in *Levy v Levy*, where the Court stated that:

> *"A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, inter alia, the language in which it is couched, the*

[25] *Rex v Dietrich* 1946 EDL 57 at 62.

> *context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised."*[26]

37 In *R v Sisilane*, the Court said:

> "*It is a general rule in the construction of statutes that a deliberate change of expression is prima facie taken to impart a change of intention. . . . That principle should operate particularly clearly where, as here, Parliament was dealing with two parts of a single provision and cannot be supposed to have lost sight of the one when dealing with the other.*"[27]

38 In the context of the Constitution, it is clear that in instances where the Constitution intended to mandate Parliament to pass legislation it did so expressly; and where the power is merely discretionary, the Constitution has made it so.

39 Sections 44(2), 55(1) and 68 do not compel Parliament to promulgate legislation as sections 9(4), 32(2) and 33(3) do, for instance, because of the deliberate change from "*must*" in the latter sections to "*may*" in sections 44(2), 55(1) and 68. The only reasonable inference is that Parliament retains the discretion to determine when it is appropriate to initiate and pass legislation.

40 We submit that it is a misconstruction of the Constitution to consider the words ("*may*" and "*must*") as interchangeable when the context of the Constitution betrays a different result. There is no artifice in use of the words in the Constitution: "*may*", whenever used, should be ascribed with the ordinary meaning of the word.

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[26] *Levy v Levy* [1991] 2 All SA 407 (A) at 417.

[27] *R v Sisilane* [1959] 2 All SA 519 (A) at 523.

Section 7(2) obligation

41 The applicant submits that Parliament's duty to pass COVID-19 legislation is analogous to the duty to fight corruption by setting up concrete and effective mechanisms.[28]

42 Particularly, the applicant submits that:

> *"Just as the state, through Parliament and the Executive, had a pressing duty to set up a concrete and effective mechanism to prevent and root out corruption, so too does the state, through Parliament and the Executive, have a duty to set up concrete and effective mechanisms to respond reasonably to the deleterious and disabling effects of COVID-19."*[29]

43 The applicant's reliance on *Glenister II* is, with respect, misplaced. In that case, the Constitutional Court had to consider the constitutional validity of two pieces of legislation (collectively "**Amendment Acts**"): the National Prosecuting Authority Amendment Act 56 of 2008 ("**NPAA Act**") and the South African Police Service Amendment Act 57 of 2008 ("**SAPSA Act**").[30]

44 The Court had to determine whether the Amendment Acts were consistent with the Bill of Rights. The rights which may be adversely implicated by the Amendment Acts were clearly identified and included the rights to equality,[31] human dignity,[32] freedom and security of the person, administrative justice and socio-economic rights.[33]

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[28] FA p 32, para 79.

[29] Applicant's heads of argument, para 99 (CaseLines 052-41) citing *Glenister II.*

[30] *Glenister II*, para 2.

[31] *Glenister II*, para 110.

[32] *Glenister II*, para 110.

[33] *Glenister II*, para 107

45 The Court held that the State was obliged to refrain from taking any measure (in that case the enactment of the Amendment Acts) that would unjustifiably infringe these rights. Moreover, there was a corollary obligation to realise or vindicate these rights. Essentially, the enactment of the Amendment Acts would result in the State unreasonably and gratuitously taking measures that had the effect of diminishing already achieved goals.

46 The issues in *Glenister II* are therefore distinguishable to this application.

46.1 Here the applicant has failed to identify rights that Parliament is violating or failing to uphold by not passing COVID-19 legislation. Instead, the applicant has specified rights that are violated by regulations promulgated in term of the DMA.[34] The appropriate relief to protect or vindicate the rights as referred to in this application would be to bring a challenge for this Court to determine whether the infringement of the rights the applicant refers to is unreasonable or unjustifiable. The applicant's grievance is the manner in which the State's exercise of its powers in terms of the DMA and the regulations has infringed constitutional rights.[35]

46.2 The applicant has also failed to prove that the measure (the DMA) that the State is using to manage COVID-19 is not (or less) effective or appropriate as a measure for promoting, protecting or fulfilling those rights.

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[34] FA pp 34 to 35, paras 82.1 to 82.16 (CaseLines 006-33 to 35).

[35] RA p 512, para 39.1 (CaseLines 012-17); Applicant's HoA para 107.1.

46.3 The applicant has failed to allege and prove that the measures taken or chosen by the State unreasonably or gratuitously diminish its capacity to fulfil, promote, protect or respect those rights.

47 *Glenister II* does not assist the applicant.

The State's choice to manage COVID-19 through the DMA is reasonable

48 The State's choice of the DMA as the legislation through which the State would fulfil its section 7(2) obligation is a rational and lawful one. The Courts have overwhelmingly found that to be so.[36]

49 The DMA is, as contemplated in the preamble:

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

50 This is repeated in the definition of what it is the DMA was passed to accomplish, "*disaster management*":

> *"a continuous and integrated multi-sectoral, multi-disciplinary process of planning and implementation of measures aimed at—*
>
> *(a) preventing or reducing the risk of disasters;*
>
> *(b) mitigating the severity or consequences of disasters;*
>
> *(c) emergency preparedness;*
>
> *(d) a rapid and effective response to disasters; and*
>
> *(e) post-disaster recovery and rehabilitation;"*

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[36] *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* [2020] ZAWCHC 56 (26 June 2020); *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* [2020] ZAGPPHC 246 (26 June 2020); *One South Africa Movement and Another v President of the Republic of South Africa and Others* ([2020] ZAGPPHC 249 (1 July 2020); *Freedom Front Plus v President of the Republic of South Africa and Others* [2020] ZAGPPHC 266 (6 July 2020).

51 We submit that these factors do not suggest that the DMA is only to be implemented short-term. The DMA contemplates that the Act may be used to deal with the severity and aftermath of a disaster.

52 The disasters that may be managed and regulated in terms of the DMA include,

> *"progressive or sudden, widespread or localised, natural or human-caused occurrence[s] which*
>
> *(a) causes or threatens to cause—*
>
> *(i) death, injury or disease;*
>
> *(ii) damage to property, infrastructure or the environment; or*
>
> *(iii) significant disruption of the life of a community; and*
>
> *(b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources;"*

53 It is common cause that COVID-19 falls within the ambit of disaster contemplated in the DMA.[37] This is because:

53.1 COVID-19 causes or threatens to cause death, injury or disease. On the version of the applicant, "*poses a direct threat, quite literally, to 'life and limb'.*"[38]

53.2 COVID-19 has caused significant disruption to life in the South African, indeed global, community.

53.3 COVID-19 is progressive and widespread.

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[37] RA p 499, para 6.4, read with paras 6.2.1 and 6.2.2, and 39.3, 39.5 (CaseLines 0012-4).

[38] Applicant's heads of argument, para 97.3.

53.4 COVID-19 has resulted in the State deploying Billions of Rands to assist in the management of the pandemic.

54 The DMA also contemplates instances when, even where an occurrence or event or disease would ordinarily fall within the ambit of the DMA, the DMA nevertheless does not apply. Section 2 states that the DMA does not apply when:

54.1 A state of emergency is declared in terms of the State of Emergency Act. This has not occurred.

54.2 The occurrence can be dealt with effectively in terms of other national legislation.

55 It is common cause that a state of emergency has not been declared in respect of COVID-19, and there is no other legislation that specifically regulates the State's response to COVID-19. The conditions for the application of the DMA are thus satisfied.[39]

56 It cannot seriously be suggested that Parliament must, upon the occurrence of a disaster and a declaration of the disaster, promulgate legislation that specifically provides for the management of the Disaster.

57 Section 2(1)(b) merely contemplates that there may be instances when a particular occurrence has been provided for in different and specific legislation,

[39] RA p 499, para 6.4, read with paras 6.2.1 and 6.2.2 (CaseLines 0012-4).

and, as a result, that there would be no need for the DMA to apply. Thus DMA there is no recognition of a need to create legislation that regulates COVID-19, contrary to what the applicant suggests.[40]

58 Section 27(1) of the DMA provides:

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

59 This provision, too, does not recognise an obligation on Parliament to pass legislation that deals with disasters. Section 27 merely anticipates that notwithstanding its own existence and that of other arrangements, the State may nevertheless find it necessary to put into place other measures to deal effectively with a particular disaster and its idiosyncrasies. Section 27 also sets out specific guidelines in terms of which the State, when it promulgates regulations to govern specific disasters, should be guided.

60 The State has created sufficiently concrete and efficiently avenues and mechanisms to govern and manage the ongoing COVID-19 pandemic.

61 If the applicant's real grievance is accurately captured in paragraph 39.1 of the replying affidavit that is that: "*i) the exercise of power under the [DMA] limits rights; and ii) the pandemic itself threatens rights.*" Moreover, "*the*

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[40] FA pp 36 to 37, paras 88 to 90 (CaseLines 006-36 to 37).

unprecedented and ongoing threat to a panoply of constitutional rights posed by . . . regulations made pursuant to the exercise of power under the Disaster Act",[41] the applicant ought to have brought a limitation challenge to prove that any limitation of rights caused by the exercise of power in terms of the DMA and the regulation is unreasonable and unjustifiable. The nature of the relief sought in this application is ill-conceived.

62 Finally, the applicant, in support of the submission, that when South Africa is faced with some social issues it makes laws, refers specifically to the Domestic Violence Act 116 of 1998, the Prevention and Combating of Corrupt Activities Act 12 of 2004 and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2004[42] (legislation that is specifically mandated by section 9(4) of the Constitution).

63 South Africa has other medical and health pandemics in response to which the State has elected to utilise mechanisms other than problem-specific legislation. These, too, are "*manifold, historically-given and new*".[43] However, South Africa does not, for instance, have Human Immunodeficiency Virus ("**HIV**") specific legislation or an Acquired Immunodeficiency Syndrome ("**AIDS**") Act; there is no Tuberculosis specific legislation nor is there a cancer Act.[44] And yet there are other mechanisms (HIV and AIDS policies and guidelines for implementation) in terms of which South Africa has concretely

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41 Applicant's HoA para 101.1 (CaseLines 052-42).

42 RA pp 509 to 510, paras 29, 33 and 36 (CaseLines 012-14 to 15).

43 RA p 510, para 30 (CaseLines 012-15).

44 These are but a few medical and health pandemics to which the State has had to respond.

and effectively managed these pandemic diseases. The impact of these diseases is being managed, and people in South Africa have been access to treatment and healthcare facilities – their constitutional rights are adequately and reasonably respected, protected, fulfilled and promoted.

64 The National Health Act 61 of 2003, in a manner similar to the DMA, provides a framework for a structured uniform system within South Africa according to the obligations imposed by the Constitution and other laws on the national, provincial and local governments with regards to health services.

65 Legislation is not the only mechanism through which the State can uphold, respect, promote and protect rights in the Bill of Rights. Unless expressly stipulated with regard to a specific right (for instance, sections 9, 32 and 33) Parliament is not obliged to pass legislation; it is empowered to do and has the discretion to adopt legislation as it deems appropriate. It is not for a court to mandate that legislation be promulgated.

The principle of subsidiarity applies

66 In the event that this Court finds that Parliament has a duty to pass COVID-19 specific legislation in terms of section 27(2) of the Constitution.[45] We submit that Parliament sought to comply with that duty in relation to medical and health disasters such as COVID-19 through the DMA. As a result, the principle

[45] FA p 33, paras 80 and 81 (CaseLines 006-33).

of subsidiarity would apply because the passing of legislation to vindicate and protect that right is contemplated in section 27(2).[46]

67 Once legislation is enacted, purportedly to fulfil an obligation to protect or vindicate a right in the Constitution that contemplates the passing of legislation, a litigant should rely on that legislation in order to give effect to the right or challenge the legislation as being inconsistent with the Constitution.

68 In *My Vote Counts*, the Constitutional Court noted that the principle of subsidiarity was "*a well-established doctrine within this court's jurisprudence*."[47]

69 The Constitutional Court has explained that the essence of this principle in the following terms—

> *"where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution."*[48]

70 If the complaint is that legislation suffers from shortcomings, the principle of subsidiarity requires a party to challenge that legislation as falling short of the constitutional standard.

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[46] See *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC), note that the Court did not consider it to decide whether subsidiary applies in relation to 27(2).

[47] *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31 (30 September 2015), para 161.

[48] *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC), para 73.

71 The Constitutional Court accordingly held that it was not open to My Vote Counts to found a cause of action directly on section 32 of the Constitution. It had to found its cause of action on the Promotion of Access to Information Act 2 of 2000 ("**PAIA**") or challenge PAIA's constitutionality.

72 In terms of the principle of subsidiarity, the applicant was required to bring their attack within the ambit of the DMA, or to challenge the DMA's constitutionality. The applicant has done neither.

THIS APPLICATION IS NOT URGENT

73 The applicant brings this application on the basis of urgency.[49] However, the applicant's conduct and the facts dispel this theory.

74 In terms of rule 6(12)(b) of the Uniform Rules of Court, an applicant is required to set out the circumstances that justify the hearing of an application on an urgent basis and the basis on which it contends that it would not obtain substantial redress at a hearing in due course.[50]

75 The applicant summarises the relief it seeks as being that the applicant "*does not want Parliament to pass legislation that deals only with COVID-19*"[51] Moreover, it is open to Parliament to regulate other matters too.[52]

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[49] NoM, prayer 1 p 1 (CaseLines 006-1).

[50] *IL&B Marcow Caterers (Pty) Ltd v Greaterman's SA Ltd & Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd & Another* 1981 (4) SA 109 (C) at 111A; [1981] 2 ALL SA 378 (C) at 379-380; *Ntozini v African National Congress* [2018] ZAGPJHC 415 (25 June 2018).

[51] RA p 517, para 40.1 (CaseLines 012-22).

[52] RA p 517, para 40.1 (CaseLines 012-22).

76 It is therefore clear that the applicant is not concerned with an obligation for Parliament to pass COVID-19 specific or exclusive legislation but a declaration that Parliament has a peremptory obligation to pass legislation generally. this means the application is about the interpretation and application of section 7(2), 42(3), 44(1), 68 and 85(2) generally. There is no reason this interpretative exercise cannot be conducted in due course within the regular times for determining motion proceedings in this Court.

77 The National Assembly therefore persists in disputing that the real issues to be determined in this application can be determined in due course. The matter is not urgent. If the matter is enrolled in the ordinary course, the applicant will still be able to prove its case, obtain redress, should there be a case for it.

78 In addition, the manner in which the applicant has conducted itself in launching this application does not support the proposition that it is urgent.

79 The procedure set out in rule 6(12) is not merely for the asking. Our law is replete with authority as to the requirements of urgency in applications.

80 When a litigant approaches a court as a matter of extreme urgency, as the applicant has done, that litigant seeks an indulgence and must provide a proper explanation that justifies a deviation from the ordinary forms and processes of this Court. The applicant has simply failed to do this.

80.1 Initially, the applicant brought an application for direct access to the Constitutional Court on 20 May 2020. That application was dismissed

by the Constitutional Court on 3 July 2020. The failed application was based on the same facts and legal contentions that are the same, or substantially the same as the present application. It does not suffice for the applicant to blithely state that it required time to consult with its legal representatives before it launched the present application. After all, the two applications are in substance the same.[53]

80.2 The applicant cannot sensibly suggest that it required a period of three weeks between the Constitutional Court dismissing the applicant's misguided application for direct access and 24 July when the applicant finally brought this application. It was always possible that the Constitutional Court could dismiss the application for direct access, in which event the applicant would have had to approach this Court without delay, after an order of the Constitutional Court, to the extent that it considered its application to be urgent. The applicant failed to do so, and has not provided a credible and acceptable explanation for the delay. The urgency is, therefore, self-created.[54]

80.3 Moreover, the applicant has failed to provide a timeline from when it consulted with the legal representatives and when its trustees approved the launching of this application. The applicant's attempt at an explanation is inadequate.[55]

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[53] Speaker's AA pp 109 to 110, para 10.1 (CaseLines 011-434).

[54] Speaker's AA p 110, para 10.2 (CaseLines 011-435).

[55] Speaker's AA p110, para 10.3 (CaseLines 011-435).

80.4 The applicant did not act "*prudently and as expeditiously as possible*": it waited for three weeks.[56]

80.5 The delay in launching this application is a result of the applicant's ill-advised decision to go forum shopping. The applicant sought to apply directly to the Constitutional Court. The applicant cannot wish-away the consequences of this decision. The applicant, on a reasonable assumption, knew from 20 May 2020 that it sought to bring an application of this nature. The applicant wasted nine weeks as a result on its ill-advised expedition to the Constitutional Court. The applicant's choice to seek to overlook this Court and approach the Constitutional Court is not a basis for this application to be considered urgently.[57]

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

80.7 The prospects of this application are far from strong. One need merely consider the relevant case law to realise that this application is stillborn. The National Assembly has complied with its constitutional obligations by passing legislation that provides for the management of disasters (the DMA) and has held the Minister and the Cabinet accountable by scrutinising and overseeing the manner in which the disaster is managed. More significantly, the Committees comprise

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[56] Speaker's AA p 110, para 10.4 (CaseLines 011-435).

[57] Speaker's AA pp 110 to 111, para 10.5 (CaseLines 011-435 to 436).

multi-party representatives of political parties that are represented in Parliament.[58]

80.8 Considering the importance of the application as professed by the applicant, the timelines are unreasonable and inappropriate. The respondents have been placed under undue pressure amid a global pandemic.[59]

80.9 Remarkably, the applicant claims that little time is required to address the issues that arise in this application. Yet, it took the applicant three weeks to file the application after its application to the Constitutional Court. One need only repeat this proposition for its absurdity to emerge.[60]

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

81 The National Assembly has had to hurriedly conduct consultations and prepare answering papers under circumstances where the outcome of this application have far-reaching consequences on how the National Assembly will conduct its business going forward. A substantive issue about whether Parliament powers to legislate are mandatory or discretionary should not be

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[58] Speaker's AA p 111, para 10.7 (CaseLines 011-435).

[59] Speaker's AA pp 111 to 112, para 10.8 (CaseLines 011-436 to 437).

[60] Speaker's AA p 112, para 10.9 (CaseLines 011-437).

determined or litigated in truncated timelines. This is not a matter for the urgent Court.

82 This application is not urgent at all; the purported urgency of this application is self-created, and there is no basis for imposing and inflicting that urgency upon the respondents. There is no reason why the application could not be determined in the ordinary course.[61]

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

THE APPLICANT'S BASIS FOR STANDING IS MISTAKEN

84 The applicant seeks to rely on section 38 of the Constitution without specifying a constitutional right that has been violated or is threatened.[62] Specifically, the applicant relies on section 38(a) and 38(d) of the Constitution.[63]

85 Section 38 states:

> *"Anyone listed in this section has the right to approach a competent court, **alleging that a right in the Bill of Rights has been infringed or threatened**, and the Court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—*
>
> *(a) anyone acting in their own interest;*
>
> *(b) anyone acting on behalf of another person who cannot act in their own name;*
>
> *(c) anyone acting as a member of, or in the interest of, a group or class of persons;*

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61 Speaker's AA p 112, para 11 (CaseLines 011-437).

62 FA p 517, paras 98 and 99 (CaseLines 006-41).

63 FA p 41, paras 98 and 99 (CaseLines 006-41).

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members."

86 The applicant alleges that Parliament has breached its obligations set out in section 7(2),[64] read with sections 42(3), 44(1), 55(1) and 68.[65] Specifically, the applicant submits that:

> *"But this application is not about the violation of particular rights flowing from the exercise of power by the Minister. It concerns the constitutional duties of Parliament and National Executive to initiate, prepare and pass legislation, which duties are rooted in and generated by powers gifted to them by sections 42(3), 44(1), 55(1) and 68 or 85(2) of the Constitution. The HSF approaches this Court on the back of their breaches of these duties. Therefore, it is not necessary for it to establish any rights-violations, . . ."*[66]

87 The sections the applicant alleges have been violated are not rights. Its reliance on section 38 of the Constitution is therefore ill-advised. Only because it has not pleaded a right that it alleged has been threatened or violated, which is necessary for a person to found standing in terms of section 38.[67]

88 We submit that it is necessary to allege or refer to a specific right as this is a necessary requirement for relying on section 38 of the Constitution.[68] The applicant has failed to do so. The applicant's standing cannot be based on section 38 to the extent that it has failed to succinctly refer to a specific right in the Bill of Rights that it alleges has been threatened or violated.[69]

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64 NoM prayer 2.2 p 2 (CaseLines 006-2);

65 NoM prayer 2.1 p 2 (CaseLines 006-2);

66 FA p 512, para 39.1 (CaseLines 012-17).

67 Speaker's AA pp 113 to 114, paras 15 and 19 (CaseLines 011-438 to 439).

68 FA p 113, para 16 (CaseLines 011-438).

69 FA p 114, para 19 (CaseLines 011-439).

89 The off-hand reference to several rights in the context of the regulations does not found standing, in terms of section 38, concerning the issues that the applicant has asked this Court to determine.[70] The applicant's reference or purported reliance on the threat to or violation of any constitutional rights relates to the function and effect of the Regulations promulgated pursuant to the DMA, and not the conduct of which the applicant complains: breach of sections 42(3), 44(1), 55(1) and 68 of the Constitution.[71]

90 The applicant has failed to provide a substantive basis for its reliance and invoking of section 38 of the Constitution. The applicant's reliance on this section is simply misplaced.

THE RELIEF IS UNENFORCEABLE

91 In prayer 3 of the notice of motion, the applicant asks that this Court to direct Parliament to pass COVID-19 specific legislation.[72]

92 To pass ordinary legislation to address a disaster (a matter that falls within schedule 4 of the Constitution) 50% plus one of the members of the National Assembly must be present to constitute a quorum. A majority of those present must vote in favour of it.

93 Section 53 of the Constitution states:

"(1) Except where the Constitution provides otherwise—

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70 FA p 114, para 18 (CaseLines 011-439).

71 FA p 114, para 18 (CaseLines 011-439).

72 NoM p 2 prayer 3.2 (CaseLines 006-2)

> *(a) a majority of the members of the National Assembly must be present before a vote may be taken on a Bill or an amendment to a Bill;*
>
> *(b) at least one-third of the members must be present before a vote may be taken on any other question before the Assembly; and*
>
> *(c) all questions before the Assembly are decided by a majority of the votes cast."*

94 Referring to section 53, in *Oriani-Ambrosini, MP v Sisulu, MP, Speaker of the National Assembly*, the Constitutional Court held that:[73]

> *"The language used in all these sections contemplates the making of a decision in relation to an unresolved question. Naturally, because members may disagree on whether laws should be passed or amended, Speakers elected or removed, rules made or resolutions adopted, there is a need for some voting mechanism to resolve these questions. This is the purpose served by section 53."*

95 In voting for or against any piece of legislation, members of Parliament represent their political party and the citizens who voted for that party.

96 However, should a mandamus be granted these members would not retain their right to disagree on whether COVID-19 legislation should be passed.

97 The national legislative process is governed by Chapter 4 of the Constitution, specifically sections 73 to 82 of the Constitution.

98 A Bill for COVID-19 would have to be passed by the National Council of Provinces ("**NCOP**"). In the NCOP five of the nine provinces must agree to the Bill. The provinces vote in line with provincial mandates. A mediation process is envisaged, where there is no agreement between the two houses

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[73] *Oriani-Ambrosini, MP v Sisulu, MP, Speaker of the National Assembly* 2013 (1) BCLR 14 (CC).

of Parliament. However, it is also conceivable that there is no agreement on a version of a Bill and the Bill lapses.

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

100 An order directing Parliament to enact legislation is ineffective: a *brutum fulmen*.[74]

101 If the order cannot be enforced, then it should not be made. As the Constitutional Court has held: "*It is a fundamental principle of our law that a court order must be effective and enforceable*".[75]

102 The corollary is that if an order "*unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter … it cannot be said that the court that granted it exercised its discretion properly.*"[76]

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

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[74] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA); 2012 (11) BCLR 1206 (SCA), para 46.

[75] *Eke v Parsons* 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC).

[76] *Eke v Parsons*, para 74.

103.1 The Speaker or against the Chairperson of the NCOP?

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

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

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

103.5 The official opposition?

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

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

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

106 On the applicant's prayers for a mandamus, we submit that contempt proceedings would be the only option. The applicant does not make any provision for alternative enforcement measures. But that would require a court to hold members of Parliament in contempt because they exercised their

democratic mandate. However, such an order trenches deep into the heartland of Parliament's exclusive domain and potentially infringes on the basic premises of representative democracy. It is difficult to contemplate a court exercising contempt powers in those situations.

107 Since a mandamus order cannot be enforced and would not be effective, it should not be made. Granting unenforceable orders risks bringing the judiciary into disrepute.

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

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

110 Had the DMA been attacked based on subsidiarity, Parliament could have been ordered to include particular provisions to cater for the relief sought. But that is an entirely different problem from trying to impose upon Parliament an obligation to pass a detailed piece of legislation.

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

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

COSTS

113 As stated above, the applicant has made it clear that it does not seek to assert constitutional rights but to determine whether the Parliament's duty to legislate is mandatory or discretionary.

114 In *Hotz*, the Constitutional Court held that:

> *"[t]he primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice. The 'nature of the issues' rather than the 'characterisation of the parties' is the starting point."*[77]

115 The rationale for the rule in *Biowatch Trust*[78] therefore does not apply. The mere labelling of litigation as "constitutional" and dragging in blithe references to the Constitution, is insufficient for the rule to apply. The issues at hand are

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[77] *Hotz and others v University of Cape Town* 2017 (7) BCLR 815 (CC), para 29.

[78] *Biowatch Trust v Registrar*, *Genetic Resources* 2009 (10) BCLR 1014 (CC), paras 58 and 59

to be genuine and substantive, and raise constitutional considerations relevant to their adjudication.

116 In *Lawyers for Human Rights*, the Constitutional Court held that:

> *"[Biowatch] does not mean risk-free constitutional litigation. The Court, in its discretion, might order costs, Biowatch said, if the constitutional grounds of attack are frivolous or vexatious, or if the litigant has acted from improper motives or there are other circumstances that make it in the interests of justice to order costs. The High Court controls its process. It does so with a measure of flexibility. So a court must consider the 'character of the litigation and [the litigant's] conduct in pursuit of it', even where the litigant seeks to assert constitutional rights."*[79]

117 A costs order would in no way hinder the advancement of constitutional justice,[80] or have a "*chilling effect*" on parties seeking to advance constitutional rights.[81]

118 In *Harrielall v University of KwaZulu-Natal*,[82] the Constitutional Court reiterated that:

> *". . . the rule is not a licence for litigants to institute frivolous or vexatious proceedings against the State. The operation of its shield is restricted to genuine constitutional matters. Even then, if a litigant is guilty of unacceptable behaviour in relation to how litigation is conducted, it may be ordered to pay costs. This means that there are exceptions to the rule which justify a departure from it. In Affordable Medicines, this Court laid down exceptions to the rule. Ngcobo J said:*
>
> > *'There may be circumstances that justify departure from this rule, such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves*

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[79] *Lawyers for Human Rights v Minister in the Presidency and Others* 2017 (4) BCLR 445 (CC), para 17; *Biowatch*, paras 20 and 23 to 24.

[80] *Hotz,* para 29.

[81] *Biowatch,* para 23.

[82] *Harrielall v University of KwaZulu-Natal* 2018 (1) BCLR 12 (CC).

> *censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs.'"*[83]

119 In *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another*,[84] this Court granted a costs order (including the costs of three counsel) against a party that had purportedly brought a matter that the applicant thought raised constitutional issues.

120 This application is nothing more than a meddlesome approach initiated by an applicant that seemingly considers itself as the conscience of the nation and as the fourth arm of the State.

121 The issues raised in this application do not justify an invasion by the judiciary – especially when there already is legislation (the DMA). The applicant has also sought an unenforceable order in as far as it has prayed for a mandamus directing Parliament to pass legislation. Ironically, while claiming to be upholding democracy and the rule of law. The application is one with no serious purpose or value.[85]

122 The general rule that costs follow the result should apply.

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[83] *Harrielall v University of KwaZulu-Natal*, para 12.

[84] *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* [2020] ZAGPPHC 246 (26 June 2020); See, also, *Fair Trade Tobacco Association v President of the Republic of South Africa and Others* [2020] ZAGPPHC 311 (24 July 2020), paras 7 to 12.

[85] *Lawyers for Human Rights v Minister in the Presidency* 2017 (4) BCLR 445 (CC), para 19.

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

CONCLUSION

124 This application is deficient.

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

126 The applicant has dismally failed to establish that Parliament's powers to pass legislation are mandatory and that Parliament is obligated to pass COVID-19 specific legislation.

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

128 This application is entirely without merit. The Court should, accordingly, dismiss the application with costs, including the costs of two counsel.

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28 August 2020