IN THE SUPREME COURT OF APPEAL

BLOEMFONTEIN

Case no. 001/21

In the matter between

HELEN SUZMAN FOUNDATION	Applicant

and

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

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FILING SHEET

Documents filed:

1. First Respondent's Answering Affidavit
2. Confirmatory Affidavit of Fourth Respondent: Nkosiyakhe Amos Masondo

DATED AT CAPE TOWN THIS 28th DAY OF JANUARY 2021

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Per: 

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SPEAKER'S ANSWERING AFFIDAVIT

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I, the undersigned,

THANDI RUTH MODISE,

state under oath that:

INTRODUCTION

1 I am the Speaker of the National Assembly and have been cited as the first respondent in this application, as was the case in the Court below. The National Assembly is one of the houses of the Parliament of the Republic of South Africa as envisaged in section 42(1)(a) of the Constitution of the Republic of South Africa, 1996 (**Constitution**).

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

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

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

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

THE OVERVIEW OF THE SPEAKER'S OPPOSITION

6 The Full Court dismissed the applicant's (**HSF**) application for a declaratory order that the first to third respondents have failed to fulfil their constitutional obligations to initiate, consider and pass a COVID-specific legislation to deal with the state of national disaster brought about by the pandemic caused by the coronavirus.

7 The HSF unsuccessfully applied to the Full Court for leave to appeal against the Full Court's judgment.

8 The essential contention upon which leave to appeal was sought before the Full Court, and now repeated in this application, is that the Full Court erred when it rejected the HSF's contention that section 7(2) of the Constitution, correctly interpreted, imposed an obligation on Cabinet to initiate a COVID-specific legislation, and also upon Parliament to consider and pass such legislation, even though Parliament had already passed the Disaster Management Act 53 of 2005 (**DMA**), and the National Executive invoked its provisions to deal with and regulate the ill-effects of the pandemic brought about by the coronavirus.

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9 In sum, the Full Court held that:

9.1 In instances where it is alleged and proved that there is a violation of rights in the Bill of Rights, section 7(2) of the Constitution may trigger a positive obligation on the State to take measures that are required to protect, promote, respect and fulfil the rights which are being violated, including initiating and passing legislation to give effect to such rights.

9.2 Section 7(2) does not define or limit the measures that the State may take to fulfil its obligations set out in section 7(2). The Full Court specifically held that "*[t]he argument that Section 7(2) creates an additional duty . . . for the State to legislate in response to the limitations on rights created as a result of the response to COVID-19 is not sustainable.*"

9.3 Parliament's obligation to ensure a participatory process or public consultation (which promotes the values of transparency, accountability and openness) "*is only activated when there is a need for measures or legislation – if no need for measures or legislation exists, those values cannot have the effect of compelling Parliament to embark on a law-making process simply to advance those values.*"

9.4 The DMA is intended to provide for disasters without limitation or restriction of the duration of the disaster. The DMA was not designed as a short-term measure, and has all the relevant features which cover the whole field of managing the disaster brought about by the coronavirus pandemic.

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9.5 The DMA does not define a disaster as an occurrence of exclusively limited duration.

9.6 The interpretation of the Disaster Management Act for which the HSF contends is constrained and militates against the ordinary language used in the Disaster Management Act.

10 The above findings of the Full Court were made having regard to the HSF's concession that it did not seek to challenge any specific provision of the DMA as being unconstitutional or in violation of a constitutional right(s) asserted by it. All the HSF contended for was that the provisions of the DMA provided for a temporary intervention to redress the ill-effects of the coronavirus pandemic, and that more was required by way of a COVID-specific legislation to address the long-lasting effects of the pandemic.

11 The Full Court also concluded that nothing in the provisions of the DMA, properly interpreted, suggests that the DMA was designed to apply only in respect of disasters which were of a temporary nature.

12 The Full Court concluded that the definition of "*disaster*" in section 1 of the DMA, and the scoping provisions of the field of its application in section 2, militated against the notion that its terms were of a temporary application, pending a promulgation of disaster-specific legislation to deal with a disaster that has long-lasting effects.

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13 I have been advised, and respectfully submit, that the constitutional obligation for which the HSF contends, based only upon the provisions of section 7(2) of the Constitution, has recently been repudiated, and roundly rejected by this Court in *President of the RSA and Another v Women's Legal Centre Trust and Others*; *Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others* (Case no 612/19) [2020] ZASCA 177 (18 December 2020) (***WLC judgment***).

14 Although I do not attach a copy of the *WLC judgment* to this affidavit, I direct attention to the *dicta* in paragraphs 43 and 46 of that judgment in which this Court held that Parliament does not have the type of obligation contended by the HSF, based on section 7(2) of the Constitution.

15 Moreover, in the *WLC judgment*, this Court set aside an order made by the Court below in that case which imposed such an obligation in terms of section 7(2) of the Constitution. That is clear from a fair consideration of paragraph 44 of the *WLC judgment*.

16 Therefore, I submit that the very issue sought to be raised by the HSF in this application has been argued and decisively disposed of by this Court in the *WLC judgment*. There are no reasonable prospects of success, or other compelling considerations, which warrant the grant of leave to appeal against the Full Court's judgment.

17 In addition, the HSF lists the following grounds of appeal.

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17.1 The Full Court's interpretation of the DMA fails to give effect to rights in the Bill of Rights, and renders the DMA constitutionally invalid.

17.1.1 The DMA does not and cannot cover the State's ongoing response to COVID;

17.1.2 The Executive and Parliament cannot use the DMA as a basis to avoid Parliament's legislative role by refusing to initiate and pass COVID-specific legislation (which legislative process would ensure accountability, public participation, transparency, and better outcomes).

17.2 Therefore, the HSF contends, that there are reasonable prospects that this Court would approach the interpretation process differently.

18 As I elaborate below, each of the HSF's additional grounds of appeal bear no reasonable prospects of success. This Court should refuse leave to appeal because:

18.1 The State has taken a measure to ensure that rights in the Bill of Rights are protected during national disasters: Parliament passed the DMA. This measure is reasonable, effective and efficient. In any event, the HSF has not challenged the constitutional validity of the DMA.

18.2 The COVID-19 pandemic is a disaster as defined in the DMA. The DMA is the appropriate legislation through which the State may regulate and manage the COVID-19 pandemic. There is no duty on

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Parliament to pass COVID-specific legislation. The DMA is adequate, reasonable and appropriate.

18.3 When the DMA was passed, the State complied with its constitutional obligations, including the obligation to ensure public consultation. The issues of transparency and public participation do not arise in determining whether the State has complied with section 7(2) of the Constitution.

18.4 The Full Court did not contradict previous judgments about the ambit and scope of section 7(2). Section 7(2) does not specify the measure to be undertaken. The HSF is mistaken to insist on a specific measure to fulfil the section 7(2) obligation. The State (through the Executive and Parliament) made an election to pass legislation (the DMA) that is sufficiently broad to enable the state to regulate any disaster including the COVID-19 pandemic and for the duration of the disaster. The DMA does not have a specified or limited time of application.

19 I submit that there also can be no other compelling reason for this Court to hear the appeal.

20 The HSF's application for leave to appeal is primarily focused on what the HSF contends are errors of reasoning on various aspects of the judgment. This is mistaken: it is well-established that an appeal lies against a lower court's order, rather than its reasons.

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21 Against this backdrop, I now turn to deal with the grounds on which leave to appeal is sought. I do so without specifically responding to each paragraph in the founding affidavit because the essence of the present application is based on legal argument.

THE GROUNDS FOR LEAVE

The nature and Parliament's constitutional power

22 The HSF submits that what Parliament has done (or not done on the HSF's version) was inadequate or ineffective and not concrete enough measure for the management of COVID-19.

23 According to the HSF, Parliament (and the other respondents) have failed to fulfil their constitutional obligations.

24 I disagree that Parliament has not fulfilled its constitutional obligations. In my answering affidavits before the Full Court I explained at length steps taken by Parliament, through the relevant Committees, to hold the National Executive accountable on how it was managing and regulating the state of national disaster in response to the COVID-19 pandemic. I also attached transcript of those Committees marked "**NA1**". None of what is said therein was disputed by the HSF.

25 Parliament's powers and obligations in relation to the enactment of legislation are specified in the Constitution.

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

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

25.3 Section 55(1) provides:

> *"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."*

26 Significantly, the wording of these sections of the Constitution is permissive and not mandatory.

27 The sections merely vest the National Assembly with plenary authority to initiate and pass legislation. Where the Constitution required and in fact imposed the obligation on Parliament to enact legislation to give effect to constitutional rights and privileges it expressly made provision to that effect. The obvious examples appear in sections 32 and 33 of the Constitution, which provide that "*national legislation must be enacted to give effect to this right . . .*". Therefore, the only reasonable inference is that, in terms of sections 42, 44

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and 55, Parliament retains the discretion to determine when it is appropriate to initiate and pass legislation.

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

29 The HSF does not seem to consider whether Parliament has sought to oversee and scrutinise the Minister's actions taken in terms of the DMA; and whether what Parliament did in substance and reality amount to the fulfilment of its constitutional obligations.

30 Throughout the litigation, the HSF acknowledged that some of the measures Parliament has implemented to ensure that it fulfils its obligations of holding the Executive accountable by overseeing and questioning how the relevant members of the Executive are managing the COVID-19 disaster.

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

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

33 The HSF has claimed that the DMA may have the effect of Parliament unlawfully delegating legislative power to the Minister. Although this proposition is not pursued with much vigour, I consider it necessary to point out that the scope of the delegation provided for by the DMA is entirely lawful because it is near impossible to predict the nature of a national disaster with precision and Parliament considered it necessary and reasonable that the Minister and the Cabinet or Executive have the power to respond to readily deal effectively with any such disaster when it occurs – until the disaster no longer presents a threat.

34 And, by all accounts, a response to a state of national disaster, especially the disaster brought about by the COVID-19 pandemic, has to be immediate, swift and dynamic. Parliament does not readily have the necessary capacity and practical, logistical resources to manage this type of disaster effectively and efficiently as the National Executive, through the administrative capacity established by the DMA.

35 Section 27 of the DMA appropriately and lawfully delegates Parliament's legislative power to deal with disasters such as COVID-19 comprehensively and effectively. It was competent for Parliament to do so. And section 27 is sufficiently broad to enable the Minister and the Cabinet to deal with the COVID-19 disaster.

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36 More importantly, section 27(3) places appropriate constraints on the delegation by limiting the exercise of this delegation to what is absolutely necessary to contain the disaster. It is therefore unnecessary for Parliament to promulgate any further legislation.

The proper interpretation of the DMA

37 The DMA is the measure Parliament chose to promulgate to provide for the management of and a response to all disasters in South Africa. This was a choice that Parliament exercised in compliance with its constitutional obligations. The HSF does not suggest that Parliament acted irrationally by its definition of disaster in section 1 to include a disaster to the nation's health, such as that which arises from or flow from the COVID-19 pandemic. In fact, the HSF is driven to accept the broad definition of disaster in section 1 of the DMA includes the COVID-19 pandemic, for it accepted that the DMA was a necessary measure of lawful response to COVID-19 pandemic, albeit only the first and temporary response, on its contention. By that concession, the HSF cannot contend that the non-promulgation of a COVID-specific legislation is irrational.

38 It is common cause that the HSF does not take issue with the constitutionality of that response, including the Minister exercising her powers in terms of the DMA and the various regulations promulgated under the DMA.

39 The preamble of the DMA in relevant part provides:

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> *"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;"*

40 The HSF contends that the DMA operates for a short period and is not meant to "*regulate the state's response to COVID-19 for any sustained period of time*". However, the basis for this proposition is unclear. The HSF does not give the slightest indication of where the cut-off point should be drawn to determine when the obligation contended by it should begin. There is also no indication what more would be required in the COVID-specific legislation for which the HSF contends which would be different from the provisions of the DMA to meet the constitutional standard of validity urged by the HSF.

41 The lack of clarity in the HSF's case on these essential matters shows that the present case lacks the necessary basis of a valid cause of a legitimate constitutional challenge.

42 The period over which the state of disaster would apply is expressly specified in the DMA. Section 27(5) provides:

> *"A national state of disaster that has been declared in terms of subsection (1)—*
>
> *(a) lapses three months after it has been declared;*
>
> *(b) maybe terminated by the Minister by notice in the Gazette before it lapses in terms of paragraph (a); and*
>
> *(c) maybe 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."*

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43 The DMA expressly contemplates that its provisions and regulations promulgated in terms thereof would operate for an extended period, and for as long as the state of disaster persists. The period during which the provisions of the DMA may be extended, from month-to-month after the initial period of three months is without limitation. There is no reason, in logic, or as a matter of purposive interpretation, to read the provisions of section 27(5)(c) of the DMA in any other way, to import the notion of temporary application of the DMA into that section.

44 Therefore, I submit that the contention that the DMA operates for a short period is contrary to the express words of section 27(5)(c). It would be impermissible for a court to interpret legislation contrary to the express language of a specific section of the legislation. The contention that "*the Disaster Act does not and cannot cover the ongoing response to COVID*" is untenable in the light of section 27(5) of the DMA.

45 The Full Court was also correct to find that the DMA is the State's legitimate response to COVID-19 pandemic and is not an interim or short-term measure but a measure intended to have long-term effect consequences.

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

47 I deny that the section may be interpreted that way. Such an interpretation is insensible in the context of the DMA in general and section 2(1) specifically.

Section 2(1)(b) provides that the DMA does not apply if the management of the disaster can be managed in terms of a different statute. Section 2 provides:

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

48 I submit that section 2(1)(b) means that there is an obligation to promulgate specific legislation instead section 2(1)(b) suggests that if legislation does exist, that legislation should be applied. It does not create an obligation to pass specific legislation at all. If what Parliament has done by promulgating the DMA does not meet the constitutional requirements of section 7(2), then the remedy is to attack the DMA as constitutionally offensive. The HSF has not sought to attack any provision of the DMA. In fact, it has eschewed any such attack. That must mean an end to any of its constitutional complaint.

49 The Full Court agreed. The Full Court held that "*the reference to other national legislation must therefore be to existing as opposed to contemplated legislation*".

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

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

52 Therefore, there exists no basis for the judicial intervention the HSF seeks in terms of this application.

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

54 It is also insufficient for the HSF to suggest that it should be interpreted in a manner that results in Parliament being found to have failed to act, when in fact, the HSF is dissatisfied with the actions of Parliament.

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

56 The HSF's contention that Parliament should initiate a process for new COVID-specific legislation is insensible when considering the process that has to be undertaken and the time that the process, when conducted properly, will consume.

57 The inescapable inference is that the HSF considers the ambit of the DMA to be constitutionally impermissible in the extent to which it empowers the Minister (and the Cabinet) to regulate and manage disasters. The HSF does not consider the DMA to be a "*concrete and effective mechanism*" for responding to, controlling and managing the COVID-19 disaster.

58 However, the HSF has failed to challenge the DMA. Instead, it seeks to limit the ambit of the DMA by opting for a strenuous interpretation of that Act. There is no sound constitutional basis for the HSF's approach. The HSF must bring a constitutional challenge directed at specific provisions of the DMA if it indeed considers it constitutionally invalid.

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59 The Full Court was correct when it held that it was impermissible for the HSF to seek legislation that deals with the consequences of the State's response to COVID-19 in terms of the DMA being a limitation of rights without challenging the limitation itself.

60 There is no suggestion in section 2(1) of the DMA that Parliament must, upon the occurrence of a disaster and a declaration of the disaster, promulgate legislation that specifically provides for the management of a disaster. The section merely contemplates that there may be instances when a particular occurrence has been provided for indifferent and specific legislation. As a result, there would be no need for the DMA to apply. The DMA should not, therefore, be invoked. There thus is no recognition of a need to create legislation that regulates COVID-19.

61 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."*

62 This provision, too, does not recognise an obligation on Parliament to pass legislation that deals with disasters. The sections of the Constitution that empower Parliament to pass legislation are permissive. It is therefore understandable that the DMA provides for or anticipates that there may be an occurrence that may fall within the definition of a disaster for purposes of the

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DMA but may not effectively be managed in terms of the DMA because there already exists legislation that deals with the management of the disaster of that nature. The suggestion that section 27(1) recognises an obligation on Parliament is perversely strenuous of the words of section 27(1).

63 The Full Court applied well-established principles of interpretation. The Full Court considered the words of the definition of a disaster in section 1 and section 27 of the DMA in their context, the apparent purpose of the sections and the relevant background material.[1] I respectfully submit that the Full Court's interpretation was sensible.

64 The Full Court was correct to find that the DMA (and the regulations passed in terms of that Act) are lawful measures in terms of which the State legitimately responded to and managed the COVID-19 pandemic.

65 Finally, the Full Court correctly found that the Parliament properly delegated the regulation-making power to the Minister and that the exercise of the regulatory powers fits into the broad constitutional scheme.

The State's obligations in terms of section 7(2)

66 I submit that section 7(2) does not specify the measures the State ought to take to protect and vindicate rights in the bill of rights.

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

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67 The DMA is the measure through which the state elected to protect and promote rights in the bill of rights whenever a disaster occurs. This was Parliament's choice.

68 In *Glenister*,[2] the Constitutional Court held:

> *"The Constitution leaves the choice of the means to the state. How this obligation is fulfilled, and the rate at which it must be fulfilled must necessarily depend upon the nature of the right involved, the availability of government resources and whether other provisions of the Constitution spell out how the right in question must be protected or given effect. Thus, in relation to social and economic rights, in particular those in sections 26 and 27, the obligation of the state is to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights'."*[3]

69 A court ought to respect that choice, unless it is called upon to determine whether the choice elected by Parliament indeed fulfils the state's obligation in section 7(2). The Full Court was not called upon to make that determination. It was not invited by the HSF to engage in such an inquiry.

70 The HSF asserts that the State's response is not reasonable because it relied on promulgating regulations in terms of the DMA to regulate the state of national disaster, and, in doing so, the State has failed to ensure public participation. The contention is mistaken. The DMA was promulgated in accordance with Parliament's constitutional obligations which include the obligation to ensure public participation.

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2 *Glenister v President of the Republic of South Africa* 2011 (7) BCLR 651 (CC).

3 *Glenister v President of the Republic of South Africa* 2011 (7) BCLR 651 (CC), para 107.

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71 The HSF did not challenge the DMA on the grounds of lack of public participation. Therefore, it is impermissible to seek to raise the purported failure to ensure public participation without challenging the DMA.

72 Until that legislation has been declared ineffective in protecting the rights in the bill of rights, the state is entitled to rely upon it.

73 There is no express obligation on the state to enact COVID-19 specific legislation, unlike in sections 9(4), 32(2) and 33(3) of the Constitution.

THERE ARE NO OTHER COMPELLING REASONS TO GRANT LEAVE

74 The HSF submits that there are other compelling reasons for this court to grant leave to appeal.

75 First, HSF submits that the Full Court judgment conflicts with other judgments about the standard required for complying with the section 7(2) obligation. This is not true.

76 The Full Court found that there may be a positive duty to enact legislation to protect and promote constitutional rights as contemplated in section 7(2) and that the State has a choice in the measure it takes to comply with its obligation. This finding is in line with previous judgments of the Constitutional Court on the nature and ambit of the obligation in section 7(2) including *Minister of*

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Safety and Security v Van Duivenboden,[4] *Glenister v President of the Republic of South Africa*[5] and *Rail Commuters Action Group v Transnet t/a Metrorail*.[6]

77 As I have stated above, this Court recently interpreted these Constitutional Court judgments in *the WLC judgment*.

78 Second, the HSF submits that since the State will apply the DMA for an extended period, it is necessary for the legal issues raised in this application to be determined by a higher court.

79 This, too, is mistaken. The application of the DMA is the necessary consequence of the continuing state of national disaster.

80 In the light of the *WLC judgment* of 18 December 2020, the issues have been determined convincingly and conclusively. A further ruling on the nature and ambit of the State's obligations in terms of section 7(2) is unnecessary. It is not in the interests of justice for this Court to grant leave to appeal.

81 The HSF application is primarily about whether the state has failed to comply with section 7(2) the Constitution. This Court has already decided that matter. There is no suggestion that this Court's decision is manifestly wrong, and there is reason to revisit it.

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4 *Minister of Safety and Security v Van Duivenboden* [2002] 3 All SA 741 (SCA), para 20.

5 *Glenister v President of the Republic of South Africa* 2011 (7) BCLR 651 (CC).

6 *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC).

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82 Finally, the HSF submits that the issues raised in its application are novel in relation to the DMA. Moreover, that there is no case law that considers when and how the section 7(2) obligation is triggered for the state to pass COVID-specific legislation. The HSF is mistaken on this score too. The issues may be novel, but depend on applying principles that this Court has decisively determined. Based on the application of the well-established principles, the novelty contended by the HSF is irrelevant.

CONCLUSION

83 For the reasons set out above, I submit that:

83.1 The Full Court was correct to dismiss the HSF's application, and refuse the HSF's attempt to procure leave to appeal against the dismissal of its main application.

83.2 The present application for leave to appeal should be dismissed.

WHEREFORE, I ask for an order dismissing this application for leave to appeal.

DRModise

THANDI RUTH MODISE

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Johannesburg on this the 26th day of **JANUARY** 2021, and that the Regulations contained in Government

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Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

COMMISSIONER OF OATHS

Full names: Practising Attorney RSA
Address: Commissioner of Oaths (RSA)
Capacity: **Lesego Legodi**
191 Jan Smuts Avenue,
Rosebank

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IN THE SUPREME COURT OF APPEAL
BLOEMFONTEIN

CASE NO: 001/21

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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CONFIRMATORY AFFIDAVIT

I, the undersigned,

NKOSIYAKHE AMOS MASONDO,

state under oath that:

1 I am the Chairperson of the National Council of Provinces. I have been cited the fourth respondent in these proceedings.

2 The facts set out in this affidavit are within my knowledge and are true and correct.

AM.
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3 I have read the answering affidavit of Thandi Ruth Modise, who is cited in her official capacity as the first respondent in these proceedings, dated 26 January 2021.

4 I confirm the correctness of the facts in so far as they relate to me and the National Council of Provinces.

NKOSIYAKHE AMOS MASONDO

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Johannesburg on this the 28 day of **JANUARY** 2021, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

COMMISSIONER OF OATHS
Full names:
Address:
Capacity:

Practising Attorney RSA
Commissioner of Oaths (RSA)
Lesego Legodi
191 Jan Smuts Avenue,
Rosebank