IN THE SUPREME COURT OF SOUTH AFRICA

SCA CASE NO.: 001/2021

GP case no.: 32858/20

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
THE 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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SECOND, THIRD AND FIFTH RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned

NANGAMSO QONGQO

do hereby make oath and state that:

1. I am an adult female attorney of the High Court of South Africa and a Senior Assistant State Attorney, practising as such at the Office of the State

Attorney situated at 316 SALU Building, 316 Thabo Sehume Street, Pretoria.

2. I am the attorney of record for the second, third and fifth respondents ("the Executive respondents") in this matter and am duly authorised to depose to this affidavit on their behalf by virtue of the position that I hold.

3. Given that this answering affidavit is based almost entirely on submissions of a legal nature, it is appropriate that I depose to it. Matters of fact are based on the answering affidavit deposed to on behalf of the Executive respondents in the proceedings before the High Court.

4. I have read the founding affidavit deposed to by Mr Francis Antonie ("Mr Antonie) on 4 January 2021 on behalf of the applicant; and I respond to it as follows. Due to the fact that the affidavit consists mostly of legal argument, I also do not regerally respond on an ad paragraph basis. I only do so in respect of select paragraphs. Allegations that are inconsistent with what I say in this affidavit are denied.

APPLICATION DOES NOT MEET THE SECTION 17 STANDARD

There are no compelling reasons why the appeal should be heard

5. The applicant brings its application for leave to appeal in terms of section 16(1)(a)(ii) and 17(2)(b) of the Superior Courts Act 10 of 2013 ("Superior Courts Act"). Section 16(1)(a)(ii) empowers this Court to grant leave to appeal where a Full Court sat as a court of first instance. In order to grant leave, this Court must be satisfied that the applicant has met the requirements of section 17 of the Superior Courts Act.

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6. Section 17(1), provides that a court may grant leave to appeal only if that court is of the opinion that the appeal would have a reasonable prospect of success or that there are other compelling reasons, including conflicting judgments, why the appeal should be heard.

7. In seeking leave to appeal, the applicant submits that there are prospects of success and that the High Court judgment "*gives rise to conflicting judgments relating to the standard*" to be met by legislative and other measures to respect, protect, promote and fulfil the rights in the Bill of Rights."[1] The applicant does not identify the specific judgments that conflict with the judgment of the High Court. It is not correct that the High Court's judgment gives rise to conflicting judgments.

8. The issue of conflicting judgments aside, there are no other compelling reasons why this Court should grant the applicant leave to appeal.

9. In an attempt to make out a case for compelling reasons, the applicant alleges that:

> *"The arguments and contentions are novel and there is no similar precedent or case law already considering the question of when and how section 7(2) obligations upon the State require the initiation and preparation of COVID specific legislation through a constitutionally-appropriate understanding of the Disaster Act."*[2]

10. There is nothing novel about the interpretation of legislation in order to determine whether reasonable and effective measures exist to safeguard the rights in the Bill of Rights. The applicant itself has, in its founding affidavit, referred this Court to *Glenister II*, *Metrorail* and *Women's Legal*

[1] FA, para 57.
[2] FA, para 61.

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Centre as authorities for what the standard required to meet the obligation in section 7(2) of the Constitution is.

11. The question posed in the preceding paragraph has been pertinently, comprehensively and authoritatively answered in the recent matter of *President of the RSA and Another v Women's Legal Centre Trust* [2020] ZASCA 177 (18 December 2020),[3] (*WLCT SCA*), particularly paragraphs [34] to [44].

12. The duty to safeguard the rights in the Bill of Rights is imposed on the State. In its papers before the High Court, the State (both the Executive and Parliament) stated clearly that during the COVID-19 pandemic, it is relying on the Disaster Management Act 57 of 2002 ("DMA") as a mode via which it fulfils its obligations under section 7(2) of the Constitution. To counter that, the applicant would have to challenge the DMA as inadequate. This, it has not done.

13. The applicant's contention that the DMA is a temporary measure is not supported by the text and scheme of the DMA itself. Absent a challenge to the DMA itself, or a demonstration of the aspects in which the DMA falls short of the section 7(2) standard, this Court will not reasonably come to a finding that controverts the Full Court's finding.

[3] *President of the RSA and Another v Womens 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* (612/19) [2020] ZASCA 177 (18 December 2020).

14. The applicant thus fails to establish the basis for seeking to rely on section 17(1)(a)(ii) of the Superior Courts Act.

Proposed appeal bears no prospects of success

15. At its core, the complaint against the Full Court is that it erred in:

    15.1. its interpretation of the DMA as the absolute and long-term response to the COVID-19 pandemic; and

    15.2. finding that section 7(2) of the Constitution does not obligate Parliament and the Executive to initiate legislation that deals directly with COVID-19.

16. The applicant also complains in part that the Full Court mischaracterised the applicant's case.[4] It states in this regard that the applicant's concern is not with the exercise of power under the DMA, or with the limitation of that power on rights. Rather, its case is:

> *"premised on the impact of COVID-19 itself and the legislation-making duties that this impact creates – duties which cannot be discharged through an ongoing exclusive reliance, as the state has done, on the Disaster Act".*[5]

17. If the applicant's case is generally about the impact (in the abstract) that results from the COVID-19 pandemic on the one hand, and the State's reliance on the DMA on the other, then its case was inappropriately brought as a section 7(2) obligations case. Section 7(2) is concerned with the protection of rights in the Bill

[4] FA, paras 49 - 50.
[5] FA, para 50.

of Rights. That protection requires the State to safeguard against the unjustifiable limitation of rights in the Bill of Rights. This, section 7(3) recognises when it states that the rights in the Bill of Rights are subject to constitutional limitations as set out in section 36.

18. To rely on section 7(2) as giving rise to obligations on the Executive and Parliament, the applicant would have to show that rights in the Bill of Rights are under threat and there is a lacuna that requires the Executive and Parliament to initiate legislation to protect the country and its inhabitants against such a threat.

19. It is, however, not correct that the Full Court mischaracterised the applicant's case.

20. The issue that the High Court was invited to decide was two-fold: the **first** was whether, although couched in permissive language, sections 42(3), 44(1), 55(1), 68, and 85(2)(d) of the Constitution impose an obligation on Parliament and the Executive to initiate legislation.[6] The applicant located this duty in section 7(2) of the Constitution.

21. On this question, the High Court correctly found that although these provisions are couched in permissive language, section 7(2) may, "*in appropriate circumstances trigger a positive obligation on the part of the Parliament and the Executive to initiate and pass legislation*".[7]

[6] High Court Judgment, para 42(a).
[7] High Court Judgment, para 55.

22. Whether those circumstances exist is a factual inquiry whose outcome depends on the facts and circumstances of each case.[8] The High Court's finding in this respect is consistent with the Constitutional Court's approach in *Rail Commuters Action Group v Transnet t/a Metrorail*[9] and *Glenister v President of the RSA*[10]; as well as this Court's judgment in the *WLCT SCA* case.[11]

23. In *Metrorail*, the Full Court pointed out in its judgment that the respondents were found to bear a positive obligation, under section 12 of the Bill of Rights, "*to ensure that reasonable measures are in place to provide for the security of rail commuters*".[12]

24. The applicant placed undue reliance on the Constitutional Court's decision in *Glenister*. In that case, the obligation on the respondent arose as a consequence of the scheme of the Constitution as a whole, which "*imposed a pressing duty on the state to set up a concrete, effective and independent mechanism to prevent and root out corruption.*"[13]

25. The *Women's Legal Centre Trust* case came on appeal before this Court.[14] In that case, this Court clarified that:

> "*It is so that in Glenister it was stated that in some circumstances s 7(2) imposes a positive obligation on the State. It relied on a dictum in Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) [2001] ZACC 22; 2001 (4) SA 938 (CC) para 44 . . .*
>
> *These dicta do not prescribe that s 7(2) could oblige the State to enact legislation on a specific subject, nor that a court may order it to do so.*

[8] High Court Judgment, para 55.
[9] *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC).
[10] *Glenister v President of the RSA* 2011 (3) SA 347 (CC).
[11] [2020] ZASCA 177 (18 December 2020).
[12] High Court Judgment, para 59.
[13] High Court Judgment, para 61.
[14] *WLCT SCA*

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They state that there may be a positive obligation on the State 'to provide appropriate protection to everyone through laws and structures designed to afford such protection'. What the appropriate protection should be, is for the State to determine. This was put as follows in Glenister:

'Now plainly there 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 Constitution imposes, so long as the measures taken are reasonable.'"[15] [Underlining added].

26. The complete answer to the applicant's case lies in the following passages from this Court's decision in *WLCT SCA:*

"Sections 43 and 44 of the Constitution stipulate that the legislative authority in the national sphere of government is exclusively vested in Parliament. In terms of s 42(1) of the Constitution, Parliament consists of the National Assembly and the National Council of Provinces. This legislative authority confers on the National Assembly and the National Council of Provinces the power to pass legislation. It is the responsibility of Parliament to make laws. The President and Cabinet are given a discretion as to the nature and content of the legislation that it prepares and initiates. It must follow that the obligation to enact legislation must be found outside of s 7(2) of the Constitution.

We know of no authority, and we were not referred to any, where the court directed the enactment of legislation outside of the parameters that we have mentioned, namely, international law and specific constitutional obligations, and solely under s 7(2) of the Constitution. In our view, for a court to order the State to enact legislation, on the basis of s 7(2) alone, in order to realise fundamental rights would be contrary to the doctrine of separation of powers, in light of the express provisions of ss 43, 44, and 85 of the Constitution. As we have said, these sections vest the power to initiate legislation in the President and Cabinet, and to adopt legislation in Parliament. This is not to say that this Court is insulating itself from constitutional responsibility. It is for Parliament to make legislative choices provided that they are rational and constitutionally compliant. And if they are not, the court must act in terms of s 172 of the Constitution."[16] [Underlining added].

[15] *WLCT SCA* at paras 33 – 34.
[16] *WLCT SCA* at paras 42 – 43.

27. I therefore submit that section 7(2) does not, on its own and without more, impose an obligation on the Executive and Parliament to legislate.[17] There must be a need (trigger) for the legislation.

28. The **second** question, which flowed from the first, was whether "*the [r]espondents failed to discharge their duty to initiate and pass legislation to deal with COVID-19*". Linked to that question was the issue whether "*the DMA [is] the constitutionally appropriate response both in the short term as well as the long term.*"[18]

29. The Full Court correctly found that the Executive and Parliament did not fail to discharge their duties to pass COVID-19 specific legislation. This is so because the State relied on the DMA as the vehicle through which it would respond to the pandemic. In other words, the fullness of the State's response to the COVID-19 pandemic is the DMA. Both the Executive and Parliament stated this under oath. It was always open to the applicant to challenge the DMA as being an inadequate response to the pandemic. This is a hurdle that the applicant will not overcome before this Court, because it chose to eschew such a challenge.

30. To avoid this difficulty, the applicant asserts that the High Court was obliged to interpret the clear wording in the DMA in a manner that is not supported by the text of the Act or its purpose.

31. The High Court correctly found that interpreting the DMA as the comprehensive response to COVID-19 (and other disasters) is in compliance with the

[17] High Court Judgment, para 73.
[18] High Court Judgment, para 42(b).

Constitution. Section 27 of the DMA gives the Minister of Cooperative Governance and Traditional Affairs ("Minister") wide power to make regulations. The applicant does not challenge either the empowering provision in the DMA, or the regulations that were made under that empowering provision. On the contrary, it accepts them as legitimate and valid.

The section 7(2) argument has no merit

32. In its application for leave to appeal, the applicant argues that the central question is whether section 7(2) requires Parliament and the Executive to implement COVID-19 specific legislation. According to the applicant, there is a reasonable prospect that this Court will answer that question in the affirmative.[19]

33. I submit that there are no such prospects.

34. The Full Court was correct in finding that the respondents did not fail in their obligation to protect the rights in the Bill of Rights. Section 7(2) would have imposed an obligation on the respondents if there was a lacuna in the law and if the State had done "*nothing in the face of a pandemic that medical science tells us spreads with often fatal consequences by close human contact.*"[20]

35. But the State did not do nothing. To protect the rights in the Bill of Rights in light of the COVID-19 pandemic, the State invoked the DMA, which is

[19] FA, para 10.
[20] High Court Judgment, para 67.

the government's response to national disasters. Among the tools in the DMA are powers that are vested in the Minster, which include regulation making.

36. It is important to bear in mind that section 7(2) of the Constitution does not prescribe what measures the State must adopt in order to promote and protect the rights in the Bill of Rights.[21] It requires only that the measures adopted be reasonable and effective.

37. To give comply with her constitutional obligations in the face of the pandemic, the Minister, acting in terms of the DMA, issued a body of regulations "*which also have as their broad objective the protection of various rights (including the right to health care and physical integrity).*"[22] For the applicant to argue that the Executive and Parliament have failed in their legislative obligations as triggered by section 7(2) of the Constitution, it would have to show that the DMA, alternatively the regulations that the Minister issued, have been unreasonable and ineffective as a response to the threat that COVID-19 poses to constitutional rights. The applicant makes no such claim.[23]

The DMA cannot be interpreted as a temporary stop-gap measure

38. The applicant argues that the Full Court erred in interpreting the DMA as the legislation through which the State coordinates its efforts in order to respond to all national disasters, including COVID-19. However, the High

[21] *WLCT SCA* Judgment paras 34 and 42.
[22] High Court Judgment, para 68.
[23] High Court Judgment, para 96.

Court's finding in this regard was premised both on fact and the law. Both Parliament and the Executive stated in their affidavits that there is no lacuna in the law, with respect to dealing with the COVID-19 pandemic. The DMA *is* the State's response. That was the factual finding. The High Court also engaged in an analysis of the scheme of the DMA, and concluded that it was intended to be the State's response to disasters – including the COVID-19 pandemic. That was the finding on the law.

39. Disaster management is listed as a functional area of concurrent national and provincial legislative competence in Part A of Schedule 4 of the Constitution. Therefore, both the national and provincial spheres of government are authorised to enact laws within this area and have powers and responsibilities in relation to disaster management.

40. Local government is also empowered to deal with a number of functions which are closely related to disaster management under Part B of Schedules 4 and 5 of the Constitution, such as firefighting services. In addition, section 152(l)(d) of the Constitution requires local government to promote a safe and healthy environment. The DMA gives effect to these constitutional obligations, as well as to the rights in the Bill of Rights. In addition, Chapter 5 the DMA[24] also assigns disaster management to local government in line with section 156(1)(b) of the Constitution.

[24] Sections 42 to 55 of the DMA.

41. Both the DMA and the National Disaster Management Framework ("NDMF"), which was adopted in 2005, are the centrepiece legislation that govern the state's response to disasters.

42. The aim of the DMA is to ensure a uniform and integrated approach to disaster management and disaster risk reduction in each sphere of government and across all spheres of government involving all relevant stakeholders. In essence, the DMA focuses on four aspects:[25]

42.1. it establishes an elaborate institutional framework for disaster management, including the establishment of disaster management centres across the three spheres of government;

42.2. it entrenches a detailed policy development and strategic planning framework for disaster management;

42.3. it provides for the classification and declaration of disasters; and

42.4. it deals provisionally with the funding of post-disaster recovery and rehabilitation.

43. The coming into being of the DMA itself is somewhat instructive. The need for a comprehensive approach to dealing with disasters was realised in 1994, after the floods on the Cape Flats.[26] A Green Paper towards the end of putting in place an Act of Parliament that dealt comprehensively with how the state was to respond to national disasters was introduced in 1994.

[25] Executive AA in the High Court, para 42, page 168.
[26] Executive AA in the High Court, para 33, page 165.

That document highlighted the need for a holistic mechanism for the management of disasters in South Africa.

44. The Green Paper was followed by the White Paper on Disaster Management in 1999. The White Paper had among its key policy objectives "*the need to improve South Africa's ability to manage emergencies or disasters and their consequences in an efficient and effective manner*".[27] [Underlining added].

45. The DMA was assented to in 2002, and its preamble, which encapsulates its objective reads as follows:

> "*to provide for 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*" [Underlining added].

46. The Act defines a national disaster as a disaster classified in terms of section 23. That provision sets out the steps that must be followed in classifying an occurrence as a disaster.

47. The DMA defines "*post-disaster recovery and rehabilitation*" to mean:-

> *"efforts, including development, aimed at creating a situation where-*
> *(a) normality in conditions caused by a disaster is restored by the restoration, and improvement, where appropriate, of facilities, livelihoods and living conditions of disaster-affected communities, including efforts to reduce disaster risk factors;*
> *(b) the effects of a disaster are mitigated; or*
> *(c) circumstances are created that will reduce the risk of a similar disaster occurring"*

[27] Executive AA in the High Court, para 34, page 166.

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48. Section 56 provides the guiding principles regarding the funding of post-disaster recovery and rehabilitation. Subject to the provisions of the Public Management Finance Act 1 of 1999 ("PFMA"), section 56(2)(b) provides that the cost of repairing or replacing public sector infrastructure will be for the account of the state organ responsible for the maintenance of such infrastructure. This provision does not subject this to any other Act that Parliament may promulgate in dealing with a national disaster. This is so because *it* is the complete legislation for that purpose.

49. Section 57 deals with national contributions to alleviate effects of local and provincial disasters and the factors to be taken into account when requests for financial contributions to post-disaster recovery and rehabilitation are made.

50. This provision deals to finality with the issue of post-disaster rehabilitation funding, without yielding to any legislation that may be promulgated in future to deal with the national disaster.

51. In section 1 of the DMA, disaster management is defined as:

> *"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."*

52. Moreover, the DMA contemplates a "wall-to-wall" response to disaster management and does not leave an aspect of it to any Act that Parliament may promulgate to deal with the disaster.

53. Although an occurrence qualifies as a disaster under section 1 of the DMA, it would be excluded from the purview of the DMA if it can be effectively addressed in terms of other national legislation "*aimed at reducing the risk, and addressing the consequences, of occurrences of that nature*" and if it has been so identified by the Minister in the Gazette.

54. Nothing in this provision suggests that the DMA ceases to apply in relation to a disaster at any stage during that disaster.

55. Section 4 of the DMA requires the President to establish an Intergovernmental Committee on Disaster Management. The Committee's activities include advising and making recommendations to Cabinet on:-

> "*the establishment of a national framework for disaster management aimed at ensuring an integrated and uniform approach to disaster management in the Republic by all national, provincial and municipal organs of state, statutory functionaries, non-governmental institutions involved in disaster management, the private sector, communities and individuals.*"

56. Section 6 requires the Minister to prescribe a national disaster management framework and section 7 requires that framework to "*provide a coherent, transparent and inclusive policy on disaster management appropriate for the Republic as a whole*". In terms of section 7(2) thereof, the framework "*must reflect a proportionate emphasis on disasters of different kinds, severity and magnitude that occur or may occur in southern Africa, place emphasis on measures that reduce the vulnerability of disaster-prone areas, communities and households.*"

57. Section 8 of the DMA establishes the National Disaster Management Centre ("NDMC") as an institution within the public service, whose objective is:

> *"to promote an integrated and co-ordinated system of disaster management, with special emphasis on prevention and mitigation, by national, provincial and municipal organs of state, statutory functionaries, other role-players involved in disaster management and communities."*[28]

58. The powers and duties of the NDMC are set out in section 15 of the DMA. It is specially required to have expertise "*in issues concerning disasters and disaster management*".

59. The DMA requires the establishment of a disaster management centre in every Province and in every District and Metropolitan Municipality, to coordinate disaster management in its sphere of responsibility. In addition, staff of the various Centres consist of the Head of the Centre and suitably qualified persons.

60. These provisions illustrate that the DMA was intended not as an interim or temporary response to disasters. It is the absolute response to disasters in South Africa.

61. At its core, the applicant argues that this interpretation permits Parliament and the Executive to "refuse"[29] to enact legislation that deals specially with COVID-19 in circumstances where the pandemic is ongoing. A corollary of this argument is that the DMA must be interpreted as an interim measure

[28] Section 9 of the DMA.
[29] FA, para 20.

while Parliament and the Executive implement legislation that is specially tailored to whatever national disaster presents itself.

62. There are a number of difficulties with this contention. The *first* is that the applicant provided no evidence that Parliament and the Executive refused to enact legislation. It did not point the High Court to an instance where Parliament and the Executive refused to enact legislation. It was never the Executive's case in the court *a quo* that it refused to initiate legislation whereas the circumstances obliged it to do so. The response has always been that the DMA is the legislation through which the State responds to COVID-19. The High Court was therefore correct in its finding in this regard.

63. The applicant argues that in not passing COVID-19 specific legislation, the Executive and Parliament undermine the values of transparency, openness and public participation, that are at the core of our constitutional democracy.[30]

64. That argument loses sight of the fact that the DMA is an Act of Parliament and would have been adopted through the processes that section 59 of the Constitution envisages. It may be so that section 27 of the DMA gives powers to the Minster to issue regulations in times of a national disaster; but neither the Minister's powers under the DMA, nor their exercise, are under attack in these proceedings. The applicant's case is also not one premised on unlawful delegation of power by Parliament to the Executive.

[30] FA, para 47.7.

65. The *second* problem for the applicant is that there is nothing in the scheme, structure and text of the DMA that supports an interpretation that it was only a temporary stop-gap measure. It is notable that the applicant was never able to point to the period of time that would constitute "temporary" for purposes of the DMA's operation. This is significant when juxtaposed to the provision in the DMA that permits the Minister to extend the state of disaster one month at a time, but indefinitely for as long as the disaster persists. That provision (which the applicant does not challenge)[31] cannot co-exist with the applicant's interpretation of the DMA as a temporary measure.

66. The applicant argues that interpreting the DMA as a temporary instrument would render it constitutionally compliant.[32] While it is correct that legislation must be read in conformity with the Constitution, the Courts have made it clear that statutory provisions should always be interpreted purposively, as well as properly within their contexts.[33] The clear words in legislation cannot be sacrificed or strained at the altar of alleged constitutional conformity. Words must be capable of the supposed meaning required to render the provision constitutionally compliant. Significantly, the constitutional inconsistency must be established. It cannot simply be assumed in order for an applicant to pursue a supposed constitutionally compliant meaning.

[31] FA, para 13.
[32] FA, paras 13 and 14.
[33] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC).

67. To give effect to this principle, the High Court appropriately engaged in an analysis of the text and purpose of scheme of the DMA. It was through that process that the Full Court came to a finding that the DMA was in fact intended to be the wall-to-wall response to national disasters, and not just a stop-gap.[34]

68. The applicant engages that finding by the Full Court, by arguing, *inter alia*, that the provision in the DMA which permits a declaration of a national disaster if the disaster cannot be dealt with through other legislation signals that the Act is a temporary measure until legislation is enacted. This is not correct. That the Minister is permitted to declare a national state of disaster under section 27(1)(b) clearly signals that the existence or coming into being of legislation is not a requirement.

69. It is important to note that the applicant did not challenge the DMA as being too broad in scope or ineffective for purposes of section 7(2) of the Constitution. In other words, no frontal constitutional challenge to the DMA has been brought at all.

70. In its application before this Court, the applicant argues (further) that the High Court erred in not evaluating the adequacy of the DMA as the response to COVID-19, *"on an ongoing and indefinite basis, by means of Ministerial regulatory-diktat*".[35] The applicant also argues that it would be unreasonable for Parliament and the Executive to rely on the Ministerial regulations in responding to COVID-19 on an ongoing basis. That, the

[34] High Court Judgment, para 101.
[35] FA, para 26.

argument suggests, is not what section 7(2) of the Constitution contemplates.[36]

71. It is submitted that the argument is still-born and reliance on *Metrorail* does not bring it to life. Section 7(2) requires only that the measures adopted be reasonable and effective. On the applicant's admission, the measures under implementation to deal with the pandemic meet that standard. That is why the applicant does not challenge the regulations that the Minister issued under section 27 of the DMA. If it wished to make the opposite contention, it would have had to challenge the regulations as not reasonable and effective to deal with the COVID-19 pandemic.

72. The applicant argues further that the Court failed to apply the Constitutional Court's decision in *Glenister II* by assessing whether the DMA has the institutional tools created with the constitutional implications of COVID-19 in mind.[37]

73. It is submitted that there was no basis for the Court to make that assessment. It was never the applicant's case that the DMA lacked "institutional tools" in order to properly respond to the pandemic. That is in any event not the test that section 7(2) requires. Section 7(2) does not prescribe what tools must be utilised. It requires only that the tools employed be reasonable and effective to promote and protect rights in the Bill of Rights. If the applicant wished to contend that the DMA lacked these

[36] FA, para 44.
[37] FA, para 27.

qualities and did not comply with the Constitution, it ought to have challenged the DMA.

74. The applicant's case before the High Court was that the DMA ought to be interpreted as a temporary measure, because on a proper construction of the constitutional scheme, the obligation to initiate legislation lies with Parliament and the Executive. Stated otherwise, the applicant's case was that the Executive and Parliament must prepare and adopt legislation that deals specifically with the threat posed and the harm caused by COVID-19.

75. The applicant's constant refrain is that there is an obligation on the Executive and Parliament to initiate legislation because of the impact that COVID-19 has on the rights in the Bill of Rights. The applicant does not at all identify the shortcomings of the DMA in dealing with the pandemic. Its failure to do this is significant, especially in the light of the Executive and Parliament's contention, and the High Court's finding, that the DMA is the wall-to-wall response to the pandemic. The argument, with reliance on *Women's Legal Centre*, that Parliament must figure it out, is not appropriate in circumstances where the shortcomings of the DMA as the response to the pandemic have not been identified, and, in particular. in the light of this Court's judgment in *WLCT SCA*.

76. It is correct that section 7(2) of the Constitution requires the implementation of measures that are "effective and concrete". Those measures are contained in the DMA and the COVID-19 specific regulations that the

Minister issued in terms of section 27 of the DMA, and which are not challenged.

77. The applicant argues that "*the proper location of legislative power when giving effect to section 7(2) of the Constitution is Parliament rather than the Minister ongoingly*".[38] The DMA is a legislative instrument that was enacted by Parliament and that provides mechanisms for the protection and promotion of the rights in the Bill of Rights, which is what section 7(2) requires. The Minister's powers to issue regulations "*ongoingly*" emanate from the DMA.

78. The applicant seeks to avoid the difficulty of not having challenged the DMA by arguing that the DMA is constitutionally acceptable in the short-term, but not as a long-term solution. The applicant argues that the DMA is effective in the short run because "*by regulating the state's response to all disasters in general, and by locating legislative and executive power in one member of Cabinet, it enables the state to act quickly when there are no existing tools to tackle this threat or harm.*"[39]

79. That argument misses the point. In the High Court, it was not contested on the facts that COVID-19 is ever changing and its characteristics are unknown. It is therefore reasonable all the time, for the State to be able to respond quickly. Given the nature of COVID-19, that is an "effective and concrete" measure that section 7(2) requires.

[38] FA, para 32.4.
[39] FA, para 31.1.

80. In the long term, so the argument goes, the DMA is not reasonable because it does not protect constitutional rights. In this regard, the Full Court was correct to find that the limitations of rights that have occurred (under the DMA regulations) have been the result of measures the State took in response to COVID-19. A fundamental flaw in the applicant's case is that it did not engage in a section 36 analysis to establish whether these rights-limitations were unconstitutional,[40] where section 7(3) envisages the justifiable limitations of rights under section 36.

81. There was in any event no evidence before the High Court to support the applicant's argument that the DMA is a temporary measure. Absent such evidence, it must be accepted that the DMA is the comprehensive response to the COVID-19 pandemic. The applicant did not challenge the constitutionality of the DMA on any basis.

AD PARA 2

82. I deny that the allegations in the founding affidavit are true and correct.

AD PARAS 6 and 16

83. I deny these allegations, to the extent that they suggest that the Full Court accepted the three propositions without more and without qualification or context. I have dealt above with what the applicant's case was before the

[40] High Court Judgment, para 69.

High Court, and how the High Court determined that case. The High Court's determination of that case cannot be faulted.

AD PARA 7

84. I admit that the High Court found against the applicant on the basis that section 7(2) of the Constitution does not require Parliament and the Executive to adopt COVID-19 specific legislation. I submit that that finding has now effectively been endorsed in the *WLCT SCA* case.

AD PARA 12

85. This paragraph is not an accurate exposition of the reasons why the High Court dismissed the applicant's applications – both on the merits and in the application for leave to appeal. As I have already explained above, there was a misalignment between the case the applicant brought to Court, and the relief that it sought in the High Court. Stated otherwise, the applicant's case was misconceived.

AD PARA 17

86. I deny this paragraph. The applicant assumes without establishing and demonstrating, that any other interpretation of the DMA (that does not accord with its own) would render the DMA unconstitutional. There is a step missing in the applicant's logic.

MM

N-9

AD PARAS 20 and 21

87. I deny these paragraphs for reasons that I have already set out above in response to this aspect of the applicant's contentions. If the applicant sought to impugn the DMA on any ground, it should have brought a frontal attack and not vaguely state that the DMA was "putatively unconstitutional", whatever that might connote.

AD PARA 22

88. I deny this paragraph. I have dealt with this line of reasoning, above. In any event, as demonstrated therein, this Court's judgment in *WLCT SCA* effectively disposes of argument in this paragraph.

AD PARA 28

89. I deny this paragraph. I have provided an explication of the section 7(2) standard above. All that is required is that the measures adopted by the State be effective and reasonable. The applicant does not allege that the DMA (which was adopted by Parliament) falls short of this standard.

90. I have stated *ad nauseam* above that the DMA is the State's response to national disasters and it is to be relied on indefinitely. This is attested by the fact that there is no sunset clause in the number of times, or the time period that the Minister can extend the state of national disaster.

AD PARAS 30 to 32

91. The allegations in these paragraphs are inconsistent with the scheme and text of the DMA itself. They are therefore denied. Whether the DMA is specific or otherwise is not the standard required by section 7(2) of the Constitution. The standard required is effectiveness and reasonableness.

92. It may be so that section 27(2) of the DMA affords the Minister wide-ranging powers, but those powers are: (i) finite; (ii) to be exercised subject to the provisions of section 27(3) of the DMA; and (iv) are subject to judicial scrutiny.

AD PARAS 33 and 34

93. I admit the allegations herein to the extent that they are an accurate reflection and objective discussion of the judgment of the Full Court. But I must point out that nothing turns on this whole argument. The question that the applicant posed before the High Court for determination was simply whether section 7(2) required the Executive and Parliament to enact COVID-19 specific legislation. The answer that the Full Court provided was in the negative. The DMA is that legislation, and the applicant did not argue that it is ineffective and/or unreasonable.

94. Reference to "*other national legislation*" in the DMA refers to legislation that is already in existence.

CONCLUSION

95. The High Court's answer to the question that the applicant brought before it cannot be faulted. It is so that although couched in permissive language, the empowering provisions in the Constitution could give rise to an obligation on the Executive and Parliament to initiate and pass legislation. The Executive and Parliament would be required to initiate and pass legislation if there was a lacuna in the law and the State's obligation in terms of section 7(2) remains unfulfilled.

96. The Full Court was, however, correct to find that on the facts of this case, no such a lacuna exists, because of the existence of the DMA; which is an Act of Parliament. The DMA permits the Minister to issue COVID-19 specific regulations. It also allows for COVID-19 specific directions to be issued. The standard required by section 7(2) is that the measures that are adopted must be reasonable and effective. The applicant does not argue that the measures in fact adopted under the DMA are not reasonable and/or effective. Its insistence, without good reason, is that Parliament *itself* must issue COVID-19 specific legislation. No satisfactory explanation is provided why Parliament is required to do that if the DMA is in place, and if it or measures that it authorises are reasonable and effective.

97. The applicant's contention that the DMA is only an interim measure finds no support in the construction of the DMA itself. The High Court was therefore correct to find that the DMA is the State's response to the threat posed and the harm caused by COVID-19.

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98. The applicant's argument that the Full Court ought to have adopted an interpretation of the DMA that is constitutionally compliant pre-supposes that the DMA is unconstitutional. The applicant is not entitled to make such an assumption in circumstances where it did not bring a constitutional challenge against the DMA, and where that challenge was not tested in Court. In any event, it failed to show that the DMA is inconsistent with the Constitution. The DMA is not a temporary measure and no case is made out that it is unconstitutional for providing a more enduring response to the COVID-19 pandemic than a temporary one.

99. For these reasons, the proposed appeal bears no prospects of success and the application must be dismissed with costs. There is also no compelling reason why the appeal should be heard.

WHEREFORE I pray that the applicant's application be dismissed with costs, including the costs of two counsel.

DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn before me at PRETORIA on this the 2nd day of February 2021, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

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