



HELENSUZMAN FOUNDATION

For attention: Ms Thandi Modise

Email: speaker@parliament.gov.za

Speaker of the National Assembly

18 March 2021

Dear Ms Thandi Modise

Submission in response to the Notice of Intention to Introduce the Draft Disaster Management Amendment Bill, 2021

We attach our written submission in response to the notice of intention to introduce the Draft Disaster Management Amendment Bill, 2021.

Should you have any queries, it would be appreciated if you could contact Catherine Kruyer (Email: catherine@hsf.org.za) and Chelsea Ramsden (Email: chelsea@hsf.org.za).

Yours sincerely

Francis Antonie

Director



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1. Introduction

The Helen Suzman Foundation (“HSF”) welcomes the opportunity to make submissions to Parliament on the Notice of Intention to Introduce the Draft Disaster Management Amendment Bill, 2021.

The draft Bill seeks to amend the Disaster Management Act¹ (“the DMA”) – the legislation that has governed the state’s response to the COVID-19 pandemic. The DMA empowers the Minister of Cooperative Governance and Traditional Affairs (“the Minister”) to declare a national state of disaster,² and to make regulations or issue directions concerning the state’s response to the disaster.³ The Minister exercised her power under section 27(1)(b) of the DMA to declare a national state of disaster in response to the threat posed by the COVID-19 pandemic in March 2020. Since then, the state’s response to the pandemic has been through ministerial regulation and direction in terms of the DMA.

The draft Bill seeks to place constraints on the wide-ranging powers conferred on the Minister under the DMA, and to provide for parliamentary oversight over the exercise of the Minister’s powers to declare a state of disaster and to make subordinate legislation.

The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, with a focus on the rule of law,

¹ 57 of 2002.

² Section 27 (1) of the DMA. The Minister may only do so in the event of a “national disaster”, as defined in section 1 of the DMA, and if “existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster; or other special circumstances warrant the declaration of a national state of disaster”.

³ Section 27(2) of the DMA lists the measures that may fall under ministerial regulation or direction. Section 27(3) of the DMA imposes certain constraints on the power conferred on the Minister in section 27(2).

transparency and accountability. The HSF is currently involved in litigation concerning the proper interpretation and application of the DMA as it pertains to the state's response to the COVID-19 pandemic.

In July 2020, the HSF approached the Pretoria High Court seeking an order declaring that the Executive and Parliament have failed in their constitutional obligation to initiate, prepare and pass legislation governing the state's response to COVID-19 and directing them to enact such legislation. On 7 October 2020, the Full Court in the Pretoria High Court handed down a judgment and order dismissing the HSF's application.⁴ The HSF has taken the judgment and order of the Full Court on appeal before the Supreme Court of Appeal.

The HSF contends that the DMA is not intended to be the state's complete response to the pandemic, but is rather intended to operate as a short-term, stop-gap mechanism empowering the state's response to a national disaster, like COVID-19, only until such time that more concrete and fit-for-purpose legislation is initiated, prepared and passed. The HSF further contends that the Executive and Parliament bear a constitutional obligation under section 7(2) of the Constitution to initiate, prepare and pass legislation that regulates the state's response to COVID-19. Now that the initial disaster has passed, Parliament is required to respond to the threat posed by COVID-19 by passing specific and targeted legislation to respond to the pandemic.

The HSF welcomes the draft Bill and sees it as an opportunity to ensure that there are safeguards against executive encroachment upon the legislative authority of Parliament – such as that which has occurred under the DMA in response to the COVID-19 pandemic.

2. The DMA is a short-term, stop-gap mechanism

Properly interpreted, the DMA is a short-term, stop-gap mechanism empowering the state's response to a national disaster only until such time that more concrete and fit-for-purpose legislation is initiated, prepared and passed.

This, however, is not how the state has understood and applied the DMA in its response to COVID-19. The state has instead understood the DMA as providing the complete response to

⁴ *Helén Suzman Foundation v Speaker of the National Assembly and Others* (32858/2020) [2020] ZAGPPHC 574.

the pandemic, and as *indefinitely* delegating the power to regulate the state’s response to the pandemic to the Minister through subordinate legislation.

The state’s interpretation and application of the DMA – as conferring legislative powers on the Minister indefinitely – is inconsistent with the separation of functions and powers of the different branches of government provided for in our constitutional scheme. The Constitution envisages a role for the Executive in initiating and preparing legislation.⁵ However, only Parliament – as “the engine-house of our democracy” – is empowered to pass legislation.⁶ While Parliament may delegate powers to members of the Executive to issue regulations, the Executive cannot supplant the primary law-making function of Parliament.⁷

The HSF has accordingly approached the courts to clarify the proper interpretation of the DMA as a short-term, stop-gap mechanism, and the constitutional obligations of the Executive and Parliament to initiate, prepare and pass legislation.

The HSF maintains that, on a proper interpretation, the DMA is a short-term, stop-gap mechanism, and is thus not inconsistent with the Constitution. However, the HSF sees the draft Bill as an opportunity to further clarify that the DMA is not intended to indefinitely delegate legislative powers to the Minister. To achieve this, the HSF recommends three amendments to the DMA.

First, the HSF recommends that the definition of disaster in section 1 of the DMA⁸ be amended to clarify that an event only continues to qualify as a “disaster” for so long as time-sensitive reasons exist that frustrate the making of new measures through regular legislative and executive processes. Once the time-sensitive reasons, which may have initially precluded the

⁵ Section 85 of the Constitution.

⁶ *Matatiele Municipality and Others v President of the RSA and Others* 2006 (5) SA 47 (CC) para 109. See sections 43, 44 and 55 of the Constitution.

⁷ *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 51. See also *Smit v Minister of Justice and Correctional Services and Others* [2020] ZACC 29; 2021 (3) BCLR 219 (CC) at para 35.

⁸ Disaster is defined in section 1 as:

“[A] progressive or sudden, widespread or localised, natural or human caused occurrence which—

(a) causes or threatens to cause—

(i) death, injury or disease;

(ii) damage to property, infrastructure or the environment; or

(iii) 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”.

Executive and Parliament from exercising their ordinary powers to regulate the response to an event through specific legislation, cease to exist, then the DMA should cease to apply.

The HSF contends that this, in any event, is the proper and constitutionally compliant interpretation of the terms “sudden” and “progressive” in the definition of “disaster” in section 1. However, the DMA will benefit from clearer language in this regard so as to prevent a re-occurrence of the present situation in which the Cabinet and the Minister have sought to regulate the state’s response to COVID-19 through regulations and directions indefinitely, and the Executive and Parliament have divested themselves of their constitutional obligations to expeditiously initiate, prepare and pass more concrete and specific legislation.

Second, the HSF recommends that the time period from the date of declaration after which a national state of disaster lapses be shortened to more appropriately reflect that the DMA is intended as a temporary stop-gap mechanism. Section 27(5)(a) of the DMA provides that a national state of disaster lapses three months after it has been declared. This is an extraordinary lengthy period for the Minister to take over the response to a disaster through regulations and directives, without any need to reassess the Executive’s and Parliament’s ability to respond through ordinary law-making processes.

The draft Bill seeks to amend this time-period to a period of 21 days to resemble the 21-day limit placed on states of emergency in the Constitution.⁹ While the HSF does not contend that there should be perfect resemblance between the constitutional constraints placed on states of emergency and the constraints placed on states of national disaster, a 21-day limit for the initial state of disaster would better cohere with the purpose of the DMA as a temporary stop-gap mechanism.

Third, the HSF recommends that constraints be placed on the Minister’s power to extend a national state of disaster. Section 27(5)(c) of the DMA provides that the Minister may extend a national state of disaster for one month at a time by notice in the government gazette.

There are no guidelines in the DMA or in regulations to guide the Minister’s exercise of discretion in extending the national state of disaster. Guidelines must be provided. The Minister should at least be required to consider whether time-sensitive reasons that frustrate

⁹ Section 37(2)(b) of the Constitution.

the making of new measures through regular legislative and executive processes continue to exist before exercising the power to extend.

Section 27(5)(c) appears to empower the Minister to extend a national state of disaster *indefinitely*. The HSF submits that the Minister should not be able to extend a state of disaster more than twice unless exceptional circumstances exist, which prevent new measures being introduced by the Executive and Parliament to adequately deal with the threat posed or harm caused by the disaster.

Finally, the period of extension – being one month – should be shortened to cohere with the shorter period for an initial state of disaster as proposed above.

3. Greater parliamentary oversight

In addition to its constitutionally mandated law-making role, Parliament is required to ensure that the executive is accountable to it by scrutinizing and overseeing executive action.¹⁰ The Constitutional Court recognised this oversight role in *EFF I* and *EFF II*, where it held that section 42(3) of the Constitution “obliges the [National] Assembly to, among other duties, scrutinise and oversee executive action” and a failure to play this role properly will result in “the objective of government by the people” not being realised.¹¹

As currently formulated, the DMA does not provide for any parliamentary oversight over the Minister’s exercise of the powers delegated to her in section 27.

Section 27(2) of the Disaster Management Act provides the Minister with law-making powers to make regulations impacting on essentially all spheres of a person’s life or business. Most

¹⁰ This role can be found in sections 42(3) and 55(2) of the Constitution.

Section 42(3) of the Constitution provides:

“The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.”

Section 55(2) of the Constitution provides:

“The National Assembly must provide for mechanisms—

(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
(b) to maintain oversight of—
(i) the exercise of national executive authority, including the implementation of legislation; and
(ii) any organ of state.”

¹¹ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (EFF I)* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at paras 97-9; *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another (EFF II)* [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC) at paras 149-151.

importantly is the catch-all clause contained in section 27(2)(n) that provides the Minister with the authority to take all “other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster”. This subsection effectively provides the Minister with the staggering power to regulate on a broad, or even unlimited, scope of issues which impacts the fundamental rights of persons. Section 27(3) of the Disaster Management Act is supposed to act as a constraint against this vast law-making power. However, the limits provided are so broadly formulated as to be considered extremely weak.¹²

The Minister has promulgated a vast amount of far-reaching regulations, at a rapid rate, in response to the COVID-19 pandemic. In essence, the only role currently played by Parliament is to hold briefings with Portfolio Committees and/or Select Committees where the minister of the relevant department provides updates on the approach taken and then question and answer sessions where the ministers will respond to any questions arising from these briefings.

The passing of regulations, which extend across almost every aspect of life and impacts numerous constitutional rights,¹³ has not been subjected to any parliamentary process or involvement. This cannot be considered as Parliament fulfilling its constitutional scrutiny and oversight role as provided for in the Constitution.

¹² Section 27(3) provides that:

“The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of—

- a. Assisting and protecting the public;
- b. Providing relief to the public;
- c. Protecting property;
- d. Preventing and combatting disruption; or
- e. Dealing with the destructive and other effects of the disaster

¹³ Minister has regulated all aspects of life, which impacts on all various fundamental constitutional rights including the right to equality; the right to life; the right to dignity; the right to bodily and psychological integrity; the right to privacy; the right to freedom of religion; the right to freedom of expression; the right to assemble, demonstrate and picket; the right to freedom of association; the right to freedom of movement; labour rights; the right to an environment that is not harmful to their health or well-being; the rights of children to family or parental care; the right to education; the right to participate in the cultural life of one’s choosing, and the right to enjoy one’s culture with the members of one’s community; and the right of access to court.

As the DMA currently stands, there are no procedural constraints on the Minister's law-making powers. It is obviously undesirable to delegate wide-ranging law-making powers to the Minister, without subjecting the exercise of these powers to Parliamentary oversight and scrutiny. The HSF contends that increased oversight requirements in the DMA will better ensure that Parliament effectively plays its constitutionally mandated oversight role.

The safeguards in place when a state of emergency is declared in terms of section 37 of the Constitution, and the State of Emergency Act, 1997, provide salutary guidance in this regard. Section 3 of the State of Emergency Act provides for Parliamentary supervision and requires that all regulations made pursuant to a state of emergency must be tabled in Parliament as soon as possible.¹⁴ In addition, Parliament is conferred with the power to disapprove of any regulation or make any recommendation related thereto.¹⁵

The HSF contends that similar safeguards must be put in place in the DMA to ensure effective parliamentary oversight, and to ensure that the immense and broad powers given to the Minister are exercised in a constitutional manner.

First, the HSF recommends that all regulations should have to be tabled before the National Assembly as soon as possible. Second, the HSF recommends that the National Assembly should have the power to decide, by resolution, to invalidate or amend any such regulation if it so chooses.

It is important to note that parliamentary oversight over the exercise of the Minister's delegated law-making powers does not divest Parliament of its constitutional obligation to exercise its primary law-making function and initiate, prepare and pass concrete and specific legislation to regulate the state's response to COVID-19.

4. Conclusion

The HSF welcomes the introduction of the draft Bill. The HSF sees the draft Bill as an opportunity to further clarify that the DMA is not intended to indefinitely delegate legislative powers to the Minister. It is the HSF's hope that the amendments to the DMA recommended herein will assist to clarify Parliament's law-making and oversight obligations in respect of

¹⁴ Section 3(1).

¹⁵ Section 3(2).

disasters that threaten harm to the Republic. As one of the three arms of government, Parliament cannot abdicate its law-making and oversight obligations to the Minister for an indefinite period of time.