

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: _____

In the matter between:

DUWAYNE ESAU	First Applicant
NEO MKWANE	Second Applicant
TAMI JACKSON	Third Applicant
LINDO KHUZWAYO	Fourth Applicant
MIKHAIL MANUEL	Fifth Applicant
RIAAN SALIE	Sixth Applicant
SCOTT ROBERTS	Seventh Applicant
MPIYAKHE DLAMINI	Eighth Applicant

and

THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	First Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE MINISTER OF TRADE, INDUSTRY AND COMPETITION	Third Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA IN HIS CAPACITY AS THE CO-CHAIRPERSON OF THE NATIONAL CORONAVIRUS COMMAND COUNCIL	Fourth Respondent
THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS IN HER CAPACITY AS THE CO-CHAIRPERSON OF THE NATIONAL CORONAVIRUS COMMAND COUNCIL	Fifth Respondent
THE NATIONAL CORONAVIRUS COMMAND COUNCIL	Sixth Respondent

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THE GOVERNMENT OF THE REPUBLIC OF
SOUTH AFRICA

Seventh Respondent

THE NATIONAL DISASTER MANAGEMENT
CENTRE

Eighth Respondent

FOUNDING AFFIDAVIT

I, the undersigned –

DUWAYNE ESAU,

do hereby make oath and state as follows:

1. I am an adult male student at the University of Cape Town, a South African citizen and the first applicant in this matter.
2. I am authorised to depose to this application on behalf of the other applicants, who have deposed to confirmatory and supporting affidavits that will be filed in due course.
3. The facts contained in this affidavit are, to the best of my belief, both true and correct. Unless the context indicates otherwise, they fall within my personal knowledge or are apparent from documentation under my control.
4. In some instances I have relied on information that is in the public domain. I believe such information to be true. To the extent that I rely on hearsay information, I submit that it is in the interests of justice for such information to be admitted in these proceedings.

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5. Where I make averments or submissions of a legal nature, I do so based on advice received from the applicants' legal representatives, which I believe to be correct.

A INTRODUCTION

6. South Africa is in the midst of the pandemic caused by the Coronavirus Disease 2019 ('Covid-19'). The respondents, who have been primarily responsible for leading the South African government's response to the pandemic, have imposed a regime of regulations that have made unprecedented inroads into the constitutional rights guaranteed by the Bill of Rights.
7. Some aspects of the regime, though onerous, may be justified by the legitimate government purposes of limiting the spread of Covid-19, allowing the authorities the necessary time to ensure that South Africa's health infrastructure is able to cope with a spike in infections and promoting appropriate levels of general health and hygiene. Unfortunately, many other aspects of the regime cannot be justified and bear no rational link to the objective of limiting the spread and lessening the impact of Covid-19.
8. The regulations imposed by the respondents ban movement, stifle economic activity and limit consumer choice. Many of the regulations are characterised by two things: (i) a lack of any rational connection to the objective of combating the pandemic and (ii) a disregard for South Africans' fundamental rights to, among other things, human dignity and freedom of the person.

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9. Furthermore, the respondents' decision-making processes have been marked by an opacity that contradicts South Africa's founding values of openness and accountability. Most worrying in this regard has been the role of a structure described by the Pretoria High Court as '*the nebulous National Command Council*', an entity of unknown size and membership that has no statutory foundation and no legislated duties or functions, but that has been central in determining the national response to the Covid-19 pandemic. For reasons I shall explain, the applicants contend that the Command Council and its involvement in the governance of South Africa is unlawful.
10. At the outset, it is important to clarify that the applicants are not seeking to set aside the regulatory regime that the respondents have put in place to combat Covid-19 (other than a set of directions promulgated by the third respondent in respect of permissible clothing). The applicants confine the relief they seek to having the constitutional invalidities in the regulations cured by the respondents, through an order from this Court directing the COGTA Minister to revise the regulations in accordance with the constitutional rights and principles that will be set out in due course. Nothing in the notice of motion will jeopardise the imperative of combating the pandemic.
11. Furthermore, we do not suggest that, in acting as they have, any of the respondents have acted in bad faith or for an untoward purpose. We have utmost respect for the President's dedication to combating this pandemic and are committed to doing our part to ensure that South Africa remains safe, healthy and prosperous.

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12. That being said, this application has been necessitated by the respondents' failure to adhere to the rule of law, promote and respect constitutional rights and observe the public-administration values of transparency, openness and accountability. The applicants have no wish to obstruct any legitimate efforts to fight Covid-19. However, to be legitimate such efforts must be lawful.
13. This application comes at a critical juncture. When the respondents first imposed the national lockdown, it was expected to last for three weeks. While everyone chafed at the prospective infringement of their liberties, it was thought to be a necessary sacrifice to ensure that South Africa could build up the capacity to handle Covid-19 when infections hit their peak.
14. However, the lockdown was extended for a further two weeks, and then retained (with minor amendments) as '*Alert Level Four*'. Now, almost two months later, the President has announced that he intends for some parts of the country to move to Level Three with effect from 1 June 2020, while the urban hubs remain at Level Four. There is no end in sight. Each new day sees the continued negation of South Africans' autonomy and freedom, fresh reports of some in the armed forces brutalising residents in order to '*enforce*' the lockdown and new directions from Cabinet members telling us what we can eat, what we can buy, how we can dress and when we can leave our homes.
15. We bring this application in order for this Court to vindicate the constitutional vision of a free and dignified citizenry and a government that is caring and respectful rather than controlling and authoritarian. This application is also of immense importance going forward, as the respondents urgently require

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intervention and direction from the courts on the extent to which constitutional rights may not be derogated from, as well as the dividing line between regulating in the public interest and encircling citizens with a palisade of irrational restrictions.

16. This urgent application has three basic premises.

17. **First**, the rule of law and principle of legality are sought to be vindicated.

17.1 In this respect we have challenged the constitutional validity of the Command Council. We contend that it has no legal validity and no decision-making powers. Yet it has seemingly managed and made decisions affecting all South Africans' rights.

17.2 Even if the Council is not found to have made binding decisions, contrary to numerous public documents, media statements and other communications by the President and members of the Cabinet, then in any event it unlawful and an invalid usurpation of Parliament's choice as to which body manages national disasters.

17.3 Parliament has determined that it is the National Disaster Management Centre that manages national disasters. It is not open to the executive to ignore Parliament's intention and create a parallel structure such as the Command Council. Yet that is what the President and the National Executive have purported to do.

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- 17.4 We are entitled to an order declaring the Command Council invalid to the extent of its invalidity by virtue of section 172(1)(a) of the Constitution.
18. **Second**, we submit that certain violations of rights occasioned by the enactment of the Disaster Regulations do not withstand scrutiny under the constitutional limitations analysis, and that those regulations were unfairly made and are inconsistent with the Act. In the circumstances we seek declaratory orders to that effect.
19. **Third**, we appreciate both the immense task the respondents have in dealing with the disaster, as well as this Court's function in determining this challenge. In the circumstances we acknowledge that a just and equitable order as contemplated by section 172(1)(b) of Constitution may well be that the declaratory orders we seek are to be suspended to allow the relevant respondents to correct the defects determined by this Court.

THE PARTIES

20. I am the first applicant. I reside at 24 Waterbury Drive, Aliwal Gardens, Ruyterwacht, Cape Town.
21. The second applicant is **NEO MKWANE**, an adult male civil servant and a South African citizen. He resides at 1 Long Street, Mowbray, Cape Town.
22. The third applicant is **TAMI JACKSON**, an adult female and a South African citizen employed as a media intern. She resides at 10 Rose Way, Matroosfontein, Cape Town.

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23. The fourth applicant is **LINDO KHUZWAYO**, an adult female student at the University of Cape Town and a South African citizen. She resides in Liesbeeck Gardens, 50 Durban Road, Mowbray, Cape Town.
24. The fifth applicant is **MIKHAIL MANUEL**, an adult male research assistant and PhD student at the University of Cape Town and a South African citizen. He resides at 1101 Marlborough Park, 13 Bath Road, Claremont, Cape Town.
25. The sixth applicant is **RIAAN SALIE**, an adult male student at the University of South Africa and a South African citizen. He resides at 23 Montpelier Avenue, Uitsig, Wellington, Western Cape.
26. The seventh applicant is **SCOTT ROBERTS**, an adult male student at the University of Cape Town and a South African citizen. He resides at B4 Ventnor House, 213 Main Road, Three Anchor Bay, Cape Town.
27. The eighth applicant is **MPIYAKHE DLAMINI**, an adult male data analyst and researcher and a South African citizen. He resides at 17 Bayswater Road, Kensington B, Randburg, Gauteng.
28. The applicants bring this application in their own interest. They also bring this application in the public interest, as contemplated in section 38(e) of the Constitution of the Republic of South Africa, 1996 ('**the Constitution**'), given the obvious interest that all South Africans have in the ongoing unreasonable and unjustifiable infringement of their fundamental rights by the respondents, the fact that there is no end in sight to those infringements and the resource and capacity

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constraints that many ordinary citizens and residents would face in bringing the necessary legal challenge to the Disaster Regulations.

29. The first respondent is **THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS** ('the **COGTA Minister**'), care of the State Attorney, Liberty Life Building, 22 Long Street, Cape Town. The COGTA Minister's office is located in the Good Hope Building, 1st Floor, Room 1, Plein Street, Cape Town. The COGTA Minister is the member of the Cabinet who has been designated to administer the Disaster Management Act, 57 of 2002 ('the **Act**'). She has made a series of regulations in terms of section 27(2) of the Act. In this application we impugn the latest of these regulations, published under Government Notice R. 480 on 29 April 2020 in *Government Gazette* 43258 ('the **Disaster Regulations**').
30. The second respondent is **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** ('the **President**'), care of the State Attorney, Liberty Life Building, 22 Long Street, Cape Town. The office of the President is located at Tuynhuys, Plein Street, Cape Town. The President is the Head of the National Executive and is cited in these proceedings by virtue of his interest in the Disaster Regulations and his role in establishing and convening the National Coronavirus Command Council.
31. The third respondent is **THE MINISTER OF TRADE, INDUSTRY AND COMPETITION** ('the **Trade Minister**'), care of the State Attorney, Liberty Life Building, 22 Long Street, Cape Town. The Trade Minister's office is located at Floor 15, 120 Plein Street, Cape Town. The Trade Minister is a member of the

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National Executive who has been responsible for issuing directions regarding Covid-19 and formulating national policy regarding the pandemic. He is cited in these proceedings by virtue of his interest in the Disaster Regulations and the directions made thereunder.

32. The sixth respondent is **THE NATIONAL CORONAVIRUS COMMAND COUNCIL** ('the Command Council'), care of the State Attorney, Liberty Life Building, 22 Long Street, Cape Town. We have no information or knowledge regarding the establishment, offices, powers, functions or role of the Command Council, other than an understanding that it has been established by the President and has been central in formulating the respondents' approach to Covid-19. The Command Council has been cited by virtue of its role in making the Disaster Regulations.
33. The fourth and fifth respondents, the President and the COGTA Minister respectively, are cited by virtue of their joint chairmanship of the Command Council and their responsibility for its role in making the Disaster Regulations. The fourth and fifth respondents are cited care of the State Attorney, Liberty Life Building, 22 Long Street, Cape Town.
34. The seventh respondent is **THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA** ('the government'), care of the State Attorney, Liberty Life Building, 22 Long Street, Cape Town. The government has been responsible for formulating and implementing South Africa's response to Covid-19. It has been cited in these proceedings by virtue of its interest in the Disaster Regulations.

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35. The eighth respondent is **THE NATIONAL DISASTER MANAGEMENT CENTRE ('the Centre')**, care of the State Attorney, Liberty Life Building, 22 Long Street, Cape Town. The Centre is responsible for managing and coordinating national disasters in accordance with the Act. It is cited in these proceedings by virtue of its interest in the Disaster Regulations.

B THIS HONOURABLE COURT HAS JURISDICTION

36. This Division of the High Court has jurisdiction because each of the respondents (with the possible exception of the Command Council, whose particulars are unknown to us) have offices in Cape Town and because all of the applicants (other than the eighth applicant) are resident, and have had their rights infringed by the Disaster Regulations, in Cape Town. The adverse effects of the Disaster Regulations are experienced in Cape Town.

C FACTUAL BACKGROUND

(i) The pandemic

37. In late December 2019 the World Health Organisation ('**the WHO**') received reports of pneumonia in the People's Republic of China with an unknown cause. It was subsequently determined that a novel coronavirus – the '*Severe Acute Respiratory Syndrome Coronavirus 2*' ('**the Coronavirus**') – had presented itself and was the cause of Covid-19. By mid-January 2020 Covid-19 had spread throughout various Asian countries and claimed its first reported victims.
38. As at 19 May 2020, the WHO recorded more than 4,600,000 confirmed cases of Covid-19 and more than 315,000 resultant deaths across 216 countries. On the

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same date the South African government reported more than 16,400 positive cases, more than 7,200 recoveries and 286 deaths.

39. According to the WHO, the majority of people infected with Covid-19 have relatively mild symptoms and recover without needing serious medical intervention such as hospitalisation. However, a minority of people who contract Covid-19 become seriously ill and develop a variety of symptoms that might result in death. The elderly and those with underlying medical conditions are at high risk of becoming seriously ill after contracting Covid-19.
40. According to the WHO, Covid-19 is generally spread via respiratory droplets that are produced by the body and expelled when a Coronavirus-carrier coughs or sneezes. The droplets generally do not travel more than one metre, which is the recommended distance that persons should maintain between themselves and other people.
41. The WHO therefore recommends the following '*simple precautions*' for individuals in order to reduce the chance of spreading or contracting Covid-19:
 - 41.1 Regularly and thoroughly wash hands with an alcohol-based rub or soap and water.
 - 41.2 Stay at least one metre away from other people and avoid crowded places.
 - 41.3 Avoid touching eyes, nose and mouth and follow good respiratory hygiene e.g. cover the nose when sneezing.

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41.4 When even minor symptoms present themselves, stay home.

(ii) **The respondents' response to the pandemic: the lockdown**

42. South Africa reported its first Covid-19 case in early March 2020.
43. On 15 March 2020, the Head of the Centre '*classified the COVID-19 pandemic as a national disaster*' and directed that '*the primary responsibility to coordinate and manage the disaster, in terms of existing legislation and contingency arrangements, is designated to the national executive.*' He also determined that '*organs of state are required to prepare and submit reports, as required by the National Disaster Management Centre and as outlined in section 24(4) – (8) of the Act, to the respective intergovernmental forums as listed therein.*'
44. A copy of the classification notice is annexed hereto, marked 'FA1'.
45. On the same day, acting under section 27(1) of the Act, the COGTA Minister declared a '*national state of disaster*' in respect of the Covid-19 pandemic. She noted that she was only empowered to make further regulations '*to the extent that it is necessary*' to assist and protect the public, provide relief to the public, protect property, prevent or combat disruption or deal with the effects of the disaster. A copy of her declaration is annexed hereto, marked 'FA2'.
46. On 25 March 2020 the COGTA Minister made a set of regulations that provided for a national '*lockdown*' from 26 March 2020 until 16 April 2020 ('**the Lockdown Regulations**'). During the lockdown *inter alia* everyone was confined to his or her place of residence, gatherings were prohibited, South Africa's borders were closed, all businesses and commercial activities had to cease (unless they fell

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within one of the limited categories of essential goods or services) and public transport and commuter transport were prohibited. Furthermore, public officials responsible for enforcing the lockdown were granted a general immunity from liability for causing loss or damage.

47. The Lockdown Regulations were framed as an amendment to regulations the COGTA Minister made on 18 March 2020. However, the provisions regarding the lockdown were entirely new and were brought into force without, to my knowledge, any public-participation process. As far as I am aware, South Africa had never seen such an extreme and all-encompassing derogation from the Bill of Rights since the advent of democracy in 1994.
48. On 16 April 2020 the COGTA Minister amended the Lockdown Regulations and extended the lockdown until 30 April 2020. Once again, this was done without following a public-participation process.

(iii) The respondents' response to the pandemic: the Disaster Regulations

49. On 20 April 2020, the COGTA Minister (or her Department) made a presentation to the President and the Cabinet regarding Covid-19. A copy of her presentation, which is available on the COGTA Department's website, is annexed hereto, marked 'FA3'.
50. The presentation (slide 3) notes that consideration has been given to '*input from industry and sector associations*.' I am not aware of how this input was invited or acquired. However, to my knowledge, the presentation was not preceded by a public-participation process that was open to the public at large.

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51. The presentation (slide 2) records the monumental nature of health challenge presented by Covid-19. However, in its introductory remarks it also notes the following:

[The Covid-19 crisis] presents an opportunity for South Africa to accelerate the implementation of some long agreed-upon structural changes to enable reconstruction and growth.

These will positively impact on key economic and social sectors which will facilitate a more inclusive economy whilst unlocking local production and export potential.

This will require that South Africa sequences and phases its priority areas with a view to deepening the fight against COVID-19 whilst rebuilding the economy.

52. The presentation (slide 5) describes a five-level 'alert system' for regulating South Africa during the pandemic. Level Five entails a 'lockdown' and will be imposed if there is 'high virus spread and/or low health system readiness'. Level One entails 'minimum restrictions' and will be allowed if there is 'low virus spread with high readiness'. Levels Four through Two entail gradually less restrictive provisions, as the virus spread lowers and the health system's readiness improves.
53. The presentation (slide 20) proposed the following system for moving between levels:

*Levels of alert for each province and district **will be determined by the National Command Council** at each meeting, upon a recommendation from the Minister of Health, the Minister of Trade, Industry and Competition and the Minister of Cooperative Governance and Traditional Affairs...*

Individual Ministers, upon consultation with and approval from the Minister of Health, may provide for exceptions and additional directions in sectors within their mandate. This may be necessary as individual sub-sectors needs to be differentiated based on conditions specific to their environment. (My emphasis)

54. The presentation stipulates (slide 34) that the Command Council will '**decide** if we will use COVID-19 protocols for all funerals, or adopt a dual system'.

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55. On 23 April 2020 the President addressed the nation regarding the Covid-19 pandemic and the weeks-long lockdown that it had endured to date. A copy of the speech, made available by the respondents on the 'www.gov.za' website, is annexed hereto, marked 'FA4'.
56. The President announced various measures and priorities, including a '*gradual and phased recovery of economic activity*' as from 1 May 2020, the implementation of a cautious easing of lockdown restrictions via a '*risk-adjusted strategy*', the need to avoid a '*rushed re-opening that could risk a spread which would need to be followed by another hard lockdown*' and the five '*alert levels*' for regulating different stages of the pandemic (as per the COGTA Minister's presentation to the Cabinet described above).
57. The President explained that members of the national executive would '*provide a detailed briefing on the classification of industries and how each is affected at each level. We will give all industry bodies an opportunity to consider these details and, should they wish, to make submissions before new regulations are gazetted, they are free to do so.*'
58. In accordance with the COGTA Minister's presentation to the Cabinet, the President confirmed that '[t]he **National Coronavirus Command Council will determine the alert level** based on an assessment of the infection rate and the capacity of our health system to provide care to those who need it.' He went on to explain that '[t]he **National Coronavirus Command Council met earlier today and determined that the national coronavirus alert level will be lowered from level 5 to level 4** with effect from Friday the 1st of May. This means

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that some activity will be allowed to resume subject to extreme precautions to limit community transmission and outbreaks.'

59. The minutes of the Command Council's meeting of 23 April 2020, at which it decided to move South Africa from a total lockdown to a Level-Four lockdown, are not, to my knowledge, publicly available. I invite the respondents to disclose those minutes in their answering papers.
60. On 25 April 2020 the COGTA Department published a document titled '*Schedule of Services Framework for Sectors*' ('**the Draft Schedule**'). A copy is annexed hereto, marked '**FA5**'. Its cover page states that it is subject to further revision has a time stamp of 11h00.
61. The Draft Schedule comprised various tables setting out the activities, goods and services that the respondents proposed would be permitted during each of the five alert levels. It did not set out any of the operative provisions of the proposed regulations. The Draft Schedule formed the basis for a highly truncated public-participation process, pursuant to which members of the public were invited to submit comments on the proposals regarding permitted goods and services.
62. On 29 April 2020, four days after the publication of the Draft Schedule, the Minister made the Disaster Regulations in terms of section 27(2) of the Act. A copy of the Disaster Regulations is annexed hereto, marked '**FA6**'.
63. The Disaster Regulations repealed and replaced the Lockdown Regulations (regulation 2(1)). However, they allowed for the continued criminal prosecution of contraventions of the Lockdown Regulations and provided for directions

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issued under the previous regulations to remain in force until withdrawn or amended (regulation 2(2) and (3)). I discuss the relevant provisions of the Disaster Regulations below.

64. An explanatory memorandum was not released with the Disaster Regulations. However, on 29 April 2020 the COGTA Minister and the Trade Minister held a press conference regarding the Disaster Regulations.
65. The COGTA Minister explained that, in order to finalise the Disaster Regulations, it was necessary to consult the public. She therefore allowed a 48-hour public-comment procedure in respect of the Draft Schedule, which saw more than 70,000 submissions from interested parties. Other individuals had reportedly sent through *'SMSes and calls and did not necessarily send submissions.'* It is not apparent whether these additional responses were considered.
66. The Trade Minister explained that he and the COGTA Minister *'took careful account of the many submissions we received and we were reading through them from Saturday afternoon right through until late last night'* (i.e. Tuesday night).
67. In terms of regulation 15(1) of the Disaster Regulations, the whole of South Africa moved to *'Alert Level 4'* with effect from 1 May 2020, **in accordance with the Command Council's decision** as communicated by the President on 23 April 2020 and confirmed by the COGTA Minister.
68. Since then, various sets of directions have been published by members of the National Executive. One such set is the *'Directions regarding the sale of clothing,*

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footwear and bedding during alert level 4 of the Covid-19 national state of disaster', published by the Trade Minister on 12 May 2020 (**'the Clothing Directions'**). A copy thereof is annexed hereto, marked **'FA7'**.

69. On 13 May 2020 the President again addressed the nation regarding the Covid-19 pandemic. A copy of the speech, made available by the respondents on the 'www.gov.za' website, is annexed hereto, marked **'FA8'**. The President communicated the following:

- 69.1 *'[W]e are ready to shift to a new phase in our response to the coronavirus pandemic'. Alert Levels Three to One 'allow a progressively greater relaxation of restrictions'.*
- 69.2 *However, at 'the moment infections are mostly concentrated in a few metropolitan municipalities and districts in the country... it is important that we maintain stringent restrictions in these areas and restrict travel out of these areas to parts of the country with lower rates of infection'.*
- 69.3 *The government 'will immediately begin a process of consultation with relevant stakeholders on a proposal that by the end of May, most of the country be placed on alert level 3, but that those parts of the country with the highest rates of infection remain on level 4'. Furthermore, 'in the coming days, we will also be announcing certain changes to level 4 regulations to expand permitted business activities in the retail space and e-commerce and reduce restrictions on exercise'.*

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70. As far as I am aware, neither the President nor the COGTA Minister have, to date, commenced a public-participation process in respect of the envisaged transition to a slightly revised Level Four in some parts of the country and to Level Three in other parts of the country. The only thing that is certain at this stage is that the restrictions set out in the Disaster Regulations and envisaged in the Draft Schedule will be in force for some time.

(iv) **The economic and social consequences of the Lockdown Regulations and the Disaster Regulations**

71. Recent interactions before Parliament's Standing Committee on Finance indicate the following economic consequences as a result of the Lockdown and Disaster Regulations:

71.1 Economic activity has been brought to a standstill, revenue collection has become impossible and the pressure on government expenditure remains. National government revenue is expected to decrease by 32% and revenue collection by local government has also been negatively affected. The Commissioner of the South African Revenue Services has stated that there has been an under-recovery of revenue of more than R1.5 billion on the sale of alcohol and cigarettes in the month of April.

71.2 Approximately one third of the resources that were productive in February 2020 have been 'idled' as a result of the lockdown. It was indicated that, as at May 2020, between three to seven million job losses have been forecast as a result of the lockdown.

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- 71.3 The International Monetary Fund, the South African Reserve Bank and the Organisation for Economic Cooperation and Development estimate that the country's economic growth will contract by between 6 and 7 percent in 2020. The National Treasury has stated that the full impact of lockdown will decrease the baseline growth by 7.3 percentage points in 2020.
- 71.4 Aside from the impact on domestic production, retrenchments and liquidations have increased.
72. The Meeting Report of Parliament's Finance Standing Committee on the National Treasury's briefing regarding the fiscal implications of COVID-19 and interventions by government to stimulate the economy is annexed hereto, marked 'FA9'.
73. The respondents have put the full weight of the government's coercive machinery into enforcing the Lockdown Regulations and the Disaster Regulations. An '*enforcement officer*' under the latter includes a member of the South African Police Service ('**the SAPS**'), a member of any of the metropolitan police forces, immigration inspectors and traffic officers. These are the officials who, in ordinary times, are tasked with employing minimal force within South Africa to police the country and ensure its security.
74. However, the COGTA Minister has also included members of the South African National Defence Force ('**the SANDF**') as '*enforcement officers*'. These soldiers – who are trained in the extra-territorial use of maximum force against the

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nation's enemies – are now patrolling the streets and spaces of South Africa to enforce the restrictions that the respondents have imposed.

75. I annex hereto, marked 'FA10', a letter from the President to the Co-Chairperson of Parliament's Joint Standing Committee on Defence, dated 21 April 2020. In it, the President records that he authorised the deployment of more than 2,800 members of the SANDF on 25 March 2020 *'for a service in cooperation with the South African Police Service in order to maintain law and order, support other State Departments and to control our border line to combat the spread of COVID-19 in all nine provinces.'* He goes on to record that, for the period 2 April 2020 to 26 June 2020, he has decided to deploy *'an additional 73,180 members of the SANDF, consisting of the Regular Force, Reserve Force and Auxiliary Force'*, which he estimates will cost more than R4.5 billion.
76. Over and above the engagement of South Africa's ordinary policing services, the President has thus deployed 76,000 additional soldiers to monitor and control the South African population under the Disaster Regulations. To my knowledge, the South African government has not authorised such a large deployment of its armed forces since 1994, let alone within the borders of the Republic.
77. In the matter of *Khosa and Others v Minister of Defence and Military Veterans and Others*, the Pretoria High Court was recently required to deal with the tragic case of a man who was tortured and murdered, and a woman who was beaten and humiliated, by members of the SANDF while *'enforcing'* the Disaster Regulations. To avoid overburdening these papers I have not annexed a copy of the judgment, but will make one available at the hearing of this matter. The

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Learned Judge (at para 25) recorded that *'almost 20,000 persons on day 42 of the "lock-down" have been made criminals. The consequences thereof have perhaps not been sensibly considered...'*

78. I am unaware of how many people have been arrested for allegedly infringing the Lockdown Regulations or the Disaster Regulations; how many people have been injured or killed pursuant to the *'enforcement'* activities of the SAPS, the SANDF or any other enforcement officer; how many complaints have been lodged against enforcement officers as a result of their *'enforcement'* of the Lockdown Regulations and the Disaster Regulations. I invite the respondents to provide this information in their answering papers.
79. We the applicants are ordinary citizens who have done our best to continue living, studying, working and functioning during the lockdown and the subsequent Level-Four restrictions. However, the President's address of 13 May 2020 has made it clear that there is a strong chance that the Level-Four restrictions – which are barely different from the initial lockdown in the extent of their limitations – will continue in full force in significant parts of the country (including the Western Cape, which currently has the highest number of reported cases and the highest number of Covid-19 related deaths in a province). Furthermore, the new suite of Level-Three restrictions that may come into force in some parts of the country as from 1 June 2020 will contain many of the same constitutional infringements as are present in the current Disaster Regulations. There are no indications that South Africa's health infrastructure capacity has been sufficiently boosted in the past two months to allow the lifting or amelioration of the national state of disaster. But more importantly, the Disaster Regulations' constitutional validity is

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in issue. We submit that the entire lockdown regime (including the various 'Alert Levels') is tainted with illegality, and it is only the Courts that can rectify such unconstitutionality and illegality.

D THE LEGAL FRAMEWORK

(i) The Act

80. The Act came into force in April 2004. As is evident from its long title, the Act provides for integrated and coordinated disaster management policy, mitigating the severity of disasters, the rapid and effective response to disasters and the establishment and functioning of the Centre.
81. Covid-19 may legitimately be regarded as a 'disaster' within the meaning of section 1 of the Act.
82. In respect of a national disaster such as Covid-19, the '*national executive is primarily responsible for the coordination and management*' (section 26(1)). If a national disaster has been declared, '*the national executive must deal with [the] national disaster in terms of existing legislation and contingency arrangements as augmented by regulations or directions made or issued in terms of section 27(2)*' (section 26(2)(b)).
83. Section 27(2) confers the powers to make regulations and directions in order to address a national disaster. It reads:

If a national state of disaster has been declared in terms of subsection (1), the Minister may, subject to subsection (3), and after consulting the responsible

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Cabinet member, make regulations or issue directions or authorise the issue of directions concerning –

- (a) the release of any available resources of the national government, including stores, equipment, vehicles and facilities;
- (b) the release of personnel of a national organ of state for the rendering of emergency services;
- (c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;
- (d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;
- (e) the regulation of traffic to, from or within the disaster-stricken or threatened area;
- (f) the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;
- (g) the control and occupancy of premises in the disaster-stricken or threatened area;
- (h) the provision, control or use of temporary emergency accommodation;
- (i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;
- (j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;
- (k) the dissemination of information required for dealing with the disaster;
- (l) emergency procurement procedures;
- (m) the facilitation of response and post-disaster recovery and rehabilitation;
- (n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster; or
- (o) steps to facilitate international assistance.

84. Section 27(3) of the Act imposes further restrictions on the regulation-making and direction-making powers in the context of a national disaster:

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

- (a) assisting and protecting the public;
- (b) providing relief to the public;
- (c) protecting property;
- (d) preventing or combating disruption; or
- (e) dealing with the destructive and other effects of the disaster.

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85. A national state of disaster lapses automatically after three months but may be extended by the COGTA Minister by notice in the *Government Gazette* for one month at a time (section 27(5)).
86. The Act establishes various structures that are critical to the management of disasters, most important of which is the Centre.
87. The Centre's objective is to '*promote an integrated and co-ordinated system of disaster management, with special emphasis on prevention and mitigation*' (section 9). It is the primary body established by the Act to manage and coordinate the government's response to national disasters.
88. The Centre specialises in disaster management; monitors organs of state working to manage disasters and effect rehabilitation; stores and transmits information about disaster management; is the advisory and consultative body for disaster management; makes recommendations regarding disaster management funding; makes recommendations regarding draft legislation that regulates disasters management; and operates subject to the COGTA Minister's directions (section 15(1) and (3)).
89. The Centre is required to: assist in the coordination of disaster management plans and strategies (section 19(d)); guide organs of state on determining risk levels, assessing vulnerabilities and minimising risks in communities (section 20(1)(a)); and give advice on guidelines and recommendations (section 22(a)).

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90. It is the Centre that carefully coordinates those Cabinet members who have a role to play in the management of a disaster. It was Parliament's intention to entrust the coordination of the different role players in a disaster to the Centre. The Centre is a carefully thought through mechanism to coordinate and integrate functions in a disaster. It has wide and far reaching advisory and recommendatory powers in a disaster.

91. Finally, section 61 of the Act confers a broad 'indemnity' on officials:

The Minister, the National Centre, a provincial or municipal disaster management centre, an employee seconded or designated for the purpose of the National Centre or a provincial or municipal disaster management centre, a representative of the National Centre or a provincial or municipal disaster management centre, or any other person exercising a power or performing a duty in terms of this Act, is not liable for anything done in good faith in terms of, or in furthering the objects of, this Act.

(ii) The Disaster Regulations

92. The Disaster Regulations provide for the COGTA Minister (upon recommendation from the Minister of Health and in consultation with the Cabinet) to determine the applicable 'alert level', set out certain general provisions and then prescribe the detailed rules that apply to Level Four.

93. For present purposes we take no issue with the substance of various aspects of the Disaster Regulations, including the obligation on persons to wear face masks when in public (regulation 5(1)); the obligation on business premises to ensure that they maintain adequate space for social distancing (regulation 5(4)) and to promote social distancing (regulation 5(5)); the prohibition on gatherings (regulation 23); the closure of facilities that are ordinarily used for entertainment

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and recreation of large groups (regulation 24); and the imposition of health protocols and social-distancing measures for retail stores (regulation 28(2)).

94. However, the same cannot be said for various other provisions of the Disaster Regulations. They are discussed below.

95. Regulation 16 governs the movement of persons and confines every person to his or her place of residence (sub-regulation (1)). Regulation 16(2) sets out a closed list of exceptions to this confinement rule:

A person may only leave their place of residence to –

- (a) perform an essential or permitted service, as allowed in Alert Level 4;*
- (b) go to work where a permit which corresponds with Form 2 of Annexure A, has been issued;*
- (c) buy permitted goods;*
- (d) obtain services that are allowed to operate as set out in Table 1 to the Regulations;*
- (e) move children, as allowed;*
- (f) walk, run or cycle between the hours of 06H00 to 09H00, within a five kilometre radius of their place of residence: Provided that this is not done in organised groups.*

96. The reference in sub-regulation (2)(b) is to a permit to *'perform an essential or permitted service'*. An *'essential service'* is a service listed in Annexure D and a *'permitted service'* is a service listed in Table 1.

97. Regulation 16(4) prohibits movement between *'provinces, metropolitan areas and districts'* except –

- (a) for workers who have a permit to perform an essential or permitted service who have to commute to and from work on a daily basis;*
- (b) [for] the attendance of a funeral, as allowed;*

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- (c) *[for] the transportation of mortal remains; and*
- (d) *for learners who have to commute to and from school or higher education institutions.*

98. Regulation 16(3) imposes a daily curfew:

Every person is confined to his or her place of residence from 20h00 until 05h00 daily, except where a person has been granted a permit to perform an essential or permitted service as listed in Annexure D, or is attending to a security or medical emergency.

99. The failure to comply with the movement restrictions is a criminal offence that may result, upon conviction, in the imposition of a fine, a prison sentence or both (regulation 31(2)).

100. Regulation 28 provides that only businesses set out in Table 1 may operate during Level Four and that retail stores, even if operating to sell Table-1 goods, may not sell other goods that are in store unless they are also set out in Table 1 (sub-regulations (1) and (3)).

101. Although the general selling of prohibited goods is not a criminal offence, a retailer is guilty of a crime if he or she sells prohibited goods and permissible goods in the same store (regulation 31(2)).

102. A '*permitted*' good or service is one set out in Table 1, which describes business activities in designated sectors of the economy e.g. agriculture, hunting, forestry and fishing; manufacturing; and construction. Part E of Table 1 regulates '*WHOLESALE AND RETAIL TRADE, COVERING STORES, SPAZA SHOPS, E-COMMERCE AND INFORMAL TRADERS*'. It reads:

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1	Food products, including non -alcoholic beverages and animal food.
2	The sale of hot cooked food, only for home delivery.
3	Toilet Paper, sanitary pads, sanitary tampons, and condoms.
4	Hand sanitiser, disinfectants, soap, alcohol for industrial use, household cleaning products, and personal protective equipment.
5	Products for the care of babies and toddlers.
6	Personal toiletries, including haircare, body, face, hand and foot care products, rollons, deodorants, dental care products.
7	Medical and Hospital Supplies, medicine, equipment and personal protective equipment.
8	Fuel and lighting, including coal, wood, paraffin and gas.
9	Airtime and electricity.
10	Hardware, components and supplies.
12	Components for vehicles undergoing emergency repairs
13	Chemicals, packaging and ancillary products used in the production of any these products listed in Part E.
14	Textiles required to produce face masks and other personal protective equipment and winter clothing.
15	Winter clothing, footwear, bedding and heaters and the components and fabrics required to manufacture these.
16	Children's clothing and fabrics and components required to manufacture these.
17	Stationery and educational books.
18	Personal ICT equipment including computers, mobile telephones and other home office equipment.
19	No sale of liquor permitted.
20	Directions may permit the incremental expansion of e- Commerce, taking into account the need to limit the extent of movement on the road, contact between people, law-enforcement challenges and the impact on other businesses.

103. Although seemingly numbered sequentially, Section E of Table 1 contains no item 11.

104. In order to perform an essential or permitted service, an individual must have a permit that corresponds with the standard-form authorisation set out in an annexure to the Disaster Regulations (regulation 28(4)).

E THE STANDARD OF REVIEW IN THESE PROCEEDINGS

105. The making of regulations and directions is administrative action within the meaning of section 33 of the Constitution and the Promotion of the Administrative Justice Act, No 3 of 2000 ('the PAJA'). Furthermore, the making of the Disaster

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Regulations and the Clothing Directions clearly constitutes administrative action as it constitutes the implementation of the disaster-management policy as determined by the respondents through the making of detailed rules that regulate various aspects of everyday living.

106. The decisions impugned in these proceedings therefore fall to be reviewed in accordance with the standards of lawfulness, reasonableness and procedural fairness set out in section 33(1) of the Constitution and section 6(2) of the PAJA.

107. In any event, the making of the Disaster Regulations and the Clothing Directions constituted the exercise of public power which must, in accordance with the principle of legality, be consistent with the Constitution, have been done for a proper purpose and meet the standards of lawfulness and rationality.

F THE GROUNDS OF REVIEW

(i) The Command Council is unlawful

108. Since the President's first mention of the Command Council, concerns have arisen regarding its role, composition and influence over the respondents' decision-making. The Director-General in the President's office, and the Secretary of the Cabinet ('the **Director-General**'), issued correspondence regarding the Command Council's role on 4 May 2020. It is annexed hereto, marked '**FA11**'. He set out the following explanations:

108.1 There are no rules on how the Cabinet organises its work to coordinate its members and their functions.

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- 108.2 The President decided that careful coordination of Cabinet members was required to deal with the national disaster. Accordingly, on 15 March 2020, the Cabinet decided that *'all those Cabinet members who have a role to play in the management of the disaster'* would *'form a collective that is the National Command Council.'*
- 108.3 The Command Council is *'a coordinating body'* that facilitates consultation. However, under the Disaster Regulations the COGTA Minister retains responsibility for determining alert levels.
109. To date there has been no clarity on how the Command Council was constituted, who its members are, what the terms of their membership are (for example, in relation to remuneration), what the Command Council's functions are, how it is funded and what the source of its powers is. I invite the respondents to provide this information in their answering papers.
110. However, one thing is clear: in practice, the Command Council has been the body that took critical decisions in respect of South Africa's response to the Covid-19 pandemic.
111. On 20 April 2020, the Cabinet received the COGTA Minister's proposed policy response to the pandemic (see annexure **FA3**). That proposal expressly stipulates that the Command Council will, after recommendations from the COGTA Minister, the Trade Minister and the Health Minister, determine the alert level for each province and each district. It also states that the Command Council will decide on the protocols to be adopted in respect of funerals. From early on

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the Command Council was therefore conceived of as having decision-making powers.

112. To my knowledge, the President and the Cabinet accepted the COGTA Minister's policy proposal.

113. Three days later, on 23 April 2020, the President addressed the nation and explained that the Command Council had convened and '*determined*' to move from Level Five to Level Four as from 1 May 2020. He also indicated that, in future, the Command Council would '*determine the alert level based on an assessment of the infection rate and the capacity of our health system to provide care to those who need it.*'

114. On 25 April 2020 the COGTA Minister published the Draft Schedule dealing with, among other things, the restrictions applicable during level four. And on 29 April 2020 the COGTA Minister promulgated the Disaster Regulations, moving South Africa from Level Five to Level Four as from 1 May 2020 in accordance with the Command Council's decision.

115. In summary, the Command Council **decided** that South Africa would move from the national lockdown to Alert Level Four, and other respondents implemented that decision. Whatever its other functions and roles may have been, the Command Council was not an advisory body or a consultative forum in respect of the Disaster Regulations, but the decision-making entity.

116. The movement from Level Five to Level Four that the Command Council decided on was implemented through the Disaster Regulations. The content of those

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regulations was determined, at least in part, by the Command Council. However, the Command Council had no power at all (whether under section 27 of the Act or otherwise) to determine the contents of any regulations made under the Act. The Disaster Regulations were therefore vitiated by the Command Council's unlawful hand in their making.

117. Furthermore, both the President and the COGTA Minister were clear that they were implementing a decision of the Command Council in making the Disaster Regulations. The President and the COGTA Minister therefore fettered their discretion unlawfully, abdicated their responsibilities under the Act (particularly the COGTA Minister's responsibility to determine the contents of the Disaster Regulations) and acted under the impermissible dictation of the Command Council. The conduct of the President and the COGTA Minister in relation to the Disaster Regulations was therefore also unconstitutional, unlawful and invalid.

118. There is another cause for concern in respect of the Command Council. Based on the Director-General's explanation, the Command Council comprises various members of the National Executive and functions to coordinate the respondents' response to the Covid-19 pandemic and facilitate consultation.

119. However, those are precisely the functions that Parliament has determined should be discharged by the Centre. Under the Act, the Centre is responsible for coordinating disaster management and mitigating the effects of a disaster. Its functions include acting as '*a repository of, and conduit for, information concerning disaster, impending disasters and disaster management*' and as a forum for advice and consultation for organs of state such as the National

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Executive and the COGTA Minister. It is also obliged to make recommendations regarding legislation, including regulations, that is drafted and implemented to address a national disaster.

120. Parliament clearly envisioned the need for a coordinating body, with advisory and recommendatory powers. It had a particular structure in mind, with a particular framework and composition. That structure is the Centre. However, all of the carefully calibrated provisions set out in Chapter 3 of the Act are meaningless if the National Executive and the President can create their own separate, independent and unaccountable structure.

121. The Command Council has therefore usurped the role of the Centre in respect of the Covid-19 pandemic. This is unlawful because it is inconsistent with the Act and subversive of Parliament's legislative authority. The Cabinet may not establish an unaccountable parallel structure to do the work of a dedicated statutory agency. For one thing, this strips the decision-makers of the Centre's experience, expertise and detailed planning infrastructure in respect of disaster management. For another it displaces an organ of state that is subject to the clear constraints imposed by the Act, and replaces it with the '*nebulous*' Command Council that has no constitutional or statutory basis.

(ii) The Disaster Regulations were made irrationally and unfairly

122. Prior to the Disaster Regulations, none of the iterations of the regulations made by the COGTA Minister under the Act were preceded or informed by a public-

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participation process. This was contrary to the requirements of administrative justice and procedural irrationality.

123. However, on 25 April 2020, at 11h00, the COGTA Minister commenced a public-participation process in respect of certain aspects of the intended regulations – interested parties were afforded an opportunity to comment on the Draft Schedule (see annexure **FA5**).

124. She was obliged by the Constitution and by statute to undertake and complete a process of meaningful public participation, given the extensive infringement of fundamental rights contained in the various sets of regulations.

125. However, the process followed by the COGTA Minister was not fair, rational or compliant with administrative justice:

125.1 The Draft Schedule contained 22 pages of detail and interested parties were afforded a mere 48 hours to consider it and provide responses. This was wholly insufficient to allow members of the public to properly engage with the draft and prepare appropriate responses.

125.2 The Draft Schedule only sets out the sectors and sub-sectors in respect of which the respondents considered permitting economic activity. It did not address the operative provisions of the regulations at all, for example the proposed rules regarding social distancing and hygiene in the workplace and in retail facilities, the movement restrictions, the control of funerals etc. The public-participation process therefore did not allow

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interested parties to consider or make representations on much of the content of the regulations that the COGTA Minister intended to make.

125.3 The COGTA and Trade Ministers have indicated that the respondents allowed interested parties 48 hours to make submissions. The submission window therefore closed at 11h00 on Monday, 27 April 2020. The Ministers have also indicated that more than 70,000 submissions were received, in addition to telephone calls and SMSes. The Disaster Regulations were finalised and promulgated on Wednesday, 29 April 2020. The entire process therefore lasted approximately 96 hours. It was not possible for the COGTA Minister to receive and collate more than 70,000 submissions, consider the content of the representations, make a decision on which aspects of the draft regulations should be amended, and effect those amendments within the 48 hours following the closure of the submission window, or even during the whole of the 96-hour period.

125.4 Similarly, it would not have been possible for departmental officials to receive, collate, consider and properly summarise all of the submissions, and then for the COGTA Minister to consider those summaries and revise the draft regulations accordingly, within the time constraints that the respondents set for themselves.

125.5 Having decided to conduct a public-participation process, it was irrational and unfair for the COGTA Minister not to consider the substance of the submissions made.

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(iii) The Disaster Regulations unconstitutionally infringe the rights to human dignity, freedom of the person, freedom of movement and freedom of occupation

The constitutional rights and values

126. I shall refer to regulations 16(1) – (4), 28(1), 28(3) and 28(4), read with Part E of Table 1, of the Disaster Regulations as ‘**the Impugned Restrictions**’. It is these provisions that are, in our submission, substantively unconstitutional, unlawful and invalid.
127. Section 1(a) of the Constitution provides that South Africa’s constitutional state is founded on human dignity and the advancement of human rights and freedoms.
128. Section 10 of the Constitution protects the right to human dignity, an important component of which is the autonomy that a free citizen enjoys in a constitutional republic – the freedom to make his own life choices and regulate his own affairs, and the responsibility of living with the consequences of those choices. Section 10 is one of the few provisions of the Bill of Rights that is entirely non-derogable during a state of emergency, which is indicative of the central place that human dignity occupies in the constitutional scheme.
129. The Impugned Restrictions materially infringe the right to human dignity. They operate from a starting point of itemising permitted activities and banning

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everything else, rather than setting out prohibited conduct and otherwise allowing freedom. Individuals are therefore not only limited to doing what the regulator thinks is in their best interests, but are also limited to those activities that the regulator can think to allow. A regulatory regime based on human dignity should function in the opposite manner: only prohibiting identified conduct that is proven, or may reasonably be expected, to be harmful, while otherwise allowing individuals the autonomy to make their own decisions.

130. The Impugned Restrictions generally restrict individuals to their homes, thereby depriving such individuals of autonomy about so basic an issue as human movement. On pain of criminal sanction, they only allow individuals to leave their homes if they are going to perform an allowed service, are acquiring an allowed set of goods and services, are moving a child from one parent to another or if they wish to *'walk, run or cycle between the hours of 06h00 to 09h00'*.
131. People therefore may not leave their residences for recreational walks or drives at a chosen time of day. They may not exercise outside over lunch, in the afternoon, at night or at 09h01. Even if they limit themselves to exercising before 09h00, they may not swim or kayak or hike a nearby mountain – they must choose between walking, running or cycling within a five-kilometre radius of their homes. And even where people are allowed to leave their homes to work, they may only do so if they have a duly issued permit authorising them to perform an essential or permitted service.
132. The movement restrictions operate in respect of extremely personal decisions: what to do with one's time, when to go to work, when to exercise, when to obtain

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groceries, cosmetics and other essentials, when to take one's children and pets outside etc.

133. The Impugned Restrictions also do not allow individuals the freedom to enjoy other aspects of the right to human dignity, such as family life: the Disaster Regulations allow parents to move children and allow selected relations to attend funerals, but do not allow geographically separated family members to visit each other, even in times of difficulty. In this regard I refer to the supporting affidavits filed by my fellow applicants.
134. The regulation-28 restrictions on business activity also infringe human dignity, insofar as they undermine an individual's autonomy to make her own consumption decisions. Commanding consumers to only purchase cold prepared food from grocers, but not hot cooked food, and restricting them to the purchase of '*winter clothing*' when they should have the freedom to choose whatever season of attire they wish, is a violation of the right to human dignity.
135. The infringements of human dignity are, furthermore, constant and pervasive: through the Disaster Regulations the government has insinuated itself into the privacy and minutiae of daily living to such an extent that ordinary people cannot escape its plethora of restrictions. The Impugned Restrictions go too far.
136. Section 12(1) of the Constitution guarantees freedom of the person and section 21(1) enshrines the right to freedom of movement. It cannot seriously be contended that regulation 16 of the Disaster Regulations – particularly the curfew and the prohibition of exercise outside of the 06h00 – 09h00 period – does not materially infringe these rights.

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137. Section 22 of the Constitution protects every citizen's right to freedom of trade, occupation or profession, which includes the right to practise one's chosen profession. Regulation 28 of the Disaster Regulations is an unquestionable infringement of this right in respect of the millions of citizens whose chosen profession does not fall within one of the categories of '*permitted*' or '*essential*' services. Each of those citizens has been rendered unable to work as a direct result of the government's prohibition on economic activity.

The restrictions are unjustifiable

138. In terms of section 36(1) of the Constitution, rights in the Bill of Rights may only be limited if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The Impugned Restrictions are not reasonable and justifiable as required by the Constitution.

139. As set out above, the infringed rights are of critical importance and they have been extensively limited by the Impugned Restrictions as read with regulation 31 of the Disaster Regulations.

140. The stated purpose of the Disaster Regulations is to combat the Covid-19 pandemic. In terms of section 27(3) of the Act, the regulations may go no further than doing what is absolutely necessary to assist and protect the public, provide relief to the public, protect property, prevent disruption or to deal with the pandemic's destructive effects.

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141. We do not deny that South Africa is caught in the grips of a crisis and that both the South African government and the citizenry must pursue every lawful, rational and legitimate of fighting the pandemic and addressing its consequences.

142. However, the Impugned Restrictions bear no rational or legitimate connection to this purpose:

142.1 There is no evidence to show that one has a greater risk of contracting Covid-19 outside of one's residence than inside. The risk of contagion arises from exposure to other infected persons. However, this risk is addressed by the general measures set out in regulation 5 (e.g. mandatory face masks when in public, social distancing and adequate space when in shared facilities such as retail stores).

142.2 There is no evidence to show that one has a lower risk of contracting Covid-19 if one only leaves the house to buy permitted goods or render permitted services. One does not increase the risk of spreading the virus by purchasing hot food instead of cold food from the grocery store, or by purchasing winter clothing instead of summer (or autumn or spring) clothing, or by purchasing educational books instead of books for recreational purposes (to the extent that there is a sustainable distinction).

142.3 There is no conceivable link between exercising at 05h59, 09h01 or 14h00 and the spread of Covid-19. If exercise is permitted during three early-morning hours, it should be permitted throughout the day.

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142.4 Similarly, there is no link between the curfew and combating the pandemic: Covid-19 is not more transmissible at night than during the day.

143. The Impugned Restrictions are irrational and contradictory:

143.1 One of the government's critical objections, in line with WHO policy, is to limit human-to-human contact by means of social distancing. However, regulation 16(1)(f), forces every person who wishes to exercise (or to escape their home or simply get some fresh air) to congest themselves into the streets surrounding their homes for a three-hour period each morning. If exercise were permitted throughout the day, the congestion – and therefore the risk of human contact – would be materially decreased. During the permitted exercise hours the streets are far fuller than they were prior to the lockdown or than they would be if exercise were permitted throughout the day. The exercise restriction therefore directly contradicts the respondents' policy objectives.

143.2 Exercise is permitted between 06h00 and 09h00. It is not safe to walk or run or cycle in the dark and people are therefore forced to wait for sunrise. However, it is currently autumn and winter is coming: each day sees sunrise occur later and later. On 18 May 2020 the sun rose in Cape Town at 07h34. That means that those wishing to exercise were deprived of the benefit of more than half of the allotted time, which only exacerbates the congestion on the streets during the final 90 minutes of the exercise period.

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- 143.3 Allowing retail stores to operate and sell certain goods, but not to sell other goods, does not limit the spread of Covid-19: consumers are already in the stores, purchasing what they are allowed to purchase – they are already using the retail facilities in question and the risk of human contact is already present. That risk is addressed through the mandatory health protocols, social-distancing rules and provisions for adequate spacing. Addressing the risk through such controls, rather than by banning retail activity, is in line with WHO policy. Simply put: consumers are already in stores. It makes no sense to ban what they may or may not purchase, unless those sale items themselves increase the likelihood of virus transmission.
- 143.4 Why should movement between provinces, metropolitan areas and districts be permitted for funerals and transporting mortal remains (when the relative in question is already dead) but not for family emergencies such as relatives being on their death beds (in which case both the healthy and the dying person can benefit from the movement)? Any risks associated with family emergencies could be managed through health protocols.
- 143.5 It is a criminal offence to leave the house for a reason other than what is permitted under regulation 16(2). Regulation 16(2) does not permit movement for purposes of visiting a prison or a hospital. However, regulation 25 permits individuals to visit '*Correctional Centres*' and '*Health establishments*' in certain circumstances. It is irrational for the

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Disaster Regulations to permit certain movement in one breath and then criminalise that movement in the next.

144. There are less restrictive means to achieve the objective of spreading the virus.

If movement is permissible during certain times or for certain reasons, provided that there are controls such as health protocols and social distancing in place, it must be permissible during all times and for all reasons (subject to the same protocols and social-distancing rules), unless there is a particular time or a particular reason that is likely to exacerbate the pandemic.

145. Furthermore, if the respondents are reasonably concerned that particular forms of movement risk exacerbating the disaster, those particular forms of movement should be restricted, rather than all movement, all of the time.

146. The means of limiting the spread of the virus that are less restrictive on movement are already set out in the Disaster Regulations i.e. strict health protocols, mandatory use of hand sanitiser, social distancing etc. Similarly, the means of limiting the spread of the virus that are less restrictive on economic and consumer activity are already set out in the Disaster Regulations i.e. the obligation on retail facilities provide employees with face masks, ensure adequate space, regulate queues, provide hand sanitiser etc.

147. The Impugned Restrictions are unreasonable and disproportionate, and therefore cannot be justified under section 36 of the Constitution.

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(iv) The Disaster Regulations are *ultra vires* the Act

148. The Disaster Regulations were made in terms of section 27 of the Act and are therefore constrained by subsections (2) and (3).

149. I accept that regulation 16 constitutes the regulation of the movement of persons in accordance with section 27(2)(f) of the Act. It is not apparent to me how regulation 28(1), 28(3) and 28(4), read with Part E of Table 1, could be justified, other than in terms of section 27(2)(n) of the Act, *viz* regulations concerning '*other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster*' (my emphasis).

150. Any regulations made in terms of section 27(2) of the Act must also comply with the section-27(3) requirement that they be necessary to (i) assist, protect and relieve the public; (ii) protect property and prevent disruption; or (iii) deal with the disaster's effects.

151. The Impugned Restrictions are unlawful because they are not a '*necessary*' response to the pandemic. As explained above, they bear no rational connection to the purpose of combating Covid-19, are disproportionate in the circumstances and could easily be replaced by less restrictive mechanisms. They are therefore not '*necessary*' within the meaning of section 27(2) and (3) of the Act.

152. The Trade Minister has repeatedly sought to justify the Disaster Regulations and the associated directions by reference to protecting competition and ensuring fairness to certain sectors of the economy. Furthermore, the COGTA Minister

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justified the policy underlying the Disaster Regulations on the basis that it would facilitate the *'implementation of some long agreed-upon structural changes to enable reconstruction and growth'* as well as *'a more inclusive economy whilst unlocking local production and export potential'* (see annexure **FA3**).

153. However, the regulation of competition, the promotion of exports and the implementation of structural changes to the economy are not objectives that may be sought to be achieved during a national disaster – section 27 of the Act limits the purposes for which disaster regulations may be used, and none of these economic-policy goals are allowed.

154. To the extent that regulation 28(1), 28(3) and 28(4), read with Part E of Table 1 was made to achieve the abovementioned economic objectives, it is unlawful.

(v) The Clothing Directions are unlawful

155. The Disaster Regulations empower various Cabinet Ministers to issue directions. Regulation 4(6) empowers the Trade Minister to issue directions protecting consumers from unfair pricing, maintaining the supply of goods and services and preventing and combating the spread of Covid-19. Regulation 4(10) empowers any Cabinet Minister to issue directions to address, prevent and combat the spread of Covid-19 and its impact, including –

- (a) *disseminating information required for dealing with the national state of disaster;*
- (b) *implementing emergency procurement procedures;*
- (c) *taking any other steps that may be necessary to prevent an escalation of the national state of disaster, or to alleviate, contain and minimise the effects of the national state of disaster; or*
- (d) *taking steps to facilitate international assistance.*

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156. The Trade Minister issued the Clothing Directions in terms of regulation 4(10)(a) of the Disaster Regulations. They set out the '*categories of clothing and footwear and bedding [that] are permissible for sale by retailers during Alert Level 4*'.

156.1 The permissible footwear categories are boots, slippers, closed-toe heels, closed-toe flat shoes, sneakers, trainers, smart closed-toe shoes and casual closed-toe shoes (clause 3.6 of the Clothing Directions).

156.2 The permissible adult outerwear categories include '*short sleeved knit tops, where promoted and displayed as worn under cardigans and knitwear*', '*short sleeved t-shirts, where promoted and displayed as under garments for warmth*', '*crop bottoms worn with boots and leggings*', '*shirts, either short- or long-sleeved, where displayed and promoted to be worn under jackets coats and/or knitwear*' and '*one-pieces such as bodysuits*' (clause 3.7 of the Clothing Directions).

157. The Clothing Directions are unlawful. As is evident from the notice under which they were published, the Trade Minister relied on regulation 4(10)(a) of the Disaster Regulations to make them, viz the power to prevent and combat the spread of Covid-19 and its impact by '*disseminating information required for dealing with the national state of disaster*'.

158. However, the Clothing Directions do not disseminate information required to deal with Covid-19 – they deal with the minutiae of what bedding, clothing and footwear retailers may sell. They also do nothing to prevent and combat the

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spread of Covid-19 – there is no rational link between fighting the pandemic and the retailing of summer clothing, peep-toe shoes, t-shirts or any of the other prohibited categories of apparel. The directions are therefore irrational and unlawful.

159. Furthermore, the Clothing Directions fail to meet the standard of necessity imposed by section 27(2) and (3) of the Act: the regulation of such benign goods (in circumstances where the retail of similar products is permitted) can never be seen as an essential mechanism for protecting the public from Covid-19 or dealing with the effects of the pandemic. For this reason, too, the Clothing Directions are unlawful.

G THE RELIEF WE SEEK

160. In terms of section 172(1)(a) of the Constitution, a court is obliged to declare law invalid to the extent that it is inconsistent with the Constitution. Accordingly, to the extent that this Honourable Court is satisfied that we have substantiated our allegations of unconstitutionality, it is required to grant the declaratory relief set out in the notice of motion.

161. As stated above, we are cognisant of the fact that the Disaster Regulations cannot, following a declaration that they are invalid, be set aside. That would jeopardise South Africa's response to the Covid-19 pandemic.

162. We therefore seek further relief directing the COGTA Minister and the other respondents to revise the Disaster Regulations, within a reasonable period, to

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correct the various inconsistencies with the Constitution and the Act that have been identified.

163. This form of relief appropriately balances the imperatives of protecting constitutional rights and ensuring that South Africa fights the Covid-19 pandemic in as robust a manner as possible.

H URGENCY

164. The infringement of constitutional rights is inherently urgent, particularly when the infringements are as extensive as in the present matter. Furthermore, the infringements are ongoing and are freshly perpetrated for each day that Level Four lasts. They will continue even if Level Three comes into force, as the President and the COGTA Minister have made clear that at least some of the restrictive provisions will be retained during Level Three. For example, the Draft Schedule contemplates that the curfew will be implemented even during Level Two.

165. Some of the Impugned Restrictions not only infringe constitutional rights, they also risk exacerbating the pandemic by congesting individuals into public places. This is an unacceptable risk in the context of Covid-19.

166. The public importance of this application is overwhelming.

167. We have acted as expeditiously as possible to bring this challenge. Level Four came into effect on 1 May 2020. The Clothing Directions were published on 12 May 2020. And on 13 May 2020 the President explained that the Level-Four

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restrictions would be maintained in the urban hubs beyond the end of May 2020 and that the COGTA Minister would begin the process of amending the Disaster Regulations to allow other parts of the country to move to Level Three as from the end of May. At that stage it became clear that the respondents were committed to the longevity of the Disaster Regulations (in one form or another) and therefore that urgent action was required to prevent the continued infringement of constitutional rights.

168. Furthermore, it is clear that the respondents require judicial guidance on the constitutional rights that may not be infringed in responding to the Covid-19 pandemic. This is of particular importance as the respondents intend to commence a fresh regulation-making process soon and need a judicial determination of both the appropriate process (given the procedural defects to date) and the applicable constitutional principles (given the infringements of the Bill of Rights that have repeatedly occurred thus far).

169. As is evident from the contents of this affidavit, the matter is complicated and these papers have taken some time to prepare. Furthermore, it has been challenging to source legal representation on the appropriate terms.

170. I therefore respectfully submit that, if the case is heard in the ordinary course, the applicants will not be able to obtain effective relief and irremediable harm will be done to the public and the fight against Covid-19. Furthermore, we have done everything possible to bring this matter before this Honourable Court as rapidly as possible.

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171. Due to the urgency of this application, we have effected service on the respondents by way of email to their legal representatives, the State Attorney. As per the notice of motion, the application has been filed in this manner with the Cape Town Head of the Office of the State Attorney. Out of abundant caution, the application will also be emailed to the Head of the Pretoria Office of the State Attorney: StateAttorneyPretoria@justice.gov.za and lChowe@justice.gov.za.

I CONCLUSION

172. We do not seek a costs order against the respondents, unless they oppose this application, in which case we seek costs, including the costs of two counsel.

173. Wherefore I pray for an order in accordance with the notice of motion.



DUWAYNE ESAU

I certify that:

- I. the Deponent acknowledged to me at Cape Town on this the th 20 day of **MAY 2020** that:
 - A. He knows and understands the contents of this declaration;
 - B. He has no objection to taking the prescribed oath; and
 - C. He considers the prescribed oath to be binding on his conscience.
- II. the Deponent thereafter uttered the words, '*I truly affirm that the contents of this declaration are true*'.
- III. the Deponent signed this declaration in my presence at the address set out hereunder on



COMMISSIONER OF OATHS

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