

# DISASTER MANAGEMENT AMENDMENT BILL

[B2-2021]

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## SUBMISSION

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### BACKGROUND AND INTRODUCTION

1. Since the outbreak of the Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) the virus that causes COVID-19 (coronavirus disease 2019), the World Health Organization declared it a Public Health Emergency of International Concern on 30 January 2020, and a pandemic on 11 March 2020.<sup>1</sup>
2. The first case of COVID-19 in South Africa was confirmed by the South African National Institute of Communicable Diseases (NICD) on 5 March 2020 after a 38-year-old male who had travelled to Italy with his wife in a group of 10 people arrived back in South Africa and tested positive.<sup>2</sup>
3. COVID-19 has shown its potential devastating impact over huge parts of the world that was of particular concern and cause for alarm especially in terms of public health and the economy.
4. Although the number of cases as of 15 March 2020 in South Africa remained relatively low, President Cyril Ramaphosa stated that ‘urgent and drastic’ measures were necessary to limit the spread of the virus and address this ‘medical emergency’.
5. As such, a State of Disaster<sup>3</sup> was declared by the President on 15 March thereby giving Dr Nkosazana Dlamini Zuma, the Minister of Cooperative Governance and Traditional Affairs (COGTA) power to limit certain rights and freedoms within South Africa.
6. These rights were conferred upon the Minister in terms of Section 3 of the Disaster Management Act, 2002, as amended (Act No. 57 of 2002) (“The Act”).
7. The President announced the state of disaster on the same date.
8. In a televised address to the nation the President remarked:

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<sup>1</sup> <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>

<sup>2</sup> <https://www.nicd.ac.za/first-case-of-covid-19-coronavirus-reported-in-sa/>

<sup>3</sup> Government Notice No. 313, Government Gazette No. 43096

*“We have decided to take urgent and drastic measures to manage the disease, protect the people of our country and reduce the impact of the virus on our society and on our economy.*

*We have now declared a national state of disaster in terms of the Disaster Management Act. This will enable us to have an integrated and co-ordinated disaster management mechanism that will focus on preventing and reducing the outbreak of this virus.*

*We will also be able to set up emergency, rapid and effective response systems to mitigate the severity of its impact.”<sup>4</sup>*

9. The national executive (i.e., the Cabinet) is primarily responsible for coordination and management of the disaster.
10. Regulations can only be made that assist and protect the public, provide relief to the public, protect property, prevent, or combat disruption, or deal with disruptive or other effects of the disaster.<sup>5</sup> Under this Act, a series of regulations restricting, amongst other things, the movement of persons, goods, and the dissemination of information, were promulgated on 18 March 2020.<sup>6</sup>
11. These regulations include prohibiting foreign nationals from high-risk countries (as defined by the WHO) from entering South Africa from 18 March 2020 and restricting gatherings to 100 individuals.
12. A further series of restrictions, including a “lockdown” on the movement of its citizens from midnight on 26 March were announced on 23 March 2020.<sup>7</sup>
13. In a statement by the President on escalation of measures to combat COVID-19 epidemic (23 March 2020) the President stated the following:

*“We have learnt a great deal from the experiences of other countries.*

*Those countries that have acted swiftly and dramatically have been far more effective in controlling the spread of the disease.*

*Consequently, the National Coronavirus Command Council has decided to enforce a nation-wide lockdown for 21 days with effect from midnight on Thursday 26 March.*

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<sup>4</sup> <https://www.dailymaverick.co.za/article/2020-03-15-covid-19-ramaphosa-declares-national-state-of-disaster-imposes-travel-bans/>

<sup>5</sup> Section 27(3) of the Act

<sup>6</sup> Government Notice No. 318, Government Gazette No. 43107

<sup>7</sup> Government Notice No. R. 398, Government Gazette No. 43148

*This is a decisive measure to save millions of South Africans from infection and save the lives of hundreds of thousands of people.*

*While this measure will have a considerable impact on people's livelihoods, on the life of our society and on our economy, the human cost of delaying this action would be far, far greater.”<sup>8</sup>*

14. The measures announced on 15 March and 26 March represent the most comprehensive limitation on the freedom of movement and assembly of all South Africans since apartheid. A failure to adhere to these measures may result in a fine (unspecified), imprisonment of up to 6 months or both.
15. Since 15 March 2020, South Africa remains in a State of Disaster and under lockdown albeit on adjusted levels.
16. A State of Disaster lasts for 3 months (unless terminated by the Minister) and can be extended by the Minister one month at a time. There is, thus, no role for Parliament in the declaration, extension, or termination of a State of Disaster.
17. However, the Constitutional Court can set aside the declaration of a State of Disaster and it was challenged (and subsequently dismissed) on the grounds that the regulations are violating the rights of South Africans to human dignity, freedom of movement, freedom of trade, occupation and profession, and access to healthcare, food, and water.
18. Furthermore, the regulations must conform to the Bill of Rights and a court can set aside any regulations that are an unjustified limitation on these rights under section 36(1) of the Constitution.<sup>9</sup>
19. A “State of Disaster” is distinct from a “State of Emergency” that can be declared by the President in terms of section 37 of the Constitution of South Africa and in terms of the State of Emergency Act, 1997 (Act No. 64 of 1997).
20. In a State of Emergency, derogations from civil liberties protections under the Bill of Rights such as freedom of assembly are permitted, with some exceptions that include the rights to dignity, life, and the right to a fair trial.<sup>10</sup> The courts and Parliament retain a supervisory role as the courts have the power to declare a State of Emergency invalid, and any extension of a State of Emergency beyond 21 days must be approved by Parliament.

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<sup>8</sup> <https://www.sanews.gov.za/south-africa/president-ramaphosa-announces-nationwide-lockdown>

<sup>9</sup> Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)

<sup>10</sup> Table of Non-Derogable Rights, *infra*

21. A State of Emergency is a temporary measure in which certain rights are limited and it may be declared invalid if the requirements for a declaration in section 37(1) of the Constitution are not met.
22. The declaration of a State of Emergency must be necessary to restore peace and order, and as such, may not be the first step in addressing a health emergency, such as the spreading of a virus.
23. Should the emergency escalate and lead to civil unrest, declaring a State of Emergency may be justified and it has not been ruled out.<sup>11</sup>

## **PURPOSE OF THE SUBMISSION**

24. To provide a brief overview of the current legislation pertaining to a state of disaster and a state of emergency with specific emphasis on:
  - 24.1 Powers of the Executive and Parliamentary Supervision
  - 24.2 The Duration, Lapsing, Termination and Extension of a State of Disaster and State of Emergency
  - 24.3 Limitations on Basic Human Rights
- 25 To assess the proposed Disaster Management Amendment Bill, 2020, consisting of the Memorandum on the Objects of The Disaster Management Amendment Bill, 2021 and the proposed amendments as applied.
- 26 To provide an analyses and objective conclusion.
- 27 To submit this submission to the Parliamentary Committee of Cooperative Governance and Traditional Affairs in response to an invitation by the Committee.

## **STATE OF DISASTER**

- 28 The declaration of a state of disaster is regulated by the Disaster Management Act, 2002<sup>12</sup>, as amended<sup>13</sup>, only.

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<sup>11</sup> <https://verfassungsblog.de/covid-19-state-of-disaster-in-south-africa/>

<sup>12</sup> Act No. 57 of 2002

<sup>13</sup> Disaster Management Amendment Act, 2015 (Act No. 16 of 2015)

29 The only reference in the Constitution to disaster management is with regard to the functional areas of concurrent national and provincial legislative competence.<sup>14</sup>

30 A disaster is defined 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.<sup>15</sup>*

### **Powers of the Executive and Parliamentary Supervision**

31 In terms of section 27 the Minister may, by notice in the Gazette, declare a national state of disaster 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.

32 The president under Section 4(1) establishes, in the case of a national disaster declaration, an intergovernmental committee on disaster management to co-ordinate efforts. The Minister chairs this committee.

33 The responsibilities in the event of a national, provincial or municipal disaster lies within the authority of the executive. The Act states that the national executive is primarily responsible for the co-ordination and management of national disasters irrespective of whether a national state of disaster has been declared in terms of section 27.<sup>16</sup>

34 However, the national executive must deal with a national disaster-

*(a) in terms of existing legislation and contingency arrangements. if a national state of disaster has not been declared in terms of section 37(1): or*

*(b) in terms of existing legislation and contingency arrangements as augmented by regulations or directions made or issued in terms of section 27(2) if a national state of disaster has been declared.<sup>17</sup>*

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<sup>14</sup> Schedule 4 Part A

<sup>15</sup> Section 1 of the Act

<sup>16</sup> Section 26(1) of the Act. Sections 40(1) and 54(1) apply *mutatis mutandis* to provincial and municipal states of disaster

<sup>17</sup> Section 26(2) of the Act. Sections 40(2) and 54(3) apply *mutatis mutandis* to provincial and municipal states of disaster

- 35 Currently, in the case of a national disaster, the only obligation on the executive is for the Minister to submit the annual report submitted by the National Centre in terms of section 24: Reporting, to Parliament within 30 days after receipt of the report from the National Centre.<sup>18</sup>
- 36 In the case of a provincial state of disaster, the MEC responsible for the provincial department in which the disaster management centre of a province is located, must submit the annual report to the provincial legislature within 30 days after receipt of the report from the disaster management centre.<sup>19</sup>
- 37 There is, thus, no role for Parliament in the declaration, extension, or termination of a State of Disaster, and only an annual oversight pertaining to national and provincial states of disaster.

### **The Duration, Lapsing, Termination and Extension of a State of Disaster**

- 38 At this point it is fitting to turn to section 27(5) of the Act, which forms part of the clauses the proposed Disaster Management Amendment Bill, 2020, seeks to amend.
- 39 Section 27(5) addresses the duration, lapsing, termination and extension of a national state of disaster.<sup>20</sup>
- 40 It reads as follows:

*A national state of disaster that has been declared in terms of subsection (1)-*

- (a) lapses three months after it has been declared;*  
*(b) may be terminated by the Minister by notice in the Gazette before it lapses in terms of paragraph (a); and*  
*(c) may be extended by the Minister by notice in the Gazette for one month at a time before it lapses in terms of paragraph (a) or the existing extension is due to expire.*

- 41 It is therefore clear that the duration of a state of disaster is three months before it lapses and may be extended one month at a time.
- 42 Secondly that only the executive can action an extension and the termination of a state of disaster.

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<sup>18</sup> Section 24(2) of the Act

<sup>19</sup> Section 36(2) of the Act

<sup>20</sup> Sections 41(5) and 55(5) apply *mutatis mutandis* to provincial and municipal states of disaster

## Limitations on Basic Human Rights

- 43 It is important to note that the Act authorizes the Minister to make regulations or issue directions or authorise the issue of directions concerning a series of powers and steps to assist and protect the public, provide relief to the public, protect property, prevent, or combat disruption, or deal with disruptive or other effects of the disaster.<sup>21</sup>
- 44 Some of these powers have the effect that they restrict certain basic human rights *inter alia* the right to freedom and security of the person<sup>22</sup>, assembly, demonstration, picket, and petition<sup>23</sup> and the right to freedom of movement and residence.<sup>24</sup>
- 45 In *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another (538/2020) [2021] ZASCA 95 (1 July 2021)* the Court considered the respondents' submission that the regulations are unlawful in that section 37 of the Constitution only allows a restriction of the Bill of Rights when there is a State of Emergency in the country, which is currently not the case.
- 46 The Minister pointed out that legislation, like the regulations, regulates the holding of public gatherings and demonstrations. The right to assemble, demonstrate, picket and petition is guaranteed by section 17 of the Constitution. The Minister contended that what was required was to test the regulations against section 36 of the Constitution to see if they pass muster. The Minister insisted that the limitation imposed on fundamental freedoms by the regulations was justifiable, when viewed against the provisions of section 36 of the Constitution.<sup>25</sup>
- 47 She stated:
- "There is a close connection between the limitation and its purpose. If free movement and congregations [are] minimised, the rate of infection will be reduced. If people keep social distancing, the rate of infection will be slower. If people are confined to their homes, the risk of infection is reduced. I have said in the paragraph supra, people may carry this virus without showing any symptoms. The scientific evidence locally and abroad indicates that one infected person may infect two or three people. The purpose of the limitation cannot be over emphasised. It is to save lives. Saving lives takes precedence over freedom of movement and the right to assemble or demonstrate."*<sup>26</sup>
- 48 Much reliance was placed on *Mohamed and Others v President of the Republic of South Africa and Others [2020] ZAGPPHC 120; [2020] 2 All SA 844; 2020 (7) BCLR 865; 2020 (5) SA 553 (GP)*. In *Mohamed*, the question was whether the refusal to allow an exemption to permit congregational worship, in terms of regulations issued under the

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<sup>21</sup> Section 27(2) – (3) of the Act

<sup>22</sup> Section 12 of the Constitution

<sup>23</sup> Section 17 of the Constitution

<sup>24</sup> Section 21 of the Constitution

<sup>25</sup> At [26]

<sup>26</sup> At [27]

Act, were reasonable and justifiable in the circumstances under which the regulations were promulgated. The court held that the virulent nature of the pandemic, the rate of infection, and the high risk of exponential infection meant that the social distancing measures put into place had to be enforced as far as possible. Granting relief of the nature sought, would be tantamount to opening the floodgates. The restrictions imposed were neither unreasonable nor unjustifiable. The application thus failed.<sup>27</sup>

49 At [116] the Court concluded:

*For these reasons the appeal must succeed. The constitutional challenge made to the regulations was too diffuse and inadequately specified to make out a case for an infringement of the Bill of Rights. The rationality challenge, which was likewise not properly pleaded, failed to observe the tight strictures of means and ends that founds such a challenge. A generalised disquiet that the regulations constrain liberty, lack coherence or may have been less restrictively formulated does not suffice to secure a declaration of invalidity. The high court struck down regulations that had not been challenged, on a case not properly pleaded, and on the basis of reasoning that the invalidity of certain regulations must contaminate all the regulations. In sum, neither the challenge brought, nor the high court's reasons for sustaining that challenge can be allowed to stand.*

## **STATE OF EMERGENCY**

50 The declaration of a state of emergency is regulated by the Constitution as well as the State of Emergency Act, 1997.<sup>28</sup>

51 The State of Emergency Act, 1997, provides for the declaration of a state of emergency; to empower the President to make regulations in pursuance of any such declaration; and to provide for matters connected therewith.

### **Powers of the Executive and Parliamentary Supervision**

52 In terms of the State of Emergency Act, 1997, the President makes this declaration.

53 Parliament is informed of this and of any regulations the president signed to empower any structure or person to perform duties, and impose penalties

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<sup>27</sup> Footnote 6 of the Judgment

<sup>28</sup> Act No. 64 of 1997

- 54 In terms of section 37 of the Constitution, a state of emergency may be declared only in terms of an Act of Parliament, and only when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency; and the declaration is necessary to restore peace and order.<sup>29</sup>
- 55 Section 37<sup>30</sup> of the Constitution and the 1997 State of Emergency Act provide a crucial supervisory role for Parliament.

Section 3 of the Act reads as follows:

*Parliamentary supervision*

*3. (1) A copy of any proclamation declaring a state of emergency and of any regulation, order, rule, or bylaw made in pursuance of any such declaration shall be laid*

*upon the Table in Parliament by the President as soon as possible after the publication thereof.*

*(2) In addition to the powers conferred upon the National Assembly by section 37(2)(b) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 30 1996), the National Assembly may—*

*(a) disapprove of any such regulation, order, rule or bylaw or of any provision thereof; or*

*(b) make any recommendation to the President in connection with any such proclamation, regulation, order, rule, bylaw or provision.*

**The Duration, Lapsing, Termination and Extension of a State of Emergency.**

- 56 Section 37(2) and (3) of the Constitution read as follows:

*2. A declaration of a state of emergency, and any legislation enacted, or other action taken in consequence of that declaration, may be effective only -*

*a. prospectively; and*

*b. for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the*

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<sup>29</sup> Section 37(1) of the Constitution

<sup>30</sup> Paragraph 56, *infra*

*members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.*

*3. Any competent court may decide on the validity of -*

*a. a declaration of a state of emergency;*

*b. any extension of a declaration of a state of emergency; or*

*c. any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.*

57 Section 4 of the State of Emergency Act, 1997, reads as follows:

*Lapsing of emergency regulations*

*4. (1) Any regulation, order, rule or bylaw made in pursuance of the declaration of a particular state of emergency, or any provision thereof, shall cease to be of force and effect—*

*(a) as from the date on which the proclamation declaring that state of emergency*

*is withdrawn by the President under section 1 (3);*

*(b) as from the date on which the National Assembly—*

*(i) resolves under section 37(2)(b) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), not to extend the declaration of that state of emergency; or*

*(ii) resolves under section 3(2)(a) to disapprove of any such regulation, order, rule, bylaw or provision, to the extent to which it is so disapproved; or*

*(c) as from the date on which the declaration of that state of emergency lapses as*

*contemplated in the said section 37(2)(b),*

*whichever is the earlier date.*

*(2) The provisions of subsection (1) shall not derogate from the validity of anything done in terms of any such regulation, order, rule, bylaw or provision up to the date upon*

*which it so ceased to be of force and effect, or from any right, privilege, obligation or liability acquired, accrued or incurred, as at the said date, under and by virtue of any such regulation, order, rule, bylaw or provision.*

58 In terms of Section 37(2) of the Constitution, 21 days is how long a State of Emergency may last – unless Parliament extends it, to a maximum of three months.

59 A simple majority of MPs is needed for this, but if there should be another extension of the State of Emergency, a Parliamentary majority of 60% is required. And there must be a public debate.

**Limitations on Basic Human Rights**

60 Section 37(4) – (5) of the Constitutions states that,

*Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that -*

*a. the derogation is strictly required by the emergency; and*

*b. the legislation -*

*i. is consistent with the Republic's obligations under international law applicable to states of emergency;*

*ii. conforms to subsection (5); and*

*iii. is published in the national Government Gazette as soon as reasonably possible after being enacted.*

*5. No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted, or other action taken in consequence of a declaration, may permit or authorise -*

*a. indemnifying the state, or any person, in respect of any unlawful act;*

*b. any derogation from this section; or*

*c. any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table:*

1 Section Number	2 Section Title	3 Extent to which the right is protected
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex religion or language

10	Human Dignity	Entirely
11	Life	Entirely
12	Freedom and Security of the person	With respect to subsections (1)(d) and (e) and (2)(c).
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: - subsection (1)(d) and (e); - the rights in subparagraphs (i) and (ii) of subsection (1)(g); and - subsection 1(i) in respect of children of 15 years and younger
35	Arrested, detained and accused persons	With respect to: - subsections (1)(a), (b) and (c) and (2)(d); - the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d) - subsection (4); and - subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

- 61 In short, civil liberties, with exceptions like the rights to dignity and life, are suspended for anything from 21 days to three months, and possibly longer.
- 62 The Constitution expressly makes provision and allows for the limitation or suspension of certain basic human rights during a state of emergency.

**THE PROPOSED DISASTER MANAGEMENT BILL: MEMORANDUM ON THE OBJECTS OF THE DISASTER MANAGEMENT AMENDMENT BILL, 2021 AND PROPOSED AMENDMENTS**

- 63 As introduced in the National Assembly (proposed as per section 76 of the Constitution); including an explanatory summary of Bill and prior notice of its introduction, and as published in Government Gazette No. 43834 of 23 October 2020, the Disaster Management Amendment Bill, 2020 was tabled as a private member's bill in Parliament by Dr PJ Groenewald, MP, from the Freedom Front Plus.
- 64 The purpose of the Bill is drafted as follows:

- To amend the Disaster Management Act, 2002, so as to amend the duration of a state of disaster;
- to provide that any action taken as a result of a declaration of a state of disaster is only effective prospectively;
- to further provide that only the National Assembly, a provincial legislature or a council of a municipality may resolve to extend a national, provincial or local state of disaster respectively, and to provide for the duration of the extension;
- to further provide for the requisite majorities required in the National Assembly, provincial legislature and council of a municipality in order to extend a national, provincial or local state of disaster respectively;
- to provide that a resolution to extend a national, provincial or local state of disaster, as the case may be, may only be adopted after a public debate in the respective legislatures;
- to provide for oversight by the National Assembly and provincial legislature over a national or provincial state of disaster, respectively;
- to amend the provisions dealing with the lapsing of a national, provincial or local state of disaster and the termination of the regulations and by-laws made in terms of it as the case may be; and to provide for matters connected therewith.

65 The proposed Disaster Management Amendment Bill, 2020, seeks to amend sections 27: Declaration of national state of disaster, section 41: Declaration of provincial state of disaster and section 55: Declaration of local state of disaster, of the Act,

### **Memorandum on the Objects of The Disaster Management Amendment Bill, 2021**

66 For background and clear understanding of the reasoning behind the proposed Bill one needs to consider the memorandum accompanying the Bill which reads as follows:

#### **MEMORANDUM ON THE OBJECTS OF THE DISASTER MANAGEMENT AMENDMENT BILL, 2021**

##### **1. INTRODUCTION**

On 30 January 2020, the Director-General of the World Health Organisation (“the WHO”) declared the novel coronavirus (COVID-19) outbreak a public health emergency of international concern, which is the WHO’s highest level of alarm. Following this announcement, the Minister responsible for cooperative government and traditional affairs declared a national state of disaster in terms of section 27 of the Disaster Management Act, 2002 (Act No. 57 of 2002) (“the Disaster Management Act”). **Various sets of regulations were also published following the declaration of the national state of disaster, which imposed a national lockdown.**

**The national state of disaster as well as the accompanying regulations had severe consequences and a negative impact on the lives of every citizen in South Africa.**

**Citizens' basic human rights were restricted and certain behaviours and actions were prohibited. The economic consequences were disastrous, and millions of people lost their jobs.**

**The Disaster Management Act does not currently provide adequate legislative accountability and oversight over the regulations published in terms of it, the duration of a state of disaster, nor in respect of the extension of a state of disaster.**

**In a constitutional democracy, any legislation, which has such severe consequences and which impacts all the citizens and their human rights, should be subject to more legislative accountability and oversight.**  
**(own emphasis)**

## **2. OBJECTS OF THE BILL**

The purpose of the Bill is to amend the Disaster Management Act in order to amend the duration of a state of disaster. The Bill further seeks to provide that only the National Assembly, a provincial legislature or a municipal council may resolve to extend a declaration of a national, provincial or local state of disaster respectively and for how long. The Bill also provides for the requisite majorities required in the National Assembly, provincial legislature and municipal council in order to extend a national, provincial or local state of disaster, respectively. The Bill further provides that a resolution to extend a national, provincial or local state of disaster may only be adopted after a public debate. The Bill finally seeks to provide for oversight by the National Assembly over a national state of disaster, and oversight by a provincial legislature over a provincial state of disaster.

## **3. CONTENTS OF THE BILL**

- 3.1 Clause 1 amends section 27 of the Act by the substitution for subsection (5) of a new subsection (5) as well as the addition of four further subsections. The clause now provides *inter alia* that a national state of disaster may be effective only prospectively and for no more than 21 days, unless the National Assembly resolves otherwise. It also provides that a Minister may terminate a national state of disaster before it lapses. It further provides that a copy of the notice declaring a national state of disaster must be tabled in the National Assembly. The clause also provides that the National Assembly may disapprove of any regulations or directions made under such a declaration or may make recommendations to the Minister pertaining to such regulations and directions.
- 3.2 Clause 2 inserts section 27A into the Act. This clause provides for the lapsing of a national state of disaster. The clause further regulates the validity of

anything done under or by virtue of any regulation or direction from the time of the declaration of the national state of disaster to the time it lapses.

- 3.3 Clause 3 amends section 41 to provide *inter alia* that a provincial state of disaster may be effective only prospectively and for no more than 21 days, unless a provincial legislature resolves otherwise. It also provides that a Premier may terminate a national state of disaster before it lapses. It further provides that a copy of the notice declaring a national state of disaster must be tabled in a provincial legislature. The clause also provides that a provincial legislature may disapprove of any regulations or directions made under such a declaration or may make recommendations to the Premier pertaining to such regulations and directions.
- 3.4 Clause 4 inserts section 41A into the Act. This clause provides for the lapsing of a provincial state of disaster. The clause further regulates the validity of anything done under or by virtue of any regulation or direction during the time from the declaration of the provincial state of disaster until the time it lapses.
- 3.5 Clause 5 amends section 55 to provide that a local state of disaster may be effective only prospectively and for no more than 21 days, unless a municipal council resolves to extend it. It also provides that a council may terminate a local state of disaster before it lapses. The clause further sets out how a council may extend a local state of disaster.
- 3.6 Clause 6 inserts clause 55A into the Act. This clause provides for the lapsing of a local state of disaster. The clause further regulates the validity of anything done under or by virtue of any by-law or direction during the time from the declaration of the local state of disaster until the time it lapses.
- 3.7 Clause 7 contains the short title.

#### **4. FINANCIAL IMPLICATIONS FOR THE STATE**

There will be no financial implications for the state.

#### **5. DEPARTMENTS, BODIES OR PERSONS CONSULTED**

None

#### **6. PARLIAMENTARY PROCEDURE**

- 6.1 The Member proposes that the Bill must be dealt with in accordance with the procedure established by section 76(3) of the Constitution, as its provisions in a substantial manner deal with “disaster management”, a functional area of concurrent national and provincial legislative competence listed under Schedule 4 to the Constitution.
- 6.2 The Member is of the opinion that it is necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of

2003), since it may contain provisions pertaining to customary law or customs of traditional communities.

## **Proposed Amendments**

67 For ease of reference the proposed amendments, when applied read as follows:

### **68 Amendment of section 27 of Act 57 of 2002:**

...

*(5) A national state of disaster that has been declared in terms of subsection (1), and any other action taken in consequence of that declaration, may be effective only—*

*(a) prospectively; and*

*(b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the national state of disaster.*

*(6) The Minister may terminate a national state of disaster by notice in the Gazette before it lapses as contemplated in subsection (5)(b).*

*(7) (a) The National Assembly may extend a national state of disaster for no more than three months at a time.*

*(b) The first extension of the national state of disaster must be by a resolution adopted with a supporting vote of a majority of the members of the National Assembly.*

*(c) Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the National Assembly.*

*(d) The National Assembly may only adopt a resolution in terms of this subsection following a public debate in the National Assembly.*

*(8) The Minister must table a copy of the notice declaring a national state of disaster and a copy of any regulation made or direction issued in terms of subsection (2) in the National Assembly as soon as possible after the publication thereof.*

*(9) The National Assembly may—*

*(a) disapprove of any such regulation or direction, or of any provision thereof; or*

*(b) make any recommendation to the Minister in connection with any such notice, regulation or direction, or any provision thereof.*

#### *Lapsing of national state of disaster regulations*

*27A. (1) Any regulation made or direction issued in terms of section 27(2), or any provision thereof, ceases to be of force and effect as from the date on which—*

*(a) the declaration of that national state of disaster lapses as contemplated in section 27(5)(b); or*

*(b) the National Assembly resolves under section 27(9)(a) to disapprove*

*of any such regulation or direction, or provision thereof, to the extent to which it is so disapproved, whichever is the earlier date.*

*(2) The provisions of subsection (1) may not derogate from—*

*(a) the validity of anything done in terms of any such regulation or direction, or of any provision thereof up to the date upon which it so ceased to be of force and effect; or*

*(b) any right, privilege, obligation or liability acquired, accrued or incurred, as at the date contemplated in paragraph (a), under and by virtue of any such regulation or direction, or of any provision thereof.*

## **69 Amendment of section 41 of Act 57 of 2002:**

...

*(5) A provincial state of disaster that has been declared in terms of subsection (1), and any other action taken in consequence of that declaration, may be effective only—*

*(a) prospectively; and*

*(b) for no more than 21 days from the date of the declaration, unless a provincial legislature resolves to extend the provincial state of disaster.*

*(6) The Premier may terminate a provincial state of disaster by notice in the provincial gazette before it lapses as contemplated in subsection (5)(b).*

*(7) (a) The provincial legislature may extend a declaration of a provincial state of disaster for no more than three months at a time.*

*(b) The first extension of the provincial state of disaster must be by a resolution adopted with a supporting vote of a majority of the members of the provincial legislature.*

*(c) Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the provincial legislature.*

*(d) A provincial legislature may only adopt a resolution in terms of this subsection following a public debate in that legislature.*

*(8) The Premier must table a copy of the notice declaring a provincial state of disaster and a copy of any regulation or direction made in terms of subsection (2) in the provincial legislature as soon as possible after the publication thereof.*

*(9) The provincial legislature may—*

*(a) disapprove of any such regulation or direction, or of any provision thereof; or*

*(b) make any recommendation to the Premier in connection with any such notice, regulation or direction, or of any provision thereof.*

### *Lapsing of provincial state of disaster regulations*

*41A. (1) Any regulation made or direction issued in terms of section 41(2), or any provision thereof, ceases to be of force and effect as from the date on which—*

*(a) the declaration of that provincial state of disaster lapses as contemplated in section 41(5)(b); or*

*(b) the provincial legislature resolves under section 41(9)(a) to disapprove of any such regulation or direction, or of any provision thereof, to the extent to which it is so disapproved, whichever is the earlier date.*

*(2) The provisions of subsection (1) may not derogate from—*

*(a) the validity of anything done in terms of any such regulation or direction, or of any provision thereof up to the date upon which it so ceased to be of force and effect; or*

*(b) any right, privilege, obligation or liability acquired, accrued or incurred, as at the date contemplated in paragraph (a), under and by virtue of any such regulation or direction, or of any provision thereof.*

## **70 Amendment of section 55 of Act 57 of 2002**

...

*(5) A local state of disaster that has been declared in terms of subsection (1), and any other action taken in consequence of that declaration, may be effective only—*

*(a) prospectively; and*

*(b) for no more than 21 days from the date of the declaration, unless council resolves to extend the local state of disaster.*

*(6) The council may terminate a local state of disaster by notice in the provincial gazette before it lapses as contemplated in subsection (5)(b).*

*(7) (a) The council may extend a declaration of a local state of disaster for no more than three months at a time.*

*(b) The first extension of the local state of disaster must be by a resolution adopted with a supporting vote of a majority of the members of the council.*

*(c) Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the council.*

*(d) The council may only adopt a resolution in terms of this subsection following a public debate in that council.”.*

### *Lapsing of local state of disaster by-laws*

*55A. (1) Any by-law made or direction issued in terms of section 55(2), or any provision thereof, ceases to be of force and effect as from the date on which the declaration of that local state of disaster lapses as contemplated in section 55(5)(b).*

*(2) The provisions of subsection (1) may not derogate from—*

*(a) the validity of anything done in terms of any such by-law or direction, or of any provision thereof up to the date upon which it so ceased to be of force and effect; or*

*(b) any right, privilege, obligation or liability acquired, accrued or incurred, as at the date contemplated in paragraph (a), under and by virtue of any such by-law or direction, or of any provision thereof.*

*Short title*

*This Act is called the Disaster Management Amendment Act, 2021.*

## **ANALYSIS AND CONCLUSION**

- 71 First, it is important to state that, with or without merit, the debate of whether South Africa should have opted for a state of emergency rather than declaring a national state of disaster is for purposes of this submission superfluous and irrelevant.
- 72 The discussion is therefore limited to the proposed Disaster Management Amendment Bill, 2020.
- 73 It is clear that the legislature and the drafters of the Constitution have, by means of statute, imposed different durations and processes for the declaration, extension, termination and lapsing of a state of emergency as opposed to the same processes during a state of disaster.
- 74 Furthermore, stricter checks and balances on the executive apply. A state of emergency has more Parliamentary oversight than a state of disaster. The declaration (in other words, the decision to declare a state of emergency, as well as all the legislation (including regulations), must be "laid upon the Table in Parliament by the President as soon as possible after the publication thereof".<sup>31</sup>
- 75 In other words, it must be made public, and the National Assembly (Parliament as the legislature) may then give input in these regulations. The National Assembly can either disapprove of these laws or make a recommendation.
- 76 During a state of disaster there is no specific oversight required from Parliament. Still, Parliamentarians can keep the decisions makers accountable in the National Assembly or in Portfolio Committees.
- 77 In his article "*Citizens' important role: Checking autocratic tendencies of the executive*", published in The Daily Maverick, 28 May 2020, Professor Pierre de Vos<sup>32</sup> argues that because of the Covid-19 crisis, the government currently wields enormous power with limited checks in place.
- 78 In his article he states, "*...I would argue that the autocratic tendencies of some Cabinet ministers and senior government officials, the manner in which the vast law-making powers bestowed on the executive by the Disaster Management Act has been used, the tepid response of the democratically elected Parliament to this unprecedented shift of power to the executive, and the misdirected anger of the public, pose a risk to our democracy.*

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<sup>31</sup> Section 3(1) of the State of Emergency Act, 1997

<sup>32</sup> Professor Pierre de Vos teaches Constitutional law at the University of Cape Town Law Faculty, where he is head of the Department of Public Law.

*The Disaster Management Act (which was not written with a crisis like the one we are living through in mind) enables the government to act speedily to deal with the coronavirus crisis. Given the speed with which the virus spreads, it would have been impossible for the executive to deal with the crisis without bypassing the legislature and many of the checks and balances imposed by the Constitution on the exercise of executive power. The act, in effect, allows the executive to bypass the legislature and to evade many of the formal checks and balances that would normally inhibit the abuse of power by the executive.*

*We, therefore, find ourselves in an informal, light, version of a state of emergency.”<sup>33</sup>*

79 However, the main difference between a state of emergency and a state of disaster is that certain protections afforded by the Bill of Rights can be limited or suspended in a state of emergency.

80 According to Webber Wentzel partner Michael Evans, the major right that the president may suspend is that people can be detained without trial. However, this would be subject to many restrictions,

*“Under the apartheid era we had no constitution so there was absolutely no protection. You could detain people, for example, indefinitely under the emergency in the apartheid era,” he said.*

*“Now, if we have a state of emergency it will be very different because you will still retain a number of your constitutional rights and some of the other issues are quite heavily regulated.”<sup>34</sup>*

81 We are of the opinion that this difference, as time has taught us, is watered down.

82 As found in the Minister of COGTA v De Beer case, *supra*, a limitation of your basic human rights during a state of disaster can be rational, reasonable and justifiable.

83 The courts all over have tended to show a greater amount of deference for the executive during the disaster.

84 In conclusion, the above reasons are the very reasoning and impetus behind the proposed Disaster Management Amendment Bill, 2020.

85 As explained in the explanatory summary of Bill,

*The Disaster Management Act does not currently provide adequate legislative accountability and oversight over the regulations published in terms of it, the duration of a state of disaster, nor in respect of the extension of a state of disaster.*

*In a constitutional democracy, any legislation, which has such severe consequences*

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<sup>33</sup> <https://www.dailymaverick.co.za/opinionista/2020-05-28-citizens-important-role-checking-autocratic-tendencies-of-the-executive/>

<sup>34</sup> <https://africacheck.org/fact-checks/reports/state-emergency-would-not-strip-ramaphosas-powers-and-make-dlamini-zuma>

*and which impacts all the citizens and their human rights, should be subject to more legislative accountability and oversight. supra*

- 86 When one takes a closer look at the proposed amendments, it is noteworthy to find that, by comparison, what the Bill proposes is a mere revised substitution, of the current applicable clauses of the Act, with existing legislation found in the Constitution<sup>35</sup> and the State of Emergency Act, 1997<sup>36</sup>, but with the necessary changes.
- 87 We would therefore be sceptical that the proposed amendments, if accepted, would not pass the Constitutionality test.
- 88 However, that being said, by amending and then aligning the relevant provisions of the Act with the Constitution and the State of Emergency Act, 1997, one must be mindful that South Africa has never, since the dawn of democracy and under the newly found Constitution been in a state of emergency.
- 89 Former president PW Botha had last declared such a state of emergency on July 25, 1985.
- 90 The long title of the Act states as follows:

*To provide for—*

- ***an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery and rehabilitation;***
  - *the establishment and functioning of national, provincial and municipal disaster management centres;*
  - *disaster management volunteers; and*
  - *matters incidental thereto.”*
- (own emphasis)**

- 91 Therefore, one cannot merely accept that the proposed amendments would be practical and effective in preventing or reducing the risk of disasters, mitigating the severity of disasters, and ensures emergency preparedness and rapid and effective response to disasters and post-disaster recovery and rehabilitation.
- 92 In this instance we resonate Professor De Vos's contention that given the speed with which the virus spreads and the magnitude of the pandemic we face as a nation, it would have been impossible for the executive to deal with the crisis without bypassing the legislature and many of the checks and balances imposed by the Constitution on the exercise of executive power.
- 93 In short, to amend sections 27, 41 and 55 of the Disaster Management Act, 2002, to mirror legislation applicable during a state of emergency, and thereby transfer certain powers and functions that currently fall exclusively under the authority of the executive during a state of disaster, to the exclusive authority of the legislative and submitting those

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<sup>35</sup> Section 37(2) of the Constitution

<sup>36</sup> Sections 3 and 4 of the Act

powers to mandatory Parliamentary resolutions and public debate, may defeat the purpose of the Act and could be interpreted as an overreach.

- 94 It would render conduct by the executive unlawful and even unconstitutional if legislation or checks and balances imposed by the Constitution on the exercise of executive power are or cannot be complied with during a state of disaster such as the COVID-19 pandemic and needs to be considered.
- 95 Our submission in this regard must not be interpreted as a dismissal of the proposed amendments, but merely as a necessary precaution that must be left within the required procedures and timelines of Parliament to be dealt with.
- 96 As discussed in paragraph 88, *supra*, our nation has not been in a state of emergency under the Constitution and, in this event, will find ourselves in uncharted waters.
- 97 In fact, although its authenticity is disputed, the “Draft State of Emergency Regulations”<sup>37</sup>, compiled and published by the Department of Defence on 12 December 2017 remains the only known basics for regulations during a state of emergency.<sup>38</sup>
- 98 But more recently, Justice and correctional services Minister Ronald Lamola said the provisions of the Disaster Management Act, which have never been tested before on a national scale, were the strictest means to limit people’s rights at this stage.
- 99 When asked about the possibility of a state of emergency the Minister’s only response was that they are putting all options on the table, to use all necessary means. Also, that the Department of Justice is drafting regulations if there is a need for a declaration of a State of Emergency.<sup>39 40</sup>
- 100 Solidarity’s submission is that we are in favour of the proposed Disaster Management Amendment Bill, 2020 as drafted.
- 101 We have shown that a state of disaster does indeed limit or deny citizen’s certain basic human rights as found in chapter 2 of the Constitution.
- 102 One could easily argue that a state of disaster and the severe consequences of the imposed lockdowns had and still infringe on one’s non-derogable rights such as one’s right to Human Dignity.<sup>41</sup>
- 103 But be that as it may, in Minister Lamola’s own words:

*“Many of the provisions do have an impact on a person’s human rights, but these limitations are justified, as rights listed in the Bill of Rights may be limited under*

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<sup>37</sup> <https://www.politicsweb.co.za/documents/the-draft-state-of-emergency-regulations>

<sup>38</sup> <https://www.news24.com/news24/SouthAfrica/News/draft-regulations-for-state-of-emergency-drawn-up-20171211>

<sup>39</sup> <https://www.dailymaverick.co.za/article/2020-03-19-covid-19-state-of-disaster-vs-state-of-emergency-whats-the-difference/>

<sup>40</sup> <https://mg.co.za/article/2020-03-19-constitutional-rights-during-disaster/>

<sup>41</sup> Section 10 of the Constitution.

*certain circumstances and under certain conditions - such as in terms of laws of general application where the limitation would be reasonable and justifiable in an open and democratic society based on dignity, equality and freedom and taking into account all relevant factors such as the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose.”<sup>42</sup>*

104 Moreover, we have shown that during a state of disaster, Parliament is afforded little to no Parliamentary supervision over the Executive’s powers.<sup>43</sup>

105 The submission is therefore based on the clear lack of supervision and proper (pre-emptive and current) checks and balances over the Executive’s powers by Parliament during a state of disaster.

106 We therefore find that the proposed amendments are sufficiently founded.

107 As we have witnessed, to leave such powers to only the Judiciary to make a ruling on the application of Section 36 of the Constitution, as advocated by Minister Lamola, and/or the validity of a declaration of a state of disaster; any extension of a declaration of a state of disaster; or any legislation enacted, or other action taken, in consequence of a declaration of a state of disaster is not only impractical, but retrospective.

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<sup>42</sup> [https://www.justice.gov.za/m\\_speeches/2020/20200325-COVID-19.html](https://www.justice.gov.za/m_speeches/2020/20200325-COVID-19.html)

<sup>43</sup> Paragraph 37, *supra*