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**COMMENTS TO THE PORTFOLIO COMMITTEE ON COOPERATIVE  
GOVERNANCE AND TRADITIONAL AFFAIRS ON THE DISASTER  
MANAGEMENT AMENDMENT BILL [B2 – 2021]**



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## 1. INTRODUCTION

### 1.1 The declaration of the Covid-19 global pandemic

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.<sup>1</sup>

There is no need to explain to any person, globally, that this has been an extremely tragic, disruptive and devastating pandemic, which shook the world and brought most people and their countries’ economies to their proverbial knees.

The true, and possibly lasting effect of the pandemic lies not only in the heart-breaking loss of life internationally, but in the disastrous effect of the economic lockdowns, and their respective regulations.

According to the WHO<sup>2</sup>, at the time of the writing of this submission, 13 August 2021, there have been 205,338,159 confirmed cases of Covid-19, including 4,333,094 deaths, as reported by all countries to the WHO.<sup>3</sup> In South Africa, from 3 January 2020 to 13 August 2021, there have been 2,568,511 confirmed cases of COVID-19 with 76,247 deaths.

The National Employers’ Association of South Africa (NEASA), is, however, of the opinion that the disease and pandemic itself, did not and will never, cause as much damage to this country as the executive leaders have done, through their irrational, ineffective and deadly regulatory response to the disaster, by means of the Disaster Management Act, 57 of 2002 (DMA).

In this submission, in strong and absolute support of the Disaster Management Amendment Bill [B2 – 2021] (“the Bill”), as proposed by the Freedom Front Plus, NEASA will not only address the effect that the abuse of regulatory power by the Executive, by means of the current Disaster Management Act, has had on our country and its already struggling economy, but will also highlight the non-negotiable necessity of this Bill, in order to ensure that our country will never again be crippled by its omnipotent Executive, through this Bill’s insurance of public participation, parliamentary oversight and proper constitutional accountability.

### 1.2 South Africa’s response to the pandemic

South African legislature provides three pieces of legislation for the country to respond to and deal with cataclysmic events:

- declaration, by the President, of a state of defence, in terms of section 203 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”);
- declaration, by the President, of a state of emergency, in terms of section 37 of the Constitution; or
- declaration, by the Minister, of a state of disaster, in terms of section 27 of the DMA.

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<sup>1</sup> Memorandum on the objects of the Disaster Management Amendment Bill, 2021, Introduction, p 1.

<sup>2</sup> <https://covid19.who.int/region/afro/country/za>, as accessed on 13 August 2021.

<sup>3</sup> <https://covid19.who.int/>, as accessed on 13 August 2021.

Following the announcement of a global pandemic, South African Minister of Cooperative Government and Traditional Affairs (“the Minister”), declared a national state of disaster in terms of section 27 of the DMA. Various sets of regulations were consequently published, following said declaration, which imposed a national lockdown.<sup>4</sup>

The national state of disaster, in conjunction with the accompanying regulations, had severe consequences and an adverse impact on the lives of every single citizen in South Africa. Citizens’ fundamental human rights were restricted, and certain activities and actions were completely prohibited. The economic repercussions, to be discussed in detail later in this submission, were catastrophic and millions lost their jobs.

The DMA does not currently provide adequate legislative accountability and oversight over the regulations published in terms thereof, the duration of a state of disaster, nor in respect of the extension of a state of disaster. The potential room left, through these inadequacies, for the Executive to outrightly abuse their ‘legislative and regulatory’ power, is both unbelievably arbitrary and dangerous.

In a constitutional democracy, such as our own, any legislation, which has such severe consequences and grants such unfettered powers, and which impacts all the citizen’s and their human rights to this incredible extent, must be subjected to absolute legislative accountability and oversight.

NEASA will illustrate, through this submission, that there is no choice but to implement this Bill, in order to ensure that the destruction caused by the ‘executive-disaster state’, will never occur again.

## **2. THE CURRENT DISASTER MANAGEMENT ACT, 57 OF 2002**

### **2.1 Extensive declaration and extension powers of the Minister**

As previously stated, South Africa declared a national state of disaster under section 27(1) and section 27(2) of the DMA on 15 March 2020, in response to the coronavirus pandemic.<sup>5</sup>

According to section 27(5)(a), a national state of disaster, which has been declared in terms of subsection (1), lapses three months after it has been declared, unless terminated or extended, by the Minister.

Despite the state of disaster originally being set to lapse on 15 June 2020, as per section 27(5)(c) of the DMA, the Minister exercised her power and extended the state of disaster on a monthly basis, every month, for the past 17 months.

It should be noted at this point, that Parliament had no oversight over this extension, nor did the National Assembly have an input or method of participation in either the extension of the state of disaster, or any of the accompanying regulations.

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<sup>4</sup> Memorandum on the objects of the Disaster Management Amendment Bill, 2021, Introduction p 1.

<sup>5</sup> Internal, BusinessTech, 20 July 2021, “Big changes proposed for South Africa’s state of disaster and lockdown laws”, accessed 16 August 2021.

The DMA, as it currently reads, provides for extensive and wide-ranging power for national government over the lives of citizens and the general economy, with almost no limits, and little to no accountability measures or oversight possibilities from Parliament.

Contrary to this sub-constitutional Act, both the other provisions for states of tragedy (state of defence and state of emergency), as provided for in the Constitution (highest law in the country), ensure proper legislative and parliamentary procedures for the declaration and implementation thereof.

Section 203, regarding the declaration of a state of defence, first and foremost, is not left to the power of a minister, but must be declared by the President, and:<sup>6</sup>

*“203.*

*...*

*(2) If Parliament is not sitting when a state of national defence is declared, the President must summon Parliament to an extraordinary sitting within seven days of the declaration.*

*(3) A declaration of a state of national defence lapses unless it is approved by Parliament within seven days of the declaration.*

In terms of Section 37 of the Constitution, a state of emergency may only be declared in terms of an Act of Parliament, and furthermore states:

*“37.*

*...*

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

Section 37 takes the accountability measures a step further, by determining:

*“37.*

*...*

*(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*

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<sup>6</sup> Section 203 of the Constitution of the Republic of South Africa, 1996.

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

The current DMA, unlike the above legislative provisions in our Constitution, without proper public participation, parliamentary oversight, or judicial accountability, provides the Minister with a plethora of powers to declare and extend a state of disaster, as well as to make regulations which can be deemed as irrational and disproportionate when considered in the light of their effect on the country and its economy.

In light of the number of court cases, from numerous role players in the country, challenging the constitutionality, rationality and validity of the state of disaster itself, the extension thereof and the accompanying regulations, the need for an amendment of this overreaching Act, could not be clearer.

## **2.2 Theoretical consultation but practical politics**

According to the DMA, read as a whole, the Minister, prior to any action in terms of the DMA, theoretically, should consult the National Disaster Management Centre – which in the pandemic’s case in South Africa, is the National Coronavirus Command Council (NCCC), of which the Minister is also the Head.

From shared experience, it can be noted that the NCCC’s apparent role in its ‘consultation and advice’ to the Minister, and the President for that matter, have been both extremely controversial and questionable.

The country was initially introduced to the NCCC on Sunday, 15 March 2020, when the President addressed the nation for the first time on the Government’s response to the pandemic. This council includes, among others, members of the Inter-Ministerial Committee who were dealing with the impact of the coronavirus and was stated to “meet three times a week, to coordinate all aspects of our extraordinary emergency response”.

South Africa’s Executive and its intricate web of so-called clusters seem to have successfully blurred the lines of authority and decision-making in the handling of the pandemic, more than ever before.

Despite the presidency’s repeated insistence that the NCCC was merely a coordinating structure of Cabinet, the President himself clearly indicated to the contrary with his addresses, stating:

“As a consequence, the National Coronavirus Command Council has decided to enforce a nationwide lockdown for 21 days with effect from midnight on Thursday, 26 March.” – 23 March 2020

“After careful consideration of the available evidence, the National Coronavirus Command Council has decided to extend the nationwide lockdown by a further two weeks beyond the initial 21 days.” – 30 March 2020

“The 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 1<sup>st</sup> of May.” – 21 April 2020

All of the NCCC's meetings are strictly confidential and information on how decisions are taken is not made public.<sup>7</sup> This results in the widespread criticism of the NCCC and its ability to make unchecked, far-reaching decisions after consultation with the Minister.

It is an unacceptable, blatant disregard for the widely accepted values of public participation, transparency and accountability with regard to any laws, decisions or policies, which, detrimentally, severely affects the fundamental rights of every South African citizen.

The biggest contention around this evasive advisory structure emerged when Government made a U-turn on the sale of tobacco products under Level 4 of the lockdown. Although the Fair-Trade Independent Tobacco Association (FITA) attempted to have the minutes of the NCCC meetings made public, the Executive made it clear that this would not be allowed – in the words of the Minister and Head of the NCCC, “what happens in the NCCC, stays in the NCCC.”

It is undeniable, when taking the above into consideration, that extensive powers are awarded in the current DMA to both the Minister and the secretive advisory Command Council. This leads us to the problematic results of this unhindered authority – the effects of the lockdown and the regulations and restrictions on the country.

### **3. EFFECT OF THE LOCKDOWN AND REGULATIONS ON SOUTH AFRICA**

#### **3.1 Effect of the lockdown, regulations and restrictions on the country<sup>8</sup>**

The ruling party, in conjunction with the Minister and NCCC, had the tremendous task of deciding between a humanitarian crisis and an economic one, and NEASA believes that they unfortunately, did not strike the appropriate balance.

From 1 June 2020, the powers that be introduced a five-level risk-adjusted strategy, where the restrictions and regulations change according to the ‘threat level’. Level 5 comprises a national lockdown while Level 1 allows for most commercial and social activity to resume, with additional health and safety protocols.

##### **3.1.1 Destruction of the economy**

The decision to implement social distancing measures and limiting non-essential business, has had an enormous impact on South Africa's economy. The lockdown forced a reduction in production and a slowdown in non-essential business; it impacted household spending patterns, while the disruption to global production and supply chains, and the effect of uncertainty on the commercial environment and financial markets have aggravated the combined negative impact on the economy.

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<sup>7</sup> Qaanitah Hunter, Explainer, *What exactly is the National Coronavirus Command Council*, News24, 13 May 2020.

<sup>8</sup> Gabrielle Reid, *The impact of Covid-19 on South Africa's Economy and investment landscape*, as on <https://gsi.s-rminform.com/articles/the-impact-of-covid-19-on-south-africas-economy-and-investment-landscape>, accessed on 16 August 2021.



The lockdown, coupled with a R500 billion stimulus package to prepare the healthcare sector and protect jobs, resulted in a desperate need for higher public spending patterns, which could not be satisfied due to the lockdown regulations and restrictions. This further exacerbated the country's existing economic challenges, including government debt. According to StatsSA the South African economy contracted by 7 percent in 2020<sup>9</sup>.

For the period ending 31 March 2021, SARS collected a gross amount of R1 541.1 billion which was offset by refunds of R290.9 billion, resulting in net collections of R 1 250.2 billion, versus Budget 2021 Revised Estimate of R1 212.2 billion, and which represented a contraction of –R105.6 billion ( -7.8%) against the 2019/20 financial year.<sup>10</sup> To cover the stimulus package and additional government deficits, South Africa had to tap into the international debt market, including approaching the International Monetary Fund, the World Bank, African Development Bank and the BRICS partnership.

The impact has been felt across all sectors, particularly retail and hospitality, but heavy industries like construction, mining and manufacturing have also recorded productivity losses. Widespread redundancies have already been reported across sectors, with current estimates of total job losses, due to the pandemic and ensuing lockdown, totalling between 700 000 and 1.8 million, according to the National Treasury.<sup>11</sup> This leads us to one of the most important and devastating impacts of the lockdown, restrictions and regulations – job losses and rising unemployment, something the virus itself, could have never caused.

### 3.1.2 Rise in unemployment

South Africa's unemployment rate rose to 34.4% in the second quarter of 2021 from 32.6% in the previous period. It was the highest jobless rate since comparable data began in 2008, amid the worsening pandemic crisis and also reflecting a week of deadly unrest and looting last month in parts of the country. The number of unemployed persons jumped by 584 000 to 7.8 million, employment fell by 54 000 to 14.9 million and the labour force went up by 530 000 to 22.8 million. Job losses were concentrated in the financial sector (-278 000), followed by community and social services (-166 000) and manufacturing (-83 000). The expanded definition of unemployment, including people who have stopped looking for work, was at 44.4%, up from 43.2% in the prior period. The youth unemployment rate, measuring job-seekers between 15 and 24 years old, hit a new record high of 64.4%.<sup>12</sup>

According to Simone Schotte of the Chronis Poverty Advisory Network, the shock of the pandemic will not be temporary. The lasting effects of the pandemic significantly

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<sup>9</sup> <http://www.statssa.gov.za/?p=14074> , accessed 25 August 2021.

<sup>10</sup> <https://www.sars.gov.za/media-release/sars-announces-the-preliminary-revenue-outcome-for-2020-21/> , accessed 25 August 2021.

<sup>11</sup> [http://www.treasury.gov.za/comm\\_media/press/2020/JT%20SCoF%20and%20SCoA%20briefing%20COV19.pdf](http://www.treasury.gov.za/comm_media/press/2020/JT%20SCoF%20and%20SCoA%20briefing%20COV19.pdf) , accessed on 17 August 2021.

<sup>12</sup> <https://tradingeconomics.com/south-africa/unemployment-rate#:~:text=Unemployment%20Rate%20in%20South%20Africa,the%20fourth%20quarter%20of%202008> , accessed 25 August 2021.

weigh on the role of job acquisition in the South African economy, which Schotte argues is a main factor in upward mobility for struggling to escape poverty. Schotte continues, “the pandemic may not only have short-term income effects but also hamper people’s income-generating activities in the long term, as households will turn to liquidating their small savings and selling productive assets to cope during the lockdown period”.<sup>13</sup>

Low-skilled, less-educated workers have been hit the hardest. The net effect is that the shocks are most severe on poorer, more vulnerable households. This economic shock is sufficiently severe to push many households into positions of food insecurity. Their reduced capability to purchase food has been brought about by the dramatic reduction in household income.

### 3.1.3 Increase in government debt and coinciding crises

South Africa has suffered from flattened economic growth for the past five years, averaging at 1.5 percent per annum. In February 2020, Government committed to combatting government debt and decreasing public spending. However, this option is no longer feasible given the government’s disproportionate response to the pandemic, which means the gross loan debt increased sharply by 20.7% year on year to R3 936 billion as at 31 March 2021, or 78.8% of GDP.<sup>14</sup>

According to a 2010 World Bank study, countries whose debt-to-GDP ratios exceed 77 percent for extended periods experience slowed economic growth.<sup>15</sup> For emerging countries, such as ourselves, every percentage point above 64 percent slows our economic growth by up to 0.02 percentage points each year – something South Africa surely cannot afford.

### 3.1.4 Security considerations

The socio-economic consequences of the pandemic are also likely to aggravate existing security concerns in the country, specifically civil unrest and crime. Focusing on the pandemic itself, localised protests against Government community relocation programmes, aimed at de-densifying highly populated areas, have continued. For example, in Cape Town, around R 8 million in public transport infrastructure was burnt during just two days of protest action in June. Allegations of corruption in the distribution of government relief funds are also likely to prompt further public protest in the coming months while the impact on unemployment will place additional pressure on government social grants.

Service-delivery protests – community protests against a lack of government services in the area – are also likely to ramp up. There were over 200 such protests recorded in 2019 and while lockdown measures have dampened 2020 protest levels, demonstrations will resume as restrictions ease. Service-delivery protests have a higher propensity for violence, as they often lack formal organisation, authorisation

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<sup>13</sup>Marcella Teresi, *Effects of Covid-19 on the South African Economy*, 25 June 2021, as on <https://www.borgenmagazine.com/south-african-economy/>, accessed 17 August 2021.

<sup>14</sup><https://www.resbank.co.za/en/home/publications/publication-detail-pages/quarterly-bulletins/quarterly-bulletin-publications/2021/full-quarterly-bulletin---no-300---june-2021>, accessed 25 August 2021.

<sup>15</sup>Gabrielle Reid, *The impact of Covid-19 on South Africa’s Economy and investment landscape*, as on <https://gsi.s-rminform.com/articles/the-impact-of-covid-19-on-south-africas-economy-and-investment-landscape>, accessed on 16 August 2021.

from local authorities, and often occur in areas with poor relations between the community and law enforcement. According to local statistics, 94 percent of service-delivery protests have historically involved violent confrontations and can include damage to local property and looting<sup>16</sup>.

Crime has also continued, and despite an initial decline under the Level 5 lockdown, crime rates are normalising amid increased reports of armed robberies targeting couriers and the trucking industry, as well as continuing violent crime. The latest ban on alcohol sales is partly aimed at reducing violent incidents to alleviate the pressure of trauma cases on the overstretched healthcare system. However, the ban on tobacco and alcohol will drive up counterfeit activity once more, while reducing the government's ability to claim 'sin-tax' or additional value added tax on these luxury items.

Only recently, the effects of the lockdown regulations surrounding the last alcohol-ban were not only clearly visible, but also destabilised our economy, the lives of countless citizens and governance in our provinces.

During July this year, police in the South African city of Durban fired rubber bullets, tear gas and stun grenades at alleged looters to prevent them from stealing what was left at a warehouse - which stores a large quantity of alcohol. The warehouse was initially looted of its stock during the week of deadly violence in South Africa which saw more than 200 killed.

Notwithstanding the evidently negative reaction of the South African public to the extended lockdown and accompanying regulations, South Africa continues to hopscotch between the various levels, with regulations and restrictions being amended ever so often, with no clear logic or rationale.

### 3.2 Government's lack of accountability and irrational reasoning

Introductory to the arguments regarding the irrationality and disproportionality of the lockdown regulations, it is ironic to note the following:

The DMA's definition of "disaster" is – *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) 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 their own resources.***

There is absolutely no argument to be made against the fact that Government's lockdown restrictions and regulations, i.e., 'human-caused occurrence', 'disrupted the life of communities in a magnitude that exceeded the ability of those affected by the disaster to

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<sup>16</sup> <https://insights.s-rminform.com/covid-19-south-africa-economy-investment-landscape>, accessed 25 August 2021.

cope with its effects using their own resources'. NEASA therefore contends that the lockdown and regulations in itself, qualify as a 'disaster' exactly as defined in the DMA.

Thus, in actuality, the lockdown and regulations proved to be worse disasters than the pandemic, and there was no law to help South Africa against the disaster called "omnipotent executive-pandemic" – we were at the mercy of the executive which has caused more "death, damage to property and disruption to the life of communities", than any other disaster South Africa has faced.

The decisions are made by bureaucrats and politicians who do not forfeit a single benefit through the imposition of these measures. It can only be speculated what anti-Covid measures would have looked like if the pockets of Government officials had been directly affected.

There has been veneer-thin rationale behind the majority of the regulations and restrictions. However, this is what decisions look like when they are made by those who enjoy the benefits of our taxes, without appreciating the agony and persistent toil of the private sector, from where all taxes originate.

The harshness and disrespect towards entrepreneurs, as well as the lack of sound judgement by many of those who enforce these Covid-regulations, testify of a lack of appreciation for the role these entrepreneurs play in keeping society intact.

NEASA fully supports Judge Norman Davis' scathing assessment of the Government's lockdown laws in the High Court, stating they were poorly thought out and infringed upon fundamental rights.<sup>17</sup>

### 3.2.1 Funerals and final farewells

Loved ones were prohibited from leaving their homes to visit if they were not the caregiver of the patient, being prepared to limit their numbers and take all personal precautions. But, once the person has passed, up to 50 people armed with certified copies of death certificates may have even crossed provincial borders to attend the funeral of the departed one who no longer needed support.

As Judge Davis stated: "When a person, young or old, is in the grip of a terminal disease [other than Covid-19] and is slowly leaving this life, to ease that suffering and the passing, it is part of the nature of humanity for family and loved ones to support the sufferer. One might understand the reluctance to have an influx of visitors should the person's death door be inside the doors of a medical facility, for fear of the spread of Covid-19, but what if the person is in his or her own home or at the home of a family member or friend?"

The disparity of the above situations was not only distressing, but irrational and inhumane.

### 3.2.2 Eking out a living

"There are numerous thousands - no, millions - of South Africans who operate in the informal sector. There are traders, fisheries, shore-foragers, construction workers,

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<sup>17</sup> Matthew Savides, Times Live, "These are SA's 'irrational' lockdown laws, according to high court", 3 June 2020.

street-vendors, waste-pickers, hairdressers and the like, who have lost their livelihood and the right to 'eke out a livelihood', as the President (Cyril Ramaphosa) referred to it, as a result of the regulations.”<sup>18</sup>

While the President, and his NCCC, obviously believe that they have the legislative authority to prohibit people from working, the question remains whether they have the moral authority to do so.

People perish as a result of the virus, but they also perish as a result of hunger and malnutrition, in this instance caused by not being permitted to earn a living. Does the government regard the one worse than the other?

If an employer or an employee could ask the President how he/she is supposed to survive, in the absence of the right to work and therefore earn a living in order to sustain themselves and their families, how will the President respond?

If the President does not have a sensible answer, and of course there is no answer to that question, then he cannot morally justify denying a person the right to work and earn a living.

### 3.2.3 Exercising and public open spaces

“The limitations on exercise are equally perplexing: If the laudable objective is not to have large groups of people exercising in close proximity to each other, the regulations should say so rather than prohibit the organising of exercise in an arbitrary fashion.”<sup>19</sup>

Restricting the right to freedom of movement, in order to limit contact with others in order to curtail the risks of spreading the virus, is rational, but to restrict the hours of exercise to arbitrarily determined time periods is completely irrational.

Similarly, to put it bluntly, it can hardly be argued that it is rational to allow scores of people to run on the promenade but if one were to step a foot on the beach, it would lead to rampant infection. Not to mention the ridiculous differentiation between the Garden Route and Durban (a super-spreader location in December since the dawn of time) with no basis or sound reasoning.

The clear inference that is drawn from the above, is that once the Minister had declared a national state of disaster, the goal was to ‘flatten the curve’ by way of retarding or limiting the spread of the virus - all very commendable and necessary objectives – yet, little or in fact no regard was given to the extent of the impact of individual regulations on the constitutional rights of people and whether the extent of the limitation of their rights was justifiable or not.

Their severe response was largely due to the status of South Africa’s public healthcare system. According to the operational census performed in the health care industry in

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<sup>18</sup> *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020).

<sup>19</sup> *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020).

2018,<sup>20</sup> there are approximately 18 hospital beds per every 10 000 people in the country. In the public health sector, there are 32 medical practitioners per 100 000 people who do not subscribe to private medical insurance, and about 144 professional nurses per 100 000 uninsured people.

Unfortunately, as the lockdown and the spread of the virus progressed, one would have expected, based on the reasoning of the Minister, that the spread of the virus would be inversely proportionate to the extent and harshness of the lockdown and restrictive regulations – this, was not at all the case. The medical sector was not expanded or capacitated to any extent that could effectively handle the spread of the virus. Thus, rendering the effectiveness of the lockdown regulations, practically non-existent for the purposes intended.

The lack of transparency and respect towards their citizens by governments across the world, including South Africa during the time of Covid, the overemphasis of certain narratives on the one hand and the downplaying of all other solutions which do not support their particular narrative, have caused a major credibility shortfall.

#### **4. PURPOSE OF THE DISASTER MANAGEMENT AMENDMENT BILL**

As the irrationality and severity of impact of the restrictions and regulations, including the closing of bars, restaurants and taverns, as well as the halting sales of alcohol for off-site consumption, various alert levels, social distancing, curfews and the banning of local and international traveling, have been dealt with, we move to the motivation of the Bill aimed at ensuring that none of these arbitrary moves are ever attempted by the Executive again.

This private member bill focusses on the legal, legislative and regulatory aspects of a national disaster.

##### **4.1 Objects of the Bill**

Broadly, the Bill proposes that only the National Assembly (“NA”), a provincial legislature or municipal council may implement or extend a national, provincial or local state of disaster and its duration. Additionally, any resolution to implement or extend a state of disaster, be it at national, provincial or local authority level, can only be enforced following public debate in the applicable public representative’s chamber. Oversight for either a national or provincial state of disaster will come from, in the case of the NA, the Portfolio Committee on Co-operative Governance and Traditional Affairs, and whichever provincial executive committee is tasked accordingly.

The objects are therefore, through the amendment of the DMA, to limit the arbitrary and extensive power of the Minister, by curbing the duration declaration and extension powers of the Minister, as well as subjecting all his/her regulatory and legislative decisions to parliamentary or legislative oversight and public participation.

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<sup>20</sup><https://gsi.s-rminform.com/articles/the-impact-of-covid-19-on-south-africas-economy-and-investment-landscape>, accessed 25 August 2021.

## 4.2 Analysis of amendments

### 4.2.1 Amendment of section 27(5) – Declaration and duration of a national state of disaster

Section 27(5) of the current DMA, which deals with the declaration and duration of a national state of disaster by the Minister, reads as follows:

- “(5) A national state of disaster that has been declared in terms of subsection (1)-*
- (a) lapses three months after it has so 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.”*

The Bill intends on amending the above, in order to read as follows:

- “(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; and*
- Addition of: (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 [sic] 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.”*

The above amendment, in effect, means that 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 NA 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 NA. The clause lastly provides that the NA 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.

#### 4.2.2 Insertion of section 27A - Lapsing of national state of disaster regulations

The Bill further proposes the insertion of a section 27A into the Act, after section 27:

##### ***“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 any provision thereof.”*

This clause provides for the lapsing of a national state of disaster. It 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.

#### 4.2.3 Amendment of section 41(5) – Declaration and duration of a provincial state of disaster

Section 41(5) of the current DMA, which deals with the declaration and duration of a provincial state of disaster by the Premier, reads as follows:



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

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

The Bill intends on amending the above, in order to read as follows:

*“(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; and*
- Addition of:*
- (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 any provision thereof.”*

Clause 3 above, amending section 41, ensures that *inter alia*, 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 provincial state of disaster before it lapses. It further provides that a copy of the notice declaring a provincial state of disaster must be tabled in a provincial legislature. The clause lastly 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.

#### 4.2.4 Insertion of section 41A - Lapsing of provincial state of disaster regulations

The Bill further proposes the insertion of a section 41A into the Act, after section 41:

***“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 any provision thereof, to the extent to which it is so disapproved, whichever it 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 any provision thereof.”*

Clause 4 inserts section 41A into the Act. It provides for the lapsing of a provincial state of disaster. It further regulates the validity of anything done under or by virtue of any regulation or direction from the time of the declaration of the provincial state of disaster until the time it lapses.

#### 4.2.5 Amendment of section 55(5) – Declaration and duration of a municipal/local state of disaster

Section 55(5) of the current DMA, which deals with the declaration and duration of a municipal state of disaster by the municipal council, reads as follows:

- “(5) A municipal state of disaster that has been declared in terms of subsection (1)-*
- (a) lapses three months after it has so been declared;*
  - (b) may be terminated by the council by notice in the provincial gazette before it lapses in terms of paragraph (a); and*

- (c) *may be extended by the council by notice in the provincial gazette for one month at a time before it lapses in terms of paragraph (a) or the existing extension is due to expire."*

The Bill intends on amending the above, in order to read as follows:

- "(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; and*
- Addition of: (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.*

Clause 5 above 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 disaster.

#### 4.2.6 Insertion of section 55A - Lapsing of local state of disaster by-laws

The Bill further proposes the insertion of a section 41A into the Act, after section 41:

##### ***"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 any provision thereof.”*

Clause 6 inserts section 55A into the Act. It provides for the lapsing of a local state of disaster. It 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.

### **4.3 Rationale of amendments and support thereof**

#### **4.3.1 Rationale of amendments**

The rationale of this amendment Bill is clearly in no way meant to completely remove the power of the Minister to declare a national state of disaster. It merely seeks to bring balance between the Executive’s power in limiting fundamental rights by means of the provisions of the declaration of a state of disaster, extension thereof, consequent regulations, and providing for the necessary restrictions in order to mitigate any form of national disaster.

It furthermore envisions parliamentary and legislative oversight in the making of regulations in order to give effect to the declaration of a state of disaster, without arbitrary or irrational restrictions on the fundamental rights of the country’s citizens.

The Minister can, under the amended Act, still declare and extend a state of disaster, as well as furnish regulations. However, should the Bill be adopted, South Africans can rest assured that any regulations, which could severely negatively impact their right/ability to move, work, worship, exercise etc., will be subjected to parliament for approval.

## **5. CONCLUSION**

Despite the Supreme Court of Appeal upholding the appeal against the judgement of the Pretoria High Court in the matter of *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another (Case no 538/2020) [2021] ZASCA 95 (1 July 2021)* regarding the irrationality of the Minister’s lockdown regulations, it is, from the arguments and evidence in this submission, clear that the Executive’s restrictive regulations and directives caused South Africa and its citizens irreparable harm, which is said to last for years.

Under the current DMA, the only recourse for damage due to irrational regulations was to call the Minister to answer questions regarding the rationale for the regulations. From the Minister’s vague and unsuccessful attempt to do so, it is apparent that her decisions must at the very least, pass parliament’s test prior to approval and implementation.

The DMA is intended as a short-term, stop-gap mechanism empowering the state’s response to a national disaster, only until such time that more concrete and fit-for-purpose legislation is

initiated, prepared and passed.<sup>21</sup>

The state's interpretation and application of the DMA – as conferring legislative powers on the Minister indefinitely – is inconsistent with the concept of *trias politica* (separation of powers), as provided for in our constitutional framework. The Constitution envisages a role for the Executive in the preparation and initialisation of legislation, but only our Parliament is, as the “engine-house of our democracy” empowered to pass legislation.

Our Executive abused the multitude of methods of power granted to it by virtue of the DMA in its current form. Our people and our economy pay, and will in future continue to pay the price of the disproportionate regulations and extension of the lockdown, as effected by the Executive.

This Bill must be passed and enacted in order to ensure accountability and transparency with regards to fundamental right-limiting directives issued by the Executive, should our beloved country ever be struck by disaster again.

NEASA fully understands the extremely difficult task of the Government in mitigating the Covid-19 predicament, curbing the infection rate and deaths, creating capacity in the health sector and protecting lives and jobs, however, this does not mean government should be given a free hand or a blank cheque. A state of national disaster cannot permit law-making through the back door, nor enable a slippery slope into autocracy.<sup>22</sup>

Regards

GC Papenfus  
**CHIEF EXECUTIVE**

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<sup>21</sup> Helen Suzman Foundation, Submission in response to Notice of Intention to Introduce the Draft Disaster Management Amendment Bill, 2021, 19 March 2021.

<sup>22</sup> Richard Calland, The Conversation, “*Court throws South Africa’s lockdown exit strategy into disarray. But got it wrong*”, 3 June 2020.