

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

HELD AT BLOEMFONTEIN

CASE NO:538/2020

COURT AQUE CASE NO: 21542/2020

HOLA BON RENAISSANCE FOUNDATION

**AMICUS CURIAE IN THE COURT
AQUE**

IN THE MATTER BETWEEN:

MINISTER OF COOPERATIVE GOVERNANCE

AND TRADITIONAL AFFAIRS

APPLICANT

AND

REYNO DAWID DE BEER

1st RESPONDENT

LIBERTY FIGHTERS NETWORK

2nd RESPONDENT

FILLING NOTICE

DOCUMENTS: AMICUS CURIAE : HEADS OF ARGUMENT : VIRTUAL HEARING

ON THE ROLL: 26 May 2021

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**AMICUS CURIAE's HEADS OF
ARGUMENT**

TABLE OF CONTENT

A) BACKGROUND.....4

B) CLASSIFICATION OF THE NATIONAL DISASTER..... 6

C) PARLIAMENT VIRTUAL SITTING 18 JUNE2020..... 7

D) HEALTH AND DEATH9

 i) LESSONS LEARNED BY THE MINISTER OF HEALTH ON COVID...9

 ii) UNEXPLAINED DEATH BY NATIONAL ORGANIZATION OF RARE
 DISORDERS.....10

 iii) COVID19 VS TB, SARS, HIV/AIDS, INFLUENZA10

 iv) MORTALITY RATE..... 11

E) DECLARATION OF NATIONAL STATE DISASTER MANAGEMENT11

F) THE STATE FAILURE ON COVID 19 SOCIAL RELIEF...12

 i) SOCIAL RELIEF ON SASSA.....12

 ii) SOCIAL RELIEF ON UIF..... 12

 iii) SOCIAL RELIEF ON SMALL BUSINESS..... 12

 iv) SOCIAL RELIEF ON SPORT, ARTS..... 12

 v) SOCIAL RELIEF ON TRANSPORT SECTOR..... 12

 vi) DEPARTMENT OF JUSTICE 12

G) THE JUDGMENT OF THE COURT A QOU..... 13

H) COURT ALTERNATIVE RELIEF..... 14

I) COURT ORDER NOT VAGUE..... 15

J) WHOLESALE DECLARATION..... 16

K) COURT HAS NOT STRAYED OVER ITS PLEADINGS..... 16

L) UPHOLDING THE CONSTITUTION..... 16

M) UNCONSTITUTIONAL AND LIMITATION OF
THE FUNDAMENTAL RIGHTS..... 17

N) UNFAIR AND DISCRIMINATION OF THE SOUTH AFRICANS..... 18

O) AFRICAN SITUATION..... 21

P) **STATE NOT SAVING LIVES** 21

Q) **NATURAL & NON NATURAL DEATH**..... 22

R) **INEQUALITIES**..... 23

S) **CRITICAL PATIENT OF COVID19 SAVED**..... 24

T) **POVERTY LINES**..... 24

U) **STATE POOR SERVICE DURING LOCKDOWN**..... 24

V) NATIONAL PLANNING COMMISSION 25

W) CONCLUSION 25

X) **THE JUDGEMENT OF THE COURT A QUO** 29

Y) PRAYERS 34

Z) LIST OF SOURCES 34

A) BACKGROUND

1. On the 15 March 2020 in the government Gazette Vol 657 No: 43096, the Head of National Disaster management. Dr Mmaphaka Tau stated that after assessing the potential magnitude and severity of the COVID -19 pandemic in the country, hereby give notice that on 15 March 2020, in terms of section 23(1)(b) of the Disaster Management Act, 2002 (Act No. 57 of 2002) (the Act), classified the COVID -19 pandemic as a national disaster. On the 15 March 2020 the Minister of Cooperative Governance and Traditional Affairs declared a national state of disaster and she stated – Considering the magnitude and severity of the COVID -19 outbreak which has been declared a global pandemic by the World Health Organization (WHO) and classified as a national disaster by the Head of the National Disaster Management Centre, and taking into account the need to augment the existing measures undertaken by organs of state to deal with the pandemic in the government Gazette Vol 657 No: 43096
2. On the 17 March 2020 the Minister declares on government Gazette No: 43107 regulations issued in terms of section 27(2) of the Disaster Management Act, 2002
3. On the 19 March 2020, there was a statement of the Inter Ministers Committee on the Gazetted Regulations on the state of disaster Hon. Dr Nkosazana Dlamini Zuma Minister of Cooperative Governance and Traditional Affairs
4. The State declared the national disaster - On the 23 March 2020, The President Cyril Ramaphosa: Escalation of measures to combat Coronavirus COVID-19 pandemic and called for a lock down
5. Thereafter respondent hereby referred to as the State, The State declared some Social Relief as an intervention on country challenges during lockdown

6. On the 26 March 2020 HBR Foundation approach the Constitutional court to interdict
7. On the 30 March 2020 the Constitutional Court dismissed the application on grounds that it had no prospect of success
8. There after the State proceeded with unconstitutional regulations in a form of disaster management regulation and lock down
9. The regulations violated the rights of South Africans, in terms all forms that includes work, education, Jobs, Security, health and movement, religion etc...
10. The application was successful in a court a quo, as a result the State lodged an application for Leave to Appeal
11. The HBRF acts in the interests of those without resources and means to litigate in their own names, and are people who are typically marginalized and disproportionately affected by unconstitutional lockdown regulation
12. In *Campus Law Clinic, University of Kwa-Zulu Natal v Standard Bank of South Africa Ltd* 2006 (6) 103 (CC), the Constitutional Court held that granting an *amicus* standing depends on various factors. Included in those factors are:
 - a) The nature of the relief sought and extent to which it is of general and prospective application.
 - b) The range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court.
 - c) The degree of vulnerability of the people affected, the nature of the right said to be infringed; and
 - d) The consequences of the infringement.

13. We have perused the judgment of the Court a quo as well as the founding papers we are of the view that the submissions we intend to make advance will focus on pertinent issues that have not been fully canvassed by the parties.
14. We are mindful of the duty of amicus curiae not to repeat any submissions made by the parties. We are of the respectful view that our submissions of substance which would be helpful to this Court in dealing with this matter focuses on the on the inception which is classification of Covid 19 on whether or not is a disaster, and our argument clearly indicate it is not a disaster. Then the relief and promises of the state not fulfilled and State that architected a disaster against its own people.

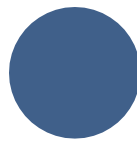
B) CLASSIFICATION OF THE NATIONAL DISASTER

15. It is apposite to state that, an Epidemic is a disease that affects a large number of people with in a community. A pandemic is an Epidemic that's spread over multiple countries or Continent. An outbreak is a greater than anticipated increase in the number of endemic cases. It can be also single case in a new area. If it's not quickly controlled; an outbreak can become an epidemic.
16. South Africa over past decades has experienced various Endemic, Epidemic and pandemic such as Cholera, Small pox, HIV/Aids, SARS, Listeriosis, Severe Acute Respiratory Syndrome (SARS), Rift Valey fever Turbelance, Epidemic and Malaria.
17. On the above the State has not differentiate between Covid19 and all the above and why it is perceived Covid 19 as a National disaster
18. The State has not provided a rational of any disease or virus including what constitute a disaster, a national disaster and how it categories such disaster in a form of an event and a form of a virus

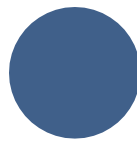
19. Instead of the state to put measures to control few single cases of the outbreak, it resulted blowing the matter out of proportion by declaring the National disaster, clearly the State has no classification of what constitute a national disaster
20. The State has failed to make it public of its Covid19 assessment, and therefore denying the public the reasons which lead to declaring a state of national disaster ultimately to Lockdown.

C) PARLIAMENT VIRTUAL SITTING

21. Parliament held a virtual sitting on the 18 June 2020 in line with Covid19 regulations:
 - a) A question was asked by the EFF leader Mr Malema to the President of the Republic of South Africa and HBRF quote —Mr President Do you have any Scientific evidence of how many people are going to die out of the pandemic, or we are just going as usual without knowing what are the expected infections and expected death within a particular period of time, have you be given an advise as to within a particular period we can expectthat SA will lose so many livesll unquote .
 - b) The President of RSA response HBRF quote: We have been advised by top Scientist in our country and we have benchmarked what we are doing here against what is happening in other parts of the world. Many parts of the world did not do what we did, our lockdown was hard we will concede that, we went on even to restrict things that many other countries did not restrict like alcohol, like cigarettes, buying and selling of a number of items, but we know in time we were not going to be able to keep to the lockdown forever.ll unquote
22. The President did not refer to the assessment report of the national disaster center and its classification which should be guiding South Africa.



23. There were no reasons for classification other than other countries are doing we doing lockdown.
24. The state failed to provide the reasonable threshold for its Hazard assessment which is lead to its decision to declare a national disaster. The State further failed to provide the reasonable threshold from its vulnerability assessment which is lead to its decision to declare a national disaster.
25. The Classification of Covid 19 as a the national disaster and all Lockdown regulations proclamation in terms of the Disaster Management Act No. 57 of 2002, had (have) a significant impact, affecting fundamental rights of South African citizens. Particularly;
 - a) Infringement of Bill of Rights Chapter 2 , Section 7, Rights
 - b) Violation of Bill of Rights Chapter 2, Sections 10, Human Dignity
 - c) Violation of Bill of Rights Chapter 2, Sections 21,
 - d) Freedom of Movement and Resistance
 - e) Infringement of Bill of Rights Chapter 2, Sections 22, Freedom of Trade, Occupation and Profession
 - f) Violation Bill of Rights Chapter 2, Sections 27 Health Care, Food Water and Social Security
 - g) Violation Bill of Rights Chapter 2, Sections 28 Children, that includes child head household, to basic nutrition, shelter, basic health care services and social services;
 - h) Infringement to Bill Of Rights Chapter 2, Section State of emergency
 - i) Violation of the Constitution in particular the preamble
26. The State discriminated by forcing South Africans to communicate with it over the internet platform nothing that not every South African has access to the Internet during lockdown, while South African we forced to Stay at home and not every South African has an income to buy data.



27. Lockdown regulations sought to combat the spread of coronavirus amongst South African citizens, but its regulations are not rationally connected to the means taken by the Executive, secondly other regulations infringed the fundamental rights mentioned in paragraph above and they are not justified and reasonable as envisaged in section 36(1) of the Constitution

¹ In terms of Section 36. of the Constitution:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

D) HEALTH AND DEATH ON COVID 19

i) Guidelines of Death by Covid 19 –

28. The State confirmed that at least 1930 death cases due to Covid 19, we would like to bring to the country the guidelines of World Health Organization. The State



report has created panic in the country on death related to Covid 19, as if it is only confirmed deaths, while the World Health Organization guidelines recording medical certificate of cause of Death it states – *COVID-19 should be recorded on the medical certificate of cause of death for ALL decedents where the disease caused, or is **assumed** to have caused, or contributed to death*” . (see **Point 3 of Annexure 1 Guidelines_Cause_of_Death_COVID-19**) -International Guidelines For Certification And Classification (Coding) Of Covid-19 As Cause Of Death)

ii) Lessons learned by the Minister of Health on Covid –

29. The media coverage 30 April 2020, where This is the opinion of Health Minister, Dr Zweli Mkhize, who joined a panel of experts from the World Health Organization (WHO) in reflecting on how countries in Africa are dealing with the worldwide pandemic. On a question of the relative low infection rates against that of the international world, Mkhize said I quote – *several factors could have contributed, including an overall younger population that could probably handle the virus better, and the fact that Africa was among the last continents to have recorded a first case and thus had the opportunity to respond faster*ll, unquote (**see annexure 2 Dr MNkhize Lesson learned on Covid 19**)

iii) Unexplained Death by National Organization of Rare Disorders –

30. this organization has reported Sudden unexplained death in childhood (SUDC) is the sudden death of a child 12 months of age or older that remains unexplained after a thorough case investigation, including performance of a complete autopsy, examination of the death scene, and review of the clinical history. Amongst other reports and However, due to the lack of standardizations of death investigations, consideration of undiagnosed cases of cardiac to list a few (**See annexure 3 Unexplained Death in Childhood**) and yet State has taken the easier route to assume all death to be due to Covid19. The National Organisation of rare disorder has since 2015 identified multiple of death and still no National Disaster was declared by the State. There has been a public outcry where family are forced to bury their deceased who died on unrelated Covid 19 death, that they are



death certificate state Covid 19 death to increase the daily death statistics in the country.

iv) Covid19 vs TB, SARS, HIV/AIDS, Influenza –

31. This Month the WHO has declared this period is an era of another Pandemic which is Influenza, of which the has cost lives during winter seasons, and the State has ignored

that Pandemic at the expense of Covid 19 and any other illnesses, which is another pandemic which is a serious virus, and TB, SARS, Malaria, HIV/Aids are serious virus that are of a serious danger to any person irrespective of their medical condition, while Covid 19 is dangerous for people with underline health condition and/or weak immune system, but mild symptoms do not need vaccine but require quarantine of 15 days to selfheal particularly from people who do not suffer any underline health condition

iv) Mortality rate –

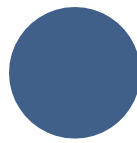
32 The State has deferred it constitutional obligation of a controlling a national disaster which is experienced everyday as reported by statistic, the infant mortality rate in South Africa from 2008 to 2018. In 2018, the infant mortality rate in South Africa was at about

28.5 deaths per 1,000 live births. **(See Annexure 4 – Infant mortality rate 2008-2018)**

E) DECLARATION OF NATIONAL STATE DISASTER MANAGEMENT

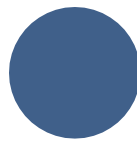
33. The State relied on a classification of a COVID19 that was baseless, unreliable and had no truth in it. Furthermore it opted to even implement Disaster management regulations that were not practiced anywhere in the world, which were hard for South Africans and which were a violation of the constitutional rights of all South Africans, as per the President Statement in the Parliament on the 18 June 2020.

F) STATE FAILURE ON COVID 19 SOCIAL RELIEF



34 The **State failure** to carry its **constitutional obligation** in terms of all Covid 19 SOCIAL RELIEF:

- a) Social Relief on SASSA** - We have experience where the State would commit and change its mind such as when the State announced the R350 to be paid to unemployed and still today majority have not paid, HBRF on the 17 June 2020 wrote a letter of demand to the Minister of Social Development this is after it identified that 16 million South Africans as per the Stats SA are unemployed , and only 1.3 Million were paid for one monthly. In the letter we request the Department to provide appeals process within 48 Hours See [\(the Annexure 5 Letter of Demand to SASSA\)](#). The Department on the 20 June 2020 issued a media statement SASSA working on appeal system for R350 grant applicants - 85 eight five days into lock down, this is a caring State to save lives from poverty [\(See Annexure 6 SASSA working on appeal system for R350 grant applicant\)](#), to date South Africans still have to queue to receive their grant
- b) Social Relief on UIF** – Because there are more than 750000(seven hundred and fifty thousand employees who have not received their salary since lockdown was declared HBRF has intervened [\(see Annexure 7 Letter of Demand UIF\)](#) and see the UIF respond [\(See Annexure 8 Letter UIF RESPONSE to HBR\)](#) to date [Employees who are retrenched have not been payed their Salaries by UIF](#)
- c) Social Relief on Small business**- with SMME we have yet to see and find an SMME that has been funded, while land lord are everyday evicting SMME due to assistance from the State [\(See Annexure 9 Letter of Demand Small Business\)](#) the [department is surrounded with corruption and SMME have not recived their grant](#)
- d) Social Relief of Sports, Arts** - majority of actors, film producers and athletes have not receive a cent from the grant since lockdown and this sector is hard hit



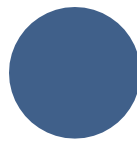
by the unconstitutional lockdown (see Annexure 10 Letter of Demand DSAC) the Department is deeply entrenched with corruption , to date artist are suffering

- e) **Social Relief on Transport Sector** – when Lockdown was declared the Taxi industry worked with the State to transport essential Services and people to hospitals and kept the industry growing. On the 22 June 2020 Taxis who assisted the State during lockdown had to strike in order for the State to get attention of it (See the annexure 11 lockdown taxi strike) while the State gives R200bn (two hundred Billion) to banks without any conditions that are aimed to improve the poor of the poorest including their partners who in this case were the Taxi operators. Noting the regulation state that taxi cannot have 16 passengers (seating together) while in a funeral 50 people can seattogether. To date the taxi fare have went up and nothing the State has done to assist to alleviate the situation that limits the rights of South Africans

- f) **Department of Justice role during LockDown** - The department of Justice is the only department that was making an income during the lockdown, with this unconstitutional regulations, due fines paid by South Africans who were trying to their daily basic living survival, while the other people are having criminal records due to this unconstitutional lockdown regulation, which has created a criminal record against obedient and discipline South Africans, with companies retrenching Like Mass Mart, Edcor, Telkom, SABC, Samancor, Sibanye-Stillwater, Glencore, Aspin , 90% of SMME and NGO to list a few the record will make it even more difficult for South Africans to obtain prospect of employment. (See the Annexure 12 Letter of Demand HBR vs Department of Justice and SAPS), to date its is the only department that is generating revenue at the expense of Poor South Africans in a form of Fines

G) THE JUDGMENT OF THE COURT A QOU

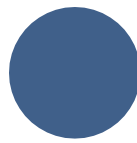
36. The judgement handed down in this matter on 02 June 2020 which is the subject of the application for Leave to Appeal, raises important issues around rationality and limitation of fundamental rights. It is therefore a case of considerable



importance and jurisprudential value.

37. The ratio and dicta of the Honourable judge a quo undoubtedly cited and relied on other divisions around the country in similar matters, but if the Leave to Appeal is granted it continue to maintain State that accounting to itself, unfair discrimination, violation of the bill of rights, the people and not businesses not being self-dependent but continue to relying on the State which has not delivered on its social relief or any of its promises.
38. The Court a quo was correct. The State decision to create the gazette and classify Covid19 a national disaster one was not rationally connected to the means taken to combat coronavirus.
39. The State lockdown regulations-driven response to the Coronavirus pandemic, including the State choices about how to combat Coronavirus, should have considered reasonable threshold for its Hazard assessment and impact assessment which is lead to its decision to declare a national disaster.
40. The State further failed to provide the reasonable threshold from its vulnerability assessment which is lead to its decision to declare a national disaster.
41. Rationality review asks a narrow question: is there a rational connection between the government's objectives and the means chosen to achieve them. The rationality is not about whether a decision is right or wrong. It follows that this case the question is much narrower: is there a rational connection between the State's objectives. The Courta quo's answer—an emphatic NO'—was correct.
42. The State has obligation when making regulations in terms of Disaster Management Act, to ensure that the means taken to combat coronavirus are rationally connected to the purpose it seeks to achieve, secondly the limitation of rights by regulations are reasonable, justifiable and there is no disproportionality between State objective and the limitation of the rights

H) COURT ALTERNATIVE RELIEF



43. The State was granted alternative relief and to review, amend and publish the regulation on of the lockdown furthermore the State were given 14 days ending 24 June 2020 to respond. The court gives alternative relief to the State which was equitable and sound.

(see Bengwenyama Minerals Pty Ltd v Genorah Resources (Pty) Ltd 2011(4)SA 133(CC) the Constitutional court Stressed the rule of law underpinnings behind section 172. the rule of law is entrenched in section 1(c) of the constitution which provides that it is a foundational value of our constitution and our society. The rule of law concern behind a declaration of invalidity of law or conduct, was dealt with as follows in the said judgment at paragraph 85 – I don't think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule must never be relinquished but the circumstance of each case must be examined in order to determine whether the factual certainty requires some amelioration of legality, if so to which extent)

44. Instead of the State (Applicant) to utilize the alternative relief, the State use that period to continue bringing more harm to South Africa with this appeal to keep the status quo of non-accountability, poverty, increase of illiteracy and retrenchments in the economy, hence we request the court to dismiss the appeal with costs

45. State failed to give measures used to combat COVID19 or any other pandemic that have strike the Republic. As the amicus we concur and agree fully in the with the profound court decisions and we further note that the court order also took into consideration the State challenges and opted to assist in remedy the situation.

46 Including **Point 4.10 of the court order**, that the need to argument the existing measures undertaken by organs of to deal with the pandemic. The recognition of special circumstances warranting such declaration. (See *In Hoffman v South Africa Airways 2001(1) SA* the court held that appropriate relief in terms of section 38 must be construed purposely and in the light of Section 172(1)(b) which empowers a court in constitutional matters to make any order that is just and equitable. Such the court held that, *appropriate relief must be fair and just in the circumstances of the particular case. "Appropriateness imports „the element of justice and fairness"*)



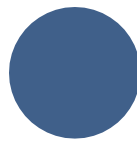
47. The State appeal has no reasonable prospect of success, the relief seek by the State undermined its own constitutional obligation, the bill of rights and the majority of South Africans who are on the urge of death due to poverty and the costs of crime rising because of this lockdown.

I) COURT ORDER NOT VAGUE

48. The State claims that the Court order is undue vague. The State has a capacity of consultants, advisors, experts, professionals, of human resource of about 1,3 (one million three hundred thousands) , and the State must not requires to be spoon fed by the court, this is unlawful, unethical and unconstitutional behavior and State decisions on this applications to leave to appeal had not put Ubuntu Principle first,
49. Should the State wanted to explore that alternative relief suggested by the court it would have found common ground with the applicants, amicus and the court to try to resolve by responding to the court request as a matter of urgent hence we request the appeal to be dismissed.

J) WHOLESALE DECLARATION

50. The State has failed to provide how it classifications of any diseases, The State has failed to convince the court of why Covid 19 was classified as a national disaster. The State has not classified correctly covid19 and against TB, Influenza, Malaria, SARS etc...
51. The State has not provide reasonable facts, have not made the assessment publicly or its ground for the declaration of a national disaster and reasons for the Declaration of the National Disaster Management. From inception of the breakout of the Covid19, they did not conduct a scan and assessing the risk.



52. The State took a decision based on hearsay of the Media and opted to violate the bill of Rights of South Africans through an unconstitutional lockdown

K) COURT HAS NOT STRAYED OVER ITS PLEADINGS

53. On the 26 May 2020, in court the State confirmed and committed to provide the level 3 regulations as part of its submission for the court before the 1 June 2020 to enable it to provide a collective judgment that had considered the level 3 regulation , theApplicants including the Amicus agreed.
54. The arrogant of the State and it chooses to have a selective memory that is what is experienced by the South Africans daily.
55. While the State has confirmed that the lockdown was initially 21 days and we are still in lockdown even today,

L) UPHOLDING THE CONSTITUTION

56. Our Lovable State has committed that there will not be any load shedding during lockdown and we are experiencing load shedding every day.
57. The State is not reliable, unethical behavior; it is arrogant and careless about the economy, its people, its land and the constitution of the Republic
58. The State exploits this circumstance hence we find the our SOE's reporting to a Presidential State Owned E Council in short our SOE's report to the likes of Sanlam, AngloGold Ashanti, MTN, Thebe investment, MISTRA to list a few
59. The State has engaged in activities that creates a national disaster to South African, Since the country is in lock down it experience a deepening violation of the Bill of Rights

M) UNCONSTITUTIONAL AND LIMITATION OF THE FUNDAMENTAL RIGHTS

60. I respectfully submit that It is important to states that in the present case, a



limitations analysis of national disaster, classification and regulations on the following legal principles:

61. State is (was) required to show that there is a rational connection between classification, national disaster and the limitation of the rights and the analysis requires an inquiry into the proportionality of the limitation in relation to the harm caused.
62. I am of the view that it is tried law that, various forms of the proportionality test have been adopted by courts, and they all are designed to ensure that a limitation does not unduly restrict a fundamental right. The test involves a balancing exercise between the rights of an individual and the rights of a community.¹
63. In order for the State to declare a national disaster to pass the proportionality test it must therefore be the least intrusive way to limit the right, and must be narrowly drawn so as to not enable officials decision making not to infringe the right disproportionately.
64. The requirement that the law limiting the right must nevertheless be ***-reasonably justifiable in a democratic society*** in effect limits the limitation
65. Based on the idea that there is an objective understanding of a democratic society and that State Decision either be Disaster management regulations or lockdown in a democratic society must adhere to the principles of proportionality and equality, it is inconceivable that the regulations could be considered to be ***-reasonably justifiable in a democratic society***.

N) UNFAIR AND DISCRIMINATION OF THE SOUTH AFRICANS

66. The State has not explained or qualify the reasons of why less than 20% of 0,001% of the 57 million South Africans which are present people affected by COVID19 due to underline health conditions and old age, should be the grounds to lockdown all South Africans and declare a national disaster



67. Furthermore that while 80% of 0.001% of the 57 million South Africans which further represent people affected by Covid 19 has self-healed through a stay home self-quarantine, without any vaccine or any medicine and that should be the grounds to lock down South Africa.

¹ The Zimbabwe Constitutional Court in Chimakure stated that *“[t]he purposes of the proportionality test is to strike a balance between the interests of the public and the rights of the individual in the exercise of freedom of expression.”*

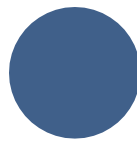
68. May the court also apply the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

69. The State has taken a decision which led to Majority of South Africans being declared insolvent and the poor becoming poor of the poorest

70. Refer to Minister of Justice and others vs SA restructuring and insolvency practitioners association and Others 2016 (4) SA 349 as follows:

“Throughout the many, many years of the Struggle for freedom, the greatest dream of South African’s Oppressed majority was attainment of equality. By that I mean remedial restitutionary or substantive equality, not just Formal equality. Promoting itself on the content of this equality, this court held Persons belonging to certain categories have suffered considerable unfair discriminating in the past. It is insufficient for the constitution merely to ensure , through its bill of rights, that statutory provisions which have caused such unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated and unless remedies, may continue for a substantial time and even indefinitely. Like justice equality delayed is equality denied”.

71. The majority of South Africans are on lockdown and their violation of Bill of Rights in the name of national disaster management.



O. AFRICAN SITUATION

72. **HBRF would bring to the court the below reports and apart of its submission for the argument**

73. HBRF sought what the Malawi court applied prior to the President of Malawi implement lockdown refer to the matter in the High Court Of Malawi Lilongwe District Registry, case no: 22 OF 2020, in a matter Esther Kathumba & Others v. The President & Others - 29 April 2020 order by Judge Kenyatta Nyirenda (See Annexure -EE)

P. STATE NOT SAVING LIVES

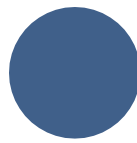
74. The state has killed people of South Africa in the name of Covid19, while people have been starve to death , denied food in our hospitals such as **Shonisani Lethole**, 35, died at Tembisa Hospital after being admitted with breathing difficulties. He was tested for Covid-19, but died without receiving his results. His family is appalled by the alleged mistreatment at the hospital and have questioned why the results took so long

Q. NATURAL & NON NATURAL DEATH

75. **HBRF sought the court to consider Mortality and causes of death in South Africa:** (Annexure AA - . StatsSA : Release October 2020)

76. Refer to 4.5 Natural and non-natural causes of death - Due to the high levels of violence and deaths attributed to accidents, natural and non-natural underlying causes of death are treated as separate groups. Non- natural causes of death comprise all deaths that were not attributable, or may nothave been attributable to natural causes Table 4.4 on Page 28: Number of natural and non-natural deaths by year of death occurrence,

1997–2017*	Number of natural deaths	Number of non-natural death	Total
2013	427 585	49 877	477 462
2014	426 469	51 015	477 484
2015	420 800	53 375	474 175
2016	416 878	53 518	470 396
2017	395 380	51 164	446 544

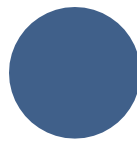


77. Furthermore the report indicates that there are Symptoms and signs not elsewhere classified (R00-R99) as per the percentage distribution of deaths by main groups of causes of death, 2015–2017* which equates to 13.4% of the overall deaths (refer on page 27)

R. INEQUALITIES

78 HBRF sought the court to consider Inequality Trends in South Africa (**Annexure BB** - Statistics South Africa, 2019) with main emphasis on Point 4.4INEQUALITY IN THE SOCIAL DOMAIN

79. Figure 4.4.19 illustrates the inequalities that exist between males and females. While approximately one out of every four males with a chronic illness reported having access to medical aid, only one out of every five females had similar medical aid coverage. Females with a chronic illness had a fairly stable level of access to medical aid coverage decreasing from 20,0% in 2009 to 18,8% in 2017 (a 1,2 percentage points difference). Meanwhile, the trend for males with chronic illnesses that had access to medical aid started at 25,8% in 2009, which then increased to a peak of 28,6% in 2012, but then decreased to 26,0% by 2017
80. According to Figure 4.4.18, whites had the highest proportion of individuals who had a chronic illness and access to medical aid, with proportions ranging between a low of 70,4% (in 2010) and a peak of 77,4% (in 2013) over the period 2009 to 2017. Meanwhile, black Africans, coloureds and Indians/Asians who reported having a chronic illness had significantly lower levels of access to medical aid relative to whites. Approximately two out of ten coloureds and one out of ten black Africans with a chronic illness were covered by medical aid.
81. Between 2009 and 2017, there has not been much change in medical aid coverage rates for individuals with chronic illnesses by population group, except for Indians/Asians who saw an increase from 33,1% in 2009 to 41,1% in 2017 (An 8,0 percentage points increase). (Please refer to attached annexure)



S. CRITICAL PATIENT OF COVID19 SAVED

82. South Africa has had a full report of Dr Taban a South African Doctor, who have saved lived of critical ill Covid19 Patient, I submit to the court that it instruct the State to implement trial and tested treatment on critical Covid19, and furthermore kindly find the academic study (See Annexure BB) . See the Story of <https://m-net.dstv.com/show/carte-blanche/videos/the-extraordinary-life-of-emmanuel-taban/video>

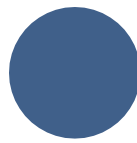
T. POVERTY LINES

83. HBRF sought the court to consider National Poverty Lines (**Annexure CC- STATISTICALRELEASE**) 2019

84. Food poverty line – R561 (in April 2019 prices) per person per month. This refers to the amount of money that an individual will need to afford the minimum required daily energy intake. This is also commonly referred to as the “extreme” poverty line; Lower-bound poverty line – R810 (in April 2019 prices) per person per month. This refers to the food poverty line plus the average amount derived from non-food items of households whose total expenditure is equal to the food poverty line; and Upper-bound poverty line – R1 227 (in April 2019 prices) per person per month.
85. This refers to the food poverty line plus the average amount derived from non-food items of households whose food expenditure is equal to the food poverty line.(Please refer to attached annexure)

U. STATE POOR SERVICE DURING LOCKDOWN

86. HBRF sought the court to consider Service delivery during lockdown complaints and grievance handled by PSC (**Annexure DD - PUBLIC SERVICE COMMISSION QUARTERLY BULLETIN VOLUME 12**)
87. **Non payment of government suppliers:** In line with its constitutional mandate, the PSC quarterly monitors the non- payment of invoices of suppliers within the stipulated 30-day period as required by the Public Finance Management Act. While there are pockets of improvement, several departments have repeatedly defaulted



on this requirement. With the arrival of the COVID-19 pandemic many Small, Medium and Micro Enterprises (SMMEs), who were already struggling to keep businesses afloat, found their operations being put under further pressures due to the non-payment of Invoices by Government. The PSC remains highly concerned about the continued failure by some departments to put effective systems in place to ensure Service Delivery (Please refer to attached annexure)

V. NATIONAL PLANNING COMMISSION

88. **HBRF sought the court to furthermore** consider National Planning commission identified nine key challenges facing South Africa since 2012 to date (NPC, 2012), namely:

- a) # Too few people work;
- b) # The quality of school education for black people is poor;
- c) # Infrastructure is poorly located, inadequate and under-maintained; 4. # Spatial divides hobble inclusive development;
- d) # The economy is unsustainably resource intensive;
- e) # The public health system cannot meet demand or sustain quality;
- f) # Public services are uneven and often of poor quality;
- g) # Corruption levels are high; and South Africa remains divided country.

W) CONCLUSION

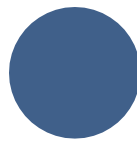
89. A proactive State and a caring State that want to save lives would have done a proper national disaster assessment and the State would have opted to identify and focus on the minority of South Africans who are the vulnerable people to Covid 19 and like related viruses, those are people with underlying health conditions and the elderly with weak immune systems.

90. The State would have and can still develop some Covid19 free Zone where the minority who cannot afford to stay home or are living in risky environment which would danger their lives , the State would have been provided safe place and caring in order to save lives from Covid 19 and/or any other virus attack during this



period,

91. While saving the majority of South Africans from poverty they experience every day of this lockdown, avoided the declaring all South Africans insolvent and drowning the economy in to recession, liquidating business and the markets, finally preserving and promoting the Bill of rights resulting to building this great nation called South Africa.
92. The State has been selective on approaching the covid19 pandemic from other deadly pandemic whether unknown and/or unknown that South Africa has had to experience in the past century, as for Covid19 there is no need to borrow \$1bn (one billion dollars) for a vaccine from the New Development Bank ([Annexure 13 New Development Bank approves US\\$1BN loan for SA](#)), while Majority of those infected arewith mild symptoms which self healing during quarantine
93. There is no prospect of success and no other court in the republic and internationally may grant the state to appeal and there is no urgency on its application but the State has a constitutional obligation ofwhich its urgency of rehabilitating,reviving and transforming the lives of all South Africans that are experiencing a disaster brought by the State:
94. In Mahomed and Another v The republic of South Africa and others 2001(3) SA 893 (CC) paragraph 69 where Chaskalson P Referred to the United State decision inOlmstead et al v United State and Qoutes the words of Justice Brandies as follows: *“ in a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously... Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example.... If the government becomes a lawbreaker, it breeds contempt forthe law; it invites every man to become a law unto himself; it invites anarchy”*
95. The State has failed to produce the reasons and report which forms basis of the declaration of national disaster



96. The state failed to provide the reasonable threshold for its Hazard assessment which is lead to its decision to declare a national disaster see judgment National Director of Public Prosecutions v Botha NO and Another CCT280/18 (see judgments paragraph (34). in respect of section 50(1)(a) of POCA from this Court requires that once the threshold of establishing that the property is an instrumentality of an offence has been met, a court is required to carry)...

97. The state failed to provide the reasonable threshold from its vulnerability assessment which is lead to its decision to declare a national disaster (see judgment *Competition Commission of South Africa v Media 24 (Pty) Limited CCT90/18* (See Judgments paragraph (53) “Judge Davis JP, in the introductory paragraph of the Competition Appeal Court judgment, places great emphasis on the fact that this matter is the first of its kind. As a result, in interpreting the Competition Act’s prohibition of predatory pricing, this Court must establish how the prohibition aligns with, and fulfills, the imperatives of the Constitution. Competition matters impact on the interests of the public, especially considering South Africa’s evolving and transforming market economy. The need to provide the country with free and fair guidelines for an equitable competitive market is crucial, and something that this Court is qualified to do”.)

98. The State intentionally and/or unintentionally by error or failed to establish a reasonable threshold from its Impact assessment for it to declare a national disaster, the determination of the threshold apply in order to make decision. (see judgment of *Booyesen v Minister of Safety and Security CCT25/17 , Para 46. Jurisdiction is a threshold requirement, and for this Court’s jurisdiction to be engaged, the pleadings must demonstrate why the matter is either a constitutional issue or an arguable point of law of general...)*



99. The court should order the capacitation of the State and disaster risk assessments and its policies, process, procedure and tools, resources and human capacity in order to ensure that the Country is better positioned to assess the any risk with potential magnitude and severity in real time. There is no doubt that the organ of State is not capacitated to on classification of risks and/or national disaster (*See judgment 1. SASSA v Minister of Social Development CCT 48/1 .Para (26).. Honest nor complete. With regard to SAPO's incapacity to provide the cash payment service, SASSA's affidavit did not tell the Court why SAPO, which was also an organ of state, was not capacitated instead).*

100. The State must not do as it will and seek the court to bring order (See In Hoffman v South Africa Airways 2001(1) SA the court held that appropriate relief in terms of section 38 must be construed purposely and in the light of Section 172(1)(b) which empowers a court in constitutional matters to make any order that is just and equitable. Such the court held that, 'appropriate relief must be fair and just in the circumstances of the particular case. 'Appropriateness imports 'the element of justice and fairness')

101. The HBRF has a standing in the present application to act in the public interest in terms of section 38(d) and (e) of the Constitution and it is bringing this application in its own interest and the interest of its members in terms of section 38(a) and (b) of the Constitutions.

102. Some of the Lockdown regulations proclamation in terms of section 23(1)(b) of the Disaster Management Act No. 57 of 2002, had (have) a significant impact, affecting fundamental rights of South African citizens. Particularly;



- a) Human Dignity (section 10).
- b) Freedom and security (section 12(1)).
- c) Freedom of Movement and Resistance (section 21); and
- d) Freedom of Trade, Occupation and Profession (section 22).

103. Lockdown regulations seeks (sought) to combat the spread of coronavirus amongst South African citizens, but certain provisions regulations are not rationally connected to the means taken by the Executive, secondly other provisions infringed the fundamental rights mentioned in paragraph 9 above and they are not justified and reasonable as envisaged in section 36(1) of the Constitution.

104. The Applicant has obligation when making regulations in terms of Disaster Management Act, to ensure that the means taken to combat coronavirus are rationally connected to the purpose it seeks to achieve, secondly the limitation of rights by regulations are reasonable, justifiable and there is no disproportionality between applicant's objective and the limitation of the rights.

X.THE JUDGEMENT OF THE COURT A QUO

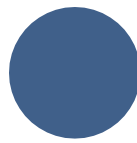
105. The discussions of the issues raised in this application, as well as their application to the facts, would benefit clarification on appeal, particularly to ensure rationality principle and limitation principle will be applied properly by the Applicant in a manners as to undermine the rights entrenched in the Constitution.



106. Instead of the state to put measures to control few single cases of the outbreak, it resulted blowing the matter out of proportion by declaring the National disaster, clearly the State has no classification of what constitute a national disaster
107. The State has failed to make it public the of its assessment, and therefore denying the public the reasons which lead to declaring a state of national disaster ultimately to Lockdown.
108. The state failed to provide the reasonable threshold for its **Hazard assessment** which is lead to its decision to declare a national disaster. The Respondent further failed to provide the reasonable threshold from its **vulnerability assessment** and **impact assesment** which is lead to its decision to declare a national disaster.

The standard of review: rationality

109. The Respondent's decisions to enact lockdown regulation fall squarely within the function of the Executive. The meaning and the use of the Lockdown regulations is subject to legality review and the low standard of rationality.



110. **The Court a quo was correct.** The Respondent's decision to declare the levels of lockdown regulations was not rationally connected to the means taken to combat coronavirus.

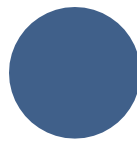
111. The Respondent's lockdown regulations-driven response to the Coronavirus pandemic, including the Respondent's choices about how to combat Coronavirus, should have considered reasonable threshold for its Hazard assessment which is lead to its decision to declare a national disaster. The Respondent further failed to provide the reasonable threshold from its vulnerability assessment which is lead to its decision to declare a national disaster.

112. Rationality review asks a narrow question: ***is there a rational connection between the government's objectives and the means chosen to achieve them.*** Though Rationality is not about whether a decision is right or wrong. It follows that this case the question is much narrower: is there a rational connection between the Respondent's objectives. The Court a quo's answer—an emphatic '**NO**'—was correct.

113. The lockdown regulations limit the fundamental rights and the limitation is not justifiable and reasonable in terms of section 36(1) of the Constitution¹.

These is based on the following facts:

¹In terms of Section 36. of the Constitution:



104. I respectfully submit that It is important to states that in the present case, a limitations analysis of regulations of lockdown, on the following legal principles:

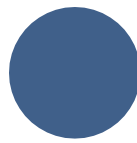
105. Respondent is (was) required to show that there is a rational connection between the lockdown regulations, and the limitation of the rights, and the analysis requires an inquiry into the proportionality of the limitation in relation to the harm caused.

106. I am advised that it is tried law that, various forms of the proportionality test have been adopted by courts, and they all are designed to ensure that a

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.



limitation does not unduly restrict a fundamental right. The test involves a balancing exercise between the rights of an individual and the rights of a community.²

107. In order for the legislation (Disaster Management regulations) to pass the proportionality test it must therefore be the least intrusive way to limit the right, and must be narrowly drawn so as to not enable officials enforcing the law to infringe the right disproportionately. **The lockdown regulations do not do so, and so cannot pass constitutional muster.**

108. The requirement that the law limiting the right must nevertheless be “***reasonably justifiable in a democratic society***” in effect limits the limitation

109. Based on the idea that there is an objective understanding of a democratic society and that the lockdown regulation in a democratic society must adhere to the principles of proportionality and equality, it is inconceivable that the regulations could be considered to be “reasonably justifiable in a democratic society.

110. The State is undermining its call of Social Distance and sanitizing your hands , resulting in the lockdown design to oppress the entire South Africans

²The Zimbabwe Constitutional Court in Chimakure stated that “[t]he purposes of the proportionality test is to strike a balance between the interests of the public and the rights of the individual in the exercise of freedom of expression.”



except a few special South Africans such as the resident see Annexure II1 and II 2

111. The current birth rate for South Africa in 2021 is **19.662** births per 1000 people, a **1.67% decline** from 2020. Meaning atleast 3431 new babies are born every day on average 142.95 in an hour, while the country experience at least 586 death daily compared to COVID19 of an average of 133 death nationally . (Annexure GG indicates the birth rate)

112. Annexure FF indicate the other pandemic which have not course lockdown and are common during winter season in South Africa

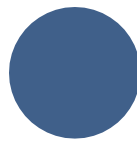
Y. PRAYERS

113. Accordingly, wherefore the HBRF prays that this Honorable Court grant an order inthe following

- a. Dismiss the State leave to appeal with costs
- b. Declaring the classification of the national disaster was irrational, vagueand unconstitutional
- c. Declaring the Disaster Management regulation unconstitutional
- d. Declaring and nullifying the entire lockdown unconstitutional
- e. Setting up of Lockdown committee of enquiry
- f. Ordering the State to carry out its constitutional obligation including thecontinuing with the Social relief as initial state commitment
- g. State to report to court on every month progress of Social Relief for 6months

Z. LIST OF SOURCES

1. Constitution of the Republic of South Africa.



South African Legislation

2. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

South African Case Law

3. In Campus Law Clinic, University of Kwa-Zulu Natal v Standard Bank of South Africa Ltd 2006 (6) 103 (CC),
4. Bengwenyama Minerals Pty Ltd v Genorah Resources (Pty) Ltd 2011(4)SA 133(CC)the Constitutional court
5. The Zimbabwe Constitutional Court in Chimakure
6. In Hoffman v South Africa Airways 2001(1) SA
7. Minister of Justice and others vs SA restructuring and insolvency practitioners association and Others 2016 (4) SA 349
8. In Mahomed and Another v The republic of South Africa and others 2001(3) SA 893