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14 July 2021

**FROM THE DESK OF ADV. J. VILAKAZI**

Dear Ms. Kunene,

**RE: HBRF // PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA NO**

1. Trusting you're well. Thank you for approaching me on the matter referred to above.
2. In the premise, you have asked me to look into whether it would be legally prudent for our client, the HBRF, to pursue the High Court matter under case number: 1357/2021.
3. In particular, you have briefed me to look into the following in respect of Covid-19 and the Regulations, in summary form, as per their Notice of Motion, namely:

3.1. Prayer 6 – Declaring COVID-19 as a national disaster irrational, unlawful and unconstitutional;

**LEADERSHIP:** AL PLATT SC (GROUP LEADER), LT SIBEKO SC (DEPUTY GROUP LEADER)  
J CORDIER (MANAGEMENT), L LIPHOTO (MANAGEMENT), MJ NGOBENI (MANAGEMENT),  
N NHARMURAVATE (MANAGEMENT), G OLWAGEN-MEYER (MANAGEMENT), J VILAKAZI (MANAGEMENT)  
IAM SEMENYA SC (MANAGEMENT – EX OFFICIO), AP BEZUIDENHOUT (MANAGEMENT – EX OFFICIO)  
**SENIOR MEMBERS:** MG KHOZA SC, TJ MACHABA SC, AL PLATT SC, R RATHIDILI SC, IAM SEMENYA SC, LT SIBEKO SC  
**MEMBERS:** LC ABRAHAMS, LH ADAMS, G ALLY, N BADAT, PP BALOYI, NB BANGISI, A BLEKI, L BOOI, HM BOTHA, VJ CHABANE, J CORDIER, R ESSACK, M GUMEDE,  
MP HLABYAGO, A JACOBS, S KELLY, BM KHUMALO, LM LIPHOTO, T MAHAFHA, MG MAKHOEBE, A MAKKA, M MATERA, D MATHUNYANE, EL MATSHABA,  
S MAZIBA, FR MEMANI, NG MIHLANGA, MS MNCWABE, TA MODISANE, Z MOKATSANE, KA MOKOENA, LM MOLOI, T MOLOI, NH MOLOTO,  
LL MPAHLWA, LZ MSIZA, L MSOMI, AM MTEMBU, RV MUDAU, MO MUDIMELI, P MUTHIGE, VMG NDIWENI, MJ NGOBENI,  
N NHARMURAVATE, MS NTESO, APS NXUMALO, G OLWAGEN-MEYER, M POMPO, E PROPHY, M RAMAILI, A RAMLAAL,  
MZ SEIMA, A SHUDE, S SIBISI, I STRYDOM, M TONYELA, MA TSHIVHASE, S TSHUNGU, J VILAKAZI, SI VOBI  
**DOOR MEMBERS:** L BOMELA, B HLANGWANE, K NAIDOO, EH TUGH  
**ASSOCIATE MEMBERS:** AP BEZUIDENHOUT, MA JONKER

3.2. Prayers 7 and 8 – Declaring the Disaster Management regulations irrational, unlawful and unconstitutional and violates the Constitution;

3.3. Prayer 9 – Directing Cabinet to review, adjust, align and update the threshold

4. I now offer a legal opinion on the Prayers:

5. In the case of *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs*,<sup>1</sup> the Applicants (De Beer, Liberty Fighter Network and Hola Bon Renaissance Foundation), prayed for the following prayers:

*“3.1 The applicants claim the following relief (paraphrased in part and summarised from the Notice of Motion):*

*3.1.1 That the national state of disaster be declared unconstitutional, unlawful and invalid;*

*3.1.2 That all the regulations promulgated by the Minister be declared unconstitutional, unlawful and invalid;*

*3.1.3 That all gatherings be declared lawful alternatively be allowed subject to certain conditions;*

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<sup>1</sup> (21542/2020) [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP) (2 June 2020).

3.1.4 *That all businesses, services and shops be allowed to operate subject to reasonable precautionary measures of utilizing masks, gloves and hand sanitizers. This relief was, however, only sought as an alternative and made subject to consultation with the Essential Services Committee contemplated in **Section 70** of the **Labour Relations Act, 66 of 1995.***”

6. The High Court granted the Application, declaring the following:

9.1 *The Minister’s declaration of a national state of disaster in terms of **Section 27(1)** of the **Disaster Management Act** in response to the COVID 19 pandemic is found to be rational.*

9.2 *The regulations promulgated in respect of Alert Levels 4 and 3 in terms of **Section 27(2)** of the **Disaster Management Act** by the Minister in a substantial number of instances are not rationally connected to the objectives of slowing the rate of infection or limiting the spread thereof.*

9.3. *In every instance where “means” are implemented by executive authority in order to obtain a specific outcome an evaluative exercise must be taken insofar as those “means” may encroach on a Constitutional right, to determine whether such encroachment is justifiable. Without conducting*

*such an enquiry, the enforcement of such means, even in a bona fide attempt to attain a legitimate end, would be arbitrary and unlawful.*

9.4 *Insofar as the “lockdown regulations” do not satisfy the “rationality test”, their encroachment on and limitation of rights guaranteed in the Bill of Rights contained in the Constitution are not justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in Section 36 of the Constitution.*

7. The Minister of COGTA appealed to the Supreme Court of Appeal<sup>2</sup> the entire ruling, setting out the following prayers in her order:

- ‘3. *An order that the national state of disaster proclaimed by the [Minister] in GN No. 313 GG No. 43096 dated 15 March 2020 in terms of Section 27(1) of the Disaster Management Act, 2002 (Act No. 57 of 2002) - hereafter referred to as the “DMA” - is declared as unconstitutional, unlawful and invalid; and*
4. *That all the DMA Regulations promulgated by the [Minister] in terms of Section 27(2) of the DMA since 18 March 2020, be declared as unconstitutional, unlawful and invalid; and*
5. *In the alternative to paragraphs 3 and 4 supra, ordering that all gatherings as defined in the Regulation of Gatherings Act, 1993 (Act No. 205 of 1993), are*

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<sup>2</sup> *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another* (Case no 538/2020) [2021] ZASCA 95 (1 July 2021)

*lawful and ordering that the processes as set out in that Act, if complied with, would render any gathering lawful.*

6. *In the alternative to paragraphs 3 and 4, and in addition to paragraph 5 supra, that all businesses, services and shops be allowed to operate further, having regard to the reasonable precautionary measures of utilising masks, gloves and hand sanitizers, until the Respondent has consulted with the Essential Services Committee (ESC) as intended in Section 70 of the Labour Relations Act, 1995 (Act No. 66 of 1995) and the ESC has legally declared any one or more service as an essential service to be included in any valid DMA Regulations further; and/or*

7. *In the alternative to paragraphs 3 and 4 and in addition to paragraphs 4, 5 and 6 supra, all other gatherings be allowed, observing the reasonable precautionary measures of utilising masks, gloves and hand sanitisers.’ (Our emphasis.)*

8. The matter was heard on 26 May 2021.

9. The SCA handed down judgment on 1 July 2021, and upheld the appeal wholly. It dismissed the application.

10. In so far as comparison between the prayers of our clients and the High Court and SCA orders are concerned, the following is apparent:

10.1. Declaring that Covid-19 is a natural disaster and was declared as such, in compliance with rationality, validity and constitutionality – this was affirmed by the SCA;

10.2. That all the regulations were valid, rational and constitutional – this was affirmed by the SCA;

10.3. That all regulations (such as gatherings and restricted movement) were rational and connected to the cause – this was affirmed by the SCA;

11. In law, there is the principle of “*stare decisis*”. *Stare decisis* is a legal doctrine that **obligates courts to follow historical cases when making a ruling on a similar case**. *Stare decisis* ensures **that cases with similar scenarios and facts are approached in the same way**. Simply put, it binds courts to follow legal precedents set by previous decisions. (own emphasis)

12. The doctrine of *stare decisis* is one that is fundamental to the rule of law. The object of the doctrine is to avoid uncertainty and confusion, to protect vested rights and legitimate expectations as well as **to uphold the dignity of the court**. It serves to lend certainty to the law.<sup>3</sup> (own emphasis)

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<sup>3</sup> *Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal* (1250/2016)r [2018] ZACC 19 (16 March 2018)

13. Put differently, a lower court is to follow decisions made by the higher courts. The hierarchy of courts ensures that a court lower than the SCA and CC, would follow any decision made by the higher courts. This includes cases where the matters are similar, or the facts are similar.
14. Therefore, a High Court may not deviate from the decision of a higher Court, like the SCA.
15. It is therefore our legal opinion that the SCA has already pronounced on the matter and the matter is res judicata. The facts, in so far as they relate to the status of Covid-19, the restrictions, etc, are similar, if not the same.
16. Taking it back to a lower court, such as the High Court, would be futile. The Court should refuse to entertain the matter.
17. Further, the Court may make an adverse costs order against the party and counsel, owing to the fact that the application may be seen to be frivolous and a waste of the Court's time.
18. A more prudent approach would be to make a direct application to the Constitutional Court.

Kind regards,

**Adv J. VILAKAZI**

**Pitje Chambers,  
Johannesburg**