

# Oxford Constitutional Law

## Republic of South Africa: Legal Response to Covid-19

South Africa [za]

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Except where the text indicates the contrary, the law is as it stood on: 18 December 2020

## I. Constitutional Framework

1. The Republic of South Africa is a constitutional democracy. The 1996 Constitution is the supreme law of the Republic, any law or conduct that is inconsistent with it is invalid.<sup>1</sup>
2. South Africa has a bicameral Parliament. The National Assembly consists of between 350 to 400 members that proportionally represent votes received in national general elections, which are held every five years. It is supported in the legislative process by the National Council of Provinces, which consists of nine delegations of 10 members from the elected provincial legislatures of each of the country's nine provinces, and represents provincial interests in the national sphere of government.<sup>2</sup> In the event of a dispute, the National Assembly typically overrides the National Council of Provinces.<sup>3</sup>
3. The President is elected by a majority of the members of the National Assembly, for a five-year term following each general election.<sup>4</sup> Executive authority in the Republic vests in the President, who is the Head of State and the Head of the National Executive.<sup>5</sup> The President appoints a Deputy President and a Cabinet. Cabinet ministers are selected from members of the National Assembly, though up to two Ministers may be selected from outside the Assembly.<sup>6</sup> All powers of the President and all executive powers are exercised subject to the Constitution.
4. Judicial authority is vested in the Courts, who have the power to declare any law or executive conduct invalid to the extent of its inconsistency with the Constitution.<sup>7</sup>
5. South Africa is a quasi-federal state, composed of nine provinces.<sup>8</sup> There are national, provincial, and local spheres of government, which are 'distinctive, interdependent and interrelated'<sup>9</sup> and are bound to constitutional 'principles of cooperative governance'.<sup>10</sup> Each province has its own legislature and executive.
6. Provinces may adopt their own Constitutions,<sup>11</sup> though only the Western Cape Province has successfully done so. Provincial constitutions may provide for different legislative or executive structures or procedures, but may not be substantively inconsistent with the national Constitution.<sup>12</sup> Provincial legislatures are competent to pass legislation in a number of functional areas listed in two Schedules to the 1996 Constitution.<sup>13</sup> For functional areas listed in Schedule 4, which include health services, legislative competence is shared with national government. Schedule 5 contains the functional areas, including ambulance services, where the provinces have exclusive powers. In the event of conflict between national and provincial legislation, national legislation typically prevails.<sup>14</sup>
7. There are 257 municipalities divided into three categories: eight metropolitan, 44 district, and 205 local municipalities. Schedules 4B and 5B of the 1996 Constitution list functional areas—including 'municipal health services', 'cleansing', 'public places', 'local amenities', and 'refuse removal' in relation to which municipalities have executive authority and the right to pass and administer by-laws, subject to national and provincial oversight and support.<sup>15</sup> By-laws that conflict with valid national or provincial laws are invalid.<sup>16</sup> Some municipalities also exercise delegated powers in other functional areas, such as health and housing.<sup>17</sup>
8. Law-making is divided between legislative instruments such as Acts of Parliament, Provincial Acts, and municipal by-laws; the common law administered by judges of the higher courts and subordinate/delegated legislation (such as proclamations and regulations) promulgated by the executive. All laws and all executive action are subject to judicial review for adherence to the 1996 Constitution.
9. The response to the pandemic has not changed the basic constitutional structure of the state.

## II. Applicable Legal Framework

### A. Constitutional and international law

**10.** South Africa has a dualist legal order in respect of international legal obligations. International agreements bind the Republic after they have been approved by resolution in both the National Assembly and National Council of Provinces and become binding law when enacted by Parliament. Self-executing provisions of international instruments are directly applicable unless they are inconsistent with the Constitution or an Act of Parliament.<sup>18</sup> When interpreting any legislation, courts are obliged to prefer any reasonable interpretation of legislation that is consistent with international law over any that is not.<sup>19</sup>

**11.** There has been no derogation from any international convention in the course of the pandemic response.

**12.** An extensive, justiciable Bill of Rights is contained in chapter 2 of the 1996 Constitution. In addition to relevant fundamental freedoms (such as freedom and security of the person and freedom of movement) the Bill of Rights also guarantees justiciable socio-economic rights such as access to adequate housing, access to health care services, and access to social security. Courts must refer to international law when interpreting the Bill of Rights.<sup>20</sup>

**13.** Section 36 of the 1996 Constitution provides that rights in the Bill of Rights may only be limited in terms of law of general application that is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account factors such as the nature of the right, the importance of the purpose of the limitation, and less restrictive means to achieve the purpose.

**14.** There is a detailed constitutional provision governing the declaration of states of emergency, the concomitant derogation of rights, and judicial oversight. Section 37 of the 1996 Constitution determines that states of emergency may be declared only 'when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency', and includes a table of rights that may not be derogated from.<sup>21</sup> This provision is supplemented by the State of Emergency Act (64 of 1997).

**15.** The state opted not to declare a state of emergency in response to the Covid-19 pandemic. Instead, it has responded to the pandemic under the framework of prevailing disaster management legislation, as elaborated in Part II.B below. This means that rights may not be derogated from in the course of the response to the pandemic. Any limitation of rights in the Bill of Rights in the course of the pandemic must thus comply with the provisions of section 36 of the 1996 Constitution.

**16.** South African became a party to the World Health Organization's (WHO) International Health Regulations (IHR) on 15 June 2007.<sup>22</sup> Their domestic incorporation in terms of legislation is incomplete, with the International Health Regulations Bill, 2013 having been published for public comment on 14 October 2013 but not yet tabled in parliament.<sup>23</sup>

**17.** National regulations and directions prescribing WHO standards in the course of the Covid-19 pandemic have included those pertaining to wearing gloves and facemasks,<sup>24</sup> using alcohol-based hand sanitisers,<sup>25</sup> transportation to quarantine facilities,<sup>26</sup> and health and safety at the workplace.<sup>27</sup>

## **B. Statutory provisions**

**18.** There was no new general law introduced to provide emergency powers in response to Covid-19.

**19.** The Disaster Management Act (57 of 2002) provides the basic framework for dealing with Covid-19 in South Africa. As per its long title, the objectives of the Act are to provide for 'an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters; mitigating the severity of disasters; emergency preparedness; rapid and effective response to disasters and post-disaster recovery; the establishment of national, provincial and municipal disaster management centres; disaster management volunteers and matters incidental thereto'. The Act was amended by the Disaster Management Amendment Act (16 of 2015). Among others, the objective of the amendment was to provide an enforcement role for the South African National Defence Force (SANDF) and the South African Police Service (SAPS).

**20.** While the definition of a 'disaster' in section 1 of the Disaster Management Act 2002 includes any 'widespread, or localised, natural or human-caused-occurrence which causes or threatens to cause death, injury or disease' and can thus be applied to Covid-19, the Act does not contain any provisions pertaining

to the control of infectious diseases. Instead, it provides a broad framework and confers the executive powers necessary for the coordination and management of a wide range of natural and man-made disasters. Infectious disease control in South Africa ordinarily takes place in terms of Regulations Pertaining to the Surveillance and Control of Notifiable Medical Conditions<sup>28</sup> promulgated pursuant to section 90 of the National Health Act (61 of 2003). These regulations played only a supporting role in the management of Covid-19.

**21.** The Disaster Management Act 2002 provides for the declaration of national, provincial, or municipal states of disaster by, respectively, the designated national Minister, the premier of a province or municipal leadership.<sup>29</sup> It further provides for the establishment and operation of disaster management frameworks, disaster management centres, disaster advisory forums, and disaster management plans at national, provincial, and municipal levels, as well as for intergovernmental relations and cooperation between these structures.

**22.** Section 23(3) of the Disaster Management Act 2002 determines that a national state of disaster must be declared where a disaster involves more than one province or cannot be managed effectively by a single province. During national states of disaster, section 26(3) of the Act determines that provincial and municipal disaster management authorities must cooperate with, and provide necessary support to, the national executive.

**23.** Under section 27(5) of the Disaster Management Act 2002, a national state of disaster lapses three months after it has been declared, or may be terminated by the relevant Minister by notice in the Government Gazette before it lapses, or may be extended by the Minister for 30 days at a time.

**24.** On 15 March 2020, the President announced that, in response to Covid-19, the Minister of Cooperative Governance and Traditional Affairs had declared a national state of disaster, across the entire Republic, in terms of section 27(1) of the Disaster Management Act 2002<sup>30</sup>. The initial state of disaster lapsed on 15 June 2020. It has since been extended for a further month, on the 15th of every subsequent calendar month, at time of writing most recently on 15 December 2020.

## C. Executive rule-making powers

**25.** Executive officials are typically delegated specific rule-making authority by Acts of Parliament. The Constitution determines that all delegated legislation (such as proclamations and regulations) must be in written form and must be accessible to the public.<sup>31</sup> Accordingly, all executive rules are published in the Government Gazette. While it does not routinely scrutinize executive rules prior to their promulgation, Parliament is constitutionally obliged to hold the executive accountable and to maintain oversight of the exercise of executive authority.<sup>32</sup> Such accountability and oversight is typically exercised in the course of various parliamentary committee procedures.

**26.** In 2005, the (then) Minister for Provincial and Local Government prescribed a National Disaster Management Framework (NDMF) in terms of section 6(1) of the Disaster Management Act 2002. The NDMF is the legal instrument required by the Act to provide 'a coherent, transparent and inclusive policy on disaster management appropriate for the Republic as a whole'.<sup>33</sup> In 2010, under section 3 read with sections 58 and 59 of the Disaster Management Act 2015, the Minister for Cooperative Governance and Traditional Affairs proclaimed Disaster Management Volunteer Regulations (DMVR), which provide for the establishment of units of volunteers to participate in disaster management.

**27.** For the duration of a national state of disaster, section 27 of the Disaster Management Act 2002 empowers the relevant Minister, after consultations with other implicated members of Cabinet, to make regulations, issue directions, or authorize the issuing of directions concerning:

- steps that may be necessary to prevent an escalation of the disaster or to alleviate, contain, and minimise the effects of the disaster (section 27(2)(n));
- the release of national government resources including stores, equipment, vehicles, and facilities (section 27(2)(a));
- the release of personnel of a national organ of state for the rendering of emergency services (section 27(2)(b));

- the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life (section 27(2)(d));
- the regulation of the movement of persons and goods to, from, or within the disaster-stricken or threatened area (section 27(2)(f));
- the provision, control, or use of temporary emergency accommodation (section 27(2)(h)).<sup>34</sup>

These powers may be exercised only for the duration of the state of disaster and only to the extent that this is necessary for the purpose of (a) assisting and protecting the public; (b) providing relief to the public; (c) protecting property; (d) preventing or combating disruption; or (e) dealing with the destructive and other effects of the disaster.<sup>35</sup> Regulations promulgated in terms of the Disaster Management Act 2002 remain in force until repealed, or until the state of disaster lapses.

**28.** Such regulations proclaimed in terms of the Disaster Management Act 2002 have been the pre-eminent governance instruments during the Covid-19 pandemic. As of 18 December 2020, the executive has issued seven sets of core 'lockdown'-related regulations, as well as 18 sets of related regulations. In addition, there have been a large number of sector-specific directives—including, for instance, measures aimed at curbing the spread and mitigating the impact of Covid-19 in public transport, air services, correctional services, sports, arts and culture, tourism facilities, schools, ports, and harbours—as well as an array of disaster management guidelines on how to implement and comply with regulations in various contexts (such as schools and workplaces), how to apply for relief measures, and how to navigate the relaxation of 'lockdown' measures in various sectors. All directives and guidelines are listed and accessible, alongside all core and related Covid-19 regulations, on a designated government website.<sup>36</sup>

**29.** All law and all executive action is subject to judicial review for constitutional compliance and adherence to the legality principle (including rationality). As discussed in Part IV.A.1 below, a number of the promulgated Covid-19 regulations have been challenged before the courts, for allegedly infringing rights in the Bill for Rights and for allegedly failing the requirement of rationality.

## D. Guidance

**30.** The National Disaster Management Centre (NDMC) exercises advisory and consultative powers under sections 15 and 22 of the Disaster Management Act 2002. It can publish guidelines and recommendations in the national Government Gazette or a provincial gazette.

**31.** As mentioned above, various state departments have published guidelines on the implementation of Covid-19 related executive regulations. Examples include the State of Disaster: Public Service guidelines for containment/management of Coronavirus Covid-19,<sup>37</sup> and the Guidelines for Mandatory Code of Practice on Mitigation and Management of Coronavirus Covid-19 Outbreak.<sup>38</sup> These guidelines are advisory in nature and lack the force of law, though their implementation constitutes administrative action and may therefore be subjected to judicial review.

## III. Institutions and Oversight

**32.** Institutionally, the main controversy has been the creation, at the President's behest, of a National Coronavirus Command Council (NCCC), consisting of the President alongside initially a selection of, and later the entire, Cabinet. The NCCC was intended as a consultative and coordinating forum to ensure effective communication over the national response to Covid-19. However, it seemed to duplicate the functions intended for the NDMC in terms of the Disaster Management Act 2002. There was some public discord over the NCCC's legality, legitimacy, and accountability,<sup>39</sup> and its constitutionality was challenged before the Western Cape High Court. In *Esau and ors v Minister of Cooperative Government and Traditional Affairs and ors*,<sup>40</sup> it was argued that the NCCC's establishment was an attempt to circumvent executive accountability, fell outside of the President's constitutional powers and was *ultra vires* the Disaster Management Act. The Court dismissed the challenge, upholding the President's argument that Cabinet could arrange itself as it deemed fit, that the NCCC was a legitimate committee of Cabinet, and that it could constitutionally be held accountable as such.

### A. The role of legislatures in supervising the executive

**33.** Parliament has a constitutional obligation to maintain oversight of the executive.<sup>41</sup> Cabinet members ‘are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions’<sup>42</sup> and must ‘provide Parliament with full and regular reports concerning matters under their control’.<sup>43</sup> Parliament and its committees typically exercise oversight over the executive by exercising powers in terms of its rules, such as putting questions to or requiring briefings from the executive. All executive action is further subject to judicial review for constitutional compliance.

**34.** In terms of section 101(4) of the 1996 Constitution, national legislation may specify the manner in which and extent to which executive instruments (such as regulations or directives) must be tabled in and approved by Parliament. But no law has been passed providing for blanket pre-promulgation legislative scrutiny of executive lawmaking, other than in the course of ordinary oversight in terms of the procedures of various parliamentary committees. In terms of section 59(4) of the Disaster Management Act 2002, regulations made by the Minister in terms of the Act must be referred to the National Council of Provinces, whose approval would be required in order for the regulation to prevail over conflicting provincial legislation under section 146(6) of the 1996 Constitution.

**35.** Over and above ‘ordinary’, constitutionally mandated, oversight, the Disaster Management Act 2002 requires of the Minister of Cooperative Governance and Traditional Affairs, who is responsible for disaster management, to submit annual reports produced by the NDMC to Parliament for scrutiny.<sup>44</sup> Provincial Disaster Management Centres must similarly report, via the responsible provincial executive leader, to Provincial legislatures.<sup>45</sup>

**36.** On 16 April 2020, the Presiding Officer of Parliament issued a statement emphasizing that ‘the role of Parliament remains indispensable during this period of national lockdown and the extended period of social distancing, which is expected to continue for months’.<sup>46</sup> A press release dated 5 April 2020 further affirmed Parliament’s responsibility to ‘oversee the delivery of services needed to relieve the burden of the Covid-19 pandemic on the public’ and emphasized that MPs retained their oversight authority and responsibilities during the state of national disaster. The statement proceeded to elaborate that, beyond parliamentary committee meetings, oversight functions would be fulfilled by individual MPs ‘carrying out constituency work in various communities and holding the Executive accountable for implementing measures designed to overcome the state of disaster’.<sup>47</sup>

## **B. The functioning of the legislature where its ordinary business is disrupted**

**37.** The commencement of the state of national disaster coincided with the scheduled constituency programme of Parliament and its Easter recess. Parliamentary sittings were suspended from 23 March until 13 April 2020. In terms of the prevailing Disaster Management Regulations,<sup>48</sup> MPs were listed as falling within the category of essential services and were required to perform constituency work—including being available to the public and solving problems in communities—during this time.<sup>49</sup>

**38.** Parliament resumed all business, including sittings of both houses and associated activities, such as passing legislation and conducting oversight over the executive, on 13 April 2020. However, it initially prioritized meetings for committees whose scope of oversight relates to government departments driving Covid-19 response measures. These included the committees on defence, social development and social services, and co-operative governance, and traditional affairs. All scheduled leave for MPs between 28 April and 4 May was cancelled.<sup>50</sup>

**39.** While initially operating only virtually, meetings of various parliamentary committees and fora—such as meetings of the Presiding Officers; forums of party chief whips in the National Assembly, National Council of Provinces, and provincial legislatures; and the Speakers’ Forum—subsequently took place as hybrid proceedings that allowed a limited number of members to attend in person, while the remainder attended via video link and could vote remotely. In their first meetings, these fora considered an amended framework for administering the business of oversight committees and plenary sittings, as well as an adjusted programme for the period ahead.<sup>51</sup>

**40.** The passing of legislation has not been suspended during the lockdown. The remote voting process during virtual plenary sessions entailed that party members communicated their intended votes on proposed legislation to their chief whips, who would in turn communicate the total caucus vote to the

Speaker. The effect was that party caucuses mostly voted en bloc, though individual MPs could indicate their express intention to abstain or record a vote contrary to the party position. Bills passed during the lockdown period included legislation aimed at addressing the economic fallout of the pandemic, namely the Disaster Management Tax Relief Administration Act<sup>52</sup> and the Disaster Management Tax Relief Act.<sup>53</sup>

### C. Role of and access to courts

**41.** After consultation with the Chief Justice and in terms of section 27(2) of the Disaster Management Act 2015, the Minister of Justice and Correctional Services issued directions to address, prevent, and combat the spread of Covid-19 in all courts, court precincts, and justice service points.<sup>54</sup> Additionally, the Chief Justice issued various directives on the management of courts during the various stages of South Africa's phased lockdown.<sup>55</sup>

**42.** The initial directives allowed the hearing of only urgent and essential matters and restricted access to court to 'persons with a material interest in a case', defined as litigants, accused, witnesses, persons who may be needed to provide support to them, family members, and members of the media. Judicial officers could insist that the number of persons in a room be reduced to comply with safety measures and social distancing requirements.<sup>56</sup>

**43.** The directions issued by the Minister of Justice further stipulated that 'audio-visual remand centres in Correctional Centres linked to a court must be used for purposes of the postponement of cases where accused persons are in custody'.<sup>57</sup>

**44.** In terms of the Chief Justice's Directions, all criminal trials were postponed to dates after the initial 'hard' lockdown, unless the interests of justice dictated otherwise or where special arrangements had been made with the judicial officers involved in the matter. Similarly, civil cases that were identified as not urgent or concerning essential services could not be placed on the court roll for the duration of the initial lockdown period. Unopposed matters or appeals that had already been placed on the court roll prior to the lockdown and that were capable of being decided without oral hearing could be decided on the papers, alternatively they could be heard by teleconference or video-conference, or any other electronic mode, which dispenses with the necessity to be physically present in a courtroom.<sup>58</sup> Heads of courts were awarded a discretion to authorize virtual hearings of civil and criminal matters as from 2 May 2020, subject to pre-existing safeguards pertaining to virtual trials or trials *in absentia*, contained in sections 159-159A of the Criminal Procedure Act (51 of 1977).<sup>59</sup> There have been reports expressing concern that access to justice may be compromised by teething problems in conducting hearings via video conferencing, especially given uneven access to technological resources in remote areas.<sup>60</sup>

### D. Elections

**45.** The Independent Electoral Commission (IEC) is constitutionally charged with managing the elections of national, provincial, and municipal legislative bodies in South Africa.<sup>61</sup> The IEC lodged an urgent application with the Electoral Court requesting the postponement of municipal by-elections and associated activities such as voter registration that were originally scheduled for March, April, and May 2020.<sup>62</sup> The Electoral Commission Act stipulates that the Electoral Court may, on an urgent basis, review any decision of the IEC relating to an electoral matter and the review shall be disposed of as expeditiously as possible.<sup>63</sup> On 19 March 2020, the Electoral court granted the urgent application and postponed 96 by-elections. The court additionally ruled that the by-elections could be held beyond the 90-day legislated period for the filling of councillor vacancies but not beyond 120 days from the date of the order.<sup>64</sup> However, the prolonged state of national disaster required the court to further postpone the by-elections twice<sup>65</sup> and to revise the electoral timetable for the by-elections accordingly.<sup>66</sup> After consultations with the Minister of Cooperative Governance and Traditional Affairs and a special National Party Liaison Committee representing political parties, the IEC resolved 'to clear the backlog of all outstanding by-elections on 11 November 2020'.<sup>67</sup> On that date, by-elections took place in 96 wards in 56 municipalities countrywide.<sup>68</sup>

**46.** The IEC is currently confident that South Africa's Local Government Elections that are due to take place in 2021 will go ahead as planned, though a date for the elections is yet to be proclaimed. Municipal elections are proclaimed by the Minister of Cooperative Governance and Traditional Affairs.<sup>69</sup> The IEC is

in ongoing consultations with the Minister of Cooperative Government and Traditional Affairs in relation to this matter.<sup>70</sup>

## E. Scientific advice

47. The Minister of Health may, after consultation with the National Health Council, establish such number of advisory and technical committees as may be necessary to achieve the objects of the National Health Act (61 of 2003).<sup>71</sup>

48. On 25 March 2020, the Minister of Health formally established the Ministerial Advisory Committee on Coronavirus Disease 2019 (MAC) and its membership list was officially published by the Department of Health on 21 April 2020.<sup>72</sup> However, it is unclear whether prescribed consultation processes were followed or on what basis members of the MAC were nominated or selected. The terms of reference, reporting lines, and operating procedures of the MAC have also not been publicly disclosed.<sup>73</sup>

49. It is nowhere expressly required that the government follow the advice of the MAC. Furthermore, the Minister of Health has the discretion not to publish the advice received from the MAC. Concerns have accordingly been expressed over the de facto independence of the MAC and over the extent to which its advice is heeded.<sup>74</sup>

## F. Freedom of the press and freedom of information

50. The 1996 Constitution enshrines ‘freedom of the press and other media’ as part of the right to freedom of expression.<sup>75</sup>

51. To date, there have been no instances of constraining or obstructing any reporting on Covid-19 by the media.

52. Under regulation 11(5) of the Disaster Management Act: Regulations relating to COVID-19, it is prohibited to publish any statement through any medium with the intention to deceive about Covid-19, any person’s Covid-19 infection status, or government measures to address the pandemic. The penalty is a fine or imprisonment for six months, or both. While aimed at curbing the spread of ‘fake news’ about Covid-19, concerns have been raised that this criminalization of disinformation about the pandemic amounts to censorship of the press.<sup>76</sup> There have been press reports of arrests and court appearances under this regulation,<sup>77</sup> but there is currently no data on convictions.

## G. Ombuds and oversight bodies

53. No special independent reviewer of Covid-19 legislation or policy has been appointed. On 4 April 2020, it was announced that former Constitutional Court judge Catherine O’Regan had been appointed as ‘Covid-19 Designated Judge’ in terms of amended regulations,<sup>78</sup> to oversee and ensure protection of the right to privacy in the course of contact tracing and associated tracking procedures.<sup>79</sup>

54. On 6 August 2020, the President appointed an inter-ministerial committee to focus on allegations of corruption associated with the response to the pandemic, in particular in relation to irregularities pertaining to procurement of personal protective equipment (PPE). The committee is supported by a coordination centre consisting of senior representatives of various law enforcement agencies.<sup>80</sup>

55. The Public Protector is established under section 182 of the 1996 Constitution to investigate, report, and take appropriate remedial action on any improper conduct in the public administration in any sphere of government.<sup>81</sup> In October 2020, the office of the Public Protector launched an investigation into allegations of irregularities in tenders awarded for provision of PPE in facilities for the treatment of Covid-19.<sup>82</sup>

56. The South African Human Rights Commission (SAHRC) is established under section 184 of the 1996 Constitution. Its functions include to ‘monitor and assess the observance of human rights in the Republic’<sup>83</sup> and it is empowered to ‘investigate and report on the observance of human rights’ and ‘to take steps to secure appropriate redress where human rights have been violated’.<sup>84</sup> In response to complaints against the City of Cape Town, pertaining to the conditions in a relocation camp established by the municipal government for housing homeless people during the initial ‘Level 5’ lockdown (see Part IV.A



below), the SAHRC commissioned a group of experts to investigate and report on conditions at the facility. The independent experts' report found that conditions at the relocation camp fell short of several human rights standards. In particular, it bemoaned the camp's inadequate Covid-19 prevention measures and the inadequacy of health care services provided to residents.<sup>85</sup> Following the report, the camp was closed in early May 2020.<sup>86</sup>

## IV. Public Health Measures, Enforcement and Compliance

### A. Public health measures

**57.** South Africa has employed a risk-adjusted approach—the 'alert system'—whereby the reach of restrictive public health measures was gradated according to the spread of Covid-19 and the 'readiness' of the health system.<sup>87</sup> The system employed five alert levels, with Alert Level 5 representing a high Covid-19 spread and low health system readiness (high risk), and Level 1 representing a low Covid-19 spread with high health system readiness (low risk).<sup>88</sup> Alert levels were determined by the Minister of Health, on advice of the MAC. However, the government has acknowledged that other factors, such as the economic and social impact of continued restrictions, also impacted on the determination of alert levels.<sup>89</sup>

**58.** The alert system makes provision for different alert levels to operate nationally, provincially, and locally.<sup>90</sup> In practice, alert levels have thus far all applied nationally, and thus uniformly throughout the country. However, on 3 December 2020, the government introduced a 'hot spot' designation which formally falls outside of the alert levels and which temporarily introduced more comprehensive restrictions in specific areas with a 'second wave' resurgence of Covid-19 infections.<sup>91</sup> The nature and extent of most public health interventions, including restrictions on travel and mobility of citizens, mandatory closure of premises, and prescriptions in terms of protective equipment, have largely been determined by the prevailing alert level or hot spot designation. Certain measures were however introduced or relaxed on an ad hoc basis. Except where stated otherwise, all regulations discussed in this section were introduced at national level in terms of the Disaster Management Act 2002 and had full force of law.

**59.** The different dates of operation for each alert level have been as follows:

Alert Level 5	Alert Level 4	Alert Level 3	Alert Level 2	Alert Level 1
26 March–31 April 2020	1 May–31 May 2020	1 June–17 August 2020	18 August–20 September 2020	21 September 2020–to present

#### 1. Individual mobility restrictions on citizens (*stay-at-home, curfews, etc*)

**60.** Under what was popularly referred to as a 'hard lockdown', from 26 March to 31 April 2020, all persons throughout the country were fully confined to their places of residence, except for providing or obtaining essential services or goods, collecting a social grant, seeking emergency medical treatment, or obtaining chronic medication.<sup>92</sup> An extensive list of essential goods and services was published. Essential goods were roughly: human and animal food, cleaning and hygiene products, fuel, medical goods, and 'basic goods', which is not defined in more detail but includes airtime and electricity as listed examples. Essential services were entities involved in providing essential goods, emergency services such as fire services, law enforcement, media, court officers, ombudsman organizations, necessary transport, and critical maintenance services.<sup>93</sup> Entities which provided essential goods or services were to identify essential workers based on, amongst other criteria, the complexity and size of the operation.<sup>94</sup> Essential workers were expected to apply for permits from their employers and to be able to produce such for inspection at any time. Only limited public commuter transport services were available, to enable essential travel for permitted activities.<sup>95</sup>

**61.** On 1 May 2020, restrictions were slightly relaxed. Access to, and the correlating ability to provide, goods and services were reintroduced in certain sectors, including construction, textile, manufacturing, and mining. The revised regulations also allowed for the reintroduction of, for example, live in and care staff, home food deliveries, limited car sales, and the sale of seasonal products such as winter clothing.<sup>96</sup> Refineries and similar facilities for energy and fuel supply were opened at full capacity.<sup>97</sup> Persons were

allowed to walk, run, or cycle within kilometres of their place of residence from 06:00 to 09:00 daily. At the same time a national curfew was introduced between the hours of 20:00 and 05:00.<sup>98</sup>

**62.** On 1 June 2020, restrictions on movement were relaxed significantly. Times for permitted exercise were extended to between 06:00 and 18:00 daily, with no specific geographic restriction.<sup>99</sup> The economy reopened and persons were allowed to leave their home to access or provide any service unless it was expressly excluded, on the understanding that everyone who could work from home had to continue to do so.<sup>100</sup> Restricted services were mostly in the tourist or hospitality industries, though limited travel for leisure purposes was again permitted from 25 June 2020.<sup>101</sup>

**63.** The national curfew was reduced to between the hours of 22:00 and 04:00 from 31 July 2020,<sup>102</sup> and again on 21 September 2020 to between the hours of midnight and 04:00.<sup>103</sup>

**64.** In areas designated as 'hot spots' after 3 December 2020, a curfew operates from 22:00 to 04:00.<sup>104</sup>

**65.** The various movement restrictions imposed by the regulations have typically been upheld and enforced by the courts, including the Constitutional Court.<sup>105</sup> However, a constitutional challenge to some of the restrictions associated with Alert Levels 3 and 4 was upheld in *De Beer and ors v Minister of Cooperative Governance and Traditional Affairs*, where the Pretoria High Court found that an unspecified number of restrictions were irrational and accordingly fell foul of the constitutional requirements for the reasonable and justifiable limitation of rights under section 36 of the 1996 Constitution. The Minister of Cooperative Governance and Traditional Affairs was ordered to reconsider, amend, and republish the regulations.<sup>106</sup> The judgment was appealed, but its effects were soon rendered moot when restrictions were relaxed in accordance with a reduction in alert level, to Level 2. A similar constitutional challenge failed in the subsequent *Esau and ors v Minister of Cooperative Government and Traditional Affairs and ors*.<sup>107</sup>

## **2. Restrictions on international or internal travel**

**66.** The national borders were closed on 26 March 2020, except for transportation of fuel and essential goods. Internally, all movement between provinces, except for attending funerals, was prohibited.<sup>108</sup>

**67.** From 1 May 2020, movement between provinces and local districts was permitted where crossing a provincial border was part of a work commute or was required to access educational services. At the same time, a one-off opportunity to travel between provinces was awarded to persons who were away from their place of residence or work at the initial enactment of the travel restrictions.<sup>109</sup> The movement of children between co-holders of parental responsibilities and rights or caregivers was permitted, and children could be moved over provincial and local borders where a permit for such purposes obtained from a magistrate.<sup>110</sup>

**68.** From 1 June 2020, inter-provincial and national borders were opened to allow daily commuters who attend school in South Africa.<sup>111</sup>

**69.** Restrictions on movement between provinces were removed on 18 August 2020.<sup>112</sup>

**70.** As of 21 September 2020, the national borders were partially reopened with certain land borders remaining closed. International travel from countries deemed to have a low rate of Covid-19 infection and transmission would be permitted subject to travellers being able to produce a negative Covid-19 test or quarantining at their own cost.<sup>113</sup>

## **3. Limitation on public and private gatherings and events**

**71.** From 26 March 2020, all public gatherings were prohibited except for funerals, where a maximum of 50 family members or persons with a close affiliation to the deceased could attend. Night vigils were strictly prohibited.<sup>114</sup>

**72.** From 1 June 2020, religious gatherings at places of worship were re-allowed, subject to a limitation of a maximum of 50 people per gathering.<sup>115</sup>

**73.** From 18 August 2020, the limited opening of entertainment venues, including bars and taverns, sporting venues and gyms, beaches and public parks, and wedding functions was allowed, subject to a

limitation of 50 persons per gathering. Personal visits between family and friends at places of residence were allowed for the first time, subject to a limit of 10 persons.<sup>116</sup>

**74.** As of 18 September, the maximum number of people allowed to gather was increased: up to 100 people could now attend a funeral; at faith-based institutions, political events, traditional council meetings, and social meetings up to 250 people could congregate indoors and up to 500 people outdoors, provided that no more than 50% of a venue's capacity may be used and that a social distancing requirement of 1.5 metres is observed.<sup>117</sup> In areas designated as hot spots, up to a 100 people can attend a social event or faith-based gathering indoors, and up to 250 people can attend the same gathering if hosted outdoors.<sup>118</sup>

#### **4. Closure of premises and facilities (eg schools, shops, services, parks, churches, sport facilities)**

**75.** From 26 March to 31 April 2020, all business and other premises, except for those that manufactured or supplied essential goods or services, were ordered closed.<sup>119</sup> Limited goods and services were reintroduced on 1 May, and those premises and facilities were allowed to reopen.<sup>120</sup> All premises and facilities reopened on 17 August, except certain specific exceptions such as gyms, bazaars, night clubs, lodging, beaches, and parks which remained closed.<sup>121</sup> On 21 September, all of these premises except for night clubs were allowed to reopen.<sup>122</sup>

**76.** The sale of tobacco, tobacco products, e-cigarettes, and related products was prohibited from Alert Levels 5–3 (27 March to 17 August). The government rationale for the tobacco ban was to reduce the behavioural risks connected to tobacco use (sharing tobacco products) and to reduce possible increased smoking-related risks of Covid-19 transmission and of developing more severe symptoms.<sup>123</sup> The constitutionality of the tobacco ban was unsuccessfully challenged before the Gauteng High Court by a tobacco association.<sup>124</sup> An appeal against the judgment ended in a settlement agreement shortly prior to the lifting of the restriction in August 2020.<sup>125</sup>

**77.** The limitation on the sale, dispensing, and transportation of liquor fluctuated throughout from complete prohibition (Levels 4–5 and for a short intermediate period during Level 3) to limited reinstatement of the sale and purchase of liquor products (Level 3 and below). The so-called 'alcohol ban' was motivated by the need to reduce alcohol-related trauma cases to increase hospital capacity.<sup>126</sup> All schools were initially closed after the declaration of the state of disaster (18 March 2020).<sup>127</sup> A phased re-opening of schools was announced by the Minister of Basic Education through published directions (23 July 2020).<sup>128</sup> Due to an increase in Covid-19 cases, public schools were briefly closed again from 27 July to 24 August, with exceptions for learners at exit-level grades (grades 7 and 12).<sup>129</sup> This second closure did not apply to independent (private) schools.<sup>130</sup> Upon reopening, only learners and officials were permitted to enter schools after being screened for Covid-19 at the entrance.<sup>131</sup> Learners and officials had to wear masks and officials were to receive two masks from the provincial Department of Education.<sup>132</sup> Schools are only allowed to operate at 50% capacity with a distance of 1.5 metres between persons.<sup>133</sup> Before opening, schools are inspected to ensure adequate health, safety, and distancing measures are put in place.<sup>134</sup>

#### **5. Physical distancing**

**78.** As gatherings of persons and the opening of business premises and schools were gradually allowed during the phased relaxation of alert levels explained above, relevant regulations required a mandatory physical distance of 1.5 meters between persons to be observed at all times.<sup>135</sup>

**79.** Where certain economic sectors reopened, businesses and other entities were required to develop adequate health protocols and plans to phase in the return of employees. All retailers were also to place controls to ensure that customers keep a distance of at least one square meter from each other, even in queues to access premises. Businesses were to minimise the need for employees to be physically present at the workplace.<sup>136</sup> Businesses were to designate Covid-19 compliance officers to oversee compliance with the regulations.<sup>137</sup>

**80.** Large businesses were specifically tasked with taking steps such as rotating shifts, staggering working hours, and enabling remote working to reduce the number of people on their premises. Special measures were to be implemented for persons over 60 living with co-morbidities to limit their exposure at work or to enable remote working.<sup>138</sup>

## **6. Use of face coverings or personal protective equipment (PPE)**

**81.** Although previously encouraged and widely practiced by the public, on 1 May 2020 regulations were issued making it mandatory to wear a face mask, or an appropriate alternative item, in all public spaces.<sup>139</sup>

**82.** On 12 July 2020, regulations specifying how masks or face coverings are to be worn were published.<sup>140</sup> The wearing of a mask or appropriate alternative item in public spaces was not required where a person was engaging in vigorous exercise and maintained a distance of at least three metres from others (regulation 5(2A)). Employers were obliged to provide masks to employees, while principals of schools and managers of early childhood development centres were charged with taking reasonable steps to procure masks for learners under their care (regulation 5(3)). Learners without masks were isolated and their parent, caregiver, or guardian was contacted.

## **7. Isolation of infected individuals and quarantine of individuals suspected of infection**

**83.** The first disaster management regulations published on 18 March 2020—before the use of alert levels—prescribed that no person who has been confirmed as having contracted Covid-19 or having been in contact with a person who has contracted Covid-19 can refuse a medical exam, admission to a health facility, quarantine, or isolation site, or treatment or prophylaxis.<sup>141</sup>

**84.** Regulation 4 specifies that where a person refuses, an enforcement officer—police, military, or peace officer—can apply to a local magistrate’s court to judicially compel such a person. The enforcement officer has 48 hours to approach the court and obtain the necessary order, during which a person can be forcibly placed in isolation or quarantine. The magistrate may judicially compel a person if it appears from a statement under oath or affirmation from the enforcement officer that the person is confirmed as having contracted Covid-19, confirmed as having been in contact with someone who tested positive for Covid-19, or reasonable grounds exist to believe a person has been in contact with a person who has contracted Covid-19. The State was to make quarantine and isolation facilities available to be used ‘when the need arises’ (regulation 5). There has been some controversy around the human rights impact of these regulations and their potential deterrent effect on testing.<sup>142</sup> Following a rationality-based legal challenge against indiscriminate forced isolation in terms of these regulations, a High Court decision clarified that compelled isolation or quarantine in a state facility would be limited to instances where persons refuse or are unable to self-quarantine or self-isolate.<sup>143</sup>

## **8. Testing, treatment, and vaccination**

**85.** The regulation and judicial process discussed in relation to forced isolation and quarantine under Part IV.A.7 above, also encompasses submission to medical exams, testing, treatment, or prophylaxis.<sup>144</sup>

**86.** There has not yet been any policy statement or regulation pertaining to the possibility of mandatory vaccinations, or regarding preferred access to vaccines. South Africa confirmed its participation in COVAX, a multi-country platform supporting the research, development, and manufacturing of a wide range of vaccine candidates, and facilitating negotiations over their pricing,<sup>145</sup> on 3 December 2020.<sup>146</sup> COVAX’s suggested priorities for access to vaccines are healthcare workers, the elderly, and persons with co-morbidities. Further considerations in the South African context include the rate of HIV, tuberculosis, and non-communicable diseases like diabetes, hypertension, and obesity.<sup>147</sup>

## **9. Contact tracing procedures**

**87.** Contact tracing was initially conducted manually by healthcare workers. A Covid-19 patient or their caregiver would be interviewed in person or by telephone. Depending on the patient’s movements, lists of potential contacts may be obtained from managers of buildings, transport providers, etc to compile an extended list of contacts. Persons identified as having been in close contact would immediately be quarantined and monitored daily. Methods of monitoring included healthcare workers conducting home visits, telephone interviews, or relying on self-reporting from the identified person.<sup>148</sup>

**88.** To complement manual contact tracing, on 2 April 2020 digital contact tracing was introduced and a national Covid-19 tracing database was established.<sup>149</sup> Private and public laboratories, places of accommodation, and electronic communications service providers generate data for the database.<sup>150</sup> Laboratories are to communicate test results and details of the person tested directly to the database

without that person's consent. Electronic communication service providers can be compelled to provide information regarding the location or movements of a person known or reasonably suspected to have contracted Covid-19 or a person known or reasonably suspected to have been in contact with a possible Covid-19 case without their prior knowledge or consent.<sup>151</sup> After six weeks, all information must either be de-identified or destroyed.<sup>152</sup> The overall contact tracing regulations are subject to a measure of judicial oversight to ensure their efficacy as well as protection of the right to privacy.<sup>153</sup>

**89.** Several other government initiatives have been launched, including developing smartphone contact tracing applications or establishing communication and reporting mechanisms via social media.<sup>154</sup>

### **10. Measures in long-term care facilities or homes for the elderly, restrictions on visitors etc**

**90.** In visits to persons who are imprisoned, in health establishments, or in the social care of the state—eg persons in frail care or old age homes—were initially entirely prohibited, and were only permitted under very limited circumstances from 1 May 2020.<sup>155</sup> Restrictions on personal visits were first lifted on 18 August 2020,<sup>156</sup> but it was not until 11 September 2020 that a ban on visits to state-run old age homes and frail care was lifted. Visitors to state-run facilities must complete a pre-screening call in order to check symptoms and ascertain whether the visitor has had any known previous exposure to Covid-19.<sup>157</sup>

## **B. Enforcement and Compliance**

### **1. Enforcement**

**91.** In terms of the Disaster Management Regulations, enforcement of lockdown regulations are allocated to enforcement officers, which includes members of the SAPS, the SANDF, or peace officers more generally.<sup>158</sup> Peace officers include justice and correctional officials.<sup>159</sup> There is no specified role for public health officials.

**92.** Enforcement officers are tasked with a range of duties: dispersing unauthorized gatherings, arresting or detaining persons at a gathering who refuses to disperse, and enforcing and applying for warrants for mandatory medical examinations, prophylaxis, treatment, isolation, and quarantine.<sup>160</sup>

**93.** Persons who violate the restrictions placed on movement, open a place or premises ordered to be closed to the public, or sell non-sanctioned goods (as per the alert level) commits a criminal offence and can be fined, imprisoned up to 6 months, or both.<sup>161</sup> Different court districts published separate schedules of fines but values generally range from R500–R5000.<sup>162</sup> Between 1 April and 30 June 2020, 298,252 people were arrested for violating the Disaster Management Regulations. Of these, 181 579 were released on warning to appear before a court.<sup>163</sup> Violations of the Disaster Management Regulations were not separately reported for the period of July to September 2020.<sup>164</sup>

**94.** While the Disaster Management Act 2002 and accompanying regulatory framework do envisage the possibility of different enforcement regimes at national, provincial, and local levels, the entire Covid-19 response has been driven nationally in terms of the national state of disaster. Relevant local government agencies, such as metropolitan police forces, fall within the definition of 'enforcement officers' and have accordingly conducted themselves as implementation agents of national regulations and directives.

**95.** Criminal sanctions were also introduced where persons intentionally published false information about Covid-19, the infection status of any person, or any government measure.<sup>165</sup> A person who intentionally exposes another person to Covid-19 may be prosecuted for an offence, including assault, attempted murder, or murder.<sup>166</sup>

**96.** The military was initially deployed from 25 March 2020 to 26 June 2020 to assist in enforcing disaster management regulations (section 201(2) of the Constitution).<sup>167</sup> Several subsequent deployments were authorized by the President and at least 73,000 military personnel have been used for enforcement and support purposes.<sup>168</sup> Isolated instances of violence perpetrated against citizens by the military gained extensive media coverage and resulted in litigation, following the death of a civilian who had been assaulted in the course of military enforcement of initial lockdown regulations. In *Khosa and ors v Minister of Defence and ors* the Gauteng High Court issued a declaratory order that the defence force and police force must abide by the Constitution's Bill of Rights, the provisions of the Disaster Management Act

2015, and international human rights law when enforcing Covid-19-related regulations. It further ordered for disciplinary action to be taken against the relevant officers and for steps to be taken to prevent a recurrence of events.<sup>169</sup>

## **2. Compliance**

**97.** A large national study with representative sampling published in June 2020 showed inadequate public knowledge of Covid-19 symptoms but large-scale behaviour change. While mask-wearing was commonly practiced and people reduced travel and attendance of gatherings, social distancing was not commonly practiced.<sup>170</sup> A study in three rural and peri-urban sites indicated that 85% of respondents self-reported satisfaction with Covid-19 knowledge in August 2020 and that mask-usage was at over 95%.<sup>171</sup>

**98.** However, non-compliance with public health measures has been noted on several occasions, especially in relation to ‘super-spreader’ events.<sup>172</sup> A series of annual events frequented by high schoolers upon finishing their final school year, where social distancing and mask wearing was not adhered to, caused a significant increase in Covid-19 infections in early December 2020.<sup>173</sup> There have also been media reports about non-compliance with mask wearing mandates on public transport.<sup>174</sup>

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## **Footnotes:**

<sup>1</sup> Constitution of the Republic of South Africa 1996, s 2.

<sup>2</sup> Ibid, s 42.

<sup>3</sup> Ibid, ss 44(1), 75, 76.

<sup>4</sup> Ibid, ss 42(3), 86.

<sup>5</sup> Ibid, s 85.

<sup>6</sup> Ibid, s 91.

<sup>7</sup> Ibid, ss 165(1), 172(1).

<sup>8</sup> Ibid, s 103(1).

<sup>9</sup> Ibid, s 40(1).

<sup>10</sup> Ibid, s 41.

<sup>11</sup> Ibid, ss 104(1)(a), 142.

<sup>12</sup> Ibid, s 143(1).

<sup>13</sup> Ibid, s 104(1)(b).

<sup>14</sup> Ibid, s 146.

<sup>15</sup> Ibid, ss 154, 155(7).

<sup>16</sup> Ibid, s 156(3).

<sup>17</sup> Ibid, s 156(4).

- <sup>18</sup> Ibid, s 231.
- <sup>19</sup> Ibid, s 233.
- <sup>20</sup> Ibid, s 39(1)(b).
- <sup>21</sup> Ibid, s 37.
- <sup>22</sup> World Health Organization, 'States Parties to the International Health Regulations (2005)'.
- <sup>23</sup> International Health Regulations Act (28 of 1974) which incorporated the International Health Regulations adopted by the World Health Assembly (WHA) on 25 July 1969, but has been entirely superseded by the IHR (2005) and was repealed by the 2013 Bill.
- <sup>24</sup> Department of Health, 'Guidelines for quarantine and isolation in relation to covid-19 exposure and infection' (5 May 2020).
- <sup>25</sup> Department of Health, 'Covid-19 infection prevention and control guidelines for South Africa - Draft V1' (31 March 2020).
- <sup>26</sup> Ibid.
- <sup>27</sup> Department of Employment and Labour, 'Consolidated Directions on Occupational Health and Safety Measures in Certain Workplaces' (1 October 2020); see also Department of Services and Administration, 'State of Disaster Covid-19: Public service return to work guidelines after the easing of the lockdown' (1 May 2020).
- <sup>28</sup> Department of Health, 'Regulations Pertaining to the Surveillance and Control of Notifiable Medical Conditions' (15 December 2017).
- <sup>29</sup> Disaster Management Act (57 of 2002), ss 27(1), 41(1), 55(1).
- <sup>30</sup> Department of Co-operative Governance and Traditional Affairs, 'Declaration of a National State of Disaster' (15 March 2020).
- <sup>31</sup> Constitution of the Republic of South Africa 1996, ss 101, 140.
- <sup>32</sup> Ibid, s 55(2).
- <sup>33</sup> Disaster Management Act (57 of 2002), s 7(1).
- <sup>34</sup> Ibid, s 27(2).
- <sup>35</sup> Ibid, s 27(3).
- <sup>36</sup> South African Government 'Regulations and Guidelines - Coronavirus COVID-19' (accessed 18 December 2020).
- <sup>37</sup> Department of Public Service and Administration, 'State of Disaster: Public Service guidelines for containment / management of Coronavirus COVID-19' (16 March 2020).
- <sup>38</sup> Department of Mineral Resources and Energy, 'Guidelines for Mandatory Code of Practice on Mitigation and Management of Coronavirus COVID-19 Outbreak' (18 May 2020).
- <sup>39</sup> See eg P Mudau, 'Has the Covid-19 pandemic exposed the fragility of South Africa's constitutional democracy?' *AfricLaw* (Online, 23 July 2020).
- <sup>40</sup> *Esau and ors v Minister of Cooperative Government and Traditional Affairs and ors* (5807/2020) [2020] ZAWCHC 56 (Western Cape High Ct).
- <sup>41</sup> Constitution of the Republic of South Africa 1996, s 55(2)(b)(i).
- <sup>42</sup> Ibid, s 92(2).

- <sup>43</sup> Ibid, s 92(3).
- <sup>44</sup> Disaster Management Act (57 of 2002), s 24.
- <sup>45</sup> Ibid, s 36.
- <sup>46</sup> ‘Statement by the Presiding Officers of Parliament on the resumption of the business of Parliament’ (14 April 2020).
- <sup>47</sup> Parliament of the Republic of South Africa, ‘Constitutional obligations of parliament during covid-19 pandemic’ (5 April 2020).
- <sup>48</sup> Regulations issued in terms of section 27(2) of the Disaster Management Act (43107/318) (18 March 2020), reg 3.
- <sup>49</sup> Parliamentary Working Group, ‘The Week Ahead: Parliament resumes & focuses on COVID-19’ (20 April 2020).
- <sup>50</sup> ‘Statement by the Presiding Officers of Parliament on the resumption of the business of Parliament’ (14 April 2020).
- <sup>51</sup> Ibid.
- <sup>52</sup> Disaster Management Tax Relief Administration Act (14 of 2020).
- <sup>53</sup> Disaster Management Tax Relief Act (13 of 2020).
- <sup>54</sup> Department of Justice and Correctional Services, ‘Directions to address, prevent and combat the spread of COVID-19 in all courts, court precincts and justice service points’ (26 March 2020).
- <sup>55</sup> In terms of the Constitution, s 165 and the Superior Courts Act (10 of 2013), s 8(3), see Directives Issued by the Office of the Chief Justice (Notice 187 of 2020).
- <sup>56</sup> Directives Issued by The Chief Justice (Government Gazette No. 43117) (20 March 2020).
- <sup>57</sup> Government Notice, ‘Directions to address, prevent and combat the spread of COVID-19 in all courts, court precincts and justice service points’ (Government Gazette No. 43167) (26 March 2020), reg 3(a).
- <sup>58</sup> Directives Issued by Chief Justice Mogoeng Mogoeng in Terms of Section 8 3 b of The Superior Courts Act 10 of 2013 for the Management of Courts During the Lockdown Period (17 April 2020).
- <sup>59</sup> Directives Issued by Chief Justice Mogoeng Mogoeng in Terms of Section 8 (3) (b) of the Superior Courts Act 10 of 2013 for the Management of Courts During the National State of Disaster Period) (2 May 2020).
- <sup>60</sup> LexisNexis, ‘Covid-19 pushes courts to new era’ (Online, 23 June 2020); N Whitear-Nel, ‘Remote justice & COVID-19: South Africa lags behind’ (Online, 30 April 2020); GO Legal ‘Impact of COVID-19 on justice system under the spotlight’ (Online, 21 May 2020).
- <sup>61</sup> Constitution of the Republic of South Africa 1996, s 190(1)(a).
- <sup>62</sup> Electoral Commission of South Africa, ‘Electoral Court grants by-elections postponement due to coronavirus’ (19 March 2020).
- <sup>63</sup> Electoral Commission Act (51 of 1996), s 20(1)(a)–(b).
- <sup>64</sup> Local Government: Municipal Structures Act (117 of 1998), s 25(3)–(4).
- <sup>65</sup> See TS James and S Alihodzic, ‘When is it democratic to postpone an election? Elections during natural disasters, COVID-19, and emergency situations’ (2020) 19 Election Law Journal 344, 347.
- <sup>66</sup> Electoral Commission of South Africa, ‘Electoral Court postpones further by-elections due to COVID-19’ (5 May 2020); Electoral Commission of South Africa, ‘Electoral Court extends postponement of by-elections’ (11 June 2020).



- <sup>67</sup> Electoral Commission of South Africa, 'Electoral Commission set to resume by-elections' (18 September 2020).
- <sup>68</sup> See the list of ward by-elections and voting stations to be held on 11 November 2020.
- <sup>69</sup> Local Government: Municipal Structures Act (117 of 1998), s 24(2).
- <sup>70</sup> Electoral Commission of South Africa, 'Electoral Commission remains on track to hold municipal elections within the Constitutional timeframe next year' (16 June 2020).
- <sup>71</sup> National Health Act (61 of 2003), s 90(1).
- <sup>72</sup> Department of Health, 'Ministerial advisory committees on COVID-19' (21 April 2020).
- <sup>73</sup> JA Singh, 'How South Africa's Ministerial Advisory Committee on COVID-19 can be optimised' 2020 110(6) South African Medical Journal 439.
- <sup>74</sup> Ibid.
- <sup>75</sup> Constitution of the Republic of South Africa 1996, s 16.
- <sup>76</sup> South African National Editors Forum, 'South Africa enacts regulations criminalizing 'disinformation' on coronavirus outbreak' (20 March 2020); D Milo and J Thiel, 'Fake news about Covid-19 now a criminal offence', Daily Maverick (Online, 20 March 2020).
- <sup>77</sup> Medical Brief 'Man accused of spreading fake coronavirus news appears in court' (8 April 2020).
- <sup>78</sup> SANews.gov.za 'O'Regan appointed as COVID-19 designated judge' (4 April 2020).
- <sup>79</sup> Amendment of regulations issued in terms of section 27(2) (43148/657) (25 March 2020), reg 11H.
- <sup>80</sup> South African Presidency, 'Statement on the virtual cabinet meeting of Wednesday' (5 August 2020).
- <sup>81</sup> Constitution of the Republic of South Africa 1996, s 182(1).
- <sup>82</sup> O Singh, 'Deputy public protector investigates Covid-19 PPE tender irregularities in KZN', *Sunday Times* (6 October 2020).
- <sup>83</sup> Constitution of the Republic of South Africa 1996, s 184(1)(c).
- <sup>84</sup> Ibid, s 184(2)(a)–(b).
- <sup>85</sup> OM Stern, G van Cutsem, D Laurenson, et al, 'Independent Report submitted to the South African Human Rights Commission concerning the City of Cape Town's COVID-19 Shelter For Street-based People – Strandfontein, Cape Town' (11 April 2020).
- <sup>86</sup> J Stent, 'Strandfontein closes but concern after former resident tests positive for Covid-19' GroundUp (Online, 14 May 2020).
- <sup>87</sup> Department of Co-operative Governance and Traditional Affairs, 'Regulations issued in terms of Section 27(2) of the Disaster Management Act, 2002' (43258/ R480) (29 April 2020).
- <sup>88</sup> Department of Health, 'Directions Issued In Terms Of Regulation 3(3) Of The Regulations Made Under Section 27(2) Of The Disaster Management Act, 2002 (Act No. 57 Of 2002): Criteria To Guide The Determination Of Alert Levels' (43599/R867) (7 August 2020), 2.
- <sup>89</sup> South African Government 'About alert system' (accessed 18 December 2020).
- <sup>90</sup> Department of Co-operative Governance and Traditional Affairs, 'Regulations issued in terms of Section 27(2) of the Disaster Management Act, 2002' (43258/ R480) (29 April 2020).
- <sup>91</sup> Amendment of Regulations issued in terms of section 27(2) (43964/R1290) (3 December 2020).
- <sup>92</sup> Amendment of Regulations issued in terms of section 27(2) (43148/ R.398) (25 March 2020), reg 11.

- <sup>93</sup> Ibid, Annexure B.
- <sup>94</sup> Ibid, reg 11.
- <sup>95</sup> Ibid, reg 11.
- <sup>96</sup> Regulations issued in terms of Section 27(2) of the Disaster Management Act, 2002 (43258/ R480) (29 April 2020) Table 1.
- <sup>97</sup> Ibid, 29.
- <sup>98</sup> Ibid, reg 16.
- <sup>99</sup> Amendment of Regulations issued in terms of section 27(2) (43364/608) (28 May 2020), reg 33.
- <sup>100</sup> Ibid, Table 2.
- <sup>101</sup> Amendment of Regulations issued in terms of section 27(2) (43476/714) (25 June 2020), 33(1)(h).
- <sup>102</sup> Amendment of Regulations issued in terms of section 27(2) (43577/846) (31 July 2020) Id, 33(1A).
- <sup>103</sup> Amendment of Regulations issued in terms of section 27(2) (43725/999) (18 September 2020), reg 66.
- <sup>104</sup> Amendment of Regulations issued in terms of section 27(2) (43964/R1290)(3 December 2020), reg 82.
- <sup>105</sup> See *Moela and Another v Habib N.O. and Another* (2020/9215) (Gauteng Local Division); *Ex parte: van Heerden* (1079/2020) [2020] ZAMPMBHC (High Ct of South Africa); *Hola Bon Renaissance Foundation v President of the Republic of South Africa and ors* (CCT 52/20); *C D and Another v Department of Social Development* (5570/2020) [2020] ZAWCHC. (Western Cape High Ct)
- <sup>106</sup> *De Beer and ors v Minister of Cooperative Governance and Traditional Affairs* (21502/2020) (Gauteng Division, Pretoria).
- <sup>107</sup> *Esau and ors v Minister of Cooperative Government and Traditional Affairs and ors* (5807/2020) [2020] ZAWCHC 56 (Western Cape High Ct).
- <sup>108</sup> Amendment of Regulations issued in terms of section 27(2) (43148/ R.398) (25 March 2020), reg 11.
- <sup>109</sup> Regulations issued in terms of Section 27(2) of the Disaster Management Act, 2002 (43258/ R480) (29 April 2020), reg 16.
- <sup>110</sup> Ibid, reg 17.
- <sup>111</sup> Amendment of Regulations issued in terms of section 27(2) (43364/608) (28 May 2020), reg 41.
- <sup>112</sup> Amendment of Regulations issued in terms of section 27(2) (43620/891) (17 August 2020).
- <sup>113</sup> Amendment of Regulations issued in terms of section 27(2) (43725/999) (18 September 2020), 75.
- <sup>114</sup> Amendment of Regulations issued in terms of section 27(2) (43148/ R.398) (25 March 2020), reg 11.
- <sup>115</sup> Amendment of Regulations issued in terms of section 27(2) (43364/608) (28 May 2020), reg 33.
- <sup>116</sup> Amendment of Regulations issued in terms of section 27(2) (43620/891) (17 August 2020), reg 55
- <sup>117</sup> Amendment of Regulations issued in terms of section 27(2) (43725/999) (18 September 2020), reg 68.
- <sup>118</sup> Amendment of Regulations issued in terms of section 27(2) (43964/R1290) (3 December 2020), reg 84.
- <sup>119</sup> Amendment of Regulations issued in terms of section 27(2) (43148/ R.398) (25 March 2020), reg 11.

- 120** Regulations issued in terms of Section 27(2) of the Disaster Management Act, 2002 (43258/ R480) (29 April 2020), reg 16.
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