



AfriForum's commentary on the
DISASTER MANAGEMENT AMENDMENT BILL

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“Emergencies' have always been the pretext on which the safeguards of individual liberty have
been eroded.”

– Friedrich Hayek

AfriForum wholeheartedly welcomes the introduction of the Disaster Management Amendment Bill and urges that it be passed as a matter of national importance.

The word *lockdown* does not appear in the Disaster Management Act 57 of 2002 (the DMA), nor in any other national statute or legislation. Yet this novel term – which encompasses an array of ever-changing measures and systems – has become interwoven with the Executive’s response to the global COVID-19 pandemic.

This Amendment Bill will remedy this unconstitutional situation. At heart it seeks to restore some measure of oversight to national governance and to address the executive overreach that has been normalised over the past 18 months since the first declaration of a national disaster. For almost two years it has been the sole prerogative of an unelected select few as to whether basic rights and freedoms may be exercised. The resultant quagmire of regulation and micro-management had a dire impact on South Africa.

For this reason alone AfriForum welcomes the introduction of the Amendment Bill. What follows hereafter is merely moral and legal justification in support of its passing.

If passed in its present form, the Amendment Bill will allow for the National Assembly, the democratically representative body of the Republic’s citizens, to deliberate any further extension of the national state of disaster. The national state of disaster will henceforth automatically lapse unless so extended. It will eliminate the Executive’s monopoly on the state’s response to the COVID-19 pandemic. Only the National Assembly, a provincial legislature or a municipal council will be able to extend the duration of the declared state of disaster.

The proposed amendment accords with the most basic constitutional principles and tenets of our political structure, and indeed any modern liberal democracy. As stated by Seedorf and Sibanda:¹

Historical experience suggests that benign dictators, who rule wisely, judge fairly and generally advance everyone’s welfare, are very hard to find — if such people ever existed. The underlying idea beneath any separation of powers doctrine is thus the sceptical assessment that good governance is more likely when political power is distributed between different institutions and persons.

[...] The objective of separation of powers is to curtail the exercise of political power to prevent its abuse — meaning the violation of human rights. This instrumental function of separation of powers as an institutional mechanism to protect human rights is the reason why the combination of these two ideas (separation of powers and human rights) has been called the ‘core of constitutionalism’. And it is these features that have ensured that there really has been a decisive break from the past constitutional system in South Africa.

Separation of powers is the cornerstone of modern democracy and is of definite application in the South African context. The language of checks and balances is redolent throughout the Constitution:²

The constitutional principle of separation of powers [...] is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers.”

¹ Seedorf, S. & Sibanda, S. 2014. Separation of powers. In Woolman, S (Ed.). *Constitutional Law of South Africa*. P. 12–1. Available at <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Closa-Consolidation.pdf>. Accessed on 20 August 2021.

² *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC), para 37.

The National Assembly is the single most essential and ineluctable counterweight to the might of the Executive. The Constitution is plain and unequivocal in this regard:

- Section 42(3) of the Constitution stipulates that one of the roles of the National Assembly is to scrutinise and oversee executive action.
- Section 55(2)(b)(i) tasks the National Assembly with providing mechanisms to maintain oversight of among others national executive authority.
- Section 92(2) provides that members of the Executive are responsible individually and collectively to Parliament.

Our Constitution furthermore places great emphasis on participatory and direct democracy.³ It is precisely because Parliament is elected and representative that it is allotted the function of law-making; it follows that the Executive cannot lawfully usurp this function totally for an indefinite period.

The Executive has interpreted the DMA as a license to make law by way of an onslaught of regulations. Plainly, such an interpretation excludes the true legislative branch of government from its allotted role. Consultation with parliamentary committees does not amount to true oversight as no brake or constraint is in place. The indefinite continuation of such skewed power is unconstitutional.

That our constitutional order envisions a specific and exclusive role for the National Assembly in extending any “state of emergency” is reflected in section 37(2)(b) of the Constitution (own emphasis):

- (2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only—(a) prospectively; and (b) for no more than 21 days from the date of the declaration, **unless the National Assembly resolves to extend the declaration.** The Assembly may extend a declaration of a state of emergency for **no more than three months at a time.** The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

Whilst recognising the severity of COVID-19 and the fact that true emergencies may require a temporary amendment to the legal regime, AfriForum submits that it should not be forgotten that any deviation from the accepted and lawful legal regime has as its justification the protection of threats to the constitutional order.

- As noted by Nicole Fritz, quoting from Ferejon and Pasquino:⁴

[t]his justification is fundamentally conservative in nature, aiming to address the threat to the system in such a way that the constitutional state is returned to its normal functioning. Rights are to “be restored, legal processes resumed and ordinary life taken up again.”

³ Section 59(1)(a) of the Constitution of the Republic of South Africa, as well as section 59 (in general), the Preamble and section 1(d)

⁴ Fritz, N. 2014. States of emergency. In Woolman, S. (Ed.). *Constitutional Law of South Africa*, page 61–4. Available at <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Closa-Consolidation.pdf>. Accessed on 20 August 2021.

- AfriForum is aware of the judgement in *Freedom Front Plus v President of the Republic of South Africa and Others*,⁵ handed down on 6 July 2020, in which the Northern Gauteng High Court in Pretoria ruled that the provisions of the DMA and those applicable to “states of emergency” under section 37 of the Constitution are distinguishable and that the DMA is not unconstitutional.⁶
- AfriForum submits in this regard that the present situation is markedly different to that which prevailed at the time of that application. The above judgement was handed down prior to the numerous monthly extensions of the DMA and the criminalisation of the infringement of its regulations. The Court’s ruling that parliamentary oversight is ensured by the fact that parliamentary committees were consulted by the executive is – with respect – misconceived.
- It has become abundantly clear, by virtue of a number of court challenges by political parties and civil society, that the National Assembly has no substantive role in the promulgation of regulations under the DMA. The passage of time and the marked increase in the volume and complexity of the regulations has taken on the character of law-making rather than the initial regulatory response to a delineated disaster.
- The Court in *Freedom Front Plus v President of the Republic of South Africa and Others* reasoned that, while regulations **may** unjustifiably limit basic rights and freedoms, such regulations remain open to judicial review, unlike in the case of a state of emergency.
- With respect, this position does not consider 1) that the regulations are not suspended pending review, 2) that judicial reviews are expensive and time-consuming, and 3) that this, in any event, places the onus on the judiciary to check the overreach of the executive, when the National Assembly is specifically allotted that purpose in the general political structure, as illustrated above.
- Under these circumstances, AfriForum submits that the provisions of the DMA have been abused to create a *de facto* state of emergency, with the Executive in perpetual control, to the exclusion of meaningful and true parliamentary oversight. Therefore, the reasoning and tenor of section 37 of the Constitution should inform the approach to the role of the National Assembly in proportion to the actual facts of the situation at present.
- The Court states in paragraph 68 of *Freedom Front Plus v President of the Republic of South Africa and Others*:

Once the fundamental distinction between a state of emergency and a state of disaster is understood, this complaint loses its force. It is because of the constitutional deviations that are permitted under a state of emergency that parliamentary oversight is expressly included in s37. Where no such deviation is permitted, it is not necessary to make special provision for parliamentary oversight.
- AfriForum submits that now, a year later, the unrelenting barrage of regulations has crossed a threshold and has deviated from constitutional norms. This necessitates special provision for parliamentary oversight.

⁵ *Freedom Front Plus v President of the Republic of South Africa and Others* (22939/2020) [2020] ZAGPPHC 266; [2020] 3 All SA 762 (GP)

⁶ See particularly the discussion under ‘Attack on the DMA’ at paras 54 – 70.

- The Amendment Bill addresses this exact situation in seeking to restore to the National Assembly a true oversight function in the working of the DMA.

Lockdown has limited the rights of citizens in a multiplicity of ways. Frequently such limitations are not expressly contained in regulation, but flow consequently from the unfettered and unwieldy diktat of the Executive. Among many others, the following selection of basic rights that are enshrined in the Constitution, were trampled:

1. Freedom of movement and assembly⁷

- The restrictions on movement are self-evident and unprecedented. South Africans were completely confined to their homes on several occasions and remain subject to a national curfew. In particular, the right to attend religious gatherings and funerals was grossly restricted at times.
- A bride and groom were arrested in Richards Bay on 5 April 2020 together with their 50 wedding guests and the pastor who conducted the ceremony, because they breached the prohibition on wedding celebrations.⁸
- More recently, a doctor was arrested and detained for responding to an emergency call after curfew.⁹

2. Economic life¹⁰

- The illogical closure and restriction of sections of the economy had a devastating impact on the livelihood of millions. The alcohol and cigarette bans are particularly egregious examples of this.
- Unemployment levels are at record all-time highs.¹¹

3. Children, family and education¹²

- The disruption of education was tremendous, from primary to tertiary levels, and will have a dilatory and long-lasting effect on scholars and their careers.¹³
- Lockdowns further disrupted care and contact arrangements, and the adjudication of disputes in this arena, as well as separated families and ultimately prejudiced the interests of children, who are the least at risk from COVID-19.

⁷ Sections 21 and 17 of the Constitution, respectively.

⁸ BBC News. 2020. *Coronavirus: South African bride and groom arrested over lockdown wedding*. 6 April. Available at <https://www.bbc.com/news/world-africa-52183152>. Accessed on 18 August 2021.

⁹ Heywood M. 2021. *Blue lights and red flags: Gauteng doctor on emergency call arrested for breaking curfew*. *Daily Maverick*, 20 July. available at: <https://www.dailymaverick.co.za/article/2021-07-20-blue-lights-and-red-flags-gauteng-doctor-on-emergency-call-arrested-for-breaking-curfew/> Accessed on 18 August 2021.

¹⁰ Sections 12 and 22 of the Constitution.

¹¹ Mokoena A. 2021 *Finding opportunities among the challenges of South Africa's current crisis*. *Mail & Guardian*. 17 August 2021. Available at <https://mg.co.za/opinion/2021-08-17-finding-opportunities-among-the-challenges-of-south-africas-current-crisis/>. Accessed on 18 August 2021.

¹² Sections 28 and 29 of the Constitution, respectively.

¹³ UNICEF. 2021. *Learners in South Africa up to one school year behind where they should be*. Available at <https://www.unicef.org/press-releases/learners-south-africa-one-school-year-behind-where-they-should-be>. Accessed on 18 August 2021

4. Access to justice and the courts¹⁴

- The judicial system suffered and was at times completely inaccessible during lockdown for all but the most urgent of matters. Justice was delayed and in some cases denied for thousands of South Africans, as court systems were disrupted and entire case rolls often scrapped.¹⁵

5. Freedom of expression¹⁶

- It is a criminal offence to spread “false information” regarding the COVID-19 pandemic.
- A man was arrested in Cape Town on 7 April 2020 for creating and sharing a video that claimed that government would be sending out 10 000 workers to perform door-to-door tests for COVID-19. He called on people to refuse to be tested on the basis that the tests might be contaminated with the virus.¹⁷

6. Human dignity¹⁸

- Much has been said and written about the public health aspects of the COVID-19 pandemic; however, the spotlight was seldom placed on the consequences of governmental responses, and particularly the response by the South African government. Due to the broad powers currently granted to the Executive in terms of the DMA in its current reading, South Africa is witnessing horrific infringements of human dignity during the COVID-19 pandemic.
- In *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* Fabricius J noted:

The virus may well be contained (but not defeated until a vaccine is found) but what is the point if the result of harsh enforcement measures is a famine, an economic wasteland and the total loss of freedom, the right to dignity and the security of the person and overall, the maintenance of the rule of law. The answer in my view is: there is no point.
- During the course of the lockdown that was made possible and subsequently imposed in terms of the current reading of the DMA, many South Africans were unable to attend funerals of loved ones. School closures also resulted in the closure of school feeding schemes on which thousands of South African children rely as their only meals each day. Open spaces such as beaches were closed because an airborne virus is plaguing our country. Not to mention the catastrophic economic consequences that will likely linger in South Africa years after COVID-19 has been defeated.

¹⁴ Section 34 of the Constitution.

¹⁵ Singh N. 2020. *Justice delayed is justice denied: We must speed up the court system*. Daily Maverick, 21 May. Available at <https://www.dailymaverick.co.za/opinionista/2020-05-21-justice-delayed-is-justice-denied-we-must-speed-up-the-court-system-under-lockdown/> accessed on 18 August 2021.

¹⁶ Section 16 of the Constitution.

¹⁷ Grobler, R. 2020. *Man who posted fake 'contaminated Covid-19 test kits' video arrested*. News24, 7 April. Available at <https://www.news24.com/SouthAfrica/News/man-who-posted-fake-contaminated-covid-19-test-kits-video-arrested-20200407>. Accessed on 8 April 2020.

¹⁸ Section 10 of the Constitution.

Cumulatively, these limitations and restrictions have an unquestionable impact on the human dignity of South Africans. Dignity and freedom are non-derogable rights and form the foundational core of all other rights.

The enforcement of these restrictions has on occasion even led to the deaths of citizens. The tragic example of Collins Khosa is apposite in this regard. Last year saw several reports of the SAPS using brutal measures to enforce the lockdown.¹⁹ The Independent Police Investigative Directorate (IPID) received complaints about people who were assaulted and killed by the SAPS. By 26 March, IPID had already logged 14 assaults, one rape and eight deaths as a result of SAPS action.²⁰

The above limitations can only exist where the national state of disaster persists. Where such a state is extinguished, the regulations and decrees delivered by the Executive necessarily fall away.

The language and tenor of the present DMA do not lend itself to an interpretation that envisions the current situation, where power is concentrated in the Executive for an indefinite duration.

Purposively and rationally construed, the DMA is reactive and of necessarily temporary application. It is inconceivable that the legislator intended for the Executive to assume control without any brake or constraint on such control. That would be contrary to the structure of the constitutional order. The Executive interpreted the provisions of the DMA to allow for a parallel system of governance that supersedes basic principles of accountability in perpetuity, premised on vague descriptors and broad definitions.

The effect of this system and the regulations issued in terms of it on South Africa cannot be understated. They are supremely invasive and have impacted every conceivable facet of citizens' private and public life. It is astounding that this has carried on for 18 months with little to no consultation with the public or any representative body of the public.

Such a situation is a *prima facie* violation of the constitutional order and cannot be allowed to persist. The very structure of our system of government demands that the public is consulted. A democratic government that does not do so is illegitimate. On what basis can the Executive presume to understand the consequences of the regulations at a ground roots level? The determination of the actual effect that gives rise to the regulations is self-evidently a matter for debate.

To quote again from Fritz, who quotes from Ferejon and Pasquino:²¹

[t]his placement [regarding states of emergency in the Constitution] serves fundamentally to underscore that rights are to be suspended only in order to preserve the larger constitutional edifice that safeguards such rights. Were these powers to be used to undercut or to modify substantially the legal order of the constitution itself — were they to be used to effect permanent changes to the normal legal order — it would not only be a violation of the norms regulating the emergency powers, it would also “no longer properly [be] an exercise of an emergency power at all but ... an exercise of constituent power. It [would be] an abrogation or transformation of the constitution and ... [would] not [be] functioning to preserve it.”

¹⁹ Knoetze, D. 2020. Police kill three people in three days of lockdown. This is normal for South Africa. *GroundUp*, 1 April. Available at <https://www.groundup.org.za/article/police-kill-three-people-three-days-lockdown-normal-south-africa-data-reveals/>. Accessed on 8 April 2020.

²⁰ See <https://www.documentcloud.org/documents/6824649-IDATED-IPID-CASES-26-MARCH-20-at-MIDNIGHT-to-02.html>.

²¹ Fritz, N. 2014. States of emergency. In Woolman, S. (Ed.). *Constitutional Law of South Africa*, page 61–5. Available at <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Closa-Consolidation.pdf>. Accessed on 20 August 2021.

As Plaskett JA recently stated in *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others*:²²

In other words, even in times of national crisis, as this undoubtedly is, the executive has no free hand to act as it pleases, and all of the measures it adopts in order to meet the exigencies that the nation faces must be rooted in law and comply with the Constitution. The rule of law, a founding value of our Constitution, applies in times of crisis as much as it does in more stable times.

The question is not whether these limitations on the basic rights of South Africans are reasonable and justifiable in terms of the section 36 exercise. The question is whether one branch of government is legally allowed perpetual discretion in the determination of this issue.

It cannot be expected of the public to bring an expensive review challenge to every regulation so promulgated. That oversight role is to be played by the National Assembly. That is what it is there for.

Therefore, AfriForum reiterates its support for the Amendment Bill and the purpose it seeks to achieve. The amendment will bring the DMA in line with the constitutional procedure regarding states of emergency, which is compliant with the doctrine of separation of powers and establishes proper oversight.

It bears noting that in 1985, the Executive of the former regime greedily assumed extraordinary power for itself as well, on the justification that it was for the security and safety of the Republic.

The price of freedom is eternal vigilance. This Amendment Bill is an expression of that commitment to our constitutional order.

²² *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* (611/2020) [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) at para 5.