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# PRO BONO & HUMAN RIGHTS ALERT

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### Constitutional Court dismisses application to have the COVID-19 declaration of a National Disaster declared invalid

On Monday, 30 March 2020, the Constitutional Court (court) dismissed an application by the NGO Hola Bon Renaissance Foundation (HBRF) for direct access to challenge the validity of the government's decision to declare the COVID-19 pandemic a National Disaster in terms of the Disaster Management Act, 2002 (Act) and to interdict the implementation of the decision. The court dismissed the application on the basis that the application lacked merit.

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CLIFFE DEKKER HOFMEYR

## Constitutional Court dismisses application to have the COVID-19 declaration of a National Disaster declared invalid

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The dismissal of the application indicates that while the court may in due course consider challenges to Regulations/Directives made in terms of the Act for the purposes of regulating the "lock down" or any challenges to the conduct of any State authorities in implementing these Regulations and Directives, it is unlikely to interfere with the decision to invoke the Act to assist the State in responding to the rapidly growing threat posed by COVID-19 in South Africa. This because the court will likely adopt the attitude that in line with the principle of separation of powers, deference should be given to the Executive which is presumably best placed to determine if conditions exist necessitating the declaration of a national disaster. The court, however, did not give reasons for its decision and may simply have concluded that this particular application lacked merit.

The application was launched by HBRF on 25 March 2020, and sought multiple relief, including a declaration that the President had "abused his power" and that his declaration of a "lock down" constituted a violation of his constitutional duties under Chapter 5 of the Constitution, and violated numerous rights in the Bill of Rights (Chapter 2 of the Constitution); that there was no strong evidence to support the decision and that the decision to declare a national state of disaster had no basis. It also sought an order from the court declaring that COVID-19 poses "no serious threat to the country or its people" and that the court order that state funds that have been "dedicated to COVID-19" be stopped and re-channelled to the provision of essential services.

While HBRF's concern that the imposition of a national state of disaster will have a drastic negative economic impact on the population of South Africa and encroach on numerous human rights enshrined in the Constitution cannot be faulted, its application was in material ways misconceived.

First, because technically it was not the President who declared a state of National Disaster but rather the Minister of Cooperative Governance and Traditional Affairs who is the Minister designated under section 3 of the Act to administer

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## Constitutional Court dismisses application to have the COVID-19 declaration of a National Disaster declared invalid...*continued*

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the Act, and who is empowered under section 27 of the Act to declare a national state of disaster. Accordingly, the accusation that the President had abused his powers was seemingly misplaced. Furthermore, a number of assertions made by it in support of its application appear to have been based on a selective appreciation of the facts – for example the averments that the President was “*misled*” and that because the first people reported to have contracted COVID-19 were “*reported to have recovered*” and because there were no COVID-19 deaths in South Africa, this was an indication that there was “*no disaster in the country.*” Perhaps more disconcerting are the averments that HBRF believes that COVID-19 is “*not harmful to Africans*” due to various factors.

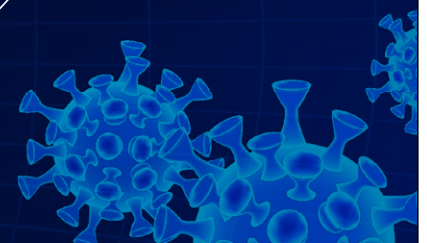
At the time of going to print, at least five South African's have died from COVID-19 and all the evidence shows that the infection rate is increasingly rapidly. Denialist assertions are unhelpful and if anything may hinder the State's attempts to control the spread of the disease in South Africa and provide care to those affected.

However, the HBRF's warning that the “*lock down*” will have severe economic consequences, especially for the poor and most vulnerable, is a valid one as is the concern raised that the lock down will have serious human rights implications. It is for this reason that lawyers around the country, including many here at CDH are working around the clock to assist in considering shortfalls in the Regulations and Directives in an attempt to mitigate some of the unintended consequences that the declaration of a national disaster may have for numerous stakeholders. While rights in the Bill of Rights may be reasonably and justifiably limited under a National Disaster declared so under the Act (in terms of section 36 of the Constitution), they cannot be suspended as they may be under a state of emergency and we all need to be vigilant in ensuring that any undue encroachment on rights does not go unchallenged during this difficult period in our young democracy.

*Jacquie Cassette*

# CDH'S COVID-19 RESOURCE HUB

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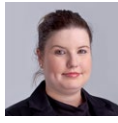


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