

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 5812/2020

In the matter between:

<b>DEMOCRATIC ALLIANCE</b>	First Applicant
<b>1000 WOMEN TRUST NPO</b>	Second Applicant
and	
<b>MINISTER OF SOCIAL DEVELOPMENT</b>	First Respondent
<b>MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS</b>	Second Respondent
<b>MINISTER OF POLICE</b>	Third Respondent
<b>NATIONAL COMMISSIONER OF POLICE</b>	Fourth Respondent

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**APPLICANTS' HEADS OF ARGUMENT**

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## INTRODUCTION

- 1 This urgent application concerns fundamental principles governing South Africa's constitutional democracy and the exercise of public power by state officials, whether in ordinary times or times of crisis. It concerns draft directions (the **Directions**) prepared by the first respondent (the **Minister**) to regulate the distribution of food to the needy and vulnerable under the Disaster Management Act 27 of 2002 (**DMA**) and Regulations promulgated by second respondent (the **COGTA Minister**) (**DMA Regulations**).
- 2 The Directions, if issued, will impose arbitrary and onerous restrictions on the distribution of food by non-governmental organisations to the hungry. They will render it impossible for NGOs like the second applicant (**1000 Women**) to distribute food, or will mean they can distribute far less food than they are currently able to do. The net effect will be that fewer people will have access to food. This at a time where many people have lost their incomes and usual sources of food and sustenance.
- 3 Furthermore, not for the first time during the response to the Covid-19 pandemic,<sup>1</sup> government officials have been enforcing a *draft* legislative instrument before it has been finalised and promulgated by the relevant Minister. That is inimical to the rule of law.
- 4 These Directions:
  - 4.1 Are *ultra vires* Regulation 4(5) of the DMA Regulations;

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<sup>1</sup> See FA pp 34-35 paras 78-85.

- 4.2 Are vague, irrational and unreasonable;
  - 4.3 Have been developed in a manner that is procedurally unfair; and
  - 4.4 Unjustifiably limit the right of access to food in section 27(1)(b) of the Constitution.
- 5 The applicants seek the following relief:
- 5.1 A declaration that the enforcement of the Directions prior to them being lawfully issued is unlawful;
  - 5.2 Directing the Minister and the fourth respondent, the National Commissioner of Police, to bring the order to the attention of the officials under their control;
  - 5.3 Interdicting the Minister from issuing the Directions in their current unlawful and unconstitutional form;
  - 5.4 *Alternatively*, if the Directions have been issued by the time of the hearing, reviewing and setting aside the Directions.
- 6 The National Commissioner of the Police and the third respondent, the Minister of Police, abide the decision of the Court.<sup>2</sup> Only the Minister has indicated her intention to oppose the application. The COGTA Minister has not entered the fray.
- 7 The Directions have proved to be a moving target. When the matter was initially issued, the applicants were only aware of Draft Directions dated 17 May 2020

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<sup>2</sup> Pp 131-132.

attached as **FA1** to the founding affidavit (the **Initial Directions**).<sup>3</sup> After the application was launched, the applicants received the current draft which is attached as **EJ1** to the supplementary affidavit (the **New Directions**).<sup>4</sup> The New Directions retain the defects of the Initial Directions, as we explain below.

## URGENCY

8 The matter is inherently urgent.

9 As set out in the founding papers, there is evidence that public officials have begun enforcing the Draft Directions as if they were law.<sup>5</sup> It is contrary to the rule of law for the government to seek to enforce regulations or directions that have not been duly promulgated or issued. It is inherently urgent for this Court to prevent such unlawful conduct. As the Court held in *Apleni*: “*Where allegations are made relating to abuse of power by a Minister or other public officials, which may impact upon the Rule of Law ... the relevant relief sought ought normally be urgently considered.*”<sup>6</sup>

10 The applicants understand that the Directions will be issued imminently.<sup>7</sup> The sporadic unlawful enforcement will become consistent enforcement across the country. It is urgent to prevent unlawful, irrational and unconstitutional Directions from becoming law.

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<sup>3</sup> **FA1** pp 41-45.

<sup>4</sup> **EJ1** pp 126-130.

<sup>5</sup> FA pp 14-16 paras 27-32.

<sup>6</sup> *Apleni v President of the Republic of South Africa and Another* [2017] ZAGPPHC 656; [2018] 1 All SA 728 (GP) at para 10.

<sup>7</sup> FA p 14 para 26.

- 11 If the Directions continue to be unlawfully enforced, or are properly issued and enforced country wide, they will deprive the most vulnerable and needy in our society of access to food.<sup>8</sup> It will threaten the right of access to food of tens of thousands of people who have no other way to feed themselves. The risk of mass starvation is real. This is occurring at a time in our country when more and more people are going hungry because they no longer have income and cannot access food without assistance. Every day that the applicants wait to approach this Court for relief, more people will go hungry.
- 12 The Constitutional Court held in *South African Informal Traders Association* that an application by informal traders to interdict the City of Johannesburg from preventing them from trading was urgent because the City's conduct "*spawned immediate and acute hardship that left the applicant traders destitute. It was never disputed that they were unable to feed or house themselves or their families. The situation would have only worsened if it persisted.*"<sup>9</sup> Precisely the same reasoning applies here.
- 13 The applicants sent a letter to the Minister on 20 May 2020 demanding an urgent undertaking that the Directions would not be enforced or issued.<sup>10</sup> The Minister failed to respond.
- 14 The applicants therefore had no choice but to approach this Court for relief. An unissued version of the application was served electronically on the

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<sup>8</sup> FA p 31 para 68.

<sup>9</sup> *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) at para 36.

<sup>10</sup> FA p 39 para 100; **FA15** pp 111-112.

Respondents on the evening of 20 May 2020 in order to afford them as much time as possible to respond.

- 15 In light of the manifest illegality of the ongoing enforcement of the Directions, and the serious harm it is causing and will continue to cause, we submit that the applicants are justified in approaching this Court as a matter of extreme urgency.

### **RULE OF LAW, NOT EXECUTIVE DIKTAT**

- 16 Section 1(c) of the Constitution provides that “*The Republic of South Africa is one, sovereign, democratic state founded on ... supremacy of the constitution and the rule of law.*”

- 17 The rule of law requires that laws be made public before they are effective and binding.<sup>11</sup> This requirement has an ancient pedigree in our legal system<sup>12</sup> and was present even before the Constitution became South Africa’s supreme law.<sup>13</sup> Nearly a century ago in *R v Gluck*,<sup>14</sup> Innes CJ held: “*A law must be promulgated before it can come into operation. That is a principle well established in our practice and no authority is needed to support it.*”<sup>15</sup> The

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<sup>11</sup> *Liebenberg NO and Others v Bergrivier Municipality* 2013 (5) SA 246 (CC) para 148 (Khampepe J concurring in part and dissenting in part): “*Legislative acts depend for their legal efficacy on due promulgation. This is an incident of the rule of law that has long been part of South African jurisprudence.*”

<sup>12</sup> Voet 1.3.9: ‘*A law must be promulgated.—Finally promulgation is required to make a law valid; for without it neither can a law become properly known to the people, nor can a people be bound by it if without negligence it is ignorant of the law.*’

<sup>13</sup> *Byers v Chinn and Another* 1928 AD 322 at 330: ‘*Published notices in matters affecting the public at large, a considerable portion of it, or a large class of persons, is the only practical way of informing the individuals concerned of their rights and duties.*’

<sup>14</sup> *R v Gluck* 1923 AD 149.

<sup>15</sup> *Ibid* at 151.

common law was given statutory imprimatur by section 13(1) of the Interpretation Act.<sup>16</sup>

18 The reason for this requirement is obvious. Without due publication and notice, individuals cannot be aware of their legal rights and obligations, and cannot know whether their conduct is permissible or prohibited. The existence of a crisis or emergency does not detract from this rationale.

19 Unfortunately, during the past seven weeks, there have been myriad instances of public officials enforcing draft regulations and directions before they have been finalised and published, perhaps mostly notoriously banning the sale of hot cooked food by supermarkets *before* any regulation or direction was promulgated to that effect.<sup>17</sup>

20 This case concerns, in part, the enforcement of the Draft Directions by various officials in the national and provincial departments of social development, *before* they were finalised and issued by the Minister. We submit that this is contrary to the rule of law and cannot be countenanced by the Court.

21 What is more, the enforcement of the Draft Directions has already started to have severe consequences in vulnerable peoples' access to food. In some parts of the country, provincial departments have: refused to permit an NGO from providing *sandwiches* to 600 people a day;<sup>18</sup> and has issued its own directives purporting to regulate the distribution of food by NGOs which are

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<sup>16</sup> Interpretation Act 33 of 1957 s 13(1): "*The expression 'commencement' when used in any law and with reference thereto, means the day on which that law comes or came into operation.*"

<sup>17</sup> FA pp 34-35 paras 78-84.

<sup>18</sup> FA p 14 para 28.

clearly based on the Draft Directions of the Minister.<sup>19</sup> In others, NGOs have been required to complete applications forms to obtain approval to distribute food on a daily basis.<sup>20</sup> At present, however, there is no requirement *in law* to obtain such approval.

22 In order to put an end to this unlawful state of affairs, the applicants seek declaratory and consequential relief which we address in turn.

### The declaratory order

23 The applicants seek an order declaring that public officials are not entitled to enforce the Draft Directions, until such time that they are duly issued and published.<sup>21</sup>

24 The legal principles governing the Court's powers to make declaratory orders were recently restated by Fabricius J in *Khosa v Minister of Defence and Military Veterans*.<sup>22</sup> The Court's powers are contained in:

24.1 The authority in section 38 of the Constitution to order "*appropriate relief*" where a right in the bill of Rights has been threatened or breached;

24.2 The power in section 172(1)(b) of the Constitution to "*make any order that is just and equitable*"; and

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<sup>19</sup> FA pp 14-15 paras 29-30.

<sup>20</sup> FA pp 15-16 para 32.

<sup>21</sup> Amended NoM pp 1-2 para 1.

<sup>22</sup> *Khosa and Others v Minister of Defence and Military Veterans and Others* (21512/2020) [2020] ZAGPPHC 147 (15 May 2020) para 67.

24.3 The discretionary power in section 21(1)(c) of the Superior Courts Act 10 of 2013 to grant declaratory relief.

25 In *Khosa* the Court granted wide-ranging declaratory relief about the state of the law and the obligations of the government respondents to respect it.

26 In *Fose v Minister of Safety and Security*, the Constitutional Court (per Ackermann J) described the duty of the Courts to grant appropriate relief in section 38 in the following terms:<sup>23</sup>

*“In our context **an appropriate remedy must mean an effective remedy**, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. **Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.** The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.”* (Our emphasis.)

27 The powers to grant just and equitable orders in section 172(1)(b) are not limited to declarations of invalidity.<sup>24</sup> In *Hoërskool Ermelo*, Moseneke DCJ explained that:<sup>25</sup>

*“A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the*

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<sup>23</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69.

<sup>24</sup> *Economic Freedom Fighters v The Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) paras 210.

<sup>25</sup> *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 96.

*parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements.”*

28 In *Competition Commission of South Africa v Hosken Consolidated Investments Limited*, the Constitutional Court explained that the discretionary power to make a declaratory order in section 21(1)(c) of the Superior Court Act requires a two-stage inquiry: first, the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; and second, the court may then exercise its discretion either to refuse or grant the order sought.<sup>26</sup>

29 We submit that the Court should exercise its powers to grant the declaratory order in this case for the following reasons:

29.1 First, the declaratory order will clarify the legal obligations of public officials and the rights of the subjects of the State and promote the protection and enforcement of the Constitution and the rule of law;<sup>27</sup>

29.2 Second, the premature enforcement of unfinalized and therefore unissued draft directions is not only contrary to the rule of law, but threatens to unjustifiably limit constitutional rights which should be allowed to continue;

29.3 Third, in light of the general issue of this type of conduct occurring we submit that justice and equity demand that the Court declare the correct legal position to put a stop to unlawful behaviour.

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<sup>26</sup> *Competition Commission of South Africa v Hosken Consolidated Investments Limited and Another* 2019 (3) SA 1 (CC) para 80.

<sup>27</sup> *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 107.

## The consequential relief

30 As consequential relief to the declaratory order, the applicants ask the Court to direct the Minister and the National Commissioner of Police to bring the declaratory order to the attention of all officials under their authority.<sup>28</sup>

31 While declaratory relief may stand alone, often justice and equity dictate that some consequential relief also be granted to ensure that the Constitution and the law is complied with. In *Rail Commuters Action Group*, O'Regan J explained that: “*Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.*”<sup>29</sup>

32 In addition to *Fose*, which empowers the Court to grant any *effective* relief, Madlanga J explained in *Corruption Watch* that:<sup>30</sup>

*“the operative word ‘any’ [in section 172(1)(b)] is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity. ... What must be paramount in the relief that a court grants is the vindication of the rule of law.”*

33 The purpose of the consequential order is to ensure that the public officials tasked with enforcing the law (the SAPS) and those mandated to regulate social development (officials in the Department) are aware of the rule of law and the

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<sup>28</sup> Amended NoM p 2 paras 2-3.

<sup>29</sup> *Rail Commuters Action Group* supra para 107.

<sup>30</sup> *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* 2018 (10) BCLR 1179 (CC) para 68.

basic requirement that without publication, anything purporting to be a law may not be enforced. In the circumstances of the case, and the situation South Africa finds itself in at present, we submit that the consequential relief is both just and equitable and will serve as an effective remedy.

## **THE DRAFT DIRECTIONS ARE UNCONSTITUTIONAL**

34 Any exercise of public power, which includes the issuing of Directions under the DMA Regulations, must meet the fundamental requirements of legality and may not violate the Bill of Rights.<sup>31</sup> We submit that the Draft Directions are unlawful and unconstitutional.

### Unlawful, vague and irrational

35 The Minister expressly relies on Regulation 4(5) of the DMA Regulations in both the Initial and New Directions.<sup>32</sup> As explained in the founding affidavit, the powers of the Minister in Regulation 4(5) are limited to addressing, preventing and combating the spread of Covid-19 “*in all Department of Social Development facilities.*”<sup>33</sup> The Minister has no power to prohibit and regulate the distribution of food by NGOs in the Regulation. If they are issued, they will be *ultra vires* and unlawful.<sup>34</sup>

36 The founding and supplementary affidavits set out in detail why the Draft Directions are irrational and vague.<sup>35</sup> The Draft Directions also leave too much

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<sup>31</sup> FA p 16 para 33.

<sup>32</sup> **FA1** p 41; **EJ1** p 126.

<sup>33</sup> FA pp 16-17 para 36.

<sup>34</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 56-58.

<sup>35</sup> FA pp 17-27 paras 39-52; SA pp 121-125 paras 6-20.

discretion to public officials – both the SAPS and officials in the Department – allowing them to determine what conduct is permitted and to determine what requirements must be met to obtain authorisation.<sup>36</sup> Furthermore, the reasons contained in the Minister’s media statement,<sup>37</sup> are further evidence of the defects in the Draft Directions.<sup>38</sup> We do not repeat the explanation here but set out the legal principles.

36.1 First, the law requires that exercises of public power be rational. That means that a “*decision [must be] founded upon reason – in contradistinction to one that is arbitrary.*”<sup>39</sup>

36.2 Second, any law or legislative instrument – such as the Draft Directions – must not be impermissibly vague. In *Affordable Medicines* Ngcobo J held that “*The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.*”<sup>40</sup>

36.3 Third, in *Dawood* the Constitutional Court held that discretionary powers must contain guidance and constraints, otherwise rights could be violated and parties who are adversely affected by the exercise thereof “*will not know what is relevant to the exercise of those powers or in what*

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<sup>36</sup> FA p 19 para 44.2, p 26 para 50; SA p 124 para 18.

<sup>37</sup> **FA11** p 101.

<sup>38</sup> FaA pp 27- para 53-60.

<sup>39</sup> *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 421 (SCA) para 65.

<sup>40</sup> *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) para 73.

*circumstances they are entitled to seek relief from an adverse decision”.*<sup>41</sup>

36.4 Fourth, to the extent that it may be necessary, the Minister is bound by the reasons she gives for exercising a power at such time.<sup>42</sup>

37 We submit that the Draft Directions are riddled with such vagueness, contradiction and irrationality that if they were to be issued, it would be impossible for NGOs and others to meet the requirements to provide food to the needy and it would be impossible for officials implementing the provisions to know what is required of them. That will inevitably lead to less NGOs operating and less food being distributed to the most needy in our society.

#### Procedurally unfair

38 Despite the Draft Directions being in existence since at least the beginning of May,<sup>43</sup> the Minister has not taken any steps to notify the public – in this case the NGOs and other individuals who have been distributing food to the hungry – of her intention to adopt such directions and call for comments as envisaged by section 4(3) of the Promotion of Administrative Justice Act 3 of 2000. The failure to do, is procedurally unfair.<sup>44</sup> The failure to consult those directly affected is not only procedurally unfair, but procedurally irrational.<sup>45</sup>

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<sup>41</sup> *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) paras 47-48.

<sup>42</sup> *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited* 2020 (1) SA 450 (CC) para 39.

<sup>43</sup> FA p 13 para 23.

<sup>44</sup> FA pp 29-30 paras 61-65.

<sup>45</sup> *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); *Scalabrini* (n 41).

## Violate section 27(1)(b) of the Constitution

39 If issued, the Draft Directions will result in many thousands of desperate and hungry South Africans not having access to sufficient food. Already while officials have enforced the Draft Directions throughout the country, people have gone hungry.<sup>46</sup>

40 We submit that the Draft Directions, if implemented, would amount to a deliberate retrogressive measure and violate the existing access vulnerable and poor people have to food provided for independently of the State by non-profit organisations and other individuals. This would be a negative violation of section 27(1)(b) of the Constitution which provides that “*Everyone has the right to have access to ... sufficient food.*”

41 Where the State implements a measure which permits people to be deprived of their *existing* access to sufficient food, section 27(1)(b) is limited and the State has the obligation to justify such limitation under section 36.<sup>47</sup>

42 There is no justification for imposing burdensome and unduly onerous requirements on those seeking to distribute food to the hungry. Those operating soup kitchens or giving food to the desperate are already required to comply with the various regulations and directions concerning safety and hygiene to prevent the spread of Covid-19. There is no justification for requiring them to seek and obtain additional permission – over and above the essential

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<sup>46</sup> FA pp 30-31 paras 66-67.

<sup>47</sup> *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) para 34.

services permit – *and* to notify the SAPS each and every time they wish to do so.<sup>48</sup>

- 43 As set out in the founding affidavit, the Draft Directions if implemented will also violate South Africa’s international legal obligations under the International Covenant on Economic, Social and Cultural Rights.<sup>49</sup>

### **THE MINISTER OUGHT TO BE INTERDICTED FROM ISSUING THE DRAFT DIRECTIONS**

- 44 The applicants request the Court to interdict and restrain the Minister from issuing the Draft Directions as they are presently formulated or in any other similar form. The requirements for a final interdict are settled.<sup>50</sup> We submit that the applicants have made out a case for such relief.

- 45 First, they seek to assert the clear constitutional rights of access to sufficient food in section 27(1)(b) and to just administrative action in section 33. Furthermore, the applicants seek to require the Minister to comply with the principle of legality and the rule of law.<sup>51</sup>

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<sup>48</sup> FA p 33 para 75.

<sup>49</sup> International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200A (XXI) of 16 December 1966) which was ratified by South Africa on 12 January 2015. See FA pp 31-33 paras 71-75.

<sup>50</sup> *Setlogelo v Setlogelo* 1914 AD 221 at 227: “*The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.*”

<sup>51</sup> FA p 36 para 91.

- 46 Second, if the Draft Directions are implemented that will cause serious injury and harm as many NGOs and other individuals who have been providing food to the needy, will not be able to do so and people will starve.<sup>52</sup>
- 47 Third, the applicants have no alternative remedy.<sup>53</sup> A letter requesting an undertaking from the Minister not to issue the Directions has been ignored.<sup>54</sup> If the Directions are issued, they will be immediately effective and the distribution of food to the hungry will be instantly interrupted. Even if review proceedings are launched, in the interim thousands will go hungry and that will never be remedied.
- 48 We submit that the Constitutional Court's *dicta* in *Outa*<sup>55</sup> are inapplicable to the case as the applicants are:
- 48.1 seeking final and not temporary relief (*Outa* was dealing with an interim interdict);
- 48.2 asserting constitutional rights; and
- 48.3 seeking to prevent the Minister from acting beyond the scope of her powers and authority as well as blatantly unconstitutionally.
- 49 The Court will uphold the separation of powers by preventing the Minister from acting unconstitutionally and beyond her authority in law.<sup>56</sup>

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<sup>52</sup> FA pp 36-37 para 92 and subparagraphs.

<sup>53</sup> FA p 37 para 93.

<sup>54</sup> FA p 39 para 100.

<sup>55</sup> *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 47.

<sup>56</sup> *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 45.

50 To the extent that *Outa* is applicable, we submit that this is one of the “*clearest of cases*” where the remedy must be granted because many people will go hungry if the Draft Directions are issued and implemented in their current form.

## **CONCLUSION**

51 We submit that the applicants have made out a case for the relief sought in the notice of motion, as amended.

**Ismail Jamie SC**

**Michael Bishop**

**Mitchell De Beer**

Counsel For The Applicants

21 May 2020