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

Case No:

In the matter between:

| | |
|---|---|
| **DEMOCRATIC ALLIANCE** | First Applicant |
| **PALLADIUM HAIR CO CC** | Second Applicant |
| and | |
| **MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS** | First Respondent |
| **CABINET OF SOUTH AFRICA** | Second Respondent |
| **PRESIDENT OF SOUTH AFRICA** | Third Respondent |

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**DEAN WILLIAM MACPHERSON**

declare under oath:

1 I am an adult male Member of Parliament residing in Durban with my parliamentary address at Marks Building, Parliament, Cape Town.

DM T.B.P.

2 I am authorised to depose to this affidavit on behalf of the applicants. I make legal submissions on the advice of the applicants' legal representatives.

3 The facts contained in this affidavit are within my own personal knowledge, save where otherwise stated or where the contrary appears from the context, and to the best of my belief are true and correct. Where I rely on facts conveyed to me by third parties, I verily believe the correctness of such facts. Where I rely on evidence contained in media reports and newspaper articles or other hearsay evidence, I pray that it be admitted in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988. Where I make legal submissions, I do so on the advice of the Applicants' legal representatives. I believe that advice is correct.

4 This application concerns the continued prohibition on the operation of the personal care services industry under the lock down regulatory framework. The personal care services industry is made up of many small businesses across the country, including hairdressers and nail and beauty salons, which are predominantly small and medium sized enterprises.

5 On 28 May 2020, in *Government Gazette* 43364 the first respondent (the **CoGTA Minister**):

5.1 promulgated regulations in terms of section 27(2) of the Disaster Management Act 57 of 2002, which made certain amendments, deletions and insertions to regulations she had previously published in terms of section 27(2) in *Government Gazette* 43258 in GNR. 480 of 29 April 2020 (together, the **Amended DMA Regulations**). I attach copies of each set of Regulations as **FA1** and **FA2 respectively**; and

5.2 issued a determination that "*Alert Level 3 will apply nationally from 1 June 2020*".

6 In terms of Regulation 46(1) read with item 7 of Table 2 of the Amended DMA Regulations, the "*Personal care services*" industry is not entitled to operate under Level 3, unless some unspecified Minister, in consultation with the Minister of Health, issues directions which exempt certain unspecified "*categories*" of services subject to conditions to be solely identified by the unspecified Minister.

7 These directions have not been issued. There is no certainty about whether they will ever be issued, and if so what categories will be exempted from the ongoing prohibition, and under what conditions and circumstances.

8 The Amended DMA Regulations are unconstitutional, arbitrary and unlawful:

8.1 Parliament has not delegated authority to the Minister in the Disaster Management Act to indefinitely prohibit the operation of an entire industry. If it has, that delegation is unconstitutional.

8.2 The blanket ban on the personal care services industry operating is irrational, arbitrary and unreasonable. The industry is made up of small business and employs hundreds of thousands of people across South Africa who are precluded from earning a living. Almost all other economic activity is permitted to resume under Level 3, subject to hygiene protocols. So too are religious gatherings and professional sports. There is no rational basis for the indefinite exclusion of the industry.

8.3 Item 7 of Table 2 is impermissibly vague and arbitrary. "*Personal care services*" is not properly defined: while it includes hairdressing and other beauty services, it does not include massages and similar services. It is not possible for people who provide such services to know whether they are permitted to operate or not;

8.4 Item 7 of Table 2 also grants a near-unfettered discretion to some unidentified Cabinet Minister to decide which services are "*safe to resume*" and under what conditions, without providing any criteria or guidelines for those determinations. That unfettered sub-delegation of legislative power is patently unlawful.

9 The Amended DMA Regulations also violate various rights in Chapter 2 of the Constitution:

9.1 The indefinite prohibition is an unjustifiable violation of the section 22 right of thousands of people to choose and practice their trade freely; and

9.2 The continued prohibition unjustifiably limits the right of freedom of expression of both the parties who provide personal care services and their customers.

10 The applicants seek orders: declaring the Amended DMA Regulations to be unconstitutional and unlawful on these grounds; and reviewing and setting aside Item 7 of Table 2.

11 In this affidavit:



T.B.P.

11.1 First, I set out the parties' details;

11.2 Second, I describe the relevant parts of the Amended DMA Regulations and the background to this application;

11.3 Third, I explain why the Amended DMA Regulations are irrational, unreasonable, and unlawful;

11.4 Fourth, I explain why the Amended DMA Regulations violate the Bill of Rights;

11.5 Fifth, I set out the remedy sought by the applicants in more detail; and

11.6 Finally, I demonstrate that the matter is urgent.

**PARTIES AND STANDING**

12 The first applicant is the **Democratic Alliance** (**DA**), a political party duly registered with the Electoral Commission with its head office at 2nd Floor, Theba Hosken House, 16 Mill Street, Gardens, Cape Town.

13 The DA brings the application:

13.1 in its own interest as contemplated by section 38(a) of the Constitution;

13.2 in the interests of its members as contemplated by section 38(e) of the Constitution;

13.3 in the interests of thousands of persons involved in and employed by the personal care services industry who have no resources to access legal

representation, as contemplated by section 38(b) of the Constitution; and

13.4 in the public interest as contemplated by section 38(d) of the Constitution.

14 The second applicant is **Palladium Hair Co CC** (**Palladium**) a close corporation duly registered and incorporated in terms of the Close Corporations Act 69 of 1984, with reg no 1996/056203/23 and with its place of business in the Western Cape at Cape Quarter Life Style Centre, Somerset Road, Green Point, Cape Town. Palladium is a hair services company which operates in the Western Cape and Gauteng and employs 75 people. I refer the Court to the affidavit of Genevieve Abouchabk.

15 Palladium brings this application:

15.1 in its own interest as contemplated by section 38(a) of the Constitution;

15.2 in the interest of other similarly situated businesses operating in the "*personal care*" industry; and

15.3 in the public interest as contemplated by section 38(d) of the Constitution.

16 The first respondent is the **Minister of Cooperative Governance and Traditional Affairs** who is cited in her official capacity as the member of the National Executive responsible for the Disaster Management Act and the Regulations promulgated thereunder. She is served care of the State Attorney at 22 Long Street, Cape Town.

17 The second respondent is the **Cabinet of South Africa** which, in terms of section 91 of the Constitution, consists of the President, the Deputy President and all Cabinet Ministers appointed by the President. The Cabinet is cited insofar as any individual member of the Cabinet may have an interest in the relief sought in the application, and is served care of the State Attorney at 22 Long Street, Cape Town.

18 The third respondent is the **President of South Africa** who, in terms of section 83(a) of the Constitution, is the head of state and the head of the national executive. The President is cited insofar as he may have an interest in the relief sought in the application, and is served care of the State Attorney at 22 Long Street, Cape Town.

19 Due to the urgency of the matter, the application will be served on the respondents via email.

**THE AMENDED DMA REGULATIONS AND BACKGROUND**

20 Under Level 4 and what has come to be known as Level 5 of the national government's lockdown in response to the Covid-19 pandemic, the Regulations issued by the CoGTA Minister provided for a general prohibition on all industries and businesses operating, other than those specifically listed as being allowed to operate (see Regulation 28).

21 Level 3 takes the opposite approach: all industries and business may operate subject to hygiene protocols and conditions, other than those specifically excluded from operation by the Regulations. Regulation 46(1) says: "*Businesses and other institutions may operate except those set out in Table 2.*"



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The rest of the Regulation provides for conditions and hygiene protocols which businesses must comply with to operate.

22 Item 7 of Table 2 states the following:

> *"Personal care services, including hairdressing, beauty treatments, make-up and nails salons and piercing and tattoo parlours, except those categories of services identified in directions by the relevant Cabinet member, in consultation with the Cabinet member responsible for health, as safe to resume, under specified conditions."*

23 Business which fall within the "*Personal care services*" industry, as defined, are therefore prohibited from operating by Regulation 46(1).

24 As adumbrated above, Item 7 of Table 2 appears to contemplate that certain personal care services may eventually be able to resume operations under Level 3. However, this is contingent on some unspecified Minister issuing directions which identify what services these are, at some future uncertain point decided by this Minister. The Regulations provide no criteria to be applied when making these determinations or guidelines for the exercise of these discretionary powers.

25 No such directions have been issued.

26 On 1 June 2020, the Applicants' attorneys, Minde Schapiro & Smith, addressed a letter to the CoGTA Minister (**FA3**) urgently seeking the following information by 3 June 2020:

> *"6.1. Which Cabinet Member is responsible for issuing the directions in terms of Item 7 in Table 2;*

> 6.2. *Whether a determination has been made that it is currently not "safe" for the industry "to resume" work and, if so, who made such determination, when was it made, and what the reasons for making such determination are;*
>
> 6.3 *What criteria will be used by the relevant Minister for determining whether it is "safe to resume" work in the industry;*
>
> 6.4 *Why the criteria which apply to religious gatherings under Level 3 are not applicable to the Personal Care Services industry; and*
>
> 6.5. *Whether any directions as contemplated by Item 7 in Table 2 will be issued and, if so, what conditions and restrictions will be placed on the Personal Care Services industry by such directions?"*

27 The CoGTA Department acknowledged receipt of the letter only on 5 June 2020, but provided no substantive response to any of the issues raised (**FA4**).

28 Nonetheless, according to various statements issued by the Employer's Organisation for Hairdressing, Cosmetology and Beauty (**FA5.1** and **FA5.2**):

28.1 The CoGTA Department had addressed a letter to it on 1 June 2020, which stated that an unspecified Department was presently drafting protocols and guidelines for the industry to reopen, and that these would be finalised by the end of the week (i.e. 5 June 2020). The Organisation states that it did not publish the full letter from the Department "*due to the sensitivity of the matter and the confidential nature thereof.*"

28.2 However, the Department did not issue the directions on 5 June 2020.

29 Therefore, the State has failed to provide any concrete indication as to whether these directions will be issued, who is responsible for issuing them, and when (if ever) they will be issued.

30 Many businesses and individuals employed in the industry are indefinitely precluded from earning a living and have absolutely no certainty about whether and, if so, when, they will be permitted to resume working. The industry is unable to plan and prepare for a return to work, if that occurs.

## THE BLANKET PROHIBITION IS UNLAWFUL AND ARBITRARY

31 I am advised that the promulgation of regulations by the CoGTA Minister in terms of section 27(2) of the Disaster Management Act is administrative action for the purposes of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**) and is subject to review in terms of the Act.

32 I am further advised that, in any event, in terms of the constitutional principle of legality, all exercises of public power – including the promulgation of the Amended DMA Regulations – must comply with all applicable laws and legal requirements (the legality requirement) and must be rationally related to the purpose for which the power was given (the rationality requirement), and are reviewable on this basis as well.

33 I submit that to the extent that the Amended DMA Regulations create a blanket prohibition on the personal care services industry from operating they are arbitrary and unlawful on the following grounds:

33.1 They are *ultra vires*;

33.2 Irrational, arbitrary and unreasonable; and

33.3 Impermissibly vague; and

33.4 Sub-delegate authority to limit rights without guidance.

*Ultra vires* the CoGTA Minister's authority

34 Parliament is not permitted by the Constitution to delegate plenary legislative powers – which may only be exercised by Legislatures – to the Executive. Decisions relating to the prohibition of certain industries, businesses, professions and occupations, must be made by democratically elected legislatures as part of their plenary legislative power. The power to amend such decisions is not delegable from the Legislature to the Executive.

35 The CoGTA Minister has purported to exercise the authority vested in her by section 27(2) of the Disaster Management Act so as to indefinitely ban the operation of an entire industry.

36 Parliament, however, has not delegated such authority to the CoGTA Minister. Properly interpreted, section 27 of the Disaster Management Act does not delegate such wide-reaching powers to the Minister:

36.1 Subsection (2) sets out various matters that may be dealt with in regulations. The only business which may be explicitly limited is the sale, dispensing and transportation of alcoholic beverages. The provision does not empower the Minister to prohibit the operation of other industries indefinitely;

36.2 Subsection (3) places further limitations on the power to make regulations in subsection (2), in that the power may only be exercised for the limited purposes listed in subsection (3). None of those purposes

grant the Minister authority to continuously prohibit the operation of an entire industry.

37 As the CoGTA Minister has purported to exercise authority she does not have to adopt a blanket ban on the personal care services industry, she has acted *ultra vires* the Disaster Management Act.

38 I submit that Item 7 of Table 2 read with Regulation 46(1) is reviewable:

38.1 in terms of section 6(2)(f)(i) of PAJA and/or the principle of legality because the promulgation of the Regulations contravened various laws and was not authorised by section 27(2);

38.2 in terms of section 6(2)(a)(i) of PAJA and/or the principle of legality as the Minister was not empowered to take the decision by section 27(2) of the Disaster Management Act; or

38.3 alternatively, in terms of section 6(2)(a)(ii) of PAJA and/or the principle of legality as the Minister acted under a delegation of power which was not authorised by the empowering provision.

39 *Alternatively*, if s 27(2) can be interpreted to afford the Minister the power to prohibit entire industries from operating, then it is unconstitutional and invalid. It is an impermissible delegation of plenary legislative power. Parliament may not grant the Minister the unguided power to prohibit entire industries from operating. That is particularly the case because prohibiting the operation of the industry limits both the right to freedom of trade, and the right to free expression.

40 The appropriate remedy is to declare s 27(2)(n) unconstitutional and invalid to the extent it affords the Minister the power to ban the provision of "*personal care services*".

<u>Irrational, arbitrary and unreasonable</u>

41 Under Level 3 of the lockdown, the default position is that all industries and businesses have been permitted to resume working, subject to various conditions and protocols necessary to prevent the spread of Covid-19.

42 Not only businesses are allowed to operate:

42.1 Religious institutions have been permitted to hold gatherings of up to 50 people, subject to conditions and hygiene protocols.

42.2 Non-contact professional sport is allowed to resume with limitations.

42.3 Schools have re-opened – at least in the Western Cape – with protective measures in place.

42.4 Flea markets – which were prohibited under level 4 – are allowed to operate.

42.5 Restaurants now offer not only delivery but take away services.

42.6 Air travel will resume shortly, at least for business purposes.

42.7 Other businesses which also necessitate that people work in close proximity to each other and are not vital for survival have been operating since level 5.

42.8 Similar services, if deemed medical, are available. Physiotherapy, cosmetic dentistry, plastic surgery and other elective medical procedures are all lawful.

43 In contrast, at present the entire personal care services industry is indefinitely prohibited from resuming work by the Amended DMA Regulations. That is arbitrary. There is no justification for allowing some industries to resume work, to allow religious gatherings and sports events under conditions, while indefinitely prohibiting an entire industry from operating.

44 According to an economic study conducted by the Department of Higher Education and Training of the hairdressing industry in 2016 (**FA6**):

44.1 It is estimated that there are approximately 40 000 hair salons in South Africa, although official statistics are difficult to ascertain because the industry has a very large informal sector (p 18);

44.2 73% of hairdressing and beauty business are small or small-medium enterprises where the owner/manager fulfils a role in an increasingly competitive market (p 19);

44.3 In 2015, the hairdressing industry supported approximately 185 000 employees who earned R 16 billion in wages and income (p 41):

44.4 Around half of these employment opportunities are taken up by semi-skilled persons which "*suggests that the sub-sector may be an important contributor to poverty alleviation for many, and may also make a notable impact on the eradication of unemployment among previously disadvantaged communities.*"

45 In addition, it is well-known that a majority of workers in the industry are female.

46 All of these people are precluded from resuming work by the Amended DMA Regulations.

47 No discernible decision appears to have been taken by the CoGTA Minister – or any other Minister for that matter – that it is unsafe for the personal care services industry to return to work under Level 3. To the extent that such a decision has been made, the State has not communicated any criteria which were used to make the determination or any reasons justifying it, despite a request from the DA.

48 The industry is simply prohibited from operating indefinitely, subject to the whims of some unidentified Minister.

49 It is irrational and arbitrary to adopt such a blanket prohibition where other industries have been permitted to resume:

49.1 The industry is one which has always adopted proper hygiene measures and practices, even before the Covid-19 pandemic; and

49.2 Businesses in the industry are able to:

49.2.1 comply with sanitation and hygiene protocols;

49.2.2 track and trace any client or employee who may have come into contact with anyone infected by Covid-19; and

49.2.3 adopt social distancing measures to prevent the spread of the disease amongst clients and employees.

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50 To the extent that the industry may need to adopt additional hygiene protocols to minimise the risk of the virus spreading, it is irrational for the CoGTA Minister to have left that determination to another unidentified Minister and not provided criteria for use in making such determination or set a time by which the determination must be made.

51 The means chosen by the CoGTA Minister – a blanket and indefinite prohibition on the industry resuming work subject to the discretion of an unidentified decision-maker – have no rational connection to the purpose for which the decision was taken: namely, managing the pandemic and minimising the risk of spreading the virus. I submit that the decision also has no rational connection to the information before the Minister.

52 Not only is the blanket prohibition irrational and arbitrary, it is also unreasonable:

52.1 A blanket prohibition on the industry resuming work with no clear ending is excessive and disproportionate;

52.2 There are less drastic and oppressive means to achieve the same end, namely allowing the industry to resume work subject to compliance with hygiene protocols and other conditions;

52.3 Business in other industries – like retailers and mines – and the public service have been permitted to resume working subject to hygiene protocols and conditions. Religious institutions, schools and sports have been allowed to hold gatherings subject to similar conditions – there is no reason for the personal care services industry to face a blanket ban



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where these other industries and institutions are permitted to resume operating; and

52.4 Finally, as many businesses in the industry are in the informal sector, their employees may have limited access to Covid-19 relief from the State and need to return to work to earn a living and maintain themselves and their families.

53 Closing this industry does not just stop people getting haircuts, piercings or tattoos; it stops people keeping a roof over their heads and food on the table. After more than two months of lockdown, any continued prohibition would require the most compelling justification. Here, there is none.

54 I submit that Item 7 of Table 2 read with Regulation 46(1) is reviewable:

54.1 In terms of section 6(2)(f)(ii) of PAJA and/or the principle of legality as it is irrational and arbitrary; and

54.2 In terms of section 6(2)(h) of PAJA as the decision to promulgate the regulation is one which a reasonable decision-maker could not reach.

Impermissibly vague

55 Item 7 of Table 2 is vague on two counts.

56 First, the definition of "*Personal care services*" is inchoate:

56.1 While it is defined to "*include*" certain business which evidently fall within the industry – like hairdressers, nail salons and tattoo artists – it is silent as to whether people who provide other similar services, such as

massages, acupuncture, reflexology, hair removal or aroma therapy are also prohibited from resuming work.

56.2 The definition provides no certainty as to whether these individuals are bound by the prohibition in Regulation 46(1) and they are unable to take steps to conform their conduct accordingly. As the entire economy has been shut down for two months, many of these businesses will be anxious to reopen. If their services are intended to fall into the definition of "*personal care services*" they run the risk of being penalised, especially if public officials charged with enforcing the law interpret the provision in that manner.

57 Second, Item 7 of Table 2 does not specify which Cabinet member is "*relevant*" for the purposes of issuing directions in terms thereof:

57.1 The rest of the DMA Regulations as Amended provide no clues as to which Minister is the relevant Cabinet Minister.

57.2 It could be any Minister other than the Minister of Health who must be consulted. The more obvious ones might include: the CoGTA Minister; the Minister of Small Business Development; or the Minister of Trade and Industry. But the Amended DMA Regulations do not tell us.

58 I am advised that the rule of law requires the law to indicate with reasonable certainty what is required of those bound by the law so they may regulate their conduct accordingly. I submit that Item 7 of Table 2 fails to meet these requirements of the rule of law and is accordingly reviewable in terms of the principle of legality.



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Delegate authority which limits constitutional rights without guidance

59 Not only has Item 7 of Table 2 failed to specify who the "*relevant*" Minister, it has also not provided any guidelines to determine:

59.1 What categories of services should be exempted from the prohibition and why;

59.2 In what circumstances it will be "*safe to resume*" working; and/or

59.3 What kinds of "*specified conditions*" ought to be imposed.

60 The relevant Minister may exercise near unfettered discretion in making these decisions. The exercise of these discretionary powers could potentially limit various rights including the right to choose and practice a trade and freedom of expression:

60.1 the relevant Minister may decide not to exercise this discretion at all, which would mean the whole industry's rights (and those of all its customers, being almost all South Africans) would be indefinitely violated;

60.2 or he or she may only permit certain businesses in the personal care services industry to continue operating, which would lead to some rights being violated;

60.3 or he or she may adopt stringent conditions which are both impossible to comply with and irrational, which would also continue to violate rights.

61 I am advised that the rule of law requires that when discretionary powers are granted which have the potential to limit constitutional rights, proper guidance must be provided to ensure that the discretionary powers are exercised in a manner which promotes the spirit, purport and objects of the Bill of Rights. That is even more so where the Minister is herself exercising a delegated power which she has sought to sub-delegate to another, unnamed, minister.

62 As the CoGTA Minister has failed to provide any guidance in making these crucial decisions, Item 7 of Table 2 violates the rule of law and, I submit, is reviewable also on this basis in terms of the principle of legality.

**THE INDEFINITE PROHIBITION UNJUSTIFIABLY LIMITS RIGHTS IN CHAPTER 2 OF THE CONSTITUTION**

63 In addition to contravening basic requirements of PAJA, the rule of law, and the principle of legality, the Amended DMA Regulations violate constitutional rights.

<u>The right to choose and practice a trade</u>

64 In terms of section 22 of the Constitution: "*Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.*"

65 The provision of all personal care services undoubtedly falls within the purview of a trade or profession. For example, the Department of Higher Education and Training's economic study from 2016 recognised that hairdressing has "*become recognisable as a profession and trade*" (p 18 of **FA6**). The same is true of beauticians and tattoo and piercing artists.

66 In order to comply with section 22 of the Constitution:

66.1 Measures preventing someone from choosing a trade must be reasonable; and

66.2 Regulating a trade or profession by the State must be rationally related to a legitimate government purpose.

67 The ongoing and indefinite prohibition of the personal care services industry is not merely a regulation of the industry, it makes it impossible for a person to practice the trade at all. It limits the right to choose a trade. For the reasons given above, that limitation is not reasonable.

68 Even if it amounts to mere regulation, the prohibition is not rational for the reasons set out above. Additionally, the indefinite prohibition violates the right to freedom of expression, as I explain below.

69 Therefore, I submit that the Amended DMA Regulations violate section 22 of the Constitution.

Freedom of expression

70 In terms of section 16(1) of the Constitution: "*Everyone has the right to freedom of expression which includes … (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity…*"

71 Many services provided in the personal care services industry are a form of creative expression which conveys ideas and information. For example:

71.1 Hairdressing is a creative endeavour by the hairdresser and a manner in which his or her client can convey their identity and other ideas to the world. For some people hairstyles are also linked to religious or cultural beliefs, or to their gender identity.

71.2 Tattooing is a very specialised skill, which requires artistic ability on the part of the tattoo artist. A client who chooses to tattoo or pierce themselves is also expressing ideas, identity and information. and

71.3 Make-up, too, is an art form, and a means through which people express their identity.

72 That is why professionals are referred to as tattoo artists and make-up artists. They are both a profession, and an art.

73 The indefinite prohibition on the operation of the personal care services industry prevents professionals from expressing themselves through their art, and prevents clients from expressing themselves through their choice of hair, make-up, tattoos or piercings.

<u>The limitations are not justifiable</u>

74 I submit that the limitation of these rights is neither reasonable nor justifiable in terms of section 36 of the Constitution:

74.1 The limitations of these rights are indefinite and absolute, unless an unidentified Minister decides otherwise;

74.2 The presumed purpose of the limitation – minimising the spread of the Covid-19 virus – can be achieved by less restrictive means, namely



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allowing the personal care services industry to operate subject to hygiene protocols and conditions.

75 Item 7 of Table 2 of the Amended DMA Regulations is therefore unconstitutional. This is another reason why it is reviewable, whether in terms of the section 6(2)(i) of PAJA or in terms of the principle of legality.

**REMEDY**

76 The Court's remedial powers are contained in:

76.1 Section 38 of the Constitution, which empowers the Court to grant "*appropriate relief*" where rights has been infringed;

76.2 Section 172(1) of the Constitution, which mandates the Court to "*declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency*" (paragraph (a)) and empowers the Court to "*make any order that is just and equitable*" (paragraph (b)); and

76.3 Section 8(1) of PAJA, which empowers the Court to grant any order which is "*just and equitable*" including setting aside administrative action.

77 The applicants seek orders: declaring that Item 7 of Table 2 read with Regulation 46(1) is unconstitutional and unlawful; and reviewing and setting aside Item 7.

78 I submit that this relief is both appropriate and just and equitable in the circumstances:

78.1 It will remedy the blanket prohibition on the operation of businesses in the personal care services industry;

78.2 Businesses will still be required to comply with all applicable safety and hygiene protocols and conditions, including those contained in Regulation 46 of the rest of the Amended DMA Regulations; and

78.3 Should the CoGTA Minister believe it is necessary to provide further conditions and hygiene protocols, she will not the precluded from adopting them, save that the decision to adopt such conditions and protocols must comply with the Constitution and the law.

**URGENCY**

79 The industry is predominantly made up of small and medium enterprises and employs individuals from all walks of life and demographics across the country, in both the formal and informal sectors.

80 Businesses and employees in the industry have been precluded from working since the beginning of the lock down on 23 March 2020, which was 11 weeks ago. They have not been able to earn a living at all during that time. People are unable to maintain themselves and their families. The longer they are prohibited from operating by the unlawful and irrational regulations, the more severe the impact will be.

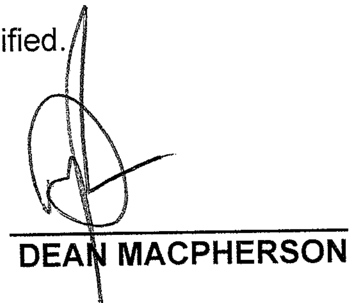
81 While item 7 of Table 2 appears to contemplate that certain parts of the industry may eventually be able to resume working, it provides no detail as to: when that may be; what categories of services will be exempted; and under what

conditions the industry may resume working. Most crucially, the relevant Minister has no obligation to adopt the directions.

82 The Amended DMA Regulations were promulgated on 28 May 2020. The Applicants' attorneys wrote to the COGTA Minister on 1 June 2020 – just four days and two business days later. The COGTA Minister responded on 5 June 2020. This application will be launched the very next court day. There has been no improper delay in bringing this application.

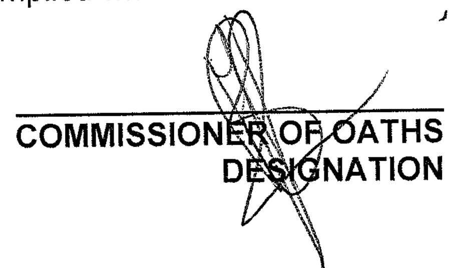
## CONCLUSION

83 The Applicants have made out a case for the relief sought in the notice of motion. I submit that the costs of two counsel are justified.



**DEAN MACPHERSON**

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at UMHLANGA on this the **8th** day of **JUNE 2020**, the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended by Government Notice No. 1648 of 17 August 1977, as amended having been complied with.



**COMMISSIONER OF OATHS**
**DESIGNATION**

COMMISSIONER OF OATHS
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