

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case no: _____

In the matter between:

THE DEMOCRATIC ALLIANCE

Applicant

and

THE MINISTER OF BASIC EDUCATION

First respondent

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Second respondent

**THE MINISTER OF CO-OPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS**

Third respondent

THE CABINET OF THE REPUBLIC OF SOUTH AFRICA

Fourth respondent

FOUNDING AFFIDAVIT

I, **PROFESSOR BELINDA BOZZOLI**, declare under oath:

1. I am an adult member of Parliament for the applicant and the applicant's shadow minister for higher education. I have been authorised by the applicant to depose to this affidavit on its behalf. The applicant has duly resolved to bring this application.

2. The facts contained in this affidavit are to the best of my belief both true and correct. They fall within my personal knowledge or are apparent from documentation under my control, except where the context indicates otherwise.

Where I rely on information provided to me by others, I have obtained confirmatory affidavits, if possible.

INTRODUCTION

3. On 23 July 2020, the President announced that Cabinet had '*decided*' that all public schools should close. To date, this '*decision*' has not been gazetted in any form. As a result, it is a nullity – an announcement by the President is not a law and cannot create rights and obligations in law.
4. Nevertheless, the Minister of Education has treated the announcement as if it were handed down on stone tablets. Provincial education MECs have been forced to run their departments as if this speech was law.
5. This is not the first time under the COVID-19 pandemic that government officials have sought to enforce '*laws*' that have not been promulgated – and therefore that do not exist in legal terms. This pattern undermines the rule of law, and the government's attempts to combat the pandemic.
6. The applicant is therefore forced to approach this Court to obtain declaratory relief for what should be obvious: that no President (and no government official) may rule by announcement (or speech, or press release, or tweet). To the extent necessary and to the extent that the presidential announcement embodies or refers to a decision, the applicant will ask, in the alternative, that such decision be reviewed and set aside.
7. I structure the remainder of this affidavit as follows:

- 7.1. first, I describe the parties and explain why the applicant has *locus standi*;
- 7.2. secondly, I set out the factual background;
- 7.3. thirdly, I explain why the presidential announcement is a legal nullity and why the applicant is entitled to a declaration to this effect; or why it deserves to be reviewed and set aside; and
- 7.4. finally, I set out why this application deserves an urgent hearing.

PARTIES

8. The applicant is **THE DEMOCRATIC ALLIANCE**. It is a duly registered political party with its main offices at 2nd Floor, Theba Hosken House, 16 Mill Street, Gardens, Cape Town. Under its federal constitution, the applicant is a body corporate with perpetual succession, capable of suing in its own name.
9. The first respondent is **THE MINISTER OF BASIC EDUCATION** ('**the Minister**'). Her offices are at 222 Struben Street, Pretoria Central, Pretoria. The incumbent is Ms Matsie Angelina Motshekga. She is cited in her official capacity as the national minister responsible for basic education.
10. The second respondent is **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**. His offices are at the Union Buildings in Pretoria. The incumbent is Mr Matamela Cyril Ramaphosa. He is cited in his official capacity as official that made the announcement that is impugned in this application.
11. The third respondent is **THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS** (hereafter, '**the CoGTA Minister**'). Her offices

are at 87 Hamilton Street, Arcadia, Pretoria. The incumbent is Dr Nkosazana Clarice Dlamini-Zuma. She is cited in her official capacity as the minister that is responsible for administering the Disaster Management Act, as stipulated in section 3 thereof, although no relief is sought against her.

12. The fourth respondent is **THE CABINET OF THE REPUBLIC OF SOUTH AFRICA** (hereafter, '**Cabinet**'). It is served care of the President, and is joined out of an abundance of caution.

STANDING

13. The applicant brings this application under the extended standing provisions in section 38 of the Constitution:

- 13.1. acting in the public interest in terms of section 38(d); and

- 13.2. as an association acting in the interests of its members under section 38(e).

FACTUAL BACKGROUND

(a) COVID-19 and the government response

14. The Severe Acute Respiratory Syndrome Coronavirus 2 (or '**SARS-CoV-2**') is a strain of coronavirus that causes coronavirus disease 2019 (or '**COVID-19**'). An outbreak of COVID-19 was first identified in Wuhan, China, in December 2019. The first case of COVID-19 in South Africa was reported on 5 March 2020.

15. The government's response to COVID-19 has transformed the life of every South African. Freedoms previously taken for granted in the democratic era have been severely limited.
16. The pandemic has also stretched our constitutional form of government close to its breaking point. Our democracy currently no longer operates as it did before, where the Legislature passed legislation that the executive implemented. Instead ministers have invoked powers under the Disaster Management Act 57 of 2002 ('**DMA**') to act as a mini-legislature, promulgating new laws – sometimes on a daily basis – to give effect to the government's response to the pandemic. Many of these laws are far more intrusive than anything dreamt up by Parliament in the constitutional era.
17. This has been the *status quo* since the end of March 2020 – now around four months. It could, in theory, go on forever. Section 27(4)(c) permits the Minister of Co-operative Governance and Traditional Affairs ('**the CoGTA Minister**') (currently Dr Nkosazana Dlamini-Zuma) to extend the COVID-19 national state of disaster for a month at a time *ad infinitum* without parliamentary oversight (or, indeed, any oversight at all). She has just done so for a second time. Copies of the two gazetted notices are annexed marked '**FA0**'.
18. This application is not about the constitutionality, or even the wisdom, of any of the substantive measures the national executive has taken. It concerns process and how the national executive lacks the capacity to enact laws, whatever their content might be. Even if were to be assumed for the sake of argument that every regulation and direction is justified, the national executive must still comply with the DMA and the Constitution in the manner in which it enacts laws. That requires

publication in the Government Gazette before any policy can become law. Attempts to enforce government policy as law prior to publication are deeply unconstitutional and undemocratic. They are also subversive of the rule of law.

(b) COVID-19, schools and the presidential announcement

19. School-going children have not escaped this regulatory regime. Under what has subsequently been called '**alert level 5**', all schools (public and private) were required to be closed between 18 March and 30 April 2020 in terms of regulation 6 of the regulations issued in terms of section 27(2) of the D in GN 318 GG 43107 of 18 March 2020 ('**the lockdown regulations**').
20. Between 1 and 30 May 2020, South Africa was placed under '**alert level 4**' (a regime slightly less restrictive than alert level 5) in terms of the regulations issued in terms of section 27(2) of the Disaster Management Act, 2002 in GNR 480 GG 43258 of 29 April 2020 ('**the COVID regulations**'). A copy of the COVID regulations as currently amended are annexed marked '**FA1**'. Under alert level 4, schools (public and private) were required to remain closed.
21. On 1 June 2020, South Africa moved from alert level 4 to '**alert level 3**', where it has remained. Regulation 33(1)(g), which applies during level 3, permits every child to '*leave his or her place of residence to ... attend a school or learning institution, once these are opened*'.
22. On 29 May 2020, the Minister promulgated directions regarding the re-opening of schools in GN 302 GG 43372 of 29 May 2020. I attach a copy marked '**FA2**'. Item 4 provided for the '*phased in return to school of learners, educators and*

officials' and provided that Grades 7 and 12 would return to school on 1 June 2020.

23. However, on 31 May 2020 the Minister released a press statement in which she announced that, despite the fact that approximately 80% of schools were ready to readmit their Grade 7 and 12 learners, some schools were not ready and, as such, all Grade 7 and 12 learners would only return to school on 8 June. A copy of this press statement is annexed marked '**FA3**'.
24. This change was never gazetted but was, in fact, implemented. Schools across the country were therefore closed where, by law, they were required to be open for Grade 7 and 12 learners.
25. On 23 June 2020, the Minister promulgated further directions regarding the re-opening of schools in GN 343 GG 43465 ('**the school directions**'), which withdrew and replaced the set of directions referred to in the previous paragraph. I annex a copy of the relevant pages from the school directions as they were at the time, marked '**FA4**'.
26. At the time the school directions were promulgated, item 5 provided that Grades R to 3, and 6, 10, and 11 would return to school on Monday, 6 July 2020; and that the remaining year groups (Grades 4, 5, 8, and 9) would return on 3 August 2020.
27. On Thursday, 2 July – in other words, the Thursday before the Monday that Grades R to 3, and 6, 10, and 11 were to return to school – the Minister announced that only Grades R, 6, and 11 (and not Grades 1, 2 and 10) would be

going back on 6 July 2020. I annex a copy of the relevant press released marked **'FA5'**.

28. On 7 July 2020 – the day after learners were supposed to return to school – the Minister amended the school directions to implement this change of plans retroactively. In other words: she announced the change of plans on 2 July, the change purported to come into effect on 6 July, but it was only gazetted on 7 July. I attach a copy of the amended direction marked **'FA6'**.
29. As a result, from Monday, 6 July 2020, Grades R, 6, 7, 11, and 12 were back at school. Under the newly amended school directions, Grades 3 and 10 were due to return to school on Monday, 20 July. For all provinces except Limpopo and KwaZulu-Natal, this occurred. The provincial education departments for the latter two provinces chose not to permit the two year groups to return because they considered themselves not ready to look after them.
30. Prior to the evening of Thursday, 23 July 2020, and under the school directions as amended, Grades 1 and 2 were due to return to school on 27 July 2020, grades 4 and 9 were to return on 17 August 2020, and grades 5 and 8 on 31 August 2020.
31. However, the multitude of directions permitted schools to deviate from the timetable and allow learners to return earlier, if they complied with the COVID-19 safety measures, and applied to the provincial head of department for the necessary exemption. Many schools did so.
32. As a result, on Thursday 23 July 2020, most public schools were open for at least some grades. Many were open for all grades, and had been for several weeks.

The various provincial departments had made plans to complete the school year within the time remaining as set out in the directions.

33. On the evening of Thursday, 23 July 2020, the President addressed the nation and made the following announcement (**'the presidential announcement'**):

'Cabinet has decided that all public schools should take a break for the next four weeks.

This means that schools will be closed from 27 July and will re-open on 24 August.

Grade 12 learners and teachers will only take a one-week break, returning to school on 3 August.

Grade 7 learners will take a two-week break, returning to school on 10 August.

Specific arrangements will be made for different categories of special schools.

As a result of the disruptions caused by the pandemic, the current academic year will be extended beyond the end of 2020.

The Minister of Basic Education will provide details on the management of the remainder of the school year.

We have taken a deliberately cautious approach to keep schools closed during a period when the country is expected to experience its greatest increase in infections.'

34. A copy of his address is annexed marked **'FA7'**.
35. To date, the *'decision'* described in the presidential announcement has not been gazetted in any form. It is not clear when it will be gazetted (or if it will be gazetted at all).

(c) The aftermath of the presidential announcement

36. The presidential announcement elicited criticism from various sectors of society.

By way of illustration, I annex —

36.1. a press statement from the Federation of Governing Bodies of South African Schools (**'FEDSAS'**), an association representing school governing bodies, dated 27 July 2020 (a copy of which is annexed marked **'FA8'**), as well as a column written by the deputy CEO of FEDSAS, also dated 27 July 2020 (a copy of which is annexed marked **'FA9'**);

36.2. a press statement by the Governing Body Foundation (**'the GBF'**), a similar organisation, noting *'with reservation'* the presidential announcement and stating that *'Covid-19 is going to be a factor in our lives for an extended period and therefore it is not helpful to halt children's learning and the other benefits of their being at school until all danger, or even the peak (in itself a problematic concept), has passed'* (a copy of which is annexed marked **'FA10'**);

36.3. a media statement by the South African Human Rights Commission describing the announcement as *'regrettable and unjustifiable'* (a copy of which is annexed marked **'FA11'**);

36.4. a statement by the Western Cape Minister of Education dated 24 July 2020, noting *'with deep disappointment'* the presidential announcement (a copy of which is annexed marked **'FA12'**);

- 36.5. a statement by the applicant dated 23 July 2020, entitled '*Teacher unions come first, children (who can't vote) come last*' (a copy of which is annexed marked '**FA13**'); and
- 36.6. an editorial in the *Business Day* entitled '*Unions win, as experts slam Ramaphosa's decision to close schools*' (a copy of which is annexed marked '**FA14**') and an opinion piece in the *Daily Maverick* entitled '*School closures: A triumph of special interests over social justice*' (a copy of which is annexed marked '**FA15**').
37. Taken together, this criticism may be summarised as follows:
- 37.1. First, the closures would further diminish the amount of effective education learners would receive this year, one that has already been marred by interruptions. This would affect poor learners the most severely, as they have the least access to remedial catch-up measures and computers and airtime for e-learning.
- 37.2. Secondly, the announcement was preceded by insufficient consultation.
- 37.3. Thirdly, the announcement was vague and confusing – it did not, for example, stipulate when year groups other than Grades 7 and 12 were returning to school, and it did not stipulate which teachers would be required to return to school, and when.
- 37.4. Fourthly, it placed an unexpected additional burden on many parents, who either had to arrange childcare at the last minute, or postpone returning to work. They were given a single weekday's notice.

- 37.5. Fifthly, it was made in the face of scientific evidence that children are far less likely to contract COVID-19, to fall seriously ill, or to transmit the disease to others; and that schools have not proven to be a significant contributor to the spread of the virus. It was based on the proposition that *'the country is expected to experience its greatest increase in infections'*. This is certainly not true of at least the Western Cape which has already reached its peak.
- 37.6. Sixthly, the announcement appeared to be a last-minute capitulation to pressure from teachers' unions.
- 37.7. Finally, the announcement was clearly an irregular way to communicate a decision (to the extent that a decision had even been taken). We deal with this point in more detail below.
38. Nevertheless, the Minister has treated the announcement as if it were a binding decision in law. On 24 July 2020, she released a media statement *'welcom[ing] the announcement by President Cyril Ramaphosa today regarding [the] Cabinet decision on the school break'* and exhorting schools to make the most of the *'break'*. A copy of the media statement is annexed marked **'FA16'**.
39. Given the presidential announcement, and given the Minister's reaction to it, provincial education departments had no option but to plan accordingly:
- 39.1. On 24 July 2020, the Western Cape Minister of Education wrote to the principals of all public schools to provide *'some guidance on how to manage your schools in the weeks to come'*. A copy of the letter is annexed marked **'FA17'**.

39.2. The following day, the head of the Gauteng Department of Education wrote a similar letter to the principals of all public schools in Gauteng *'seek[ing] to provide guidance and clarity on matters that need to be addressed following the announcement by the President'*. A copy of this letter is annexed marked **'FA18'**.

THE PRESIDENTIAL ANNOUNCEMENT IS A NULLITY ALTERNATIVELY IS UNLAWFUL

40. In broad terms, the applicant seeks two heads of relief:

40.1. first, it seeks a declaration that the presidential announcement, to the extent that it purports to contain or communicate a binding law, is a nullity, together with related declaratory relief; and

40.2. secondly, and in the alternative, it seeks an order declaring unlawful, reviewing and setting aside any decision contained in or communicated by the presidential announcement.

41. I deal with the grounds for each head of relief in turn, and then describe the ancillary relief that is sought by the applicant.

(a) *The presidential announcement is a nullity*

42. I am advised that a law can only have legal effect once it has been published in the *Government Gazette*. The presidential announcement, and the Cabinet *'decision'* it communicates, has not been published in the *Gazette*. As such, it has no legal effect, and the applicant is entitled to a declarator to this effect.

43. The applicant is not asking this Court to decide an abstract or academic issue. There are various reasons that such a declarator is sorely needed from this Court. I summarise those reasons below.

(i) The presidential announcement is part of a disturbing pattern

44. The presidential announcement is merely the most recent of what is becoming a disturbing pattern under the executive's response to the COVID-19 pandemic – that of public officials handing down *diktats* before they are gazetted (or without gazetted them at all) and expecting citizens, organisations and other spheres of government to obey them without more.

45. There are many examples. I have already referred to two of them:

45.1. On 29 May 2020, the Minister promulgated directions requiring Grade 7 and 12 learners to return to school on 1 June 2020. But on 30 May, she released a press statement moving this date to 8 June. She has never gazetted this change.

45.2. Immediately prior to 2 July 2020, the (gazetted) school directions provided that Grades R to 3 and 6, 10, and 11 would return to school on Monday, 6 July 2020. But on 2 July, the Minister announced that only Grades R, 6 and 11 would be returning. This was then gazetted retroactively – on 7 July 2020.

46. Another example is the following:

46.1. Under the original lockdown regulations, it was clear that the sale of hot, cooked food by supermarkets was permitted. Regulation 11B(1)(c)

permitted *'retail shops'* to sell *'essential goods'* as defined and the list of essential goods included *'food'*, which was defined to include *'any food product, including non-alcoholic beverages'* (my underlining). A copy of the *Gazette* containing the relevant portion of the lockdown regulations as initially promulgated on 25 March 2020 is annexed marked **'FA19A'**.

46.2. Despite the clear wording of the lockdown regulations, some government officials and organs of state began to behave as if supermarkets were not permitted to sell hot, cooked food.

46.3. On Thursday, 16 April 2020, the Companies and Intellectual Property Commission (or **'CIPC'**) tweeted: *'Prepared food is not allowed to be sold during the lockdown period. Supermarkets are also not allowed to sell cooked food.'* It encouraged people to report non-compliant supermarkets to the police. A print-out of the tweet is annexed marked **'FA19B'**

46.4. In a similar vein and on the same day, the Minister of Trade, Industry and Competition told journalists that retailers were not permitted to sell hot food. A copy of a news report in this regard is annexed marked **'FA19C'**.

46.5. Also on 16 April, Eusebius McKaiser tweeted that CoGTA had informed him in an interview that cooked food should not be sold by supermarkets. A print-out of the tweet is annexed marked **'FA19D'**.

46.6. As a result of these public announcements, many supermarkets stopped selling hot prepared food, even though there was no legal prohibition on them doing so.

- 46.7. The DA had written to the dti Minister complaining about these public statements. I attach copies marked **FA19E**. It was on the verge of launching litigation substantially similar to the present – making the obvious point that tweets are not law.
- 46.8. Only on 20 April 2020 did the CoGTA Minister promulgate an amendment to the lockdown regulations that prohibited the sale of hot, cooked food by supermarkets. A copy of the gazetted amendment is annexed marked '**FA19F**'.
47. A further example involves the sale of liquor and the curfew under alert level 3:
- 47.1. For the first few weeks of alert level 3 (specifically, the whole of June and the beginning of July), the sale of liquor was permitted and no curfew was imposed.
- 47.2. But on 12 July 2020, the President announced in a televised address that *'the sale, dispensing and distribution of alcohol will be suspended with immediate effect'*. A copy of this address is annexed marked '**FA20**'. This occurred before the publication of the *Gazette* putting this announcement into effect. The gazette was only published hours later. In other words, the President expected liquor stores to shut down their businesses immediately on his say-so, and without the publication of any regulation in the *Gazette*.
48. A final example pertains to the distribution of food parcels to the needy by private charities:

- 48.1. In May 2020, and in Gauteng, the Western Cape and the Free State, the applicant received reports of private food charities being required by provincial authorities or the SAPS to comply with onerous, non-gazetted *'requirements'* or to obtain a *'permit'* before being allowed to distribute food to the hungry. It later turned out that these authorities were applying *draft* directions that had been circulating informally in government, but that had not yet been gazetted.
- 48.2. On 21 May 2020, the applicant launched an urgent application for an order that government could not enforce draft directions or regulations before they were gazetted – and to interdict the draft regulations, as they then stood, from coming into force for being irrational and unconstitutional. I annex a copy of the notice of motion and relevant extracts from the founding affidavit of this application marked **'FA21A'**.
- 48.3. The application was heard by Henney J the next day. He granted an order declaring that 'the South African Police Service (**SAPS**), officials in the Department of Social Development and any other public officials are not entitled to enforce the Draft Directions'. The order also required the Minister of Social Development to give the DA 48 hours' notice if she intended to publish similar directions. And it set a hearing for the remaining relief on 19 June 2020. I annex a copy of the order as **'FA21B'**.
- 48.4. This attempt to legislate through drafts had a disturbing sequel. On the morning of Saturday 20 June 2020, the State Attorney gave the DA notice that the Minister of Social Development intended to publish directions on Monday 22 June 2020. The DA immediately renewed its

application, and obtained a further order on Tuesday 23 June 2020. The order interdicts and restrains her from issuing those directions, and requires her to give the DA three court days' notice if she intends to issue any future directions. I attach an unsigned copy of that order (the applicant has not been able to obtain a signed version) marked '21C'.

48.5. To my knowledge, nothing like the draft regulations have ever come into force.

49. The upshot of all of this is that it appears that various members of the executive (including the President and the Minister) are under the impression that the COVID-19 pandemic permits them to legislate by decree (or announcement, or press release, or tweet), without properly exercising statutory powers through publication in the *Gazette*. I respectfully submit that it is necessary for this Court to disabuse them of this notion.

(ii) Legislation by announcement undermines the rule of law

50. Apart from its manifest unlawfulness, legislation by announcement undermines the rule of law in at least two ways.

51. First, an announcement often does not specify the source of the statutory power relied upon, or even who the decision-maker is:

51.1. The presidential announcement illustrates the point well. The presidential announcement does not specify the source of the power that has been invoked to close schools. This is, perhaps, unsurprising, because the presidential announcement also claims that schools have

been ordered to close because of a decision by 'Cabinet'. But no law exists that gives Cabinet the power to make such a decision. But if Cabinet did not make the decision, who did? The President? The Minister? The CoGTA Minister? And what was the law upon which the decision was based?

- 51.2. When a regulation or a direction is gazetted, on the other hand, it is signed by the relevant functionary, and he or she usually specifies the source of the power. The COVID regulations, for example, begin with the following preamble:

'I, Dr Nkosazana Dlamini Zuma, Minister of Cooperative Governance and Traditional Affairs, designated under section 3 of the Disaster Management Act, ... having declared a national state of disaster, ... hereby in terms of section 27(2) of the Disaster Management Act, ... after consultation with the relevant Cabinet members, make the Regulations in the Schedule.

(Signed)

DR NKOSAZANA DLAMINI ZUMA, MP

**MINISTER OF COOPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS**

DATE: 29.04.2020'

- 51.3. The directions issued by the Minister concerning the opening and closing of schools are preceded by this heading:

I, Angelina Matsie Motshekga, Minister of Basic Education, in terms of regulation 4(3) of the Regulations made under the Disaster Management Act, 2002 (Act 57 of 2002), as published under Government Notice R480, in Government Gazette 43258 of 29 April 2020, as amended by the Regulations published under Government

Notice R608, in Government Gazette 43364 of 28 May 2020, hereby issue the directions in the Schedule regarding the re-opening of schools and measures to address, prevent and combat the spread of COVID-19 in the National Department of Basic Education, all provincial education departments, all education district offices and all schools in the Republic of South Africa.

(Signed)

MRS AM MOTSHEKGA, MP

Minister of Basic Education

DATE: 29 May 2020

- 51.4. All of this is important. Citizens need to know the legal source of a coercive power, as well as the identity of the decision-maker, in order to determine whether that power has been lawfully exercised. It is impossible to assess the lawfulness of a portion of a speech.
52. Secondly, a gazetted set of regulations or directions is made up of regulations and sub-regulations (or items and sub-items), containing carefully described powers, rights and obligations. They also clearly specify which regulations or directions they repeal or amend. They are often drafted by civil servants that have training and experience in legislative drafting. As a result, they are capable of describing, with reasonable clarity, what is expected of citizens and how the powers of public officials are circumscribed:
- 52.1. In contrast, an announcement (or a speech, or a press release, or a tweet) has none of these attributes. They are written in a narrative style. They are, at best, written by speech-writers or spin-doctors. They are not aimed at describing rights, obligations and powers – they are usually

political documents aimed at justifying a position or influencing public opinion.

52.2. The presidential announcement, again, illustrates the point well. The paragraphs dealing with school closures are but a small part of the address. The rest is intended to describe the current state of the pandemic, to sell school closures to sceptical parents, to describe fiscal measures to alleviate the impact of the pandemic and initiatives to combat corruption, and to motivate and inspire South Africans in difficult times.

52.3. What the announcement does not contain is information that teachers, school management, parents and learners need. It does not specify when learners other than those in Grades 7 and 12 will return to school. It does not specify whether and how, the current timetable in the school directions have been amended. It does not specify when teachers other than Grade-12 teachers must return to school. A regulation or a direction would, by its nature, contain this information.

(b) *Alternatively, the presidential announcement should be reviewed and set aside*

53. If this Court were to take a different view of the matter and were to find that the presidential announcement is (or reflects) a decision to close schools that is not a nullity, then the DA seeks an order declaring such decision unlawful, and reviewing and setting it aside.

54. The reason for this is simple. The presidential announcement either —

(a) describes an earlier decision, by Cabinet, to close schools; or

(b) contains a decision by the President to close schools, because he made the announcement.

55. Regardless of whether the position is (a) or (b), such a decision would be unlawful because there is no law (whether in a statute, regulation or direction) that gives Cabinet or the President the power to close schools. Any such decision falls to be reviewed and set aside for this reason alone.

56. Importantly, it is not open to the Minister to claim that the decision to close schools is hers because in the press release I have annexed above as 16, she welcomed the decision and expressly described it as one by Cabinet.

57. While the applicant's review relief does not depend on it, I note that a decision closing schools is unlawful and unconstitutional for a host of other reasons:

57.1. It clearly limits the right of access to basic education. This limitation is unjustifiable because, on the Minister's own version, it does not serve the interests of children. In her 24-July media release (already annexed as 16), she admitted that —

'the latest opinions of the Ministerial Advisory Committee, medical and science experts is that learners are better at school than in communities and homes where the infections are actually taking place'.

57.2. For the same reason, school closures limit the right of children to have their best interests protected under section 28(2) of the Constitution.

57.3. It is, moreover, clearly disproportionate. On 21 July 2020 (two days before the Presidential announcement), the Western Cape Minister of Education released a study assessing how Western Cape public schools that were open were faring under the pandemic. A copy of the study is annexed marked '22'. It found, *inter alia*, that —

57.3.1. only 0.8% of WCED staff were infected with COVID-19;

57.3.2. the rate of new infections among WCED staff was decreasing;

57.3.3. only 0.1% of learners had tested positive for COVID-19, and no deaths had been reported to the WCED;

57.3.4. over half of Western Cape schools have never reported a single COVID-19 infection; and

57.3.5. no evidence existed that teachers and learners were more likely to contract COVID-19 at school than elsewhere.

57.4. There are at least some regions (including the Western Cape) where it is safe for schools to remain open. And yet the President (or Cabinet) chose to close public schools everywhere. A decision that is disproportionate is unjustifiable under section 36 of the Constitution.

57.5. Closing schools is, moreover, deeply irrational. Currently, buses and minibus taxis may run at full capacity for trips of up to 200km (COVID regulations, reg 43(3)(b)). People may gather in places of worship (reg 37(1)(a)), funerals (reg 37(1)(b)), work (reg 37(1)(c)) and cinemas (reg 37(1)(e)). People may visit supermarkets (reg 33(1)(c)). Indeed,

children may do all of these things. And yet they are not permitted to go to (public) school. There is no rational basis for this differential treatment.

- 57.6. In addition, the presidential announcement only purports to close public schools. Private schools are free to open. If government genuinely was of the view that schools posed a greater risk for the spread of COVID-19 than, say, crowded taxis or casinos (see reg 37(1)(g) of the COVID regulations), it would have closed all schools and not just public schools.
58. If there was a properly gazetted decision by the Minister or the COGTA Minister, the applicant could raise all the above complaints through a challenge to that direction. But as there is only a speech, it is neither necessary nor possible for this Court to consider the substantive irrationality and unreasonableness of the decision. It is invalid for the simple reason that:
- 58.1. The purported to decision makers (Cabinet or the President) had no power to take the decision; and/or
- 58.2. Any power that exists has not been properly exercised because no decision has been published in the Government Gazette.
59. For present purposes, the Applicant's complaint is limited to those two grounds of review. However, the applicants reserves its rights to raise additional review grounds on a future occasion.

(c) Additional relief

60. In addition to an order declaring the presidential announcement to have no effect, or setting it aside, the Applicant seeks three prayers in order to give effect to

those orders, and to put a stop to government's practice of legislating through press statement.

61. First, the applicant seeks an order declaring that it the Respondents' conduct was unlawful and unconstitutional because they made the announcement without subsequently ensuring that, on or before 27 July 2020, either:

61.1. the contents of that announcement was published in the *Government Gazette*; or

61.2. the public was informed that there was no legal instrument giving effect to the presidential announcement, was unconstitutional and unlawful

62. The respondents were under a duty to either ensure that the statement was given effect to in law by the announced date, or to make it clear that there was no such law. Their inaction sought to capitalise on the good faith belief that a presidential announcement would be given the necessary legal effect. The failure to correct that misrepresentation has resulted in schools closing without any lawful basis.

63. Second, the applicant seeks a declaration that speeches and press statements announcing government policy do not have the force of law unless and until they are published as regulations or directions in the *Government Gazette*. One would think this was unnecessary. However, it is justified by the government's pattern of conduct over the last few months.

64. Third, the applicant seeks an order directing the respondents to bring the order to the attention of the provincial departments of education. This is vital so that they know what the law is and is not, and can act accordingly.

URGENCY

65. The application will be unable to obtain substantial redress at a hearing in due course. There are at least three reasons for this:

65.1. First, the announcement has had the effect that schools have closed because MECs, HoDs and SGBs have assumed that the speech was binding, or that it will be followed by a proper regulation. Those were reasonable assumptions. But the Respondents' failure to promulgate a binding decision giving effect to the announcement means they have acted unlawfully, or have been duped into closing schools when there is no legal obligation on them to do so. It is urgent to remedy that ongoing illegality.

65.2. Secondly, under the announcement as it stands, the closure it mandates will end in four weeks, on 27 August 2020. Without an urgent hearing, thus, what is unlawful about the announcement will be over before it can be reviewed.

65.3. Thirdly, I have described the disturbing and growing tendency of members of the executive to rule by press release, interview, tweet or decree and without publishing their decisions in the *Government Gazette* (or only publishing them after the relevant decision is treated as binding). There is every reason to think that this will continue – unless this Court intervenes. If this matter is heard in the ordinary course, the relevant decisions will be far in the past.

66. The applicant has acted with all possible haste:

- 66.1. The presidential announcement was made in the evening of Thursday, 23 July 2020.
- 66.2. On Friday and over the weekend, the applicant consulted with its lawyers. The applicant also thought it prudent to wait for a short while because it assumed a gazetted regulation or direction would be published before Monday 27 July 2020.
- 66.3. When none came, on Monday, 27 July 2020, the applicant's attorneys wrote to the respondents, asking whether the announcement was intended to have the force of law, and, if not, when the envisaged closure of schools would be gazetted. I annex a copy of this letter marked 'FA23'. No response was received by the deadline. Counsel began drafting this application in the afternoon of Monday, 27 July 2020.

CONCLUSION

67. The presidential announcement is a legal nullity. Alternatively, it is clearly unlawful and deserves to be reviewed and set aside. And yet the President and the Minister appear to be under the impression that the President can close every public school in the country by making a speech. This is not how things work in a constitutional democracy. The applicant is forced to approach this court for an order that would make this clear.

WHEREFORE I pray for the relief sought in the notice of motion.

PROFESSOR BELINDA BOZZOLI

Signed and sworn before me at JOHANNESBURG on Wednesday, 29 July 2020, the deponent having acknowledged that she knows and understands the contents of the affidavit, that she has no objection to taking the prescribed oath and that she considers it binding on her conscience.

COMMISSIONER OF OATHS