

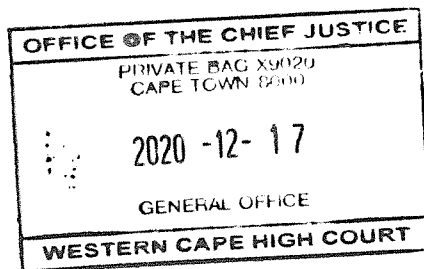
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 18967/2020

In the matter between:

DEMOCRATIC ALLIANCE

and



First Applicant

MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS

First Respondent

PRESIDENT OF SOUTH AFRICA

Second Respondent

MINISTER OF HEALTH

Third Respondent

PREMIER OF THE WESTERN CAPE PROVINCE

Fourth Respondent

NOTICE OF MOTION

KINDLY TAKE NOTICE THAT the applicants intend making application on **MONDAY 21 DECEMBER 2020 at 14h30** or so soon thereafter as counsel may be heard, for an order:

1. Dispensing with the forms and services provided for in the Uniform Rules of Court and directing that the application be heard as a matter of urgency in terms of Rule 6(12).

- 2.1 Declaring that Regulations 69(12)(b) and 84(12)(b) read with Item 4 of Table 4, of the Amended Regulations promulgated in terms of section 27(2) of the Disaster Management Act 27 of 2002 by the Minister of Cooperative Governance and Traditional Affairs in GNR 1346 in GG 43997 (15 December 2020) (**Amended DMA Regulations**) are unconstitutional, unlawful and invalid to the extent that they close beaches in the Garden Route District to the public for the period from 16 December 2020 until 3 January 2021.
- 2.2 Reviewing and setting aside Regulations 69(12)(b) and 84(12)(b) read with Item 4 of Table 4 of the Amended DMA Regulations.
- 3.1 Declaring that Regulations 69(12)(f)(i) and 84(12)(f)(i) of the Amended DMA Regulations are unconstitutional, unlawful and invalid to the extent that they close all beaches otherwise open to the public in the Western Cape Province between 18h00 and 09h00.
- 3.2 Reviewing and setting aside Regulations 69(12)(f)(i) and 84(12)(f)(i) of the Amended DMA Regulations to the extent that they apply in the Western Cape Province.
4. Directing that the first and second respondents to pay the applicants' costs, including the costs of two counsel.
5. Granting the applicants further and/or alternative relief.

TAKE NOTICE FURTHER that if you wish to oppose this part of application, you are required:

- (a) On or before **17h00 on Thursday 17 December 2020**, to notify the applicants' attorneys in writing that you intend to oppose the application and appoint an address at which you will accept notice and service of all documents in these proceedings;
- (b) To file your answering affidavit in respect of that relief, if any, on or before **12h00 noon on Saturday 19 December 2020**, in which event the applicant will file its replying affidavit on or before **09h00 on Monday 21 December 2020** and the parties must file their heads of argument by **12h00 on Monday 21 December 2020**

TAKE NOTICE FURTHER that the applicants will rely on the affidavits of **JOHN HENRY STEENHUISEN** together all annexures, and confirmatory affidavits, in support of this application.

TAKE NOTICE FURTHER that the applicants appoint the address of their attorneys, indicated below, where they will accept service of all process in this matter. The applicant requests service via email at elzanne@mindes.co.za and karin@mindes.co.za.

KINDLY SET THE MATTER DOWN FOR HEARING ACCORDINGLY.

4

E JONKER

MINDE SCHAPIRO AND SMITH INC.

Applicant's attorneys

Care of Van der Spuy Attorneys

Suite 603 Constitution House

Adderley Street

Cape Town

Email: elzanne@mindes.co.za; karin@mindes.co.za

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

First respondent

Served via the State Attorney

CAPE TOWN

Per email: lgolding@justice.gov.za ; amugjenkar@justice.gov.za;
mbiko@justice.gov.za

AND TO PRESIDENT OF SOUTH AFRICA

Second Respondent

Served via the State Attorney

CAPE TOWN

Per email: lgolding@justice.gov.za; amugjenkar@justice.gov.za;
mbiko@justice.gov.za

AND TO MINISTER OF HEALTH

Third Respondent

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Per email: lgolding@justice.gov.za; amugjenkar@justice.gov.za;
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AND TO PREMIER OF THE WESTERN CAPE PROVINCE

Fourth Respondent

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FOUNDING AFFIDAVIT

I, the undersigned,

JOHN HENRY STEENHUISEN

declare under oath:


1. I am the Federal Leader of the Democratic Alliance, the applicant (the **DA**) and a Member of Parliament.



2. I am authorised to depose to this affidavit on behalf of the DA. I attach as **FA1** a letter of the Chairperson of the Federal Executive Ms Helen Zille granting me authority to represent the DA in these proceedings pursuant to clause 1.5.6 of the DA's Constitution (available online at <https://www.da.org.za/why-the-da/constitution>).
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 relief 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, it is materially relevant to the application and I pray that the evidence it be admitted in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988. I make legal submissions on the advice of the DA's legal representatives.

INTRODUCTION

4. The DA challenges the decision of the National Government to limit the number of hours that beaches across the Western Cape are permitted to be open, and to impose a blanket closure of beaches in the Garden Route district for the period of festive season.
5. The DA emphasises that it supports rational, reasonable and lawful measures to reduce the risk of transmission of the Covid-19 virus.



6. The application is brought not to undermine the Government's response to the pandemic, but rather to assert the rule of law in a time of emergency and crisis and to ensure that measures adopted are rational and lawful.
7. On 14 December 2020, the President announced that Cabinet decided to impose further restrictions to address a rise in Covid-19 cases across the country (a copy of the statement is attached as **FA2**).
8. The President announced that in certain areas with high infection rates, *"beaches and public parks will be closed for the duration of the festive season from the 16th of December to the 3rd of January"*, including beaches in the Garden Route district.
9. The President also announced that other beaches which were not being closed (including those in the rest of the Western Cape) would be open only for limited hours between 9am and 6pm.
10. On 15 December 2020, in GNR 1346 in *Government Gazette* 43997, the COGTA Minister promulgated regulations in terms of section 27(2) of the Disaster Management Act 57 of 2002 (**DMA**) (**Amended DMA Regulations**). I attach a copy as **FA3**.
11. In terms of Regulations 69(12)(f)(i) and 84(12)(f)(i) *"all beaches that are open to the public shall ... be open between 09H00 and 18H00."* Therefore, beaches which are otherwise open to the public in the Western Cape have been shuttered between 18h00 and 09h00.
12. In terms of Regulations 69(12)(b) and 84(12)(b) read with Item 4 of Table 4 of the Amended DMA Regulations, *"beaches in the Garden Route District will be*

closed to the public from 16 December 2020 until 3 January 2021. In other words, the COGTA Minister has imposed a blanket closure of beaches in the Garden Route district for the entire festive season.

13. Neither the Minister nor President could provide reasons for the decision regarding the closure of the Garden Route urgently.
14. To the extent that Regulation 69(12)(f)(i) closes most beaches in the Western Cape between 6pm and 9am, it is unlawful and irrational. The blanket closure of beaches in the Garden Route district contained in Regulations 69(12)(b) and 84(12)(b) read with Item 4 of Table 4 the Amended DMA Regulations, is unconstitutional, arbitrary and unlawful.
 - 14.1 First, the blanket closure violates the right to freedom of movement entrenched in section 21(1) of the Constitution. It also violates the section 22 right of people in the tourism industry to choose and practice their occupation and trade. The limitation of these rights is not justifiable in terms of section 36;
 - 14.2 Second, neither the blanket closure nor the beach hours restriction are "*necessary*" for the purposes contemplated by section 27(3) of the DMA. The Minister exceeded her regulation-making powers in subsection (2) and violated the constitutional principle of legality;
 - 14.3 Third, the decision to close the beaches in the Garden Route appears to have been made without providing affected stakeholders – specifically individuals making up the tourism industry in the Garden Route – adequate notice or an opportunity to comment on the restrictions. The

Minister was required to provide some opportunity to those adversely affected by her decision to be heard;

- 14.4 Fourth, the blanket closure of beaches in the Garden Route is an irrational and arbitrary measure to address the spread and transmission of the virus. Visiting a beach poses a lower risk of transmission than other activities, especially those held indoors which are still permitted by the Regulation;
- 14.5 Fifth, the decision to restrict access to other beaches in the Western Cape will result in more people visiting these spaces at the same time and larger crowd which is both counter-productive and irrational; and
- 14.6 Sixth, the blanket closure and the beach hours restrictions, interfere with local governments' executive authority over, and right to administer beaches in terms of section 156(1) read with Part B of Schedule 5 of the Constitution.
15. The restrictions in the Garden Route are already having a devastating impact on the battered tourism industry. This industry suffered major financial setbacks due to the pandemic and the government's response earlier in the year.
16. The DA seek orders declaring the relevant regulations in the Amended DMA Regulations to be unconstitutional, unlawful and invalid on these grounds and reviewing them and setting them aside.
17. The regulations are reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**) and/or the principle of legality.



18. It is important to emphasise that the DA seeks orders in respect of beaches in the Western Cape. It is the governing party in the Province and the Provincial Government will ensure that municipalities are able to address any problems occurring at beaches. It has also had time to consult with the officials in municipalities it governs.
19. In this affidavit:
- 19.1 First, I set out the parties' details;
- 19.2 Second, I explain why the impugned Regulations unjustifiably violate the Bill of Rights;
- 19.3 Third, I explain why the impugned Regulations are unlawful, irrational and procedurally unfair;
- 19.4 Fourth, I explain why the impugned Regulations unconstitutionally impede the executive authority and right of local government to regulate beaches;
- 19.5 Fifth, I set out the remedy sought by the DA in more detail; and
- 19.6 Finally, I explain why the matter is urgent.

PARTIES AND STANDING

20. The DA is 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. The DA is the governing party in the Western Cape.



21. The DA brings the application:
- 21.1 in its own interest as contemplated by section 38(a) of the Constitution;
 - 21.2 in the interests of its members as contemplated by section 38(e) of the Constitution;
 - 21.3 in the interests of all people involved in and employed by the tourism industry in the Garden Route who have no resources to access legal representation, as contemplated by section 38(b) of the Constitution; and
 - 21.4 in the public interest as contemplated by section 38(d) of the Constitution.
22. The first respondent is the **Minister of Cooperative Governance and Traditional Affairs** (the **Minister** or **COGTA Minister**) 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, and served care of the State Attorney at 22 Long Street, Cape Town.
23. The second 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 served care of the State Attorney at 22 Long Street, Cape Town.
24. The third respondent is the **Minister of Health** who is cited in his capacity as the cabinet member responsible for health. He is cited insofar as he may have



an interest in the relief sought in the application and served care of the State Attorney at 22 Long Street, Cape Town.

25. The third respondent is the **Premier of the Western Cape Province**. In terms of section 125(1) of the Constitution the executive authority of the Province is vested in him. He cited insofar as he may have an interest in the relief sought in the application and served care of the State Attorney at 22 Long Street, Cape Town.
26. The DA only seeks costs against the COGTA Minister.
27. Due to the urgency of the matter, the application will be served on the respondents via email.

THE IMPUGNED REGULATIONS VIOLATE THE BILL OF RIGHTS

28. The impugned regulations violate various rights in Chapter 2 of the Constitution.
29. Section 21(1) of the Constitution provides "*Everyone has the right to freedom of movement.*"
30. The blanket closure of beaches in the Garden Route patently violates everyone's right to freedom of movement within the District.
31. Before the closure, anyone was able to access the beaches, subject to the relevant by-laws. Now, no one may access the beaches, unless they are fishermen for fishing purposes (who are in possession of a permit or exemption granted in terms of the Marine Living Resources Act 18 of 1998, see Regulations 69(12)(g) and 84(12)(g)).



32. People wishing to sunbathe, swim, surf, scuba dive, and conduct other economic activities – for example the selling of goods and providing surfing lessons – are not able to access the beach.
33. Furthermore, the beach hours restriction also limits section 21 of the Constitution. Before the Regulations were promulgated, anyone could access beaches subject again to the relevant by-laws. Now (save for the narrow category of fishermen) people are only allowed to visit other beaches for nine hours – even though a day lasts longer than 12 hours in the Western Cape.
34. Section 22 of the Constitution provides *“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.”*
35. The blanket closure of beaches in the Garden Route district violates the right of citizens operating businesses in the tourism industry – which includes everything from accommodation, to restaurants, beach activities, and the wider economy. Only fishermen are not directly affected by the closure.
36. A News24 media report recording the immediate economic impact of the decision to close the beaches in the Garden Route is attached as **FA4**, which sets out the following:
- 36.1 Since the President’s announcement on 14 December 2020, in some towns up to 80% of bookings for accommodation at bed and breakfasts, AirBnBs and guest houses were cancelled;
- 36.2 Travel agents reported that many clients had cancelled their flights to the Garden Route;



- 36.3 The CEO of Tourism for Plettenberg Bay estimated that the area would lose R 200 million in revenue as a result of the beaches being closed; and
- 36.4 That even though there are other activities available for visitors in the area, people primarily come to the Garden Route to enjoy its beaches.
37. The closing of beaches has had an immediate and severe economic impact on the tourism industry within the Garden Route and its wider economy. People operating their chosen businesses, trades and occupations may never recover financially.
38. The harsh and drastic decision to close the beaches thus violated the section 22 rights of these people.
39. The COGTA Minister is required to justify the violations of these rights in terms of section 36 of the Constitution. Any limitation must be reasonable and justifiable in an open and democratic society.
40. The Minister's decisions to impose the blanket ban in the Garden Route and to restrict the hours of access to other beaches in the Western Cape are disproportionate.
41. She failed to have regard to the less restrictive means available to her to achieve the same purpose (as contemplated by section 36(1)(e)). The purpose appears to be control crowds which gather at beaches in the festive season (I refer to the comments made by the President in his statement).



42. There are many other less restrictive means available which will also control crowds and thus reduce the risk of the virus spreading.

43. In respect of the blanket ban in the Garden Route:

43.1 First, the Minister could have decided only to close beaches on specific days when large crowds are known to gather. This was the approach taken in KwaZulu-Natal (in terms of Regulations 69(12)(c) and 84(12)(c)) and could have been adopted in the Garden Route as well;

43.2 Second, the blanket approach does not distinguish between beaches which are smaller or not as busy (and thus less likely to give rise to a risk of spreading Covid-19) and larger or busier ones (which have a greater risk).

43.3 It also does not have consider the fact that access to many beaches can be adequately controlled to ensure that large crowds do not gather. The Minister could have adopted a mechanism to close particular beaches which pose a risk and take action where appropriate.

43.4 Again, she has done so in respect of other beaches: Regulations 69(13) and 84(13) provide that *"Non-compliance with the prohibitions, conditions, days of opening of beaches, and wearing of face-masks and social distancing measures, will result in the closure of those non-complying beaches throughout the festive season."*

43.5 The same could have been adopted in the Garden Route. A blanket ban ignores the specific circumstances of each beach.

44. In respect of the beach hours restriction, the Minister's decision is likely to have the opposite effect of the purpose.
45. Limiting the number of hours in which people can access a beach, does not necessarily lead to fewer people accessing it – the same number of people may seek to access the beach, but will do so in a truncated time.
46. This will lead to (rather than discourage) crowds gathering.
47. The less restrictive means available to the Minister could have included opening beaches only during daylight hours. In the Western Cape the sun rises many hours before and sets many hours after the restrictions. People would be able to access the beach over a longer period of time which would lead to fewer large crowds and reduce the risk of spreading the virus.
48. Municipalities in the Western Cape have the capacity to act and close beaches where necessary to prevent the risk of transmission.
49. These less restrictive means can achieve the same purpose, and probably better, than the blanket closure of beaches and the hours restriction seek to achieve.
50. They will not have the same detrimental and disproportionate impact and effects on constitutional rights.
51. Since less restrictive means are available, the limitation of the rights is not capable of justification and is unconstitutional on this basis alone.



52. Nonetheless, the limitations are also unreasonable because they fail to satisfy the minimum threshold requirement of rationality. This is a further reason for why the Regulations are unconstitutional.
53. As the impugned Regulations unjustifiably limit the rights, they are unconstitutional. This Court is obliged by section 172(1)(a) to make a declaration to that effect.

THE IMPUGNED REGULATIONS ARE UNLAWFUL, IRRATIONAL AND PROCEDURALLY UNFAIR

54. 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 PAJA and is subject to review in terms of the Act.
55. In terms of the constitutional principle of legality, all exercises of public power 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.


Not “necessary” in terms of section 27(3) of the DMA

56. The Minister relied on section 27(2) of the DMA in promulgating the impugned Regulations. It empowers her to make regulations concerning matters to address national states of disaster, declared in terms of subsection (1).
57. Crucially, section 27(3) provides:

*“The powers referred to in subsection (2) may be exercised only to the extent that this is **necessary** for the purpose of—*

- (a) *assisting and protecting the public;*
- (b) *providing relief to the public;*
- (c) *protecting property;*
- (d) *preventing or combating disruption; or*
- (e) *dealing with the destructive and other effects of the disaster* [my emphasis]

58. In *British American Tobacco South Africa (Pty) Ltd and Others v Minister of Co-operative Governance and Traditional Affairs and Others* (6118/2020) [2020] ZAWCHC 180 (11 December 2020) paras 195-199, a Full Court of this Division held that the term “*necessary*” must be interpreted narrowly.
59. It also held that a wide interpretation may adversely affect constitutional rights and it is rights that must be interpreted broadly.
60. The Full Court also held that whether the making of a regulation constitutes the “*necessary*” step is a jurisdictional fact which is to be ascertained objectively.
61. It was not necessary for the Minister to impose a blanket closure of beaches in the Garden Route and to impose beach hour restrictions for any of the purposes listed in section 27(3) of the DMA.
62. The measures are not necessary for protecting the public (paragraph (a)) as beaches are open spaces. Adequate social distancing measures can be implemented.
63. The restrictions are also not necessary to “*deal[] with*” the effects of the pandemic (paragraph (e)). That less restrictive means could have achieved the same results must mean that the restrictions are not necessary.



64. The jurisdictional fact for exercising the section 27(2) powers was not objectively present.
65. The Minister thus exceed her powers and acted unlawfully.
66. Her decision is accordingly reviewable in terms of section 6(2)(b), 6(2)(d), 6(2)(e)(i), 6(2)(f)(i) and 6(2)(i) of PAJA and the principle of legality.

Procedurally unfair and/or procedurally irrational

67. The decision of the Minister to impose the blanket ban materially and adversely affected the rights of a significant group of the public – individuals operating in and employed by the tourism industry in the Garden Route.
68. In order to give effect to the right to procedurally fair administration action, the Minister should have followed the notice and comment procedure set out in section 4(3) of PAJA.
69. In order to make a rational decision, the Minister was required by the principle of legality to include parties that would be adversely affected by her decision in her decision-making process.
70. While some consultations occurred with representatives of provincial and local government and some industry bodies, it appears that the views of specifically affected individuals were not called for or considered by the Minister.
71. I call on the Minister and the President to disclose to this Court the full details of any consultations or public participation process undertaken before the decision to impose the blanket ban was made.



72. Nonetheless, the Minister's failure to notify the specifically affected group of the public of her intention to impose the blanket ban and her failure to comply with the statutory duty in section 4(1) read with section 4(3) of PAJA to give effect to the right to procedurally fair administrative action, further vitiates the impugned Regulations.

Arbitrary and irrational

73. The closure of the Garden Route beaches and the beach hour restrictions are irrational and arbitrary.
74. In the first place, the impugned Regulations are vague and give no definition of what a "*beach*" is exactly.
75. Is it merely the sand? Or does it include seawaters accessible from a beach? Can a person swim in the sea if they can access it without walking on a beach, or can they board a boat (again not from a beach) and sail in the waters of the Garden Route? Are other nearby places such as estuaries, lagoons, jetties, launch sites, open coastal waters, etc, included in the closures?
76. The impugned Regulations do not say.
77. Without a comprehensible definition, members of the public, SAPS officers and municipal officials will have to determine what is and what is not included in the closure of the beaches (including what activities are allowed and prohibited)
78. It is irrational to close a space without giving a full and proper definition of what that place entails. It also violates the rule of law, as those affected by the impugned regulations do not know what is expected of them.



79. The blanket prohibition is plainly arbitrary, when one has regard to the fact that the Minister has not closed other places where people undertake recreational activities. This includes shopping malls, restaurants, taverns and pubs, as well as places of worship. Large crowds also congregate at these places. In contrast to the beach, they are indoor and have poorer ventilation.

80. Professor Shabir Madhi, a Professor of Vaccinology at the University of Witwatersrand – who has been leading clinical trials for Covid-19 vaccines in South Africa – has spoken out against closing beaches but keeping other places open. He said:

“It makes no sense to close beaches but keep places of worship open. Walking on the beach without a mask is not the main problem here. People gathering in places with poor ventilation are the problem. We’re talking about shebeens, pubs, clubs, indoor seating at restaurants.”

81. I attach a copy of the media report as **FA5**.

82. Professor Madhi also explained:

“Even physical distancing won’t help if you’re in a closed space without great ventilation. Even if it is a small number of people and there is physical distancing, it doesn’t help if there is poor ventilation — it is about airborne transmission. Even an air-conditioning system can actually distribute the virus to a different room.”

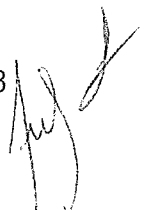
83. Ultimately, he suggested that people go outdoors and avoid indoor public spaces.

84. Professor Madhi’s opinions are consistent with a manuscript recently accepted by *The Journal of Infectious Diseases*.: Bulfone et al ‘Outdoor Transmission of



SARS-CoV-2 and Other Respiratory Viruses, a Systematic Review' (attached as **FA6**).

85. The authors conducted a systemic review of peer-reviewed papers published in prestigious journals and periodicals about the transmission of the virus outdoors.
86. The concluded that "[e]xisting evidence supports the wide-held belief that the risk of SARS-CoV-2 transmission is lower outdoors" as long as mitigation measures are followed. The authors even suggest that "*moving activities to outdoor settings may reduce infections and ultimately save lives.*"
87. The Minister's approach is, with respect, back-to-front. People who would have gone to the beach, now have limited alternative options which are mostly indoors.
88. The outdoors are not only better ventilated, but UV light from the Sun is effective in decreasing the survival of the Covid-19 on surfaces (see **FA6**).
89. This is all not to say that there is no risk of infection outdoors. Rather, that the risk is demonstrably reduced.
90. There is no rational basis to treat beaches in such a disparate manner
91. This is especially in light of evidence that in the outdoors, the virus is less likely to spread. There are also less restrictive means available to the Minister which could appropriately address the risk of transmission.



92. Closing only the beaches will not address the transmission of the virus – nor the knock-on effects on the healthcare system – if other places (with a higher risk of transmission) remain open.
93. To the extent that nearby public places, like rivers and estuaries, are not closed by the Regulations, people may gather there as an alternative. In some instances, those places are smaller than beaches which could lead to overcrowding and a higher risk of transmission.
94. Moreover, there appears to be no basis for treating beaches in KwaZulu-Natal differently from those in the Garden Route.
95. If the Minister is concerned about large crowds gathering on specific days, she could have adopted the same approach as in KwaZulu-Natal, subject to individual beaches being closed where necessary and appropriate.
96. The beach hour restrictions, on Cape beaches outside the Garden Route, are also irrational.
97. Limiting the hours of access on these beaches does not necessarily result in limiting the number of people visiting that place on any given day. If the same number of people visit a beach in a shorter period of time, that will result in congestion and larger crowds.
98. This undermines social distancing – which is the effective tool in fighting the pandemic – and increases the risk of transmission. The measure is therefore not rationally related to the purpose for which it was adopted.



99. At this time of year in much of the Western Cape, the summer daylight exceeds twelve hours.
100. There is no justification for limiting the number of hours to nine, where people could access beaches at other times, and thus reduce the number of people on the beach at any time. That would reduce the risk of transmission.
101. The abrupt closing time of 18h00 – a few hours before sunset – will also have unintended consequences. It will require the use of police resources (which are better spent elsewhere).
102. As people start leaving all at the same time, that could lead to congregating – especially where there is limited access to the beach concerned.
103. People who have gathered on the beach during the day, who are forced to leave, will in all likelihood congregate in other spaces – most probably closed shopping and other indoor places.
104. Those results are incongruent with the Minister's purpose of reducing crowding to decrease the risk of transmission.
105. Any suggestion that the 6pm to 9am beach ban will assist in policing and enforcement must be rejected. A strict cut-off time will require the deployment of many officers to move people off the beach. Those resources could be used for other purposes. To be enforced, the 15 hour ban will also require the SAPS and Municipalities to patrol beaches, further using valuable resources.



106. I respectfully submit that the Minister should be making decisions to encourage social distancing, and to discourage congregating – restricting beach hours has the opposite effect.
107. Western Cape Municipalities are equipped and capacitated to regulate and control beaches within their jurisdiction, and to take action where necessary and appropriate. This includes closing beaches if appropriate or regulating the numbers of people who have access.
108. For these reasons, limiting the number of hours in which the public may access other beaches in the Western Cape is irrational.
109. The Minister's decisions are therefore reviewable in terms of section 6(2)(f)(ii) of PAJA and/or the principle of legality.

Ex post facto reasons

110. Finally, when the President and GOCTA Minister were requested for the reasons of the decision to impose the blanket beach closure in the Garden Route, they could not provide them urgently.
111. The President asked for an extension of four days in which to provide reasons (which will be after the application is issued), which the DA's attorney do not accede to (see annexures **FA8.2** and **FA8.3**).
112. The reasons for the decision as well as the information which informed it, should have been in the possession of the Minister (and the President) when the decision was made.



113. The failure urgently to provide reasons must lead to an inescapable inference that reasons did not exist. Any reasons which may be provided by the Minister (or the President) will be manufactured *ex post facto*.

114. It is impermissible for a decision-maker to rely on such *ex post facto* reasons.

THE CONSTITUTIONAL RIGHT AND AUTHORITY OF LOCAL GOVERNMENT TO ADMINISTER AND CONTROL BEACHES

115. Section 156(1)(a) of the Constitution provides that "*A municipality has executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5.*"

116. Part B of Schedule 5 includes as local government matters "*Beaches...*" and "*Public places.*"

117. Accordingly, the Constitution vests authority for the administration of beaches in local governments.

118. Other spheres of government are not permitted to interfere with those powers:

118.1 Section 151(4) of the Constitution says "*The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.*"

118.2 Section 41(1)(e)-(g) requires all organs of state (including the Minister and President) to:

"(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

- (f) *not assume any power or function except those conferred on them in terms of the Constitution;*
- (g) *exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere."*

118.3 While section 156(3) provides that a by-law which is inconsistent with national legislation is invalid, that is subject to section 151(4) (cited above).

- 119. By promulgating the impugned Regulations, the Minister acted contrary to these various constitutional provisions.
- 120. She impeded the Garden Route District Municipality's right and authority to administer its beaches and has encroached on the geographical, functional and institutional integrity of the Municipality (and its constituent local municipalities). This is the same for all coastal municipalities in the Western Cape where beach hours has been restricted.
- 121. That is unconstitutional.
- 122. Municipalities in the Western Cape – including in the Garden Route – are adequately equipped to exercise their authority, monitor beaches and take action where there is an increased risk of transmission.
- 123. There is no need for the blanket ban or the beach hours restrictions.
- 124. I attach as **FA7.1**, version 1 of the Western Cape Province's Covid-19 Resurgence Response plan, which notes the following:



124.1 The Western Cape is experiencing a resurgence of the transmission of the virus.

124.2 In accordance with criteria determined by the National Department of Health, if a municipality receives an “Alert” classification – that is “*Greater than or equal to 10% increase in new COVID-19 cases compared to 7 days prior (based on the 7-day moving average)*” – it will be required to develop an integrated response plan with specific activities/interventions to manage the COVID-19 resurgence.

124.3 Part of the plan is to develop and adopt “*An integrated law enforcement plan coordinating activities of all law enforcement agencies and focussing on the relevant recreational facilities of the particular region (beaches, caravan parks, etc).*”

124.4 The City of Cape Town has adopted a law enforcement plan which includes daily beach patrols, and a volunteer programme to clamp down on alcohol consumption at beaches.

125. The Mossel Bay Municipality (which forms part of the Garden Route District) has adopted comprehensive “Risk Adjusted Strategies for Beaches” (attached as **FA7.2**) in terms of which:

125.1 It procured additional security guards to: patrol beaches; inform visitors of protocols, and remove visitors who are not complying.

125.2 Security guards in parking areas will be given additional responsibilities to inform persons of Covid-19 and ensure that alcohol is not brought onto beaches.

125.3 Lifesavers who are deployed from 1 December 2020 to 31 January 2021, will also to inform visitors to the beaches of the relevant protocols.

125.4 The Municipality also notes that closing beaches could have unintended consequences, such as crowds gathering in estuaries and rivers resulting in a higher risk of transmission of the virus.

126. The Mossel Bay Municipality is able to give effect to these strategies. Other Municipalities also have capacity to implement similar strategies, depending on the nature of the beaches in their areas of jurisdiction.

127. The Executive Mayors of the Garden Route District Municipality as well as the George and Hessequa Municipalities each addressed a letter to the President explaining the devastating impact on their communities of the decision to close their beaches for the whole festive period, setting out their ability to take action to prevent transmission, and requesting that consideration be given to adopting less restrictive measures (such as those KwaZulu-Natal). I attached these letters as **FA7.3** to **FA7.5**.

128. There is no justification to impose a blanket closure in the Garden Route and to adopt beach hours restrictions, where local governments – acting with the Province – are able to exercise their original constitutional competencies and functions to control and regulate access to beaches.

REMEDY

129. The Court's remedial powers are contained in:

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

129.2 Section 172(1) of the Constitution, which obliges 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

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

130. The DA seek the following orders.

130.1 In respect of the Regulations affecting the Garden Route:

- Declaring that Regulations 69(12)(b) and 84(12)(b) read with Item 4 of Table 4, of the Amended DMA Regulations are unconstitutional, unlawful and invalid to the extent that they close beaches in the Garden Route District to the public for the period from 16 December 2020 until 3 January 2021; and
- Reviewing and setting aside Regulations 69(12)(b) and 84(12)(b) read with Item 4 of Table 4 of the Amended DMA Regulations.

130.2 In respect of the 6pm to 9am beach ban:

- Declaring that Regulations 69(12)(f)(i) and 84(12)(f)(i) of the Amended DMA Regulations are unconstitutional, unlawful and invalid to the extent that they close all beaches otherwise open to the public in the Western Cape Province between 18h00 and 09h00.

- Reviewing and setting aside Regulations 69(12)(f)(i) and 84(12)(f)(i) of the Amended DMA Regulations.


131. These remedies are constitutionally mandated, appropriate and just and equitable for the following reasons:

131.1 First, the declaratory orders will vindicate the rule of law. They will also confirm that in our constitutional democracy government is required to act lawfully and rationally in making decision, and respect rights and the constitutional functions of different spheres of government, especially in times of emergency or crisis;

131.2 Second, once the impugned Regulations are set aside, the COGTA Minister will be entitled to adopt lawful, rational and appropriate measures to address the transmission of the virus. Her responses must be proportionate and respect the rights of everyone to freedom of movement and of those businesses to practice their trade and profession.

132. The DA seeks relief insofar as beaches in the Western Cape are concerned. It is the governing party in the Province and the Provincial Government will ensure that municipalities are able to address any problems occurring at beaches.

133. In so doing the DA does not in any way suggest that measures adopted in other provinces are constitutional. Indeed those measures may well be unconstitutional and unlawful.



URGENCY

134. This application is necessarily brought on extreme urgency. It will be issued on Thursday, 17 December 2020 and heard on Monday 21 December 2020.

135. The truncated timeline and reasonable in the circumstances:

135.1 The blanket closure of Garden Route beaches was imposed suddenly and had an immediate impact on various rights. It will expire on 3 January 2021 (unless it is extended by the Minister).

135.2 If urgent relief is not granted, the relief will become moot and the rights violations which are presently ongoing will never be remedied. Any other form of relief would not be effective.

135.3 The longer the blanket ban is in place, the less likely it is that tourists will return to the Garden Route district – struggling businesses will not be able to recover anything. It is imperative that the application is heard before Christmas.

135.4 Moreover, the longer the blanket closure is in place, and the beach hour restrictions are enforced, the greater the likelihood is of crowds gathering. This could lead to greater transmissions, which should be halted as soon as possible.

136. The DA has also come to Court as soon as it was practicable:

136.1 The President's announcement of the beaches closures and restrictions was made on the evening of 14 December 2020.



- 136.2 The Regulations came into effect over the next two days.
- 136.3 The DA did not approach the Court immediately.
- 136.4 Instead, on 15 December 2020, the DA's attorney addressed a letter to the Minister and the President urgently requesting the reasons for the blanket closure by 17h00 on 16 December 2020 (attached as **FA8.1**).
- 136.5 On 16 December 2020, an official in the President's office responded requested an extension to Friday, 18 December 2020 – that is four days from the request – to provide reasons (attached as **FA8.2**).
- 136.6 No response was received from the Minister (who is the decision-maker in terms of the DMA).
- 136.7 The DA's attorney responded immediately to the official in the President's office stating that such an extension is not acceptable, especially because the decision – with its drastic consequences – had already been made and the reasons and information should be readily available.
- 136.8 The DA's attorney granted an extension until 10h00 on Thursday 17 December 2020, indicating that she had instructions to bring this application (see **FA8.3**).
- 136.9 The President's office responded the same day and noted the extension (**FA8.4**).
- 136.10 The application will be launched on 17 December 2020 and be heard on Monday 21 December 2020.



137. The case is urgent and requires an urgent and immediate determination.

CONCLUSION AND COSTS

138. DA has made out a case for the relief sought in the notice of motion and requests orders:

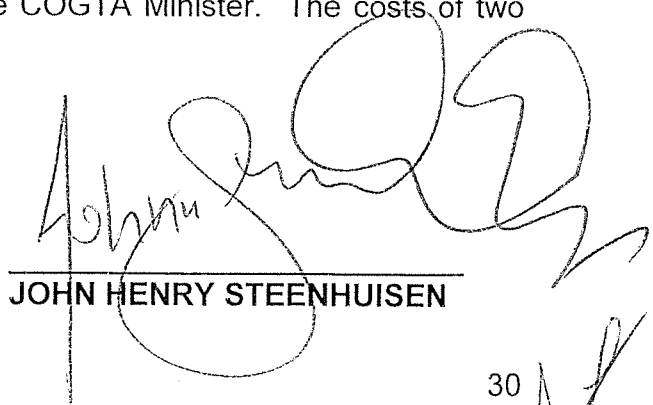
138.1 Declaring that Regulations 69(12)(b) and 84(12)(b) read with Item 4 of Table 4 of the Amended DMA Regulations are unconstitutional, unlawful and invalid to the extent that they close beaches in the Garden Route District to the public for the period from 16 December 2020 until 3 January 2021.

138.2 Reviewing and setting aside Regulations 69(12)(b) and 84(12)(b) read with Item 4 of Table 4 of the Amended DMA Regulations.

138.3 Declaring that Regulations 69(12)(f)(i) and 84(12)(f)(i) of the Amended DMA Regulations are unconstitutional, unlawful and invalid to the extent that they close all beaches otherwise open to the public in the Western Cape Province between 18h00 and 09h00.


138.4 Reviewing and setting aside Regulations 69(12)(f)(i) and 84(12)(f)(i) of the Amended DMA Regulations.

139. The DA seeks its costs only against the COGTA Minister. The costs of two counsel are justified.



JOHN HENRY STEENHUISEN

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 Cape Town on this the 17 day of **DECEMBER 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**

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