**SITTA CC South Africa National Disaster Management Act 57-2002 19.4.20**

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The National Disaster Management Act, Covid -19 measures, fundamental rights affected and infringed and remedies – short analysis

1. Introduction:
2. This is a short and concise legal analysis for non-jurists, especially enterprises and business of all kind. Mumbo-jumbo is avoided and the purpose is to give you a first push for an in-depth analysis for your situation and legal needs.
3. What is the difference between a state of emergency according to article 37 of the (ZA) Constitution and a disaster according to the NDM Act?

Both are extremely serious and severe threats which in article 37 (1) (a0 can also include a natural disaster, for example an epidemy. The difference is that according to article 37 the declaration of emergency is necessary *to restore (public) peace and order* and the essence of an disaster is (Chapter I, article 1 (b) ) a **magnitude** which exceeds (from the point of view of an adequate average analysis) the capability of the affected to help themselves using their own resources.

1. a) All legislation enacted, ordinances, orders, measures and activities by state organs must be judged if under the disaster situation
* they are necessary and fit to restore (or preserve from imminent danger) peace and order and in the other case
* are necessary and fit to prevent, reduce, mitigate one disaster and response rapidly and effectively to a disaster and its consequences with the aim to reduce or annihilate the ‘magnitude’.
* Damages are limited , risks and dangers decreased. But also we have to test if under once risks, dangers and damages are increased in (an)other sphere and weight, if the overall balance can be justified or not,

Protected in the first case is public peace and order and in the second case the individual or a community lacking necessary abilities and resources. (Test of purpose)

b) In addition, any infringement or limitation or reduction in essence of a right, especially a fundamental right contained in Chapter 2 and 3 of the constitution must be judged if

* in general, they are necessary to defend and restore the protected constitutional or legal properties and values and

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* From a practical point of view are fit, useful and proper to defend and restore the protected constitutional or legal properties and values. (Test of legal limits)
1. We are NOT in a national state of emergency according to article 37. That means that all actions and ordinances, orders, measures and activities do not derive from the constitution itself BUT from a normal Law , the NDMA.

That the NDMA cannot give state organs or anyone more powers and possibilities than article 37 should be and is evident. South African has a hierarchy of norms with the basic principles of the constitutions highest, then coming the Constitution itself, then normal laws, then ordinances or rules based on normal laws and then individual activities or measures based on the foregoing norms.

1. Therefore, the provisions of the NDMA and all state activities based on it **must be read, understood and interpreted with an " *automatic reflection and reference towards the constitution*".**
2. As far as a definition are concerned, we refer to article 1 of the said Act.
3. Lock down measurements and orders;” It’s a disaster! Is it ? “:
4. For the purpose of this opinion all Law amendments, ordinances, orders, measures and activities by state organs are called ‘ C-19 measures ‘.
5. We will not go into medical, epidemiologic or virologic details of the corona virus and the disease called Corvid-19. This specific type of virus is new, spreads or did spread very quickly (geometric progression or exponential) , is or was highly contentious and is an additional severe burden to the public health system. We refer to our consideration son C-19 dated 17.3.2020.

The specific threat lied in the doubling of registered infections every two days, the large number of people infected or weakened by the consequences of Tbc or AIDS, extremely unhealthy conditions in ‘informal settlements’ , a possible unbearable strain on the public health system and the coming of winter in the southern hemisphere. This and a possible very negative development constituted a dangerous mix around mid of March 2020.

 Irrespective of mortality this constitutes a ‘magnitude’ ( Article1, (b) NDM Act) but not an imminent threat to public peace and order and also – until now – has not the capacity to endanger public peace and order or can break it down.

The situation, the knowledge, information, experiences, both nationally and internationally change very quick and therefore measurements must be constantly adapted to a new situation etc in order to be able to serve the purpose(s). Monitoring, measuring and evaluating DM plans and initiatives in the field of prevention, mitigation and response is an important duty of the NDM centre before and during a disaster according to article 21.

The measurements introduced are very strict especially under the light of low numbers if compared with other states, but the government has obviously seen that other states lost a lot of time and had at the time of declaring a national disaster identified a comparative advance by comparing the development in other states and in South Africa, especially in numbers of affected persons.

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As of mid of April the growth rate of registered infections went down to about 3-4 percent per day, meaning a doubling of registered infections every 3 – 4 weeks (‘doubling time’) . BUT from Thursday 16th to Friday 17th of April they rose from 2505 registered infections to 2,783 meaning a rise of nearly 7 percent. *If this is a severe trend or just a statistical variation and especially based on the fat of far increased testing’s ( at present the more you test the more registered infections you get which may contain more asymptotical or very mild cases than in the past ).* But also, the number of registered healed persons is rising, as the healing process needs about 2-4 weeks a lot of persons become healthy again within the doubling time which is both statistically and epidemiologically relevant as this is a counter effect against contagion. In any way asymptotic infections ( one’s with no or only very mild effects )must be considered whose number seem to be high or very high according to various studies in various countries. Spot check testing may reveal secure estimations.

As per Saturday 18th 108,021 tests had been made,3034 positive tested, sick persons (2.81 % of tested), 903 persons recovered ( 22.93 percent of all cases) , 52 death ( 1.32 of all cases or 0.048% of all tested). If we combine this percentages to the number of all South Africans, about 55 million, we could expect about 2.185 million infections of which most could be asymptotic or mild cases. About 26,600 deaths could be expected over a longer period in which deaths primarily caused by old age fragility, preconditions or other multiple causes ( anyway” deaths) should be deducted or taken into accounts. Finally, overall death rates of previous years and months must be compared with developments this year. Surely every single death is tragic, but sickness, infections and deaths belong to human life and , also based on international experiences and developments the disaster mainly lays in the lack of proper preparations to disaster situation, sloppiness, lack of rational analysis, late decisions, panic reaction due to lack of proper disaster training.

 According to serious estimations and calculations internationally the death rate is seen as being below one percent, around 0.5 percent or lower of all infections, registered or not. In relation to the whole population of a state the death rate is then even far lower. Also it must be taken into account if someone’s death is caused by C-19 only or if multiple reasons exist or if previously such deaths would have been registered under other causes ( that means that statistically we could see an decrease in the number of deaths reported for other diseases in the respiratory tract). All that must be considered carefully.

As of 17.4.2020 restrictions on economic activities as far as mines, ports and ICTs (call centres) had been eased.

1. Measurement for the professionality of measures is also if they are based on useful information which at the time being the state possessed or should have possessed if being orderly prepared according to the provisions of the NDM Act.
* What did the state organs know ?
* What they should have known if having been careful prepared ?
* Which additional information they gained later or should have gained if acting carefully?
1. Measures can be grouped as follows:
* *Medical:* f e preparation of hospitals, submission to treatment by infected people, quarantine.
* *Hygienic:* f e disinfection in shops etc , wearing of masks,

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* *Compartmentalisation*: travel restrictions or bans, social distance rules, reorganizing of work like homework or reorganizing shifts , rules on all form of public (everything other than own vehicle ) transport, stay at home rules,
* *Isolation*: of groups exposed to C-19 with a high risk like elderly, people with preconditions or general in a fragile health state.
1. Following the concept and logic of the NDM Act measures must be questioned and judged as follows:
2. Does the measure mitigate according to the definition (reducing the impact or effects of the disaster)
3. Does the measure prevent (stopping the disaster)?
4. Is it a response (bringing relief to people and communities)?
5. The following organs are constituted by the NDM Act:
6. Administrator of the Act according to article 3 being a cabinet minister designated by the president.
7. Intergovernmental committee according to article 4 ,
8. NDA management forum according to article 5,
9. NDA framework according to article 6 being both an organisation and a policy,
10. NDA centre according to articles 8 ff.
11. The following policies are to be prepared, instituted and build up according to the NDM Act:
12. NDM framework, see above,
13. System of integrated and coordinated disaster management according to article 9,
14. Preparation and prevention activities By NDM centre according to article 15,
15. Communication and information system according to article 16-18,
16. Preparatory plans and strategies according to article 19,
17. Guidance to prevention and mitigation according to article 20,
18. Monitoring, measuring and evaluating before, during and also after a disaster according to article 21,
19. Advice and guidance according to article 22,
20. According to article 25 (1) (a) (b) (c) disaster management plans by each national organ within the NDM framework.
21. To judge C-19 measures legally we have to ask:
* Which policies had been prepared especially in relation to epidemics ?
* The content of these policies?
* Are they formulated and constructed *arte egis,* means are they reasonable, effective, adequate, suitable and built on up to date scientific and technical knowledge and experience?

If the answer to the third question is ‘yes’’ they are lawful but the question if constitutionally admissible remains. If the answer is no or partially ‘’ no” they are

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not lawful and then maybe in addition also an unlawful infringement of fundamental rights as they miss the test laid out in paragraph A.3.

Access to this information is guaranteed according to article 32 (1) (a) of the constitution.

1. For the purpose of this opinion we base our considerations on the situation end of March ( **situation ./A**) and mid of April shortly before the extension of the C-19 measures and after (**situation ./B**) as a measure in situation ./A could have

been correct, meaningful, in line with the NDM Act and constitutional but due to change of events partly or wholly turn to the opposite under situation ./B .

1. As a general rule formulated out of the definitions of the terms mitigate, prevention and response purpose is always to limit damages and every measurement must be evaluated not only which damages  *in concreto* or in *abstracto* it can prevent or mitigate but also if it can cause damages in other fields which are as big or even bigger than the others. As the proverbs – cynically but straightforward – say “*Operation succeeded, but patient is dead*” or “*it is not important that we life, it is important that the virus is killed*” . That situation must be avoided and is not in line with the aim and purposes of the NDM Act.
2. A lot of measurements had been taken:

Out of many we have chosen the most important. If need for legal advice arises in detail, we can go through all regulations, guidelines, direction and notices and evaluate them. The prime question is if measures are based on catalogue of measures listed article 27 NDM Act.

-confinement of residents to their place of residence with privilege to leave only for performing an essential service, obtaining essential good or services, collecting a social grant or seeking emergency, life saving or chronic medical treatment. This is most severe and goes beyond measurements taken for example in Austria and Germany. Can be based on subparagraph (2) (f), (g)

- rules on medical examination, prophylaxis, treatment, isolation and quarantine. Can be based on subparagraph (2) c) if provided there ,

- Banning of gatherings of any kind or purpose, be it political or private (with the exception of funerals with a limitation on attendants), Can be based on subparagraph (2) (f) ,

- ban of security self- help for example patrols in rural areas. Can be based on subparagraph (2) (c), if provided there,

- restriction of movement between a) provinces b) metropolitan areas and districts and c) into or out of South Africa. Can be based on subparagraph (2) (e), (f)

- closing of all borders save for transportation of fuels and essential goods. Can be based on subparagraph (2) (e) if the whole of South Africa is deemed threatened or affected area, ,

-suspension of visits to certain facilities like prisons. Can be based on subparagraph (2) (f) and maybe ( c ) if provided there,

- Selling of alcoholic beverages by any kind of trader, shop or outlet. That means commercial sale not a private one from one to another one. Can be based on subparagraph (2) (i),

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- Selling of tobacco products by any kind of trader, shop or outlet. That means commercial sale not a private one from one to another one. No base for it.

- Sale of goods and rendering of services is limited to ”essential’ ones ( appendix ./A to regulations) being the privilege of government to define and decide what is essential. Can be based on subparagraph (2) (n) as in general other steps to prevent an escalation etc are admissible but we can see no causal connection between sale of some goods and dissemination of a virus ( If one buys food in a supermarket but may *not* buy children toys, car care or electronic entertainment devices what limiting effect on an epidemy has that?) ,

-closing of all operations save for manufacturing, supply or provision of essential goods and services OUTSIDE place of residence. Can be based on subparagraph (2) (n) as in general other steps to prevent an escalation etc are admissible but we can see no causal connection between closing of some operations and dissemination of a virus,

- Closing of public spaces and utilities including utilities of public transport with a very limited exception for ‘essentials”. Can be based on subparagraph (2) (e),

-restriction of public transport and taxi services with exception to ‘essentials. Can be based on subparagraph (2) (e),

- closing of schools, universities and all kind of learning institutions. Can be based on subparagraph (2) (f) and (c0 if provided there,

- Technically even the maintenance of plants and factories closed is not permitted as only maintenance and repair in relation to critical service ( not even goods)is allowed. Can be based on subparagraph (2) (n) if someone twitches his brain excessively,

,-happily, we can report that the services of the Gender Commission are deemed to be essential,

Each and every measure we can put under the test described in A.3. and especially test if necessary under situation ./A or situation ./ B.

According to the development of the epidemic a test result can change, at present admissible measures become obsolete for the future or obsolete measures necessary again.

*One can be said for sure that article 27 NDM Act leaves no room for dividing goods and services in essential and non-essential and generally close public places and premises to the public*. If that measures are based on some NMD plan remains to be seen and may also put under the test according to A.3.

1. Fundamental (or cornerstone) rights affected or infringed; “ May the shepherd dog turn into a wolf?”:
2. The sum of all regulations, directions, guidelines and notices represent an extensive and comprehensive of a command state and economy under the single purpose of combating the C-19 epidemy. That this epidemy threatens the biological and therefore also cultural and political survival of the nation is neither proven nor indicated by data or developments or even argued.

Regulations etc concern the general public, health care sector, financial institutions and services, hotels, retail, export, banking, air travel, ports, sport, arts and culture, public transport, tourism, small business, Courts of Law, social grants, environment, electronic communications, post and broadcasting, railways, cross boarder roads, debt relief, schooling, education.

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The question is which segment or sector is not object of regulations as the logic of the command system logically demands the integration of more and more segments and sectors and human activities into it as one command leads to a situation that more and more additional commands are necessary to maintain the purpose of the first one.

1. The questions are
2. What is not regulated or under the logic of this system exempt of regulations?

Obviously practically nothing. That does not pass prima vista the test according to A.3.

1. Does it make sense and it is necessary if put under the test according to A.3.?

That depends on the degree of danger. At present and especially if evaluating international developments and data from reliable sources we can speak of an epidemy which has or had before effective measurements had been taken an above average ( if f e compared with annual average flu infections) danger or dangerous potential but can by reasonable and early measurements be contained, mitigated and prevented. High risk groups had been clearly identified. Critical and life-threatening infections are around 5 percent, serious around 10 percent, mild or very mild around 80-85 percent. Not to be forgotten asymptotical cases which can be contagious and threating persons from high risk groups.

1. Is such a system admissible under the constitution, especially under chapters 2 and 3?

In general, we are an open society in the sense of *Sir Karl Popper* based on the rule of law and especially on recognised and guaranteed fundamental rights like general freedom, political activity, freedom of religion, believe, of association, movement, residence, trade, occupation, profession, property, language and cultural communities, just administrative action and access to Courts of Law.

The result of citizens and lawful residents exercising in various degrees and forms those rights can only form a truly pluralistic and spontaneous order and NOT a totalitarian or quasi totalitarian, single purpose system of commands. Also (constitutional) aims of social justice and improvement of quality of life and freeing potentials are adverse and inimical to a single purpose system of state administrative command.

1. List of fundamental rights affected ( rightful or not) by C-19 measures

 We may give a short answer and considerations to the questions if

* affected or infringed,
* rightfully infringed at the time of situation ./A or ./B

Of course, each single case must be checked and investigated in depth.

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 AFFECTED/INFRINGED RIGHTFULLY SITUATION ./A SIT./B

* Equality: That disaster restriction concern or touch someone more than another is evident. Someone who likes or has to travel is more ‘hit’ than someone who lacks any means to do that and confining to a suburban villa with garden a pool is certainly less irritating than being confined to a shack. But disaster measures have nothing to do with social justice or equality but with effectively fighting the consequences of a disaster. Nevertheless, the question remains if such measures are an unfair discrimination. For example, we do not see sense in enforcing social distance measures in very densely populated informal settlements and confine people to shacks may pose greater health risks than those from the epidemy .In combination with article 27 we see rather a duty of the state to clean up those settlements, giving provisional shelter to the inhabitants according to article 27 (2) (d) NDM Act. Short conclusion:
* YES NO NO
* Human dignity: That is often invoked if someone does not find any other fundamental right infringed or violated and may be blurred, fuzzy, indistinct and vague. For the purpose of this analysis a reference to this right is not needed.
* Freedom and security of person:

Measures could be judged as arbitrary and without just cause and treat people in a degrading way. Effectively fighting an epidemy demands actions which of course limit freedoms and may be under normal circumstances degrading like control of movements. Abolishing the freedom to do sport or walking pets in a save way is violating this provision as the ban on shopping for non-essential goods as it must be in the discretion of the individual o the family to decide what is necessary. Short conclusion:

 YES NO NO

* Privacy: Well, to stay in your residence and enjoy it unmolested is privacy. A violation can be seen in communications controlled or limited or interrupted or enforced cell phone applications which report the geographic position and movements and maybe even data of the cell phone and its holder. Short conclusion:

 Maybe (d) privacy of communication NO NO

* Freedom of religion, belief and opinion: We have to test which limitations on exercising religious or other cults are necessary to combat the epidemy and its effects. We can imagine that f e a mass can be hold with physical distance between the worshippers obeyed, a duty to wear masks or other face protection and a duty to refrain from practises which could transmit viruses. (holy communion f e ). A general ban on all forms of cult activities and celebration is not admissible. Short conclusion:

 YES NO NO

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* Freedom of expression: Infringement possible if issue and exchange information about C-19 disease etc are restricted or arbitrarily information not coming from government is classified as ‘fake” .We have to admit that a lot of nonsense is published first always and second in such time of crises limit on freedom of expression do not extend to tin-hatters or any kind of silly ridiculous emanations.

We know that in such situations a lot of nonsense it written or communicated, and it is ‘high time’ for unsubstantial chit-chat and rumours. This is most unfortunate but does alone not justify limitations except such ‘expressions’ are a clear and present danger in effectively combating the effects of a disaster. Short conclusion:

 Possibly YES NO NO

 With the exception of outlawing the maliciously spread

 of rumours known to be wrong and suitable to create

 fear, severe unrest and endangering public peace and

 order and endangering the effectivity of reasonable

 measures .

* Assembly, demonstration, picket:

A general ban on gatherings of whatever nature is only admissible in extremely dangerous situations or in a situation which due to lack of information or dangerous potentials could turn into such one. Confronted with a highly contagious virus and a ‘doubling of cases ’ within two days severe restrictions had been reasonable. Short conclusion:

 YES YES NO

* Political rights: Are not infringed. Participation and campaigning is possible in all social media and adaptions of political activities to the disaster situation is possible. Short conclusion:

 NO

* Freedom of movement and residence:

Everyone has the right to freedom of movement, the right to leave the state and every citizen has the right to enter, remain in and reside anywhere in the state ( as of course holders of temporary and permanent residence permits have) . At the time of situation ./A a ban on private travels and a restriction to province or metropolitan areas of residences (or parts whereof) or one or more municipalities ( depending on circumstances like availability of essential services) would have been justified but a general ban not event then. The right to leave the state cannot be restricted in any way as the freedom of a citizen of another state is severely limited and it cannot be explained how persons leaving can endanger combating an epidemy (That international travel possibilities are most

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severely limited and maybe one may leave but not enter another state is another thing, but we discuss a principle.) Short conclusion:

 YES partially YES NO

* Freedom of trade, occupation and profession:

Severely limited by differing between essential and non-essential good and services and also their production and distribution. Short conclusion:

 YES NO NO

* Labour relations:

The state inhibits and forbids someone, who is able to work, willing to work and entitled to work under a valid employment contract to offer his work .This is not a fair labour practice. Also the right to strike – although we admit that in this situation no worker sees any reason to strike – has become meaningless as workers are on the one side not allowed to work and cannot therefore in an organized way refuse to work and if they may work, work in in essential services. Short conclusion:

 YES NO NO

* Property:

We qualify the prohibition of the use of a certain property, f e a truck for transportation services as deprivation of property, making it therefore a “ *ius nudum*” (a naked, meaningless right) as expropriation as freedom of use is an essential quality of property. Short conclusion:

 YES NO NO

* Health care, food, water: In the present situation access food and water and hygienic shelter and goods like soaps is essential and must be provided either by organs of the state under disaster measures or the state encouraging and making possible private charity and support. Short conclusion:

 Partially YES NO NO

Education: Closing schools providing basic education but also higher schools, universities and varsities and other teaching institutions is not admissible, setting strict rules of social distance and hygiene yes. Under situation ./A a closing can be hold admissible if necessary, to be definitely on the save side but we have to keep in mind that young and younger people are not high-risk groups and elder teachers could be freed from their duties. Short conclusion:

 YES (very limited) YES NO

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* Just administrative action: Lawful, reasonable and procedural fair actions are possible under disaster measures. That a lot of actions must be swift and definite, even sometimes drastic must be held as reasonable. Arbitrary actions are inadmissible anyway. Short conclusion:

 YES NO NO

 Meaning of term ‘procedurally fair’ may be adapted to the disaster situation

* Access to court: Limitations of access for hygienic reasons are admissible . That under the prevailing situation proceedings slow down even more is deplorable but does not violate right to ‘access’ as long as proceedings demanding immediate court actions like application for provisional injunctions are heard and decided in time. As in any way legal matters do not privilege to leave residence parties,
* witnesses and experts may not appear at court as according to annexure B, part B 16. of the regulation dated 25.3.2020 only judicial officers, sheriffs, Master of High Court and legal practioners may exercise services belonging to the essential functioning of courts. We dare say that court proceedings and hearings are essential of Court services in any way. But how to exercise them if parties and witnesses and experts may not come? A general postponement of non-urgent civil matters may be admissible but not of criminal matters.

 YES NO NO

1. State indemnity (“ Don’t even think of suing me”) :

According to section (5) of article 37 no Act of parliament, no legislation or any action may permit or authorize indemnifying the state or any person (mainly organs of the state) from any unlawful activity. The declaration of state of emergency or any state of disaster may be absolutely lawful and constitutional but that does not stop claims based on unlawful acts, measurements, activities, omissions whatever within the (lawful or constitutional ) state of emergency or state of disaster.

*Argumentum a minore ad majorem* claims are further admissible if the declaration of or content of measures taken within a state of emergency or state of disaster are partially or wholly unlawful or unconstitutional.

Regulation 11 E of the C-19 measures indemnifies all ‘enforcement officers’ as no person shall be entitled to compensation for any loss or damage caused by any enforcements officer act or omission. The regulation speaks of ‘*bona fide’* acts or omissions but this is not the point. It might be that in a concrete situation an enforcement officers acts *bona fide* but nevertheless unlawful especially as the situation is complex, complicated and full of contradictions and insecurities and also the regulations are complex .This regulation would limit claims to evidently arbitrary acts, omissions or activities.

**This regulation is evidently unconstitutional and state and any and all organs or enforcement officers remain liable. Indemnification of any kind is not allowed.**

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This regulation is obviously based on paragraph 61 NDM Act which generally indemnifies any formal or informal organ of the state for any activities done in “good faith”. This provision violates section (5) of article 37 and is therefore unconstitutional. It is understandable that in such situations often very quick decisions must be made and that *ex post* a situation may look different and that organs are under pressure and may at the time being act with reason, good faith and on the base of information they have, nevertheless decisions may be judged unlawful. The wording of the cited provision of the constitution is evident, unambiguous and clear, it centres on the *lawfulness* not on *good faith*. (by the way good faith may free the organ from any regress by the state being liable towards 3rd parties).

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For questions in relation to the C-19 epidemy reports and articles from [www.achgut.com](http://www.achgut.com) and [www.ef-magazin.de](http://www.ef-magazin.de) itself quoting reliable medical and epidemiological studies have been used. For ease of reading no foot- or endnotes.

Legal consideration based on text of the constitution, of the NDM Act and of the various C-19 regulations, directions, guidelines and notices according to list published on website [www.gov.za](http://www.gov.za) under the terms “Corona Covid-19” beginning with proclamation on the 15.3.2020 and especially the regulations dated 18.3.2020 and amendment 25.3.2020.