IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 27477/2022

In the application of:

SAKELIGA NPC	Applicant
and	
THE MINISTER OF HEATH	First Respondent
DIRECTOR-GENERAL: DEPARTMENT OF HEALTH	Second Respondent
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Third Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent

---

REPLYING AFFIDAVIT

I, the undersigned,

PIETER JACOBUS LE ROUX

do hereby state under oath as follows:

1 I am an adult male and Chief Executive Officer of Sakeliga NPC, the Applicant, which has its offices at Building A, 5th Floor, Loftus Park, 402 Kirkness Street, Arcadia, Pretoria, Gauteng Province, South Africa.

2 The facts set out herein fall within my personal knowledge, save where the contrary is expressly stated or appears from the context, and such facts are true and correct. To the extent that any facts set out herein do not fall within my personal knowledge, I shall attempt to obtain confirmatory affidavits from persons with such personal knowledge. To the extent that I am unable to confirm such facts by means of confirmatory affidavits, I request the Court to admit such facts as evidence in terms of Section 3 of the Law of Evidence Amendment Act, Act 45 of 1988.

3 Where I make legal submissions herein, I do so based on the advice that I have received from the legal representatives of the Applicant.

4 I am duly authorised to depose to this affidavit.

5 This affidavit is deposed to in reply to the affidavit of the First Respondent deposed to in answer to the founding and supplementary papers that the Applicant has filed.

AD PARAGRAPHS 1, 2 AND 3 THEREOF:

6 I note the contents of these paragraphs but deny that the contents of the opposing affidavit are true and/or correct.

7 I hereinafter also refer to Dr Mathume Joseph Phaahla as "the Minister" or the First Respondent.

AD PARAGRAPHS 5, 6 AND 7 THEREOF:

8 The Minister alleges that he considered the 2022 surveillance regulations merely to be a *"temporary stop-gap measure"* to deal with Covid-19. I deny that the Minister's intention was as he says.

9 The record of decision-making shows no evidence of the Minister's alleged intention nor what role such possible intention played in determining the regulations. On the contrary, the record shows an intention by the Minister to put in place regulations that permanently make Covid-19 a notifiable medical condition (hereinafter referred to as an "NMC") and permanently transfer powers to him, heretofore exercised by the Minister of Co-operative Governance and Traditional Affairs only under the temporary National State of Disaster, to compel at his discretion NMC related obligations, public mask wearing, gathering restrictions, vaccination-status based penalisation, and international travel restrictions.

10 The wording of the 2022 surveillance regulations indicates that such regulations were not temporary – they gave the Minister permanent and far-reaching powers. The Minister is attempting to avoid taking responsibility for the unconstitutional and invalid 2022 surveillance regulations, which should never have been promulgated.

AD PARAGRAPH 8 THEREOF:

11 I note the content of this paragraph and point out that the hearing is set for the 25th to the 27th of July 2022.

AD PARAGRAPH 9 THEREOF:

12 I point out that while regulations 16A, 16B, and 16C have been repealed, the Minister has not repealed the regulation relating to the designation of Covid-19 as an NMC. The regulations have therefore only been partially repealed.

13 Notably, the Minister now proposes to this Court a convenient, but incorrect, motive for his act of repeal. He declares that he withdrew the impugned regulations with immediate effect because they "*have served their purpose and are no longer necessary.*" I deny that the Minister's reason for withdrawal is as he says.

14 It is telling that the Minister omits all mention that regulations 16A, 16B, and 16C each contained a clause giving him the power to activate or deactivate their applicability, without repealing the regulations. The specific inclusion of a discretionary power to turn the applicability of the regulations on or off points to the Minister's intention for the regulations to remain in place regardless of the phase of any particular wave of Covid-19. What he gave himself - and by virtue of specific crafting for that purpose must be understood to have wanted - was permanent regulations affording himself a permanent discretionary power.

15 The Minister's choice of repealing regulations 16A, 16B, and 16C of the 2022 surveillance regulations, instead of relying on his supposed ability to turn their applicability off, should be understood as a concession that they cannot stand constitutional or legal challenge. Had the Minister and his advisers been of the view that the 2022 surveillance regulations were valid and constitutional, he would not have repealed anything and instead have stood by their full continued operation. The 2022 surveillance regulations were *ultra vires* and could not withstand constitutional and legal scrutiny. The Minister has attempted to avoid judicial scrutiny of his 2022 surveillance regulations.

AD PARAGRAPH 10 THEREOF:

16 I deny that the content of this paragraph is correct. While regulations 16A, 16B, and 16C have been repealed, the classification of Covid-19 as an NMC in the same promulgation has not. Moreover, the operation or not of these regulations are not the only issues in this matter before the Court, which also extends to a fatally flawed and unconstitutional public comment and participation process, as well as constitutional relief regarding section 90(1) of the NHA. Finally, the Minister's approach regarding costs is unacceptable. I deal with these matters in turn.

COVID-19 STILL CLASSIFIED AS AN NMC

17 The Minister's decision to not repeal his designation of Covid-19 as a level 2 NMC has serious ramifications. Covid-19 does not currently present a material risk comparable to other level 2 NMCs, with more than 80% of

the South African population having had it. I pointed out in my founding affidavit that prof. Shabir Madhi and several other established medical experts in February publicly declared that Covid-19 should be treated similarly to influenza from a public health perspective.

18 Despite Covid-19 being completely different from other level 2 NMCs, all provisions relating to level 2 NMCs contained in the *2017 Regulations: Surveillance and Control of Notifiable Medical Conditions* now apply. This includes *inter alia* that:

18.1 A case or carrier of Covid-19 must subject himself or herself to further medical examination (Regulation 14(2)(a)).

18.2 Anyone who has been in contact with a case or carrier must subject himself of herself to the same medical examination as a case or carrier (Regulation 14(3)).

18.3 Following medical examination, a person may be subjected to isolation and quarantine procedures if a health care practitioner deems it necessary (Regulation 14(4)).

18.4 A case or carrier of Covid-19 must provide "all information required to enable physical or virtual monitoring during the disease or pathogen incubation period" (Regulation 14(6)(b)).

18.5 The head of any institution who "is aware or reasonably suspects" that a person at the institution is a case or carrier of Covid-19, or has been in contact with a case or carrier of Covid-19, must immediately report this to the health care provider at the institution

or to the nearest health establishment, for further notification to the Department (Regulation 16(3)(a,b)).

18.6 Likewise, any member of the community who "is aware or reasonably suspects" a person in the community of being a case, carrier or contact of Covid-19 must immediately report it to the nearest health establishment (Regulation 16(5)).

18.7 Any person who fails to comply with any of the above regulations or has a duty to notify and fails to notify of a condition, is guilty of an offense and on conviction liable to a term of imprisonment not exceeding 10 years, or imprisonment and such fine as determined by a court of law (Regulation 20(a,b)).

19 It is absurd to subject the public and institutions – including, but not limited to, all doctors and medical institutions – in South Africa to the above prescriptions and obligations for a disease that has devolved in the manner that COVID-19 has. It was with good reason that the South African Medical Association, in its submission during the public participation process, rejected the then-proposed NMC designation. It stated: "Making COVID-19 a notifiable medical condition inevitably leads to [...] mandatory measures on individuals, as is required for dealing with all other notifiable diseases. The Regulations are un-enforceable and out of touch with reality."

FATALLY FLAWED PUBLIC PARTICIPATION AND COMMENT PROCESS NOT MOOT

20 I point out that the issue relating to the public participation and comment process and relief sought in this matter is not moot and still remains to be heard. The public participation process and how it has been dealt with by the Minister and his department in this matter has become a question of great public and constitutional importance.

21 As set out in the Applicant's papers in this matter (and in particular the supplementary papers) the alarming manner in which the Minister has *inter alia* screened and selectively dealt with public comments points to a current *modus operandi* within the public service which renders any public comment and participation process worthless. The approach of the Minister and his department to the public comment and participation process undermines the value of participatory democratic processes envisioned in the Constitution. It calls for urgent judicial and constitutional scrutiny and correction to avoid the same or similar invalid approaches in future legislative and regulatory processes, not only in respect of regulations under the NHA.

22 The alarming and flagrant flaws in the public participation and comment process have only been revealed and exposed due to the unique circumstances of this matter. Had the Applicant not undertaken an extensive analysis of the highly unusual record that has been made available by the Minister in this matter, this issue would not have come to light.

23 Should the public comment and participation process in this matter not be thoroughly scrutinised by the courts it will undoubtedly lead to the

continuation of such flawed practices, for which the evidence will remain buried deep in the recesses of government departments. A unique and vital opportunity is presented to the courts to expose and correct a rotten practice undermining accountable public office, participatory governance, and the constitutional order.

24 Should the relief be granted as per paragraph 3 of the amended notice of motion, the legislator should be tasked *inter alia* to design constitutionally acceptable safeguards relating to public comment and participation in respect of regulations under all legislation and in particular the NHA which the Minister clearly intends (unlawfully so, I submit) using in future for purposes similar to those set out in the now repealed 2022 surveillance regulations.

CONSTITUTIONALITY OF SECTION 90(1) OF THE NHA

25 I am advised that the constitutionality of section 90(1) of the NHA is a live issue, which will affect future regulation-making under the NHA. The Minister remains opposed to the relief sought by the Applicant and evidently still considers it within his powers to regulate in the constitutionally impermissible way he has. He and his department are on record that they intend to reinstate regulations such as they have made (and now withdrawn) at any time should they consider it necessary, and they have demonstrated their willingness to do so with immediate effect and without consultation.

26 While I am advised and submit that the Minister has acted *ultra vires* the NHA, I am advised and submit that in the event that the Court should find this not to be the case, section 90(1) of the NHA should be found unconstitutional and the legislator tasked with amending the statute and devising acceptable safeguards.

COSTS

27 I note that the Minister proposes that all the matters challenging his 2022 surveillance regulations be withdrawn with no order as to costs. I submit that this is an unreasonable approach and point out that the Minister should be tendering the costs of the application launched by the Applicant in this matter. He has conceded a substantial portion of the merits of the Applicant's case. He now attempts to avoid a judicial finding against him by repealing only the most urgent of the offending regulations. There is no reason why the First Respondent should not be ordered to pay the Applicant's costs.

28 I am advised that the issue of costs is not urgent and does not need the attention of the Full Bench on an urgent basis.

AD PARAGRAPH 11 THEREOF:

29 I am advised and submit that, given the repeal of regulations 16A, 16B, and 16C, the issues remaining in this matter no longer require an immediate and urgent hearing. The Minister's conduct has overtaken the matter to some extent.

30 I am advised and submit that the matter nevertheless merits expedited treatment. It is warranted by:

30.1 The Minister's department's public statements that it remains committed to reintroducing similar regulations should it consider them necessary.

30.2 The Minister's selective reliance on an affidavit by Professor Salim Abdool Karim that advocates for such measures in contradiction of the vast majority of other advice offered to him by the other medical and policy making experts and the public.

30.3 The Minister's current public comment process for more extensive regulations but containing *inter alia* provisions substantively similar to the impugned regulations.

AD PARAGRAPHS 12, 12.1, 12.2 AND 12.3 THEREOF:

31 I deny that the contents of these paragraphs are correct. The Minister has failed to file affidavits within the periods set by the Court. He has liberally called for additional time as would allow him to file his answering affidavit only after repeal of the most urgent and egregious of the 2022 surveillance regulations, and now avers that this state of affairs exonerates him from his obligations to have answered as he should.

32 Instead of answering substantively to the founding affidavit and the relief sought by the Applicant, the Minister now merely relies on a general denial

of the grounds relied on by the Applicant and awards himself the right to file affidavits as and when he chooses. This is irregular and unreasonable.

33 The Minister placed the Applicant under tremendous pressure by promulgating drastically intrusive regulations with immediate effect, refusing to consult with the Applicant to avoid litigation, and filing a record of more than 800 000 items. He forced the Applicant to work under extreme pressure when – if such were really his intention - he could have indicated that he was of the mind to repeal the 2022 surveillance regulations and provided a time frame for such repeal. I recall that, in the founding papers, the Applicant explained how it sought to engage the Minister before the commencement of proceedings to try to find a practical solution to this matter and avoid litigation. The Minister chose to ignore the approach of the Applicant.

34 The Minister has acted in this matter in a manner that has not been transparent, open, or in any way appropriate under the circumstances.

AD PARAGRAPH 13 THEREOF:

35 The Minister says that he accepts "that is desirable and appropriate" that he should "explain to the Court at a high-level the circumstances that led" him to "enact the impugned regulations on 4 May 2022 and repeal them on 22 May 2022". I submit that in making this statement he is in fact precisely not accepting his obligations to this Court. What would be "desirable and appropriate" for him is to explain to this Court why he opposes the relief sought by the Applicant, which *inter alia* relates to why

he considers his act of regulation, the contents of his regulations, and the flawed consultation processes he followed defensible.

AD PARAGRAPHS 14 TO 19 THEREOF:

36 I note the measurement standards that the Minister has referred to. It is common cause that the National Institute for Communicable Diseases (NICD) publishes Covid-19 statistics on its website.

37 I point out that the Minister is incorrect in unambiguously attributing to the numbers on Covid-19 hospitalisations an indication of the burden of severe disease. According to the NICD, the National Covid-19 Hospital Surveillance numbers refer to "admitted patients who test positive for SARS-CoV-2 on PCR or antigen tests." The numbers on Covid-19 hospitalisations, therefore, indicate the number of people in the hospital who tested positive for Covid-19, regardless of the reason for their hospital admission.

38 It would have benefitted the Minister to appreciate the MAC advice of 5 April 2022, which pointed out that Covid-19 hospitalisation numbers "may" indicate the burden of severe disease, but stressed its shortcomings. The shortcomings include vulnerability to "changes in testing strategies and volumes in hospitals", that the numbers "do not necessarily distinguish between admission *due* to Covid-19 and admission *with* (incidental) Covid-19."

39 I accept that ICU admissions for Covid-19 could indicate the burden of severe disease, but then calculated and considered with steps to compensate for or exclude those admissions of patients who merely test positive for Covid-19 but are receiving treatment unrelated to Covid-19. However, the Minister has not offered such data. The Minister cannot demonstrate severe disease burden of Covid-19 as a basis for the promulgation of his 4 May 2022 regulations. I submit that this failure by the Minister is instructive, for it would have bolstered his case (even if insufficiently so) if he were to not simply insinuate that there were indications of severe disease burden in the run-up to his regulations but actually demonstrate it.

40 Over and above the Minister's errors in describing and relying on the data he highlights, there is another matter which is of even greater importance. This is the question of whether the Minister is even considering the right category of data when regulating. Throughout, the Minister justifies the severity of his regulations with regard to numbers relating to infection, hospitalisation, and death. But this is the wrong (or at least, insufficient) category of data to rely on, for it tells us nothing about the relationship between his regulations and their benefit. Simply put, the Minister should justify his regulations based on their estimated benefit such as lives saved, hospitalisations spread out or prevented, or the degree to which the slopes of infection curves were flattened, etc. He should also demonstrate that such benefits exceed the monetary and non-monetary costs they inflict otherwise on society and on persons. His actual or counterfactual estimations of how effective his regulations were at having benefits are

what is relevant, and what would constitute a proper basis for him, the public, and the Court to assess reasonableness. The Minister did none of this. Instead, he instead appraised the success of his measures by their failures and concluded that the more he failed, the more of his measures were needed.

AD PARAGRAPH 20 THEREOF:

41 It is noted that the Minister is aware of the ability of the virus, that causes Covid-19, to mutate.

42 The Ministerial Advisory Committees ("MAC") accurately predicted the fifth wave, described the pattern of diminishing virulence of the SARS CoV-2 virus, and acknowledged the fact that COVID-19 is not a serious health risk requiring the restrictions set out in the repealed regulations.

43 The Minister chose to ignore the considered advice of the panels of medical experts he himself appointed. He held onto the fear, considered by his own panels of experts to be unreasonable and irrational, that the fifth wave would reveal a variant which was more transmissible and more dangerous than previous variants of the SARS-CoV-2 virus. The Minister has failed both in his Rule 53 record and in his affidavit to set out any grounds as to why his subjective fear should have prevailed over and above the specific advice given to him by the panels of experts engaged by the government to advise him.

44 I point out that the Minister and the South African Government objected vehemently to the irrational fear and reaction of foreign governments when they banned travel to and from South Africa when the Omicron variant emerged in South Africa in late 2022 (and which ban was lifted only after significant delays and massive economic and social harm). The Minister is himself now guilty of such conduct.

AD PARAGRAPH 21 THEREOF:

45 The Minister points to a graph "Covid-19 in South Africa" and says that reported deaths and hospitalisations increase significantly with each wave of Covid-19. This is not a proper analysis of the graph.

46 In fact, what the graph shows is that there exists a diminishing relationship between waves of Covid-19, hospitalisations, and deaths. While the number of infections kept increasing, the number of people admitted to hospital with a positive test for Covid-19 (regardless of the reason for admittance) kept declining from the second wave. Similarly, the number of people who died in hospital, while classified as positive for Covid-19, also kept declining from the second wave on.

AD PARAGRAPH 22 THEREOF:

47 The total number of deaths and hospitalisations as well as estimated excess deaths, is noted, but again the Minister misrepresents the graph's meaning. The misrepresentation is accomplished by presenting detail and relationships only selectively.

48 The Minister alleges that "excess deaths mimic the reported Covid-19 death in each of the waves". Upon proper analysis of the relevant data from the NICD, it becomes evident that while there was a strong relationship between estimated excess deaths and Covid-19 waves prior to 2022, that relationship has since broken down.

49 While it is denied that a strong relationship between excess deaths and Covid-19 would be justification for the Minister's impugned regulation, there was in any event, no such a strong relationship for the Minister to rely on when he promulgated his regulations on 4 May 2022 against the vehement objection by medical experts and the public during his consultation process, and against the advice of his own panels of experts.

AD PARAGRAPH 23 THEREOF:

50 I deny that "Covid-19 continues to outstrip HIV and TB as a leading cause of infectious death." I point out that no statistics relating to HIV and/or TB are set out in the affidavit of the Minister. There is no evidence of that in the Rule 53 record.

AD PARAGRAPH 24 THEREOF:

51 The content of this paragraph is so vague that it is virtually meaningless. Of course, "there is a need for appropriate preventative and mitigation measures, when necessary, to deal with Covid-19 into the future." The question is what qualifies as "when necessary", what the nature of the measures should be (for example, does it require statute, or can people

freely implement measures without waiting on regulations), and what the measures should in fact be for different people in different cases.

52 What renders that statement possibly worse than meaningless is the inclusion of the term "preventative", since prevention of Covid-19 cases at a population level is impossible. The MAC on 25 April 2022 insists that a "mitigation approach is needed" and makes no mention of prevention. The advice from the Minister's own appointed panels of medical experts, reputable medical experts on record in the public domain, and medical experts that participated in his public consultation process, is that policy-making "to deal with Covid-19 into the future," as the Minister puts it, should appreciate its endemic nature.

53 The Minister also fails to explain why, if "appropriate preventative and mitigation measures" are needed "in future", he repealed the regulations by which he afforded himself that discretionary power to do so in the manner he saw fit.

AD PARAGRAPH 25 THEREOF:

54 I note the existence of the 2017 surveillance regulations. I point out that should the Minister be correct in his extremely wide interpretation of the provisions of Section 90(1) of the NHA, the section should be deemed unconstitutional and invalid.

AD PARAGRAPHS 26 AND 27 THEREOF:

55 I note the contents of these paragraphs but point out that the 2022 surveillance regulations were unnecessary, *ultra vires*, invalid, and unconstitutional. The NHA is not fit for the purposes that the Minister had in mind.

AD PARAGRAPHS 28, 28.1 TO 28.4 THEREOF:

56 The 2022 surveillance regulations published by the Minister did not address the concerns or the specific issues raised by the 8 February 2022 MAC Advisory. The use of the NHA to attempt to create non-pharmaceutical interventions in a manner done by the Minister was incorrect and unconstitutional.

AD PARAGRAPHS 29, 29.1 AND 29.2 THEREOF:

57 I note that the Minister confirms that the public comment process was supposed to be a vital part of his decision-making. I note that the Minister has failed to deal in his answering affidavit with the fatally flawed public comment process as set out in the supplementary affidavit in this matter.

58 The reference to the National Economic Development and Labour Advisory Council (NEDLAC) refers to a body specifically created for labour and related matters. This is a statutory body whose members are appointed by the government, and which appears to have conveniently

similar views to those of the Minister. However, the point of public participation is to obtain the views of members of the public – not that of a pre-selected and extremely limited cohort of organisations with membership at a specific state entity. The NHA neither authorises nor compels the Minister to single out or pay special regard to the submissions of NEDLAC when making regulations and engaging in the public participation process.

59 It is striking that the Minister followed the NEDLAC proposal and ignored hundreds of thousands of other submissions and comments, including those by his own panels of medical experts such as the MAC and medical experts who participated in the public commentary process, such as the South African Medical Association. The Minister fails to explain why he heeds NEDLAC's insistence, on a triggering mechanism for "activation or de-activation of the regulations based on the rate of infections and the virulence of the virus", when the MAC advised him something quite different on 25 April 2022. According to the MAC, public health mitigation strategies are not warranted by a rising caseload alone, but by the likelihood of a high burden of severe disease. Only in the event that "the integrity of the healthcare system is under threat", does the MAC suggest that certain measures, such as booster drives, strengthening oxygen supplies, etc., "can be considered."

AD PARAGRAPH 30 THEREOF:

60 I note the preparation of a "tailor made regulation" but deny that this has taken place, if the Minister is here referring to his first extension of the deadline for public comments. The regulations finally published as the 2022 surveillance regulations simply mirrored those under the State of National Disaster and it is clear that the public comment process had effectively no influence in this matter.

61 If, instead, the Minister is here referring to his second extension of the deadline for public comments, this time to 5 August 2022, then it underscores the shortcomings in the Minister's approach and the non-mootness of several aspects of the case.

AD PARAGRAPH 31 THEREOF:

62 I note the statistics referred to in this paragraph and point out once again that the fifth wave and its impact were accurately predicted and anticipated by the MAC. The Minister was objectively wrong to regulate as if the fifth wave would constitute anything else and has provided no objectively justifiable reasons for refusing to follow the MAC advice.

63 The Minister further refers to the emergence of sub-variants but draws no conclusion thereupon to indicate to the Court why this is relevant in the context of the 4 May 2022 regulations.

AD PARAGRAPH 32 THEREOF:

64 I note the content of this paragraph.

AD PARAGRAPH 33 THEREOF:

65 I note the reliance by the Minister of figures relating to only the Rooiwal plant at the City of Tshwane and point out that national figures should have been studied and relied on.

66 However, and in any event, the emergence of the fifth wave was known and predicted and it was not necessary to promulgate the 2022 surveillance regulations.

AD PARAGRAPH 34, 34.1 AND 34.2 THEREOF:

67 I deny that the Ministerial Advisory Committee and the National Health Council were properly consulted. It is apparent from the record that the National Health Council was simply informed that the Minister was going to take the steps that he took. There is no indication from the record that the Ministerial Advisory Committees were consulted as alleged.

68 I point out that the Minister offers no explanation for his decision to promulgate that Covid-19 be designated a level 2 NMC.

69 I point out that there is nothing in the record to explain the Minister's decision to promulgate regulations 16A, 16B, and 16C, save for unlawful reasons such as the ulterior purpose of maintaining without interruption regulations that were in place under the National State of Disaster.

AD PARAGRAPHS 35 TO 37 THEREOF:

70 I deny that the publication of the 2022 surveillance regulations was in any way rational, justifiable or supported by science as alleged.

71 The MAC advice of 15 and 16 February 2022 and 25 April 2022 was specifically against the restrictions on gatherings and travel. Moreover, even where the MAC advisory of 25 April 2022 suggests certain measures that can be considered should the healthcare system come under threat of a high burden of severe disease from Covid-19 (which was not the case), no penalisation or discrimination based on vaccination status is even mentioned.

72 Furthermore, the publication of the 2022 surveillance regulations with immediate effect was *ultra vires* and not justified in any way.

AD PARAGRAPH 38.1 THEREOF:

73 I deny the Minister's vague averment that, as the deponent to the Founding Affidavit, I am not an expert. I have expertise in *inter alia* public policy formulation, public interest litigation, data analysis, applied research, and economics, and have practiced and been consulted as a suitably qualified expert in all these fields. I have received BCom and BCom Hons (Economics) degrees from the University of Stellenbosch and a Master's degree (Economics) from UNISA. I have practiced as a senior economist at a labour union, been the head of a research institute, presented many times on legislative matters at Parliament, and held an appointment as academic director of a private higher education institution.

My expertise is applicable in an evaluation of the Minister's policies and its impact on society.

74 However, what the Minister, in a more favourable interpretation, possibly means to say was that I am not a medical expert. This would be correct, yet at the same time not favourable to the Minister, for it underscores a shortcoming of his own decision-making process and his answering affidavit: properly understood, the impugned regulations are matters of public policy formulation, requiring a wide array of expertise for their development, yet the Minister portrays the issue as one of a strictly medical nature and relies selectively and *ex post facto* on one medical expert, to the exclusion of *inter alia* economists, actuaries, social workers, industrial engineers, psychologists, sociologists, the medical experts that disagree with the Minister, etc.

75 Moreover, it was not necessary for the Applicant to put up any special medical or scientific evidence such as would require accompanying affidavits, since the Minister's Rule 53 record failed to indicate any specific medical basis to which the Applicant would need to respond with medical expertise. There are no medical opinions, no reasons underlying the department's internal expertise and conclusions relied upon, no medical evidence or reports in its Rule 53 record to prepare on and to which an expert could respond. There is also no records or reports recording the Minister's expertise and his own consideration of the matter which would allow the Applicant to anticipate the version now put before Court in the answering affidavit. Had the Minister taken the time to ensure that a

medical or scientific basis is specifically prepared before making his impugned decision and that it be included in the record, instead of merely being content with dumping thousands of pages of records exposing the lack of proper medical and scientific evaluation, the Applicant would have been able to anticipate the Minister's ostensible case. However, as it stands, the Minister has a single medical expert providing an *ex post facto* basis not found in the record.

76 The arguments set out in the founding papers are based on applicable law, the contents made available in the Rule 53 record, and publicly available data. The grounds relied on by the Applicant demonstrate the constitutional invalidity of the 2022 surveillance regulations.

AD PARAGRAPH 38.2 THEREOF:

77 The reliance on the MAC advisories, as set out in the founding papers, indicates that expert advice was available to the Minister, indicating his decision was irrational. He has not provided advice to the contrary and in, addition to the flawed legal basis of the 2022 surveillance regulations, the irrationality of the Minister's decision is evident from the MAC advisories referred to in the founding papers in this matter.

78 The Applicant has referred extensively to MAC advisories and has not selectively misrepresented it.

AD PARAGRAPH 38.2.1 THEREOF:

79 The content of this paragraph is incorrect. Based on their observations regarding the Omicron variant and their epidemiological expertise, these eminent medical experts publicly indicated (correctly so) that the form and intensity of the next waves would not be as the Minister irrationally feared it would.

AD PARAGRAPH 38.2.2 THEREOF:

80 I note that the Minister alleges that he was guided by evidence at the time but point out that he has failed in the record to indicate any reasons for his decision and/or provide any evidence at the time that would rationally and/or reasonably have justified his decision.

AD PARAGRAPH 38.2.3 THEREOF:

81 The content of this paragraph is not entirely correct. It appears that the Minister continued beyond 8 February 2022 with attempts at containing and/or preventing Covid-19 and failed to appreciate that mitigation was required as advised by his own medical experts. I point out that the Minister admits that he maintained testing requirements for cross-border travellers against the advice of the MAC.

82 I deny that all other MAC recommendations are given effect to in the impugned regulations. Regarding vaccinations, the MAC recommends "evidenced-based programmes to engage with vaccine hesitancy", not penalisation of people based on vaccination status to force them to take a vaccine against their will or forcing companies to monitor and

discriminate based on the vaccination status of their patrons, customers, or staff. I point out that the Minister does not and is unable to rely on this MAC advice for his continued limitation on gatherings.

AD PARAGRAPH 38.2.4 THEREOF:

83 I note the content of this paragraph insofar as it accords with the wording of the MAC advisory. I note specifically that the health risk is not described as serious nor that a need was expressed to take the drastic steps that the 2022 surveillance regulations entailed.

84 I point out that nowhere in the record, in his answering affidavit, or in his choice of supporting affidavits does the Minister offer the Court evidence that he even considered "the extraordinary costs to the macroeconomy," not to speak of an explanation of how the regulations were supposedly intended to "minimise" the extraordinary costs.

AD PARAGRAPHS 40, 41 AND 42 THEREOF:

85 The contents of these paragraphs do not support the submissions made by the Minister. At most *"encouraging mask wearing indoors"* is the high point of the MAC advice relating to mask wearing under anything but the most exceptional circumstances. The MAC advice of 25 April 2022 explicitly recommends that even if "the integrity of the healthcare system is under threat", mask wearing measures should focus primarily on high-risk individuals, "with recommendations begin favoured over mandates" and that the mask should be a surgical or N95 type. Only "if the severity

of the acute outbreak is thought to justify additional measures, the ... advice can be extended to all members the public, and/or be made mandatory." The 2022 surveillance regulations imposed a mask wearing mandate against the advice of the MAC at the time of regulation.

86 The contents of these paragraphs are also incorrect where it alleges that "the science is clear that ... masks, even cloth masks, limit transmission." The MAC itself, in its 8 February 2022 advice, says that "more research and guidance on wearing of masks indoors is needed." The South African Medical Association submitted to the Minister on 24 April 2022 results of a survey which it invited member doctors to participate in. 97% of respondents said that they do not support the regulations (which included the mask mandates), with 95% saying that the regulations do not reflect what was learnt over the past two years of Covid-19. The South African Dental Association submitted to the Minister on 21 April 2022 that "Certainly going forward the use of fabric masks should be dropped as they have been scientifically shown not to provide protection against airborne diseases as they do not work." Unlike the Minister, the Applicant recognises that there are differences of opinion in the scientific community around the issue of the various levels of efficacy and desirability of cloth and several types of medical masks, and argues that it is inappropriate for the Minister to introduce mandates under such circumstances.

87 The Minister notes that *"[t]he fact that masks are less effective against a variant such as Omicron does not mean it has no effect at all or that it will not be effective against a future variant"*. The question was, however, not

whether masks have no effect at all. The issue was whether the Minister acted rationally and lawfully when he enacted a mask mandate.

88 None of the studies referred to by the Minister were disclosed in the Rule 53 record and he cannot attempt to justify his decision based on studies and information that were not considered at the time of his decision. The proper inquiry in the review application is as to whether the Minister acted rationally and lawful, given the information that he had in front of him at the time that he took his decision.

AD PARAGRAPH 43 THEREOF:

89 The content of the MAC Advisory referred to in this paragraph does not support the Minister's contention.

AD PARAGRAPHS 44 TO 48 THEREOF:

90 I note the distinction between the different types of gatherings as set out in these paragraphs, and the Minister's position that there exists a "need to provide for social distancing in gatherings to limit transmission".

91 I deny that the distinctions between types of gatherings and restrictions on gatherings were necessary to decrease the likelihood of transmission of the virus. I point out that the MAC's advisory note on "Restrictions on gatherings" dated 16 February 2022 recommended the lifting of restrictions on outdoor and indoor gatherings, on minimum physical ("social") distancing, and on 50% capacity determinations. The MAC

advised reconsideration of restrictions on gatherings only in the event that it becomes "necessary to reduce rates of hospitalisations and death attributable to Covid-19."

92 The Minister refers to "the science" as a singularity. This discounts the debate and contestation within the broad scientific community, including on the issue of transmissibility of SARS-CoV-2 in different settings. Scientific discovery and the vigorous debate within the scientific community, even where there are largely similar conclusions on an inquiry, cannot be personified into a simplified form, "the science", to summarily justify a policy position.

93 I point out that the Rule 53 record contains no indication of the reasons for the Minister's decision to maintain gathering and physical ("social") distancing restrictions, let alone his decision to ignore the advice of the MAC. The record also contains none of the WHO advice now relied on by the Minister.

AD PARAGRAPHS 49, 50 AND 51 THEREOF:

94 I note that the Minister says that "the reasoning underlying the access requirements of either proof of vaccination or a negative Covid-19 test is that the reproductive rate of the virus in large congregate settings is much higher." Neither the Minister in his affidavit nor his Rule 53 record explains how this statement of fact relates to the specific measures contained in the regulations.

95 The Minister acknowledges that current vaccines do not prevent transmission and lists benefits of vaccination with reference to the affidavit by Prof Karim. The Minister fails to point out that Prof Karim is of the opinion that "the Omicron variant readily escapes vaccine immunity even in those individuals who have had 4 doses of the Pfizer vaccine."

96 Notably, the Minister makes no mention of the role of population immunity from sources other than vaccination, such as recovery from Covid-19. He declines to explain why he ignores the MAC advice to him on 16 February 2022 that "South Africa now has a high degree of population immunity to SARS-CoV-2, which can be expected to offer strong protection against severe disease and death." The MAC acknowledged lingering uncertainties, but its caveats for reconsideration of restrictions were that such restrictions would have to serve the purpose of reducing "rates of hospitalisations and death attributable to Covid."

97 The discrimination between vaccinated and unvaccinated persons is irrational and as set out in the founding and supplementary papers is a clear Covid-19 vaccine mandate. Except of the *ex post facto* opinion of Prof Karim, there is no basis provided in the record for the decision.

98 The Minister has failed to deal with the clear indication of a vaccine mandate and the deviation from Government's precise undertaking in respect of vaccination, made by both the President and the Deputy President as set out in the founding and supplementary papers in this matter.

99 The Minister was bent upon subjecting unvaccinated persons to the inconvenience and cost of approximately R500-00 per PCR test whenever they wished to join a gathering or travel whilst exempting vaccinated persons from such costs. He was bent on forcing companies and civil organisations in general to monitor and enforce this. I point out that South Africa's expanded unemployment rate is in excess of 40%, and that almost two million people have been rendered unemployed since the first lockdown measures almost two years ago. I recall that I included statistics in my founding affidavit to show that at 18 May 2022 only 45% of adults in South Africa had been fully vaccinated, meaning that he subjected the majority of the adult population and the vast majority of the non-adult population to this penalisation. I submit that the Minister's position, that the cost and inconvenience of PCR tests do not constitute a covert or indirect vaccine mandate as submitted in the Applicant's founding affidavit, is callous and insincere. In the words of the South African Medical Association, who itself described the proposed vaccination requirements relating to gatherings to constitute "mandatory vaccination for the general public", "[t]he Regulations are un-enforceable and out of touch with reality."

100 The Minister has downplayed the fact that infected vaccinated persons transmit and spread COVID-19 and failed to explain why he did not subject vaccinated persons to the testing and restrictions he imposed on unvaccinated persons. He also failed to explain why, if variants like Omicron readily escape vaccine immunity like Prof Karim says, he does not require that people provide proof of recent booster shots. I deny that

any of these measures are, in fact, necessary, but I submit that the Minister has regulated irrationally.

101 The Minister chose to enact a roundabout and indirect vaccine mandate, designed to escape legal scrutiny, yet forceful enough that unvaccinated persons would eventually succumb to his pressure and, against their own will, submit to vaccination. This was at the very least a covert vaccine mandate.

102 The Minister also failed to consider the vastly negative economic and social consequences of his decision on the general public (as opposed to basic education alone). His decision perpetuated the harm, to people's livelihoods and the economy by which they provide for themselves, brought about by the extended restrictions under the Disaster Management Act (hereinafter "DMA") before the 2022 surveillance regulations. A rational decision-making process would have accounted for a full economic and social impact assessment of such a drastic and far-reaching decision. No such assessment appears from the record in this matter, nor has the Minister even attempted *ex post facto* to justify the non-medical aspects of his decision-making in the way that he has attempted to do regarding the medical aspects.

AD PARAGRAPHS 52 TO 54 THEREOF:

103 I note the contents of these paragraphs but deny that there was any basis for the promulgation of Regulation 16C relating to international travel.

AD PARAGRAPH 55 THEREOF:

104 I note the concession in this paragraph that the 2022 surveillance regulations were effectively an extension of the DMA regulations and point out that the Minister has confirmed the ulterior motive for the 2022 surveillance regulations.

AD PARAGRAPHS 56 TO 58 THEREOF:

105 The relative inconsequential nature of the fifth wave of Covid-19 was as predicted by the Minister's own medical experts and his unsubstantiated refusal to follow his own medical experts' advice was clearly irrational. I point out that the Minister again claims fallaciously that he has repealed the impugned regulations when he has only repealed some of them, leaving the NMC level 2 determination and its restrictions and obligations concomitant in place.

AD PARAGRAPHS 59 AND 60 THEREOF:

106 I note the threat of the Minister to seek a costs order against the Applicant. The Minister is disingenuous in this regard and should immediately have tendered the Applicant's costs to date.

AD PARAGRAPHS 61 TO 65.4 THEREOF:

107 The delays brought about in this matter were as a result of the Minister's exceptionally lengthy record and difficulties relating thereto, including the

attempts to redact the record. Despite this, the Applicant in this matter worked under tremendous pressure and filed a supplementary affidavit.

108 The Minister, however, did not at any stage indicate that steps would be taken to repeal the 2022 surveillance regulations and the partial repeal of the 2022 surveillance regulations has come as a surprise and relief to the Applicant. It appears that the Minister had decided not to file an opposing affidavit defending his 2022 surveillance regulations, but to use the time (and extensions granted) to take steps to partially repeal the 2022 surveillance regulations and claim mootness.

109 The Applicant persists in seeking the relief set out in the amended notice of motion in this matter, save for the setting aside of the Minister's decision to promulgate and act of promulgation of sections 16A, 16B, and 16C of the impugned regulations, together with costs of this application.

AFFIDAVIT OF PROF KARIM

110 I note that the Minister has filed an affidavit by Prof Salim Abdool Karim, but failed to indicate how such affidavit supported his decision to promulgate the 2022 surveillance regulations at the relevant material time in this matter, i.e., before 4 May 2022.

111 The affidavit of Prof Karim is not part of the record in this matter and is irrelevant. I submit that it has unnecessarily burdened the court record and should be struck out. It adds nothing to the issues in this matter. Should the Court hold however that it requires a response the Applicant will seek

an opportunity in due course to respond thereto properly and fully and what is set out hereinbelow is a brief and concise response thereto which will be supplemented if necessary. The Applicant could not anticipate Prof Karim's affidavit, as no basis for it was found in the Rule 53 record.

112 I accordingly, and only insofar as is necessary, refer to and respond to the affidavit of Prof Karim as follows:

AD PARAGRAPHS 1 TO 9 THEREOF:

113 I note the position and specialities of Prof Karim regarding epidemiological and medical matters. I note that Prof Karim does not possess of the relevant qualifications or experience that would enable him to offer expert testimony on the full scope of relevant dimensions for public policy-making - *inter alia* taking account of matters such as the almost two million job losses since the start of lockdown in 2020 and what further Covid-19 restrictions spell for those people's livelihoods - for which the Minister would have had to look elsewhere.

AD PARAGRAPHS 10 TO 23 THEREOF:

114 The history of the Covid pandemic is set out in the founding papers and I admit the contents of these paragraphs insofar as they accord with such history. I note that Prof Karim has failed to assist the Minister or the Court in relation to understanding and considering possible trade-offs regarding vaccine cost, efficacy, and safety for different age groups or other demographic categories. Nevertheless, I point out that Prof Karim's

observations, as set out in these paragraphs, are not the basis on which decisions were made at the beginning of May 2022 by the Minister.

AD PARAGRAPHS 24 TO 26 THEREOF:

115 Prof Karim expresses alarm at the spread of Covid-19. I point out that the MAC advisory note of 16 February 2022 does the opposite by proposing cautious mitigation and not trying to prevent infection. According to the MAC, "Covid-19 is expected to persist globally, possibly indefinitely. Costly largescale containment efforts are therefore inappropriate..." I reserve the right to respond fully to specialised scientific arguments by way of suitable expert evidence, if necessary, in due course.

116 I however point out that the consistency and rationality of arguments presented by Prof Karim are not scientific or expert issues and can be assessed and scrutinised by any reasonable person.

117 I note that Prof Karim makes mention of the Great Barrington Declaration (GBD). The Applicant has not relied on the GBD, but given Prof Karim's reliance in his testimony on criticism of the GBD, I reserve the right to file an affidavit by an author of the GBD in response.

AD PARAGRAPHS 27 TO 30 THEREOF:

118 I note that Prof Karim is arguing for prevention of the disease, which is effectively containment. SARS-CoV-2 cannot be contained or prevented

and only mitigated as has been explained *inter alia* by the panel of medical experts comprising the MAC.

119 Prof Karim argues strongly for vaccination but fails to deal with natural immunity and immunity due to prior infections.

AD PARAGRAPHS 31 TO 39 THEREOF:

120 It is noted that Prof Karim confirms that vaccines are not necessarily effective against all strains and that Omicron readily escapes vaccine immunity. Once again it is curious to note that Prof Karim does not raise the possibility of immunity brought about by natural infections and recovery or any other form.

121 Again, Prof Karim argues for a prevention strategy, which the MAC discredited on several occasions.

AD PARAGRAPHS 40, 41, 42 AND 43 THEREOF:

122 The use and merits of masks as set out in these paragraphs is not an issue that needs to be addressed at this stage. I point out that the statements are in any case not helpful to determine whether and under what circumstances and to what extent the Minister was justified in regulating for mask mandates in the way and at the time that he did. I point out that reputable medical experts deny the general effectiveness of at least certain types of masks, or the certainty regarding that effectiveness, and that certain experts deny their advisability, as referenced by the

Applicant in its founding and supplementary founding affidavits. The Rule 53 record clearly lacks evidence in support of Prof Karim's statements.

AD PARAGRAPHS 44 THEREOF:

123 Prof Karim's conclusion does not follow from his argument. Prof Karim points out that some community benefits accrue only when large numbers of people adopt certain behaviours. In the abstract this is, of course, true, yet it does not follow that in practice all such behaviours should be enforced by statute, with penalisation and criminalisation for those who believe and act otherwise.

AD PARAGRAPHS 45 THEREOF:

124 For the first and only time, Prof Karim mentions immunity gained from natural infection and recovery. He does so disparagingly, alleging that "people with natural immunity ... will only have short-lived temporary protection against reinfection", yet unlike many other places in his affidavit, he now references no sources. At the same time, I am reminded of Prof Karim's earlier view, in paragraph 36 of his affidavit, that "the Omicron variant readily escapes vaccine immunity ... even in those individuals who have had 4 doses of the Pfizer vaccine." If required, I shall provide at a later stage affidavits by subject matter experts who substantiate their views that naturally acquired immunity offers protection against reinfection that is comparable or possibly better than such

protection acquired through vaccination. In any case, the MAC itself is much more optimistic about the implications of population immunity than Prof Karim.

AD PARAGRAPHS 46, 47 AND 48 THEREOF:

125 Prof Karim's reference to the Great Barrington Declaration (hereinafter "GBD") makes a different point to one he intends. The GBD was signed by more than 15 000 public health scientists and 47 000 medical practitioners. It is clear that there is a diversity of views in the scientific world relating to how to mitigate the effects of the SARS-CoV-2 virus.

126 Moreover, the repeal of the 2022 surveillance regulations indicates that even the Minister does not agree with Prof Karim that a prevention strategy and stringent and mandatory provisions is necessary as appear to be advocated for by Prof Karim.

127 Prof Karim calls the GBD "a discredited view that the virus should be allowed to spread while protecting the elderly". His characterisation of the GBD is incorrect. A better description would be that the GBD advocates for focussing protection on the vulnerable while recognising that a prevention strategy cannot be successful and will harm the vulnerable most because of its medical, social and economic consequences.

128 I point out that the MAC adopted a strikingly similar strategy to the GBD in its position paper of 8 February 2022, "Mitigating Covid-19 in South Africa: Going forward," authored by its Technical Working Group of which

Prof Karim was a member. The working group contrasts two strategies for dealing with Covid-19, the one called "Containment" and the other – which it recommends – called "Mitigation." The policy objective of "Containment" is to "STOP transmissions in the general population", while those of "Mitigation" is to "Protect the vulnerable" and "Reduce transmission at a cost that is affordable and sustainable to society." According to the working group, containment strategies are not sustainable and only possibly effective at the start of an outbreak when the number of infected people is small.

129 It could be said that the MAC considers containment strategies for Covid-19, under the circumstances, "a discredited view." I submit that Prof Karim's recurring views on prevention and containment did not pass the scrutiny of his peers in the technical working group, but that somehow his views remained influential with the Minister. Alternatively, I submit that he now holds a different view to the one he offered to the working group of which he was part, without disclosing and explaining this change of views. In any case, whatever its merits, Prof Karim's affidavit does not represent a scientifically conclusive medical or epidemiological position, nor does it represent a sufficient basis for considering all the socially relevant trade-offs of public policy-making. His views are also not supported in the Rule 53 record and should be rejected.

AD PARAGRAPH 49 TO 51 THEREOF:

130 Prof Karim once again appears to be attempting to prevent or stop the spread of Covid-19. This is not possible, as attested to by *inter alia* the MAC and its technical working group. The effects of Covid-19 can only be mitigated.

131 I point out that Prof Karim is not an expert in all aspects of public policy-making such that his views on self-interest and common good carry special weight. I disagree with the recommendations he makes here and submits that he has made a wholly inadequate case for the restrictive public policies he favours. His affidavit is based on his medical views as if they are overriding from a public interest perspective. He offers no systematic evaluation of the economic, political, moral, or many other social and material consequences of his recommendations.

132 I submit that Covid-19 policy formulation is not a purely medical question, but a social question, for which medical and scientific expertise are necessary but not sufficient inputs.

CONCLUSION

133 The Minister has failed to remedy the defects in his clearly deficient Rule 53 record and has failed to disclose a defence to the Applicant's case.

134 The Applicant reserves the right to seek the striking of Prof Karim's affidavit as it attempts to provide an *ex post facto* - basis for the Minister, for which there is simply no supporting records to be found in the Rule 53 record.

135 The Applicant was surprised by the Minister's approach, especially considering the lack of any basis in the Rule 53 record. The Applicant also reserves the right to apply for the filing of further affidavits in order to meet the challenge of the Minister.

P J LE ROUX

Signed and sworn/affirmed to before me at Pretoria on this 13th day of June 2022, the deponent having acknowledged that he knows and understands the contents of this affidavit; which is deposed to in accordance with the 2022 surveillance regulations governing the administration of an oath as more fully set out in Government Notice R1258 of 21 July 1972, as amended by Government Notice 1648 dated 19 August 1977 and Government Notice 903 dated 10 July 1998.

Commissioner of Oaths

JOHANNES JACOBUS VAN DER MERWE
Commissioner of Oaths
HB Forum
13 Stamvrug Street
Val De Grace
Ex Officio Practising Attorney
Republic of South Africa

Signature

Full names: _____

Status: _____

Street address: _____