

## COVID-19, the courts and access to justice

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### Introduction

The challenges confronting South Africa's court system prior to the arrival of the novel Corona Virus Covid-19 are well-documented.<sup>1</sup> The system's immunity was already compromised, so to speak. With the arrival and continued spread of Covid-19 in South Africa, the court system is no longer at risk of being infected; it is infected. This article briefly considers the impact of Covid-19 on access to South African courts.

### Limiting the right of access to courts

Section 34 of the Constitution of the Republic of South Africa, 1996 enshrines the right of access to courts. The Constitutional Court has, in relation to this right, held that it is "fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved."<sup>2</sup> In *Road Accident Fund v Mdeyide*,<sup>3</sup> the Constitutional Court held that "[t]he fundamental right of access to courts is essential for constitutional democracy under the rule of law. In order to enforce one's rights under the Constitution, legislation and the common law, everyone must be able to have a dispute that can be resolved by the application of law, decided by a court. The right of access to courts is thus protected in the Constitution."<sup>4</sup> Pursuant to the nationwide lockdown, numerous practice directives have, however, been published which restrict access to courts. Consequently, the constitutional right of access to courts has been severely limited. It means that access to justice is currently inaccessible for a large part of South Africa's population. Moreover, South African courts have and will continue to witness an increase in Covid-19 related litigation.

### Increase in Covid-19 litigation

Covid-19 has involved the adoption and implementation of wide-ranging regulations to address, prevent, and combat its spread. The reality that confronts the South African court system is that the restrictions imposed in South Africa to, among other things, curb movement and freedom to engage in commercial activities will almost certainly continue to be legally challenged. In many instances, these restrictions may leave individuals and companies, especially those who are in dire financial straits, with no choice but to litigate to compel performance or to recover their losses. Similarly, the consequences of Covid-19, and the interventions implemented to mitigate its adverse impact, provide fertile ground for future litigation. It should therefore not be surprising that current South African conditions present a hotbed for litigation growth. In fact, it has already resulted in increased litigation in South African courts:

- The North Gauteng High Court ordered the South African government to free 107 individuals who were quarantined at a facility in Mpumalanga.<sup>5</sup>
- A person who posed as a United Nations employee appeared in the Pretoria Magistrate's Court on charges of fraud and contravening the Disaster Management Act 57 of 2002.<sup>6</sup>
- The Tebeila Institute of Leadership, Education, Governance and Training challenged the government's decision to reopen schools in June 2020. The Limpopo High Court dismissed the challenge.<sup>7</sup>
- Two surfers had to appear in court after they were arrested for allegedly contravening disaster management regulations during a demonstration at Muizenberg beach.<sup>8</sup>
- Solidarity laid a criminal charge against the Minister of Small Business Development for allegedly lying under oath and in court documents by stating that race did not play a role as criteria for financial assistance to small businesses during Covid-19.<sup>9</sup>
- In *CD v Department of Social Development*,<sup>10</sup> parents of two children brought an urgent application in the Western Cape High Court requesting that one of them be allowed to travel to Bloemfontein to bring the children back to Cape Town.<sup>11</sup>

- In *Association of Mineworkers and Construction Union v Minister of Mineral Resources and Energy and Others*,<sup>12</sup> the South African Labour Court ordered the Chief Inspector of Mines to publish Covid-19 specific health and safety guidelines for the mining industry.<sup>13</sup>
- A religious leader who publicly encouraged congregants to defy the President's lockdown instructions and gathered in numbers for an annual Easter festival, had to appear in the Durban Magistrate's Court.<sup>14</sup>
- A couple must appear in court on 6 August 2020 after their toddler ran onto Muizenberg beach, resulting in a contravention of level 4 lockdown regulations.<sup>15</sup>
- A taxi driver faces attempted murder charges for transporting passengers after testing positive for Covid-19.<sup>16</sup>
- In *National Education Health & Allied Workers Union v Minister of Health*,<sup>17</sup> the applicant unsuccessfully claimed that the Minister failed to ensure that health workers were provided with personal protective equipment (PPE), failed to issue guidelines for the use of PPE and failed to meaningfully engage the applicant about these issues.
- In *Ex Parte: Van Heerden*,<sup>18</sup> the applicant unsuccessfully sought leave to travel to the Eastern Cape for his grandfather's funeral, as the lockdown regulations prohibited him from travelling between provinces.
- The relatives of a deceased individual, who allegedly died as a result of being tortured by soldiers, approached the Constitutional Court for relief.<sup>19</sup>
- The Durban High Court ruled in favour of the City of eThekweni which evicted people who illegally occupied a city-owned property on the first day of the lockdown on March 27.<sup>20</sup>
- The South Gauteng High Court ruled against City of Johannesburg evictions of homeless individuals on 6 April during the Covid-19 lockdown.<sup>21</sup>
- A man charged with spreading fake news about Covid-19 testing appeared in court on 7 April 2020.<sup>22</sup>
- The Hola Bon Renaissance Foundation unsuccessfully sought leave to challenge the order that the country should go into lockdown to curb the spread of Covid-19.<sup>23</sup>
- AfriForum challenged the race criteria used to determine which businesses receive state-sponsored Covid-19 relief bailouts.<sup>24</sup>
- The Association of Mineworkers and Construction Workers of South Africa instituted urgent legal proceedings to challenge the government's decision to allow mining companies to operate during the lockdown period.<sup>25</sup>

- Muslim leaders and entities approached the Gauteng High Court in Pretoria to have certain parts of the lockdown regulations declared unconstitutional as it prohibits prayers in places of worship.<sup>26</sup>
- In *Moela v Habib*,<sup>27</sup> the High Court dismissed the urgent application by two students to extend the period for the evacuation of residences.<sup>28</sup>

Several instances of threatened legal proceedings have also recently been reported upon by South African media:

- A court showdown looms over the government's unfettered e-commerce ban.<sup>29</sup>
- Solidarity Helping Hand plans to take government to court over its decision to centralise food distribution.<sup>30</sup>
- Legal action is possible regarding the legality of the President's national coronavirus command council.<sup>31</sup>
- The Legal Resources Centre, acting on behalf of the Poor Flat Dwellers Movement, has threatened court action in relation to comments made by politicians that people will be detained for lengthy periods should they resist the law.<sup>32</sup>
- Three lawyer groups have threatened legal action against the Minister of Justice and Correctional Services regarding the regulations governing the movement of attorneys during lockdown.<sup>33</sup>
- The Fair Trade Independent Tobacco Association considered court action to have the ban on the sale of cigarettes lifted.<sup>34</sup>
- The Gauteng Liquor Forum considered going to court to challenge the lockdown regulations regarding the sale of alcohol.<sup>35</sup>
- Happy Events SA threatened to approach the Constitutional Court if the Covid-19 lockdown is extended beyond 30 April.<sup>36</sup>
- SMEs that are not wholly South African owned and where more than 30% of their employees are not South African citizens, could litigate on the basis that the Debt Relief Finance Scheme unfairly discriminates against them.<sup>37</sup>

The danger that looms is that the increase in Covid-19 related litigation will continue to detrimentally affect individuals' right to access courts. An increasingly clogged court roll will hamper the judiciary's ability to efficiently and effectively resolve disputes. South Africa is already in a recession. Covid-19 will result in an increased death rate, financial losses, business closures, retrenchments, event cancellations and so forth. No industry or sector is immune to its commercial and economic effects. This is likely to lead to increased litigation as individuals and companies try to recover their losses, including through increased employment, consumer, and public sector class action litigation.

## Mitigating the adverse impact

South Africa is likely to witness an increase in the institution of class actions. Such an increase would mirror the trend in prominent foreign class action jurisdictions.<sup>38</sup> Class actions enable similar claims of a class of persons to be grouped together and pursued in a single action by a representative on their behalf. The class members stand to benefit from the outcome of the proceedings without having incurred significant expense in the prosecution of the action. Class actions facilitate access to justice. In view of the disproportionate impact that Covid-19 has on the poorest portion of the population, and taking into account that the South African class action has to date mostly been used to litigate employee benefits and constitutional rights claims,<sup>39</sup> class proceedings are likely to be increasingly considered to be an appropriate mechanism to address mass wrongs simultaneously. As the rationale which underpins the incorporation of the class action mechanism into South African law is access to justice,<sup>40</sup> and in view of the limitation of the right of access to courts as a result of Covid-19, it would therefore seem prudent that the class action is utilised to vindicate rights on a larger scale rather than simply sitting back and expecting geographically dispersed class members to, individually, approach the courts *en masse*.<sup>41</sup>

The increased utilisation of class proceedings also serves the purpose of facilitating judicial economy. Judicial economy in this regard arises from the avoidance of a multiplicity of actions. Other than the increased utilisation of class actions, it is suggested that the courts consider rapidly increasing their use of technology to facilitate access. Consider, for example, the recent judgment of the Federal Court of Australia in *Capic v Ford Motor Company of Australia Limited (Adjournment)*,<sup>42</sup> where an adjournment of a trial had been requested on the basis of numerous difficulties associated with a virtual trial. The court held that “[i]t is not feasible nor consistent with the overarching concerns of the administration of justice to stop the work of the courts for such a period”.<sup>43</sup> The court, whilst acknowledging that certain difficulties were posed by the conduct of a virtual trial, held that those difficulties will not necessarily lead to an unfair or unjust trial. Similarly, in *Municipio De Mariana & Ors v BHP Group Plc*,<sup>44</sup> two defendants applied to stay proceedings and sought postponement of the hearing, which relates to the biggest class action in history, to a later date. Judge Eyre QC delayed

the hearing by six weeks but confirmed that it would be possible for the hearing to proceed remotely if the current lockdown continues.<sup>45</sup> Indeed, the time has come for courts to embrace court automation and modernisation as rapidly as the spread of Covid-19.

The Supreme Court of Appeal has demonstrated its willingness to use technology to provide access to the court. In this regard, a recently issued practice directive provides that “[v]irtual hearings are the default position until further direction. The primary aim is to ensure ongoing access to justice by all parties to cases before the court and safety from infection whilst facilitating hearings that allow parties to participate as fully as possible.”<sup>46</sup> The judiciary faces the prospects of an ever-increasing workload and interventions such as these are necessary to promote the efficiency and effectiveness of the judiciary, to improve court performance and to advance access to courts.

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