

# Using Technology to Track and Trace in the COVID-19 Era: An Analysis of South Africa's Legal Framework

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## Abstract

On 15 March 2020, due to the global outbreak of the novel Coronavirus (COVID-19), South Africa declared a national state of disaster in terms of section 27(1) of the Disaster Management Act 57 of 2002 ('the DM Act'). This followed the World Health Organization's characterization of COVID-19 as a pandemic on 11 March 2020. Pursuant to the declaration of disaster in South Africa, various regulations have been promulgated in terms of section 27(2) of the DM Act with a view to curbing the spread of the virus. Some of these regulations have drastically affected a variety of constitutional rights – such as the right to freedom of movement and the right to privacy. On 2 April 2020 amended regulations issued by the Minister of Cooperative Governance and Traditional Affairs set out a first for South Africa's Constitutional democracy – a legislated basis for authorities to use technology to track and trace persons infected by the virus (or reasonably suspected to be infected) via a COVID-19 Tracing Database. On 29 April 2020, a further set of amended regulations were published and although the section numbers have changed, the track and trace provisions remain unaltered (Chapter 2, section 8 of the regulations under the heading *Contact Tracing* creates the COVID-19 Tracing Database). Although constitutional rights may be validly limited by section 36 of the Constitution of the Republic of South Africa, 1996, this may only be done by a law of general application, and only to the extent that the limitation of rights is reasonable and justifiable in a democratic society. This contribution will analyse the difference between a state of disaster and a state of emergency – and comment on the State's ability to limit constitutional rights, exploring whether a state of disaster was the appropriate choice in relation to COVID-

19. Further, this article will analyse whether the provisions setting out the COVID-19 Tracing Database (which include 19 sub-sections) are a justifiable and reasonable limitation of the right to privacy. Finally, the article considers how the regulations, read together with the Protection of Personal Information Act 4 of 2013 ('POPIA'), will ensure that personal information is processed appropriately. Accordingly, the purpose of this contribution is to analyse the legal framework surrounding the tracing provisions, to comment on their legal validity, and to consider the interaction between the POPIA and the COVID-19 Tracing Database. This article considers the legal position up to and including 5 October 2020.

**Keywords:** COVID-19, track and trace, COVID-19 Tracing Database, COVID-19 Designated Judge, tracing database, right to privacy, protection of personal information, POPIA.

## **1 Introduction**

On 31 December 2019 the Wuhan Municipal Health Commission in China reported a cluster of pneumonia cases in Hubei, a landlocked province located in central China. Subsequently, the World Health Organization ('WHO') reported on social media on 4 January 2020 that a pneumonia illness – with no current deaths at that stage – had originated in Wuhan in the Hubei province. As a result, as January progressed, the WHO published technical guidance, disease outbreak news, and on 22 January 2020, convened an emergency committee to determine whether the outbreak constituted a public health emergency. The WHO emergency committee was reconvened on 30 January 2020, and the outbreak of pneumonia cases was declared a public health emergency of international concern – the outbreak was referred to as the COVID-19 virus (World Health Organization, Technical Guidance 2020). By 30 January 2020, there had been 7 818 reported cases worldwide, including 82 in 18 countries outside China. Human-to-human transmission was confirmed, and the WHO gave a risk assessment of 'very high' for China, and 'high' for the rest of the world (World Health Organization 2020).

During February 2020, the WHO released response plans, and convened a research and innovation forum. As a result of enormous increases in reported cases, together with the fact that the disease had spread rapidly throughout the world, on 11 March 2020 the WHO declared COVID-19 a

pandemic<sup>1</sup> (World Health Organization 2020). As pointed out in *Mohamed v President of the Republic of South Africa* [2020] ZAGPPHC 120, a pandemic is ‘an epidemic of disease that has spread across a large region, for instance multiple continents or worldwide, affecting a substantial number of people’. By 11 March 2020, COVID-19 had been confirmed in at least 114 countries (Bremmer 2020) – the WHO has faced criticism from a number of Western countries, including from the American president (Hernández 2020), but has received backing from the African Union and certain African countries, including South Africa (Reuters 2020).

Following the characterization of COVID-19 as a pandemic, on 15 March 2020, South Africa declared a national state of disaster in terms of section 27(1) of the Disaster Management Act 57 of 2002 (‘the DM Act’). As a result, a plethora of regulations and directives have subsequently been issued in terms of section 27(2) of the DM Act, resulting in a ‘lockdown’ which curtails certain constitutional rights – including, *inter alia*: a restriction on the movement of persons and goods, a prohibition on gatherings, closure of national borders, and restrictions of certain economic activity (see the amended regulations issued in terms of section 27(2) of the DM Act where certain restrictions are imposed on all persons in South Africa). In addition, in a first for South Africa’s constitutional democracy, section 8 of the amended regulations creates a legislated basis for authorities to use technology to track and trace persons infected with COVID-19 with what is called a COVID-19 Tracing Database<sup>2</sup>.

This article seeks to distinguish a state of disaster from a state of em-

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<sup>1</sup> According to the South African Government: ‘an outbreak is a sudden rise in cases of a disease in a particular place. An epidemic is a large outbreak. A pandemic means a global epidemic’. Further, a pandemic does not reflect the severity of the disease, but rather it means that the disease is ‘spreading widely and at an alarming rate’. (South African Government Coronavirus COVID-19 Frequently Asked Questions 2020).

<sup>2</sup> This is a database established by the National Department of Health to enable the tracing of persons who are known or reasonably suspected to have come into contact with any person known or reasonably suspected to have contracted COVID-19 and created by virtue of section 8(2) of the regulations to the DM Act. See further paragraph 4 below for a discussion of the regulations dealing with this database.

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emergency in terms of South African legislation; and will thereafter seek to determine whether the provisions setting out the COVID-19 Tracing Database are a justifiable and reasonable limitation of the right to privacy and related constitutional rights. Finally, this contribution will analyse the South African legal framework regulating aspects of the lockdown, and to comment on the interaction between the Protection of Personal Information Act 4 of 2013 ('POPIA') and the COVID-19 Tracing Database.

## **2 State of Disaster versus a State of Emergency**

### **2.1 Overview**

Before dealing directly with the legal provisions that enable a COVID-19 Tracing Database, it is pertinent to briefly outline the legislative position in relation to South Africa's legal framework regulating disasters and emergencies, and briefly consider whether the correct decision was made to characterize COVID-19 as an event that required the declaration of a state of disaster (as opposed to a state of emergency).

A state of disaster is clearly distinct from a state of emergency. South Africa has opted for a state of disaster in order to deal with the outbreak of COVID-19, primarily so that the State can deploy available resources to fight the virus (Government Notice No. 313 of 15 March 2020). Both a state of disaster and a state of emergency facilitate the limitation of constitutionally protected rights. However, holistically, the primary differences between the two drastic measures are that, firstly, a state of emergency permits a more fundamental limitation of rights. Secondly, a state of emergency is aimed at restoring 'peace and order', whereas a state of disaster is typically aimed at a situation involving some natural disaster (see, for example, *Propshaft Master (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2018 (2) SA 555 (GJ)). Thirdly, a state of emergency is derived directly from section 37 of the Constitution, whereas a state of disaster derives its power from legislation. Fourthly, a state of emergency lasts for up to only 21 days, and requires the approval of the National Assembly for extension, whereas a state of disaster lasts for up to three months and may be extended without the approval of the National Assembly. Finally, a state of emergency envisages direct oversight by Parliament, whereas in a state of disaster this is not directly provided for in the legislation (but is inferred in view of parliaments roles and responsibilities).

## 2.2 *State of Disaster*

The purpose of the DM Act, according to the preamble thereto, is to: provide an integrated and coordinated policy that reduces the risk of disasters; facilitate emergency preparedness; provide effective responses to disaster recovery efforts; and establish a National Disaster Management Centre ('DM Centre'). A key term in the DM Act is a 'disaster'. In terms of section 1 of the DM Act, a disaster is defined as a sudden, widespread natural or human-caused occurrence which causes death, injury or disease, and is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources (*Mbatha v City of Johannesburg Metropolitan Municipality* 2015 (4) SA 591 (GJ)). Importantly, the Minister of Cooperative Governance and Traditional Affairs administers the DM Act, and has responsibility to promulgate regulations; however, in terms of section 26, the national executive is 'primarily responsible' for the co-ordination and management of national disasters. The DM Act creates a DM Centre which, according to section 9, is responsible for promoting an 'integrated and co-ordinated system of disaster management, with special emphasis on prevention and mitigation by national, provincial and municipal organs of state'. The DM Centre must, before a state of disaster can be declared, in terms of section 23(1)(b), *classify* the disaster as local, provincial or national. This was done by the head of the DM Centre, Dr. Tau, on 15 March 2020 in terms of Government Notice No. 312 of 15 March 2020, where the coronavirus was *classified* as a national disaster.

Following the classification of a disaster as national, the Minister administering the DM Act may *declare* a national state of disaster, in terms of section 27(1), if existing legislation does not adequately provide for the national executive to deal with the disaster, or where special circumstances exist that warrant the declaration of a national disaster. Ultimately, having regard to the 'magnitude and severity' of the COVID-19 pandemic, the responsible minister, namely the Minister of Cooperative Governance and Traditional Affairs, Dr. Dlamini-Zuma, *declared* a national disaster on 15 March 2020 in terms of Government Notice No. 313 of 15 March 2020. Primarily, COVID-19 was declared a disaster as a result of the 'special circumstances' that exist, and in order to 'augment the existing measures undertaken by organs of state to deal with the pandemic'.

Typically, a state of disaster will be declared by the State in an attempt

to bring social conditions back to normality, following some natural disaster such as a flood, water shortage or severe weather event (i.e.: the severe event means that those affected require assistance from the State, with the primary objective being to take society back to what it was before the disaster, or as close thereto as possible in the circumstances). A state of disaster will unlock certain funds for government to spend on combatting the disaster, and will facilitate spheres of government working together with the national executive to mitigate against damage caused by the disaster, and provide support for citizens and persons affected by the disaster. Critically, section 27(2) of the DM Act empowers the responsible minister to make regulations or issue directions with a view to controlling the disaster, and providing relief for society. As noted in para 6 of *De Beer v Minister of Cooperative Governance and Traditional Affairs* [2020] ZAGPPHC 184, the making of regulations in terms of the DM Act are subject to:

- a) consultation with the responsible cabinet Minister<sup>3</sup>;
- b) section 27(2)(a) – (o)<sup>4</sup> of the DM Act which sets out what the regulations should concern;

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<sup>3</sup> For example, if a regulation pertains to sports, consultation with the Minister responsible for that portfolio should take place.

<sup>4</sup> In terms of section 27(2), the regulations should concern:

- (a) the release of any available resources of the national government, including stores, equipment, vehicles and facilities;
- (b) the release of personnel of a national organ of state for the rendering of emergency services;
- (c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;
- (d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;
- (e) the regulation of traffic to, from or within the disaster-stricken or threatened area;
- (f) the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;
- (g) the control and occupancy of premises in the disaster-stricken or threatened area;

- c) section 27(3)(a) – (e)<sup>5</sup> of the DM Act which sets out the purpose of the regulations.

The internal limitations of the DM Act notwithstanding, the powers contained in section 27(2) of the DM Act are wide-ranging, and are only subject to the supremacy of the Constitution found in terms of section 1(c) and section 2 of the Constitution. What does supremacy of the Constitution mean? Briefly, it means that the Constitution is the supreme law of South Africa, and all conduct must be consistent with its values; accordingly, no person, entity or organ of State may violate anything contained in the Constitution, and a constitutional right may only be limited in terms of section 36 (see discussion in paragraph 3 below). On 2 June 2020, in *De Beer v Minister of Cooperative Governance and Traditional Affairs* [2020] ZAGPPHC 184, the High Court ultimately found that regulations promulgated by the Minister in terms of section 27(2) of the DM Act (for lockdown levels 3 and 4) were unconstitutional and declared them invalid. This decision is being appealed, and on 30 June 2020, in *Minister of Cooperative Governance and Traditional Affairs v De Beer* [2020] ZAGPPHC 280 at para 12, leave to appeal aspects of the judgment to

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- (h) the provision, control or use of temporary emergency accommodation;
  - (i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;
  - (j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;
  - (k) the dissemination of information required for dealing with the disaster;
  - (l) emergency procurement procedures;
  - (m) the facilitation of response and post-disaster recovery and rehabilitation;
  - (n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster; or
  - (o) steps to facilitate international assistance

<sup>5</sup> In terms of section 27(3), the regulations may only be exercised to the extent necessary for:

- (a) assisting and protecting the public;
  - (b) providing relief to the public;
  - (c) protecting property;
  - (d) preventing or combating disruption; or
  - (e) dealing with the destructive and other effects of the disaster.
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the Supreme Court of Appeal was granted<sup>6</sup>. Since that date, further regulations have been promulgated and South Africa has moved to lockdown level 1.

However, regardless of the outcome of the appeal, it is worth noting that, in *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC), the Constitutional Court again confirmed the basic cornerstone of a constitutional democracy: any exercise of public power must comply with the Constitution. Further, in *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), at para 38, the Constitutional Court stated as follows in relation to the principle of constitutional supremacy:

... under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament ‘must act in accordance with, and within the limits of, the Constitution’, and the supremacy of the Constitution requires that ‘the obligations imposed by it must be fulfilled’. Courts are required by the Constitution ‘to ensure that all branches of government act within the law’ and fulfil their constitutional obligations. This Court ‘has been given the responsibility of being the ultimate guardian of the Constitution and its values’. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that the obligations imposed by [the

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<sup>6</sup> The court only granted a limited appeal, and at para 12, found as follows:

1. Leave is granted to the Minister of Cooperative Government and Traditional Affairs (‘the Minister’) to appeal to the Supreme Court of Appeal against the declaration of invalidity of those regulations promulgated in terms of section 27(2) of the Disaster Management Act 57 of 2002 which have not been expressly identified in the judgment of this court dated 2 June 2020.
2. Leave to appeal the remainder of the judgment and orders, including leave to appeal against the declaration of invalidity of those regulations mentioned in the judgment, being regulations 33(1)(e), 34, 35, 39(2)(m), the exception to reg 46 (1) and 48(2), is refused.



Constitution] must be fulfilled. [footnotes omitted]

In addition to the supremacy of the Constitution, regulations promulgated must be rationally related to their purpose – for example, the regulations promulgated in terms of the DM Act must be rationally connected to containing the spread of the coronavirus (*Khosa v Minister of Defence* [2020] ZAGPPHC 147). Rationality forms a key part of the rule of law (section 1(c) of the Constitution), and is tested objectively – in other words, an irrational decision, even if taken in good faith or made mistakenly will still be irrational and therefore should be set aside (*Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 86).

That aside, looking at a state of disaster generally, as a point of departure in terms of section 27(5), a state of disaster lasts for up to three months, but it can be terminated earlier, and it may also be extended for periods of one month at a time (in the event that a valid reason exists to extend the state of disaster). On 14 September 2020, in terms of Government Notice No. 995, the state of disaster was extended to 15 October 2020. South Africa appears to have passed the peak of COVID-19 infections, which according to the latest data occurred towards the end of July (South African Government COVID-19 Statistics in South Africa 2020). See figure 1 below<sup>7</sup>, which is a graphical illustration of the number of COVID-19 infections per day as at the end of September 2020.

However, the position remains fluid, and many parts of the world, including the United Kingdom and parts of Europe are preparing for a ‘second wave’ of COVID-19 infections (Johnson & Yorke 2020). That notwithstanding, with the benefit of hindsight, it does appear as if the initial projected mortality rates were somewhat inflated, and the early models appeared to forecast a dire position which, fortunately, has not come to fruition. The Actuarial Society of South Africa has recently revised its COVID-19 estimates from a range of between 46 000 and 88 000 deaths in April 2020 to a range of between 27 000 and 50 000 deaths in September 2020 (Actuarial Society of South Africa 2020).

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<sup>7</sup> The graph is presented by Wikipedia via data drawn from *COVID-19 Statistics in South Africa* from the South African government at [www.sacoronavirus.co.za](http://www.sacoronavirus.co.za) (Accessed on 29 September 2020.)

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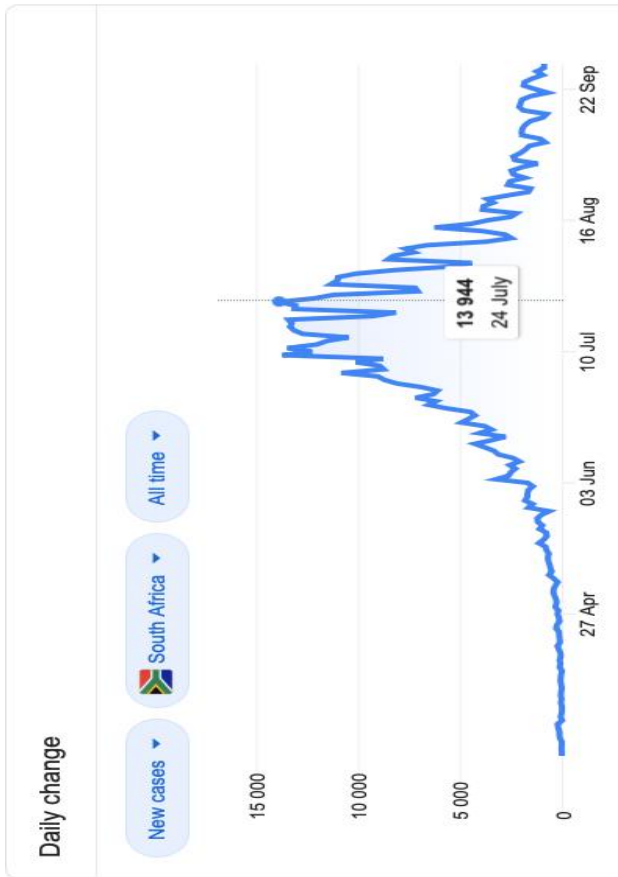


Figure 1: COVID-19 Infections Per day

Given that there are over 33,7 million infections worldwide, with over 1 million deaths (World Health Organization Coronavirus Disease (COVID-19) Dashboard 2020), some experts believe that the pandemic will last for between 18 and 24 months (Woodward 2020). However, as pointed out by global consultants McKinsey & Company, it is likely that the world will return to some form of normalcy in the third or fourth quarter of 2021: this will represent an almost 18-month pandemic if that projection is accurate (McKinsey & Company 2020). As a result, South Africa appears to have a

legitimate basis, at least in the short-term, to continue in a state of disaster. However, questions remain over the rationality of some of the lockdown measures, and further questions remain over whether these measures were successful given the damage to the economy (*Financial Times* 2020).

### **2.3 *State of Emergency***

Section 37 of the Constitution directly provides for a state of emergency in circumstances where the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency; *and* where the declaration is necessary to restore peace and order. As a result of section 37 of the Constitution, the State of Emergency Act 64 of 1997 was promulgated to flesh out the mechanism for declaring a state of emergency. The State of Emergency Act provides that the president should declare a state of emergency (unlike the DM Act, where this is delegated to a responsible minister). In addition, section 3 provides for parliamentary supervision in that it is expressly set out that the National Assembly may reject any regulation, and may make recommendations to the president in connection therewith.

A state of emergency effectively permits the State to suspend certain constitutional rights; however, it is more strictly managed in that it only lasts, initially, for 21 days from the date of declaration. Further, if a state of emergency is to be extended, a majority vote of the National Assembly is required – any subsequent extension requires a 60% vote of approval by the National Assembly. Primarily, a state of emergency is designed to ‘restore peace and order’, and although it may derogate constitutional rights contained in the Bill of Rights, this may only happen to the extent the suspension of these rights is required by the emergency. Importantly, regardless of the emergency, certain rights may never be suspended (contained in a table of non-derogable rights in section 37 of the Constitution) – such as the right to life, the right to dignity, and the right to equality.

### **2.4 *The Right Decision?***

The wording of the DM Act is sufficiently wide to ensure that a disease such as COVID-19 can be comfortably classified as a national disaster. In relation to a state of emergency, one could argue that the disease represents a public emergency, but in addition, the declaration of a state of emergency must also

be necessary to restore peace and order – does COVID-19 represent such a circumstance? In other words, would COVID-19 meet the threshold in the State of Emergency Act? In order to do so, it would need to constitute a public emergency (which it clearly is), *and* the declaration would be necessary to restore peace and order. Arguably, there is no need for the State to restore peace and order as a result of a virus. In addition, from the perspective of the State, a declaration of a state of emergency would entail having to appear before the National Assembly to extend the initial 21 day period – the first extension could only be for a maximum of three months, where after, 60% of the National Assembly would have to approve a second extension (an extension may only be granted for a maximum period of three months at a time). In addition, all regulations would need to be placed before parliament in terms of section 3 of the State of Emergency Act, *Parliamentary supervision*. Accordingly, in order to *slightly* circumvent<sup>8</sup> direct parliamentary oversight, and in order to ensure the state of lockdown can ensue for longer periods of time, without National Assembly approval, it seems a state of disaster is the most prudent and expedient option for the State in the current circumstances.

Holistically, however, it should be borne in mind that the state of disaster notwithstanding, constitutional rights may only be limited on a basis that is reasonable and justifiable in the circumstances – arguably, as will be discussed below in paragraph 3, some of the limitations South Africans have faced have been unreasonable and not justifiable. Further, South Africa's

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<sup>8</sup> Parliament should fulfil an oversight role in all circumstances, and is responsible, *inter alia*, to ensure that all government action is consistent with the Constitution (Parliament Oversight and Accountability Model, n.d.). However, as noted by the Executive Secretary for the Council of the Advancement of the South African Constitution, it appears as if Parliament has not provided much in the way of oversight during the coronavirus outbreak (Naidoo 2020). However, on 5 April 2020, Parliament released a statement noting that '[i]n performing its constitutional obligations during this period, Parliament must not be seen as interfering with the responsibility of the Executive to implement measures for which the National State of Disaster has been declared', but Parliament did reiterate its oversight role by pointing out 'Parliament, whose Members are regarded as an essential service, in terms of the lockdown regulations, has the authority to execute its oversight functions during a lockdown or social distancing period'.

economy has recorded its worst slump in decades with the gross domestic product falling drastically (*Financial Times* 2020). Only time will tell whether the harsh lock-down measures imposed in South Africa from March 2020 to September 2020 will be regarded as successful.

### 3 Limitation of Constitutional Rights

It is trite that the rights enshrined in the Constitution are not absolute (*Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC); Woolman & Bishop 2008), and that a limitation of any right in the Bill of Rights must be justified in terms of section 36 of the Constitution (*Mlungwana v S* 2019 (1) SACR 429 (CC) paras 57 – 59). Section 36 is often colloquially referred to as the ‘limitations clause’. Essentially, a section 36 analysis requires a weighing up of the nature and importance of the right(s) with the extent of the limitation. The application of section 36 involves weighing competing interests on a case-by-case basis to reach a decision that is based on proportionality (*S v Manamela* 2000 (3) SA 1 (CC)).

When may the State limit constitutionally enshrined rights? Put simply, only if done so by a law of general application, and only to the extent that the limitation of rights is reasonable and justifiable in an open and democratic society. As repeatedly noted by South Africa’s Constitutional Court, determining whether a limitation is reasonable and justifiable involves a *balancing* of interests; this is often referred to as an exercise in proportionality (*Johncom Media Investments Limited v M* 2009 (4) SA 7 (CC)). Several important Constitutional Court judgments, entire books, and many journal articles have been written on the topic of limitation of rights and proportionality, but holistically, one must consider the following: what is the nature and importance of the right(s) being limited? What is the purpose of the limitation? What is the extent of the limitation? Is the impairment of rights proportional to the purpose it seeks to achieve? Is there a less restrictive means to achieve the purpose? Accordingly, each case will turn on its own unique facts and requires independent analysis.

Importantly, as pointed out in recent cases dealing with challenges to government action in relation to the coronavirus, such as in para 6 of *De Beer v Minister of Cooperative Governance and Traditional Affairs* [2020] ZAGPPHC 184, para 40 – 42 of *Mohamed v President of the Republic of South Africa* [2020] ZAGPPHC 120, and para 19 of *Khosa v Minister of Defence*

[2020] ZAGPPHC 147, constitutional rights should only be limited where justifiable. As the court in *De Beer* puts it, the question should be asked: ‘how can we as government limit Constitutional rights in the least possible fashion whilst still protecting the inhabitants of South Africa?’

In light of cases such as *Khosa v Minister of Defence*, where the SANDF allegedly brutally assaulted Mr. Collins Khosa, leading to his death (see the full extent of the allegations at para 34 of *Khosa v Minister of Defence* [2020] ZAGPPHC 147), together with other allegations of SANDF and police brutality, which have allegedly led to the loss of at least eleven lives as a result of lockdown enforcement (Haffajee 2020), it does appear as if South Africa has gone too far in the limitation of constitutional rights in some instances. These allegations of overzealous enforcement, and the dire state of the South African economy mean that at least some of the lockdown objectives could surely have been achieved in a less restrictive fashion.

Be that as it may, in what appears to be a first for South African constitutional jurisprudence, the High Court in *Khosa* ordered that notwithstanding the state of disaster and the lockdown in terms of the DM Act, the SANDF, the South African Police Service, and the Metropolitan Police Department must ‘act in accordance with Constitution and the law’. Further, that these entities are obliged in terms of section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. The court also confirmed the obvious: all persons in South Africa are entitled to human dignity (section 10 of the Constitution), the right to life (section 11 of the Constitution), the right not to be tortured (section 12(1)(d) of the Constitution), and the right not to be treated or punished in a cruel, inhuman or degrading way (section 12(1)(e)) of the Constitution.

## **4 Track and Trace Database**

### ***4.1 Overview of Contact Tracing Regulations***

As alluded to above, a raft of regulations has been published in terms of section 27(2) of the DM Act. In relation to tracking and tracing citizens in the context of the coronavirus, in a first for South Africa’s constitutional democracy, on 2 April 2020 (Government Notice No. 446 of 2 April 2020), concepts such as ‘contact tracing’ and ‘COVID-19 tracing database’ were introduced into legal parlance. Initially, the section was inserted as 11H into the then applicable regulations (of 2 April 2020) – since then, following an amendment on 29 April

2020 (Government Notice No. 480 of 29 April 2020), the applicable section now falls under section 8 (contact tracing) of Chapter 2 (general provisions applicable during national state of disaster).

Broadly speaking, the section authorizes the National Department of Health to develop and maintain a national database to facilitate the tracing of persons who are known to be infected with COVID-19, or reasonably suspected to be infected with COVID-19. In addition, the regulation empowers the Director-General for Health to request geolocation<sup>9</sup> data to monitor location and movements – from 5 March 2020 to the date when the State of Disaster lapses.

## ***4.2 The Contact Tracing Regulations***

Section 8(1) introduces definitions for the COVID-19 Tracing Database, and the COVID-19 Designated Judge. The tracing database, which is set out in section 8(2), obliges the National Department of Health to create a national database to ‘enable the tracing of persons who are known or reasonably suspected to have come into contact with any person known or reasonably suspected to have contracted COVID-19’. This provision therefore facilitates the wide-scale monitoring<sup>10</sup> of persons in South Africa who are thought to have been exposed to the coronavirus. Although this far-reaching ability to monitor citizens at first blush appears directly out of a dystopian horror movie, one must appreciate South Africa’s tremendous socio-economic inequality, and the limited resources government has at its disposal. Further, South Africa has an enormous number of citizens living with HIV and other health related comorbidities. In addition, the regulation provides a basis to track and trace movement and whereabouts – subsection 12 specifically confirms that the regulations do not authorize any interception of electronic communications. As a result, the tracing database has the potential to allow government to monitor movement to curb the spread of the virus. As a result, in practice, this means the government may ask for information about your location, and where you

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<sup>9</sup> Geolocation refers to information that can be used to identify the real-world physical location of an electronic device.

<sup>10</sup> See also the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 which provides for the interception and monitoring of direct and indirect communications.

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have been, if you are exposed to the coronavirus, but even where a person has been exposed, these regulations do not entitle the government to intercept and monitor electronic communications; such interception and/or monitoring would require a warrant in terms of the Criminal Procedure Act, or the Prevention of Organised Crime Act or similar legislation, or compliance with other applicable legislation such as the Regulation of Interception of Communications and Provision of Communication-related Information Act. In terms of the DM, the Minister of Justice and Correctional Services appointed former Constitutional Court judge Kate O'Regan as the COVID-19 Designated Judge,<sup>11</sup> on 3 April 2020, to oversee citizens' rights (Ministry of Justice and Correctional Services, 3 April 2020).

Section 8(3) sets out the type of information that should be included in the COVID-19 Tracing Database – the wording of the section, 'including but not limited to', gives authorities the ability to include information beyond what is set out in the regulation, as long as it is 'necessary for the contact tracing process to be effective'. The information will include a person's name, identity number or passport number, address and mobile phone number; the COVID-19 test results of that person; and the details of all known or suspected contacts of any person who tested positive for COVID-19. Effectively, the information relating to known or suspected contacts will provide authorities with a reasonable basis to track and trace those persons identified as being exposed to the virus. Section 8(4) confirms that the information held in the COVID-19 Tracing Database is confidential, and section 8(5) sets out that no person may disclose any of the information held therein unless for the purpose of 'addressing, preventing or combatting the spread of COVID-19'.

Section 8(6) places an obligation on the medical professionals taking a sample for the purposes of testing. If testing, the medical professional must obtain the personal information set out in section 8(3), and in addition thereto, a copy of some photographic identification (such as passport, driver's license, identity card or identity book). In a similar vein to section 8(6), section 8(7) places an obligation on any laboratory testing for COVID-19 to send relevant personal information and the test results for inclusion in the COVID-19 Tracing Database; while section 8(8) places this same obligation on the

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<sup>11</sup> Section 8(13) of the DM Act, to be discussed below, provides that a former Constitutional Court judge should be appointed to act in an oversight role in relation to protecting citizens' right to privacy.



National Institute for Communicable Diseases to send all personal information, contact information, and test results for inclusion in the COVID-19 Tracing Database. The information contained in the tracing database will therefore be drawn from a number of sources – it remains to be seen whether the information will be accurate, and whether the tracing will assist with combatting the virus.

Section 8(9) obliges every ‘accommodation establishment’ (this term is not defined), to submit for inclusion in the COVID-19 Tracing Database personal information regarding each guest, as well as a copy of photographic identity. The term accommodation establishment should be interpreted in its normal manner, and would include any hotel, bed and breakfast, or another other establishment where a person pays for accommodation. Presumably, this part of the regulation is in place to assist the monitoring process and identify persons who may be at risk when a case of COVID-19 is identified.

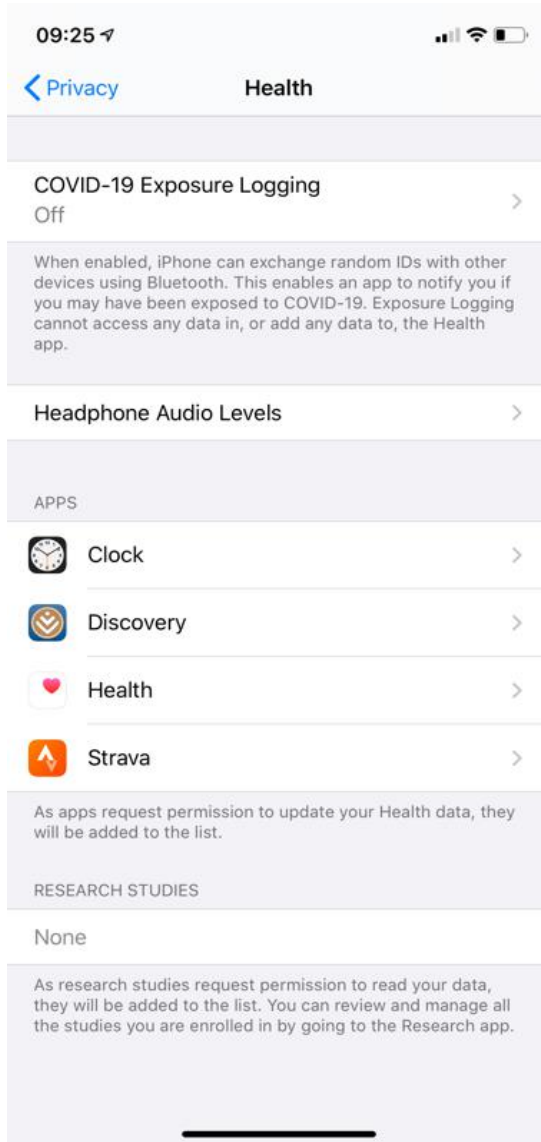
Section 8(10) permits the Director-General for Health to contact any electronic communications service provider in South Africa (licensed in terms of the Electronic Communications Act 36 of 2005)<sup>12</sup> to obtain, without notice to the person affected, location and movement data of persons infected or reasonably suspected to be infected with COVID-19 from the period 5 March 2020 up until the state of disaster is terminated (the termination date is not yet known given that the pandemic is on-going).

In addition to the ability for government to directly obtain this data from service providers, many mobile phone operating systems – such as Apple’s iOS and Google’s Android – have automatically introduced COVID-19 tracking applications to the software with recent updates, regardless of whether a user would want such software (Apple 10 April 2020). However for now, the feature does allow a user to disable the function. In iOS, the feature is located within ‘Privacy’, then ‘Health’, then ‘COVID-19 Exposure Logging’. For example, see the screenshots below, taken from my own mobile phone:

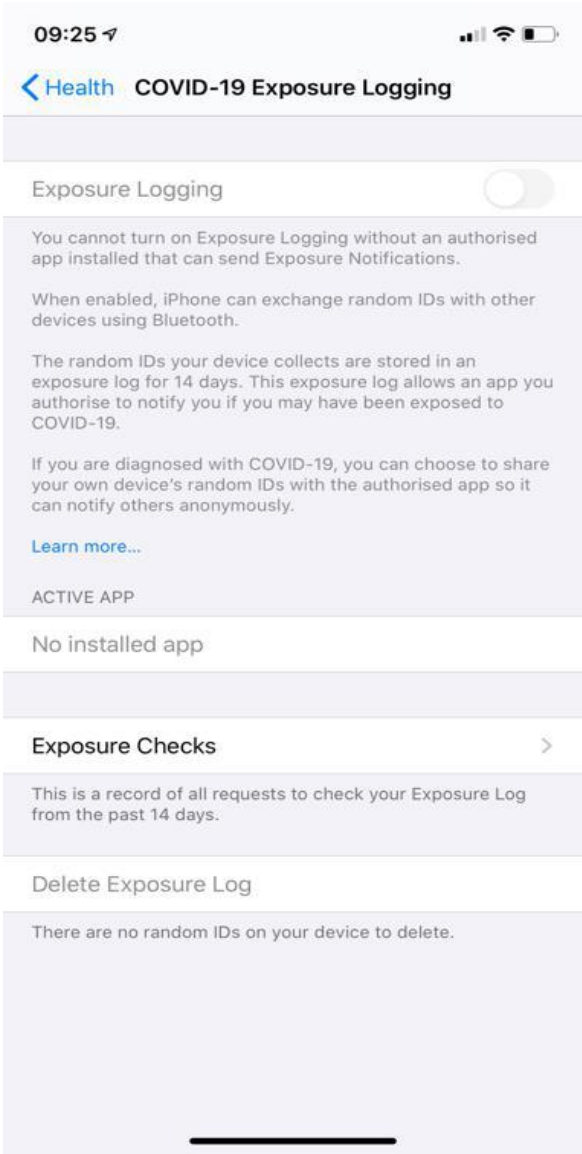
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<sup>12</sup> This piece of legislation, which regulates broadcasting, signal distribution and telecommunications in general should not be confused with the similarly named Electronic Communications and Transactions Act 25 of 2002. The latter is a wide-ranging piece of legislation regulating, *inter alia*, the legal requirements for data messages and issues relating to electronic evidence, cryptography providers, cybercrime, consumer protection, critical databases and domain name authority.

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**Figure 2:** COVID-19 Exposure Logging in the iOS software (located within ‘Health’ in the ‘Privacy’ setting).



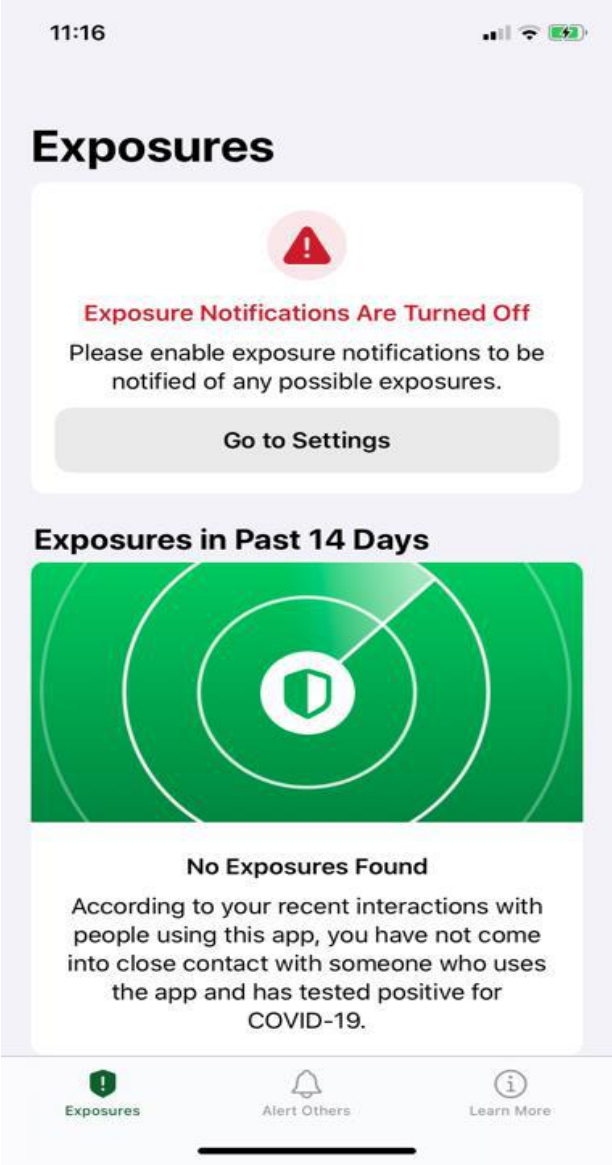
**Figure 3:** COVID-19 Exposure Logging settings in iOS.

Further, the South African government has also released its own application to trace COVID-19 exposure called ‘COVID Alert’ (this App can be downloaded voluntarily, and it should not be confused with the government’s COVID-19 Tracing Database). A user has the ability to disable exposure notifications, and via the user settings, a person can also choose to disable their ‘travel status’<sup>13</sup>. The App does not record where a person has been nor does it collect personal information – its exclusive purpose is to determine ‘how close and how long you have been in contact with others using the App’.

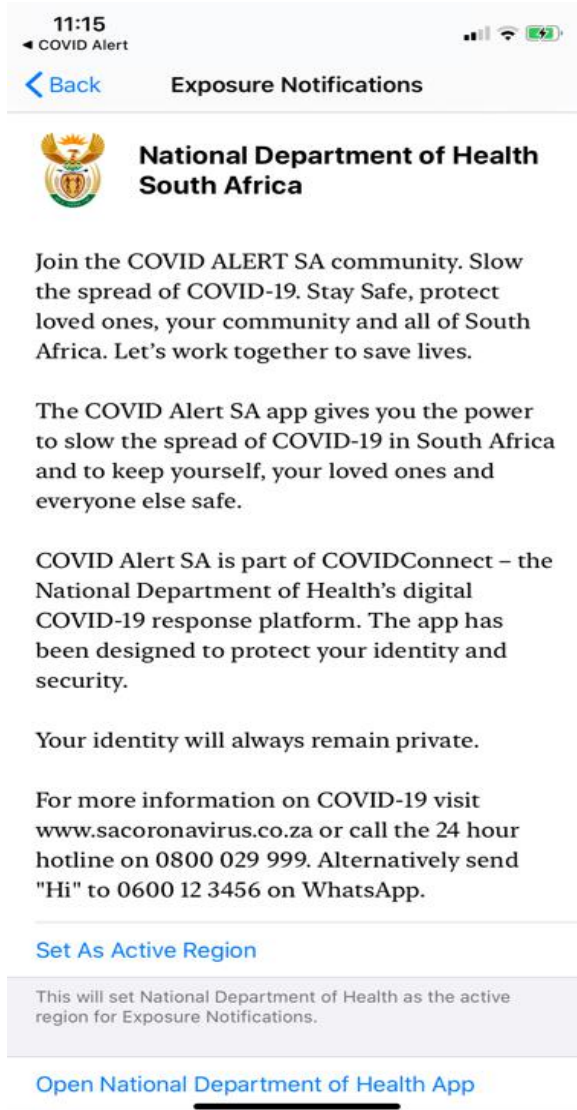
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<sup>13</sup> This setting notifies the government if a person has travelled outside their ‘active region’ in the past 14 days but it does not include information about where the person has travelled or their location. The purpose of the App is exclusively to monitor exposure to COVID-19 and not to track a person’s movements.

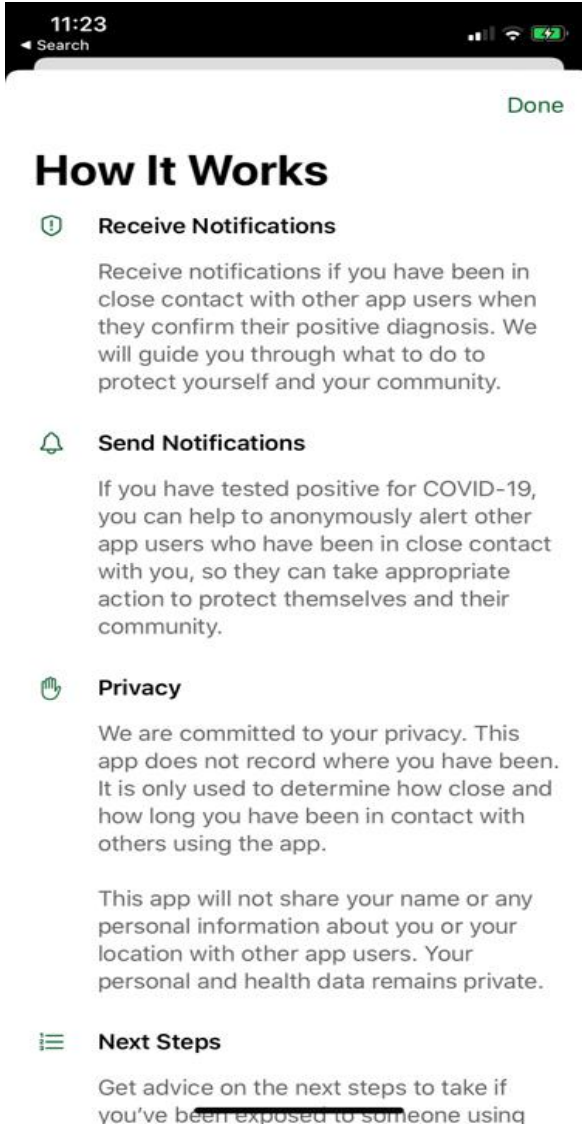
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**Figure 4:** South African government COVID Alert App for iOS main screen.



**Figure 5:** South African government COVID Alert application for iOS explanation regarding privacy.



**Figure 6:** South African government COVID Alert application for iOS explanation regarding how the App works.

Turning back to the regulations, section 8(11) provides further guidance in relation to 8(10), and largely repeats what is contained in other sections – it seeks to confirm the limitations in place on the manner in which the data can be used, and when it should be destroyed. Section 8(11)(a) repeats what is in 8(10) by stating that the geolocation data may only be accessed as far back as 5 March up until the date the state of disaster is terminated. Section 8(11)(b) repeats what is contained in 8(5) by confirming that only authorized persons may access the data, and only to the extent that it is used to combat COVID-19. Section 8(11)(c) to an extent repeats what is contained in 8(10) by noting that the data collected relevant to contact tracing must be included in the COVID-19 Tracing Database (although, this begs the immediate question: what else would it be collected for?). Finally, section 8(11)(d) introduces something new by providing that apart from what is included in the COVID-19 Tracing Database, all other data collected must be destroyed after 6 weeks.

Critically, section 8(12) provides that nothing in the regulations entitles any person to intercept the contents of any electronic communication. As a result, government is authorized to collect tracking data – to form a view on the location of a person, and their movements. However, government cannot intercept e-mails, electronic messages, phone calls or any other form of communication as a result of these regulations. A concern initially raised in the media and some social media platforms was that these regulations would allow government to spy on citizens – this is not the case. The regulations allow government to track and trace location data in order to curb the spread of the virus, but they do not facilitate monitoring of communications.

Section 8(13) provides that the Minister of Justice and Correctional Services (Mr. Ronald Lamola) must appoint a Constitutional Court judge discharged from active service – as pointed out above, this was done on 3 April 2020 where former Constitutional Court judge Kate O'Regan was appointed as the COVID-19 Designated Judge. The oversight role performed by the COVID-19 Designated Judge will be critical in relation to protecting citizens' right to privacy and ensuring that the limitation of constitutional rights is as minimal as possible.

In terms of section 8(14), the Director-General for Health must file a weekly report with former Justice O'Regan setting out the names and details of all persons whose location or movement data was obtained in terms of section 8(10) from electronic communications service providers. This obligation provides a measure of comfort because in theory an independent



observer will have a view on the amount of people being tracked and traced. Further, in terms of section 8(15), the COVID-19 Designated Judge is empowered to make recommendations to Cabinet in order to safeguard the right to privacy in relation to this regulation. However, ‘recommendations’ are exactly that – recommendations. They are not binding, and Cabinet or the relevant Minister is not obliged to follow the advice given; the advice must be considered, and taken into account, but it need not be followed.

Section 8(16) provides that the Director-General for Health, within 6 weeks after the state of disaster has lapsed, must notify every person whose information was obtained from an electronic communications service provider. As mentioned above, section 8(10) empowers the Director-General for Health to obtain this information directly from service providers without notifying the person concerned – section 8(16) at least facilitates affected persons being informed of the breach to their right to privacy, albeit after the fact.

Section 8(17) sets out important obligations in relation to the COVID-19 Tracing Database once the state of disaster has lapsed. In terms of 8(17)(a), the information contained in the database must be de-identified. Typically, de-identification is a process of ensuring that a person’s personal identity is not revealed; in other words, all personally identifiable information has been removed. Although this term is not defined in the regulations, the meaning of this word is set out in the Protection of Personal Information Act 4 of 2013, which defines the term to mean:

**‘de-identify’**, in relation to personal information of a data subject, means to delete any information that –

- (a) identifies the data subject;
- (b) can be used or manipulated by a reasonably foreseeable method to identify the data subject; or
- (c) can be linked by a reasonably foreseeable method to other information that identifies the data subject,

and **‘de-identified’** has a corresponding meaning

However, in terms of section 8(17)(b), the de-identified information can be retained for research, study and teaching purposes; section 8(17)(c) provides that all other information not de-identified must be destroyed, and crucially,

section 8(17)(d) obliges the Director-General for Health to file a report with the COVID-19 Designated Judge recording the steps taken, as well as the steps taken pursuant to the notification of affected persons set out in section 8(16). In terms of 8(17), Justice O'Regan is entitled to give directions as to any further steps to be taken in order to protect the right to privacy; unlike the 'recommendations' contained in 8(15), section 8(17) is a direction, and the regulation specifically notes that any directions given by the designed judge must be complied with. This is an important step to ensure a reasonable limitation of rights, and to ensure a modicum of oversight.

Finally, in terms of section 8(19), the report setting out the steps taken to de-identify information, and to contact affected parties, will be tabled in parliament – this is an important obligation, and adds a layer of accountability and credibility to the process.

### ***4.3 Are the Contact Tracing Measures a Reasonable and Justifiable Limitation of Constitutional Rights?***

What rights are infringed by the COVID-19 Tracing Database? Primarily, the right to privacy contained in section 14 of the Constitution – and this is borne out by the repeated references to this right in the regulations; see for example, section 8(15) and section 8(18) of the regulations. In addition, one could cogently argue that the right to dignity, enshrined in section 10 of the Constitution, and often regarded as a foundational constitutional value (*The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC) para 143) will be infringed by the COVID-19 Tracing Database in that a citizen could have her movements tracked without her knowledge. In addition, it may be argued that being monitored by the State will infringe the right to freedom and security of the person contained in section 12 of the Constitution. However, in my view, primarily, the right to privacy is at issue with the COVID-19 Tracing Database.

It is often said that when analyzing whether a right may be permissibly limited in terms of the Constitution, one must weigh up or balance competing interests (*Johncom Media Investments Limited v M* 2009 (4) SA 7 (CC) para 24). In this instance, the competing interests are those constitutional rights listed above, and the duty on the State to protect its citizens by limiting the spread of the coronavirus – the State must act to save lives and ensure that all is reasonably done to prevent further harm. In relation to the limitation of rights facilitated by the tracking and tracing of citizens, is the limitation of

constitutional rights reasonable and justifiable in terms of section 36 of the Constitution? In my view, the short answer is yes.

In terms of section 36 of Constitution, the first threshold is whether the limitation is created in terms of a law of general application. The lockdown regulations in terms of the DM Act apply to all citizens, so clearly the limitation of rights created by the COVID-19 Tracing Database passes this threshold. Next, one must consider whether it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and take into account all relevant factors<sup>14</sup>.

The rights that are limited by the track and trace mechanism implemented by the State are indeed sacrosanct rights that are critical to a healthy constitutional democracy. However, as noted above, they are not absolute. The importance of the limitation, in the current circumstances, must weigh higher and heavier than the Constitutional rights it affects. As at 30 September 2020, there are around 33,7 million infections worldwide, with over 1 million deaths (World Health Organization Coronavirus Disease (COVID-19) Dashboard 2020). Given the enormous risk to citizens, and the worldwide phenomenon caused by the coronavirus, it is important that the State takes reasonable steps to prevent further harm; tracking and monitoring the spread of the virus is one such step, and further, it is consistent with what many other jurisdictions are doing (BBC 18 June 2020). In addition, the South African government has a severe limitation on available resources; this is further exacerbated by the significant levels of inequality in society, and the many millions of South Africans that live in abject poverty. Further, many millions of South Africans live with HIV and other comorbidities – the South African landscape is a complicated one, and given the overall greater good, the importance of the limitation must outweigh the importance of the rights (in other words, the importance of tracking the disease in a third world country must outweigh the right to privacy – providing, of course, that the appropriate safeguards and checks are in place as discussed above in paragraph 4.2).

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<sup>14</sup> These factors include, but are not limited to:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

Moreover, when considering the nature and extent of the limitation, the State is not authorized to monitor or intercept communications, and a well-known credible former Constitutional Court judge has been appointed to act in an oversight capacity. The regulations also facilitate the personal information being de-identified or deleted after the state of disaster has lapsed. Cabinet is empowered to review relevant reports, and provided the oversight mechanisms in the regulations are adhered to, and the database is used in good faith for its primary purpose, the limitations appear to be justified. Is it ideal to have the State infringing upon a person's privacy and potentially monitoring whereabouts? No, of course not. But, we are not in an ideal situation – we are facing an unprecedented pandemic, a once in a generation crisis, perhaps even a once in a century crisis. Citizens cannot continue as normal and expect society to operate as if the pandemic did not happen – particularly given South Africa's socio-economic disparities, and especially given the systemic inequality that perpetuates society.

One must also consider whether there is a relation between the limitation and its purpose. In this instance, unlike some other regulations promulgated (see, for example, para 7 of *De Beer v Minister of Cooperative Governance and Traditional Affairs* [2020] ZAGPPHC 184), the track and trace regulations which limit certain rights do appear to be logically and rationally linked to the purpose – namely, to prevent the spread of the virus. Given that many South Africans do not have the benefit of adequate space, proper housing, running fresh water, electricity, and food security, there is definitely a need to ensure that the State takes measures to protect vulnerable members of society by keeping tabs on hotspots, and understanding the whereabouts of persons who are infected so as to ensure the infection is limited as far as possible. Although Mr. X living in a 200 square meter three-bedroom apartment in Sandton, a wealthy suburb in Johannesburg, may bemoan the limitation of rights, and complain of a 'police State' or a 'nanny State', when considering the greater good, and the purpose of the database, there is a definite link (which is rational, reasonable and justifiable) between the limitation and its purpose.

Finally, when considering whether there are any less restrictive means to achieve the purpose, one must note the South African population and socio-economic position. Many South Africans, despite living conditions and food security have access to mobile phones – depending on the statistics considered, this figure is anywhere from 40% (O'Dea 27 February 2020) to 80% (Gilbert

3 April 2019). The wide variance in statistics notwithstanding, given the budgetary constraints, and the dynamics of South Africa's population, there seems to be very few viable options in monitoring the spread and movement of the disease – other than to monitor geolocation data.

However, the solution is imperfect, and authorities are grappling with trying to do what is reasonably possible with technology today, and within the confines of what is legally permissible. For example, with geolocation data, the data has its own problems in that its accuracy may not be able to determine if a person came within one meter of another infected person, or within 15 meters of them; further, the data will not be able to definitively determine how long persons were in contact, and the circumstances of the contact – both persons may have been wearing protective gear, and there may be very little risk with the contact (Wild 2020). However, the steps taken appear to be necessary given that at least authorities can form a view on hotspots and infection movements.

The concerns with the data notwithstanding, the South African government was required to take decisive legally permissible steps to curb the spread of the virus – given high rates of poverty, and alarming levels of inequality, the COVID-19 Tracing Database<sup>15</sup>, when considered as a whole, represents in my view a reasonable and justifiable limitation of the right to privacy and related rights. Further, keep in mind that this is a temporary measure. Put simply, in the short term, the needs of society – particularly vulnerable members of society – must come before the interests of a single person, or a small group of wealthy persons.

This database is not the ultimate solution, and it must be read together with other measures; and when considering the limitations the database creates, and the purpose of the limitations, together with the objective it seeks to achieve, given that millions of people around the world are infected, and when

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<sup>15</sup> Although it should have no decisive impact on the legal discussion above, one should also bear in mind that prior to COVID-19, contact tracing for persons affected by an illness was already being used in South Africa in relation to tuberculosis patients (Hanrahan *et al.* 2020) – this type of methodology is therefore not new, and has already been used in a South African context (but this fact should make no major difference in the assessment as to whether the COVID-19 Tracing Database is a reasonable and justifiable limitation on the right to privacy).

thousands of new cases were occurring daily, there did not appear to be any less restrictive means to assist in monitoring data to facilitate curbing the spread of the virus in a country like South Africa.

## **5 Protection of Personal Information Act**

The Protection of Personal Information Act 4 of 2013 ('POPIA') seeks to give effect to the right to privacy enshrined in section 14 of the Constitution. It is an important piece of legislation in that it provides guidelines for the processing of personal information for public and private bodies, and sets out internationally recognizable conditions for processing personal information. Once in full effect, POPIA will align South Africa with many foreign jurisdictions in relation to best practice concerning data protection. Essentially, POPIA sets out conditions for lawful processing of data – these conditions are provided for in sections 8 to 25 of the Act. These sections form the primary provisions in relation to regulating how data should be used, collected, stored, processed and deleted. Briefly, these conditions are: 1) accountability; 2) processing limitation; 3) purpose specification; 4) further processing limitation; 5) information quality; 6) openness; 7) security safeguards; and 8) data subject participation.

On 11 April 2014, after years of discussion and the consideration of draft legislation, section 1 of POPIA (the definitions), Part A of Chapter 5 which contained sections 39 – 54 (dealing with the Information Regulator), and sections 112 and 113 (dealing with regulations to POPIA) were made effective (Government Notice No. 25 of 11 April 2014). It should also be noted that after years of waiting, on 22 June 2020, the presidency announced that the effective date for most of POPIA will be 1 July 2020. Sections 2 to 38, sections 55 to 109, section 111, and section 114 (1), (2) and (3) will commence on 1 July 2020. Sections 110 and 114(4) will commence on 30 June 2021 – the reason for the delay of the latter sections is to allow for the transfer of enforcement of the Promotion of Access to Information Act 2 of 2000 from the South African Human Rights Commission to the Information Regulator in terms of section 114(4), and to allow a further year to pass for the amendment of laws in terms of section 110.

In relation to COVID-19, on 3 April 2020, the Information Regulator – which is empowered to monitor and enforce compliance with POPIA – released a guidance note relating to processing personal information in the

context of containing the COVID-19 pandemic (Information Regulator Guidance Note on the Processing of Personal Information 3 April 2020). As part of the guidance note, the Regulator poses the following question:

Can Electronic Communication Service Providers process (provide) location-based data to the Government to process (use) for the purpose of tracking data subjects to manage the spread of COVID-19?

**Yes.** The Electronic Communication Service Providers must provide the Government with mobile location-based data of data subjects and the Government can use such personal information in the management of the spread of COVID19 if:

- a) processing complies with an obligation imposed by law on the responsible party; or
- b) processing protects the legitimate interest of a data subject; or
- c) processing is necessary for the proper performance of a public law duty by a public body; or
- d) processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied.

However, the Government must still comply with all the applicable conditions for the lawful processing as set out in this Guidance Note.

As a result, the key principles contained within POPIA must still be complied with – however, the government can legitimately monitor the geolocation data if the conditions mentioned above in the Information Regulator’s guidance note are followed. The responsible party will be the Department of Health (‘DOH’), and it will be able to satisfy, arguably, all of the four conditions listed above; although the DOH only needs to satisfy *one* of the conditions – the section is disjunctive in that the conditions are separated by an ‘or’.

In terms of the conditions noted by the Regulator in the guidance note above: a) the DOH will be complying with an obligation imposed by the regulations to the DM Act; or b) the DOH will be protecting the legitimate interests of the data subjects by being able to track infections and warn citizens; or c) the DOH is performing a public duty as a public body; or d) the processing

is necessary to protect the DOH – it must act reasonably to ensure the virus is monitored, that adequate steps are taken, and that citizens are protected – if it doesn't act, it may well open itself up to legal action for failing to fulfil its mandate, and failing to act reasonably.

However, even though authority exists to process the data of citizens lawfully, as the Information Regulator notes, 'government must still comply with all applicable conditions for lawful processing'. What does this mean? Even though the DOH is authorized (and required) to collect personal information, the processing thereof must still take place in a lawful manner – simply put, the DOH must comply with the eight conditions for lawful processing. In brief, the DOH is ultimately accountable – it must process personal information in a responsible and lawful manner, and only to the extent permissible in the regulations (which is in order to detect, contain and prevent the spread of COVID-19). Usually, a responsible party would require consent, but in these circumstances, as the DOH will satisfy one or more of the four conditions pointed to above, consent of the data subject is not required. However, the data must only be collected for the specific purpose of managing the coronavirus, and as set out in the regulations, the DOH will be required to destroy or de-identify the data (with the exception of when the data is required for historical, statistical or research purposes and provided adequate safeguards are in place). At this early stage, it is not known how the DOH will deal with the data following the termination of the state of disaster, however, this is an issue that citizens and the Regulator ought to closely monitor to ensure compliance with POPIA, and to ensure that constitutional rights are only limited where reasonable and justifiable. That notwithstanding, the DOH must take steps to ensure the data is only processed for the purpose for which it was collected, and that adequate steps are taken to ensure the quality of the information. Importantly, the DOH must retain documentation on its processes and operations relating to the detection, containment and prevention of COVID-19. Further, the DOH must ensure appropriate technical steps are taken to safeguard the data, and that only authorized persons have access thereto – in the event of a breach, reasonable steps must be taken which will include reporting the breach to the Regulator. Finally, where requested to by a data subject, the DOH must confirm whether or not it holds personal information about that data subject.

In the event that personal information is not lawfully processed, or where there is some other breach of POPIA, a data subject may lodge a



complaint with the Regulator in terms of section 74 of POPIA – the Regulator has a duty in terms of section 40 of POPIA to monitor and enforce compliance, and a further duty in terms of section 50 of POPIA to establish an enforcement committee; it remains to be seen whether this body will be an effective guardian in giving effect to the important right to privacy<sup>16</sup>. However, early signs are good – the Regulator has been established with professional and experienced staff, and it has been active in workshops and in broader society thus far; one hopes that funds are available for it to fulfil its mandate.

Further, in terms of section 99 of POPIA, a data subject, or at the request of a data subject the Information Regulator, may institute a civil action for damages for any breaches of POPIA. In addition to the statutory remedy in POPIA, a person whose privacy has been breached also has the ability to take civil action in terms of the common law right to privacy on the basis of the *actio iniuriarum* (McQuoid-Mason 2000). To be successful with a cause of action based on the *actio iniuriarum*, a person would need to establish an invasion of privacy that is wrongful where fault exists in the form of negligence or intention (*Jansen van Vuuren NNO v Kruger* 1993 (4) SA 842 (AD) at 9 – 11). As a result, if a person whose privacy has been breached would like to claim damages, that person must either institute action in terms of section 99 of POPIA, or in terms of the common law<sup>17</sup>.

## 6 Conclusion

The COVID-19 Tracing Database represents a watershed moment in the development of data privacy law in South Africa. For the first time since the birth of constitutional democracy, government authorities are authorized (and required) to actively monitor the location of certain citizens. At first blush, this seems an insidious infringement of the right to privacy – however, the limitation of rights facilitated by this unique database is lawful and reasonable given the purpose and ultimate objective. South Africa is ravaged with

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<sup>16</sup> In terms of section 107 of POPIA, dealing with penalties, a person convicted of an offence may be subject to a fine or imprisonment.

<sup>17</sup> In terms of section 109 of POPIA, if a responsible party commits an offence in terms of POPIA, and is ordered to pay an administrative fine, this fine is payable (in terms of section 109(9) of POPIA) to the National Revenue Fund referred to in section 213 of the Constitution.

inequality and socio-economic issues, and all considered, there does not appear to be a less restrictive means to achieve the goal of monitoring the virus and preventing its further spread – particularly in light of South Africa’s limited resources, and given the fact that many of its citizens live in poverty, or with underlying comorbidities. However, the regulations provide a measure of oversight, and read together with the obligations created by the POPIA, the Department of Health is required to act reasonably and limit processing of personal information – once the pandemic is over, whenever that may be, information must be destroyed or de-identified, or if retained for statistical or other purposes, reasonable protective measures must be taken. Much depends on how the COVID-19 Designated Judge fulfils the role of safeguarding the right to privacy, and once the state of disaster has lapsed, the Information Regulator will play an important role in ensuring that POPIA is complied with, and that where appropriate, its provisions are enforced. *Like it or not, we live in interesting times* (Robert F Kennedy Affirmation Address at the University of Cape Town 6 June 1966 quoted in *De Beer v Minister of Cooperative Governance and Traditional Affairs* [2020] ZAGPPHC 184).

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