IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO.: 5852/2021

DATE: 2021.05.27

In the matter between

RICARDO MAARMAN	Applicant
and	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Second Respondent
PROFESSOR SALIM ABDOOL KARIM obo the GOVERNMENTAL COVID ADVISORY COMMITTEE	Third Respondent
THE DEPARTMENT OF HEALTH	Fourth Respondent

BEFORE THE HONOURABLE MRS ACTING JUSTICE NZIWENI

ON BEHALF OF THE APPLICANT	: ADV SIBANDA
	: ADV VILJOEN
	: MS T VICTOR
ON BEHALF OF THE RESPONDENTS	: ADV TSEGARI

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PROCEEDINGS ON 21 MAY 2021 [10:46]

COURT: Counsel, if I can ask you a question?

MR VILJOEN: Yes?

COURT: You intimated earlier on that you intend to lead at the bar?

MR VILJOEN: M'Lady, in short is that we've brought an urgent application. The State then requested a postponement which was granted to them and ...[intervenes]

COURT: The State?

10 MR VILJOEN: Yes, we're for the applicant – Mr Maarman. The State is the respondent.

COURT: State referring to?

MR VILJOEN: There's four respondents. The State President, the Council for the Covid, the Minister of Health and the Minister of Cooperative Governance.

They then asked for a postponement. There was a court order by agreement that they were supposed to file their replying affidavit on 7 May. They didn't.

COURT: So they contacted you ...[intervenes]

20 MR VILJOEN: Yes, and they ...[intervenes]

COURT: ... yes, then in the interim.

MR VILJOEN: ... they then contacted us, M'Lady, and asked for an extension which we gave them. They still missed that date and they filed late, M'Lady. So we're going to ask the Court; they didn't apply to uplift the bar then, the automatic

bar; so we'll ask the Court to just listen to that and if the Court doesn't grant them bar or condonation to file late, then I don't know if we'll still have time in the day then. Then I'll apply for a default judgment stating that our papers is in order, M'Lady.

COURT: Alright.

MR VILJOEN: But it's all in my directive note there, M'Lady.

COURT: No, I need to read the file.

MR VILJOEN: Of course, M'Lady.

COURT: It's just that ...[intervenes]

10 MR VILJOEN: And I did put in my directive what the Court needs to read, because their response is quite technical, but at this stage I don't believe the Court needs to read it, because we haven't consented to receive it, because it's late.

COURT: Alright.

MR VILJOEN: Thank you, M'Lady.

COURT: [Indistinct], Mrs Kock?

MRS KOCK: It's just that we haven't had the chance to read the files.

COURT: You are kidding me.

20 MRS KOCK: I'm not kidding, M'Lady.

COURT: And those which we've read are not ready?

MRS KOCK: Ja.

COURT: Which ... how many matters are those?

MRS KOCK: I can't say, M'Lady.

COURT: I need to read. I need to read. So is it the right

time to adjourn then?

MRS KOCK: Yes.

COURT: Court then adjourns. Also seeing that we're adjourning, this early, right, it won't be at 2 now, after 2. I'll ... you see, perhaps I should start with yours. Are there others? Legal representatives who were earlier?

MRS KOCK: Yes before them.

COURT: Oh before them. Oh unfortunately.

MR VILJOEN: M'Lady, we're set for the whole day and we'll

10 wait until the Court's ready.

COURT: The whole day. Alright. Okay.

MR VILJOEN: And, M'Lady, I'll inform to say that we're sitting and that we're proceeding. They're well aware, I don't know where they are at the moment.

COURT: Alright.

MR VILJOEN: But I'll let them know, M'Lady.

COURT: Alright.

MR VILJOEN: Thank you, M'Lady.

COURT: Court then adjourns.

20 COURT ADJOURNS [10:50]

COURT RESUMES [12:17]

COURT: Counsel, I'm not trying to get you away from the people. There's something which I would like to address with you. It appears the matter is drawing some interest, people

are here.

<u>MR VILJOEN</u>: Yes, M'Lady.

<u>COURT</u>: Why was that not addressed in the practice note? Because the directions there is especially stated that:

> "Parties should inform the Court how many people are they expecting."

<u>MR VILJOEN</u>: M'Lady, we wasn't aware that so many people will pitch up and according to our client, there's media as well and he's asked us... the Court permission if they can record,

10 M'Lady. But unfortunately we were focussing on the matter, we didn't know about the media attention or that there will be public attending, unfortunately. Otherwise we would have informed the Court.

<u>COURT</u>: How do we deal with the situation now? Because this is a very small court.

<u>MR VILJOEN</u>: M'Lady, we're willing to lead from the Court, M'Lady. If the Court wants the people to wait outside then it will actually suit us, because then we can focus on the matter. It's... M'Lady, it's in the hands of the Court.

20 <u>COURT</u>: Obviously, we cannot accommodate everyone.

<u>MR VILJOEN</u>: Of course, M'Lady. I agree. Maybe we'll ask that the... our client enters the court and ask the other people to wait outside, M'Lady. That's not an issue for us. We're here to focus on the matter, M'Lady.

<u>COURT</u>: Ja. Ironically this matter deals also with COVID

matters.

MR VILJOEN: Yes, M'Lady.

COURT: So, ja. Alright then counsel, we are ready now to hear your matter.

MR VILJOEN: M'Lady, what should I tell the... the public? The media?

COURT: No, they were supposed to ask for permission.

MR VILJOEN: Yes, M'Lady. We only found out now. So, I am making application from the bar if some members

10 ...[intervenes]

COURT: For whom now?

MR VILJOEN: ... if the media can be allowed, M'Lady.

COURT: To... to sit?

MR VILJOEN: Yes.

COURT: Obviously, yes. No, but not to record.

MR VILJOEN: Thank you, M'Lady. I don't know now who is here from the media. I'm going to ask my attorney to ...[intervenes]

COURT: Okay, I cannot bar the media from coming.

20 MR VILJOEN: Yes, M'Lady.

COURT: The proceedings are not *in camera* ...[intervenes]

MR VILJOEN: M'Lady, then ...[intervenes]

COURT: ... but not recording.

MR VILJOEN: If we're then proceeding, my co-counsel will argue first. I'm, not aware where the respondents are. They

haven’t communicated with us.

COURT: I’m not really surprised that they are not here. I’m really not surprised that they are not here.

MR VILJOEN: Thank you, M'Lady.

COURT: You can go and do some housekeeping outside.

MR VILJOEN: I’ll ask my attorney to go so we can continue, M'Lady.

COURT: Thank you, thank you.

MS VICTOR: As you wish, M'Lady.

10 MR SIBANDA: Sorry, M'Lady. Advocate Sibande is my name.

COURT: Advocate?

MR SIBANDA: Sibanda.

COURT: Sibanda.

MR SIBANDA: Yes, Your Ladyship.

COURT: Let me just record your name on my side. Very hectic today. Counsel, you are also for the applicant?

MR SIBANDA: Yes, I am also for the applicant, Your Ladyship.

COURT: Alright.

20 MR SIBANDA: I am just wondering, Your Ladyship, as regards the people who are here with Mr Maarman, how many is the Court comfortable with sitting inside the courtroom?

COURT: There were indications, so we cannot accommodate everyone.

MR SIBANDA: Yes, this is... so that we know that they can

basically amongst themselves ...[intervenes]

COURT: Decide, indeed.

MR SIBANDA: ... decide as to who is coming in.

COURT: Indeed.

MR SIBANDA: What sort of number are we looking at here, M'Lady?

COURT: Check there Counsel, I don't know.

MR SIBANDA: Oh, the yellow spots.

COURT: Yes.

10 MR SIBANDA: So it is about 15, Your Ladyship.

COURT: Fifteen?

MR SIBANDA: Sorry?

COURT: Fifteen is too much.

MR SIBANDA: Fifteen is too much? How about ten?

COURT CLERK: It is between the demarcations.

COURT: Oh. So, can you count for us then, Mrs Cooper? So the yellow spots are demarcations?

COURT CLERK: Yes.

MR SIBANDA: Oh, okay. I thought the yellow spots is where

20 they sit. I apologise, Your Ladyship.

MS VICTOR: M'Lady, as the Court the pleases. We'd like to ... there are five interested parties.

COURT: Perfect.

MS VICTOR: It is the ...[indistinct] media and then the rest, we have our expert here, we have the applicant, his wife and

Jerry Els which is also ...[intervenes]

COURT: Alright then, it should be fine then. It should be fine. Please sit at the demarcated area. Make sure. Thank you, counsel, you may proceed.

MR SIBANDA ADDRESSES COURT: Thank you very much, Your Ladyship.

COURT: But before you proceed, counsel, urgency. Urgency of this matter?

MR SIBANDA: Yes, Your Ladyship. Your Ladyship, this

10 matter, as already stated by the applicant in his founding affidavit is a letter that comes before court on a basis of urgency.

COURT: Yes.

MR SIBANDA: The urgent element, Your Ladyship, being the fact that we are faced with a scenario whereby people 's liberties are at stake.

COURT: Alright.

MR SIBANDA: And being at stake on the basis of a virus that is supposed to be out there and ...[intervenes]

20 COURT: Okay. Hold on. Hold on, counsel, I've got a question for you. Unfortunately, the virus has been with us for a quite a while now, it started last year, isn't it?

MR SIBANDA: Your Ladyship, we have been told since last year that there is a virus.

COURT: We have been told.

MR SIBANDA: This is why the application is on the basis that the applicant is requesting for the respondents to produce the isolated virus.

COURT: Ja, ja.

MR SIBANDA: Because that aspect has never been conclusively established and it means, this is what raises the urgency, regardless of the time factor, Your Ladyship. The aspect that arises is that more and more measures are being cast. For example ...[intervenes]

10 COURT: Ja, the lockdowns.

MR SIBANDA: ... the lockdowns. We have heard from Government through the media that there is a third wave that is coming and that raises urgency, because necessarily as soon as Government arrives at the conclusion that there is a third wave, then they will start taking measures which are aimed, supposedly, at curtailing the adverse effects of that particular third wave. And this then necessitates an understanding as to the nature of a virus that can be predicted by man as to when exactly it will hit, because we are being

20 given precise timelines.

COURT: Alright.

MR SIBANDA: So that becomes urgent in the sense that if government is afforded an opportunity, particularly the first respondent to address the nation and say we are putting in punitive measures to protect you from the third wave, then we

will be caught in a situation where we have to approach the Court again, seeking for a remedy in that particular regard ...[intervenes]

COURT: Okay.

MR SIBANDA: ... whereas that can be curtailed by an order, which simply says first respondent, second, third, fourth produce the virus.

COURT: You've made reference to the impending.

MR SIBANDA: I beg your pardon, Your Ladyship?

10 COURT: You are making reference to the third wave?

MR SIBANDA: Yes, I am Your Ladyship.

COURT: We had a second wave. There was mention of a second wave.

MR SIBANDA: There was mention, yes, Your Ladyship.

COURT: There was mention of a first wave.

MR SIBANDA: Yes, there was, Your Ladyship.

COURT: Now it appears that there are talks that we're going towards a third wave. And according to you, you say because of those talks, those references to the third wave, that creates

20 urgency. Are you saying that, counsel?

MR SIBANDA: What we're saying, Your Ladyship, is according to paragraph 30 of the applicant's affidavit, amongst the aspects that establish urgency, is the serious violation of the citizens fundamental rights and that violation of itself becomes urgent in the sense that if the virus is not produced,

the respondents are going, according to them; we saw it's even given the Easter period where they introduce measures which took away the liberties of the nation.

COURT: Ja.

MR SIBANDA: And now when they declare that a third wave is coming, they are going again do the same thing. The history has basically confirmed how they behave.

COURT: Aren't you... you are being pre-emptive. You are... aren't you being pre-emptive now?

10 MR SIBANDA: Your Ladyship, the pre-emptive ...[intervenes]

COURT: And aren't you being speculative?

MR SIBANDA: It's not speculation, Your Ladyship, because we have already seen how exactly this scenario has played itself out. Your Ladyship made it clear that there was a first wave, there was a second wave. And we have seen what accompanies these waves in as far as the manner in which the respondents behave and in as far as the manner in which there is heavy-handedness against the fundamental rights of the citizens of the nation. Hence the stand that has been taken by

20 the respondents to say we intend to protect the nation from this happening again in the absence of there being a virus.

But note the respondents is also saying Your Ladyship, if indeed this virus exist, then definitely we can take measures which are in keeping with the nature of the virus because we now have it.

COURT: Let's go to page 7 of the bundle, notice of motion. Page 7, paragraph 7. Can you read that aspect for record purposes, flowing from your submission?

MR SIBANDA:

> "That the respondents produce the isolated and purified physical SARS-CoV-2 virus, not a culture or any mixture within which the supposed virus is, nor a photograph or the underlying sequence only to the applicant at the place of their choice and under the
> 10 security measures as preferred by the respondents."

COURT: Tell me if I'm correct, counsel?

MR SIBANDA: Yes, Your Ladyship.

COURT: That's the essence. That's the essence of the application.

MR SIBANDA: Absolutely, Your Ladyship.

COURT: Absolutely.

MR SIBANDA: The isolated virus to be produced.

COURT: Yes. Yes, that's the essence. It's not the essence
20 of the application that they are impending perhaps lockdowns, impending restrictions, that's not really that.

MR SIBANDA: Your Ladyship ...[intervenes]

COURT: The backbone of this application is contained in paragraph 7 of page 7. Isn't it?

MR SIBANDA: In as far as the order that the applicant is

seeking ...[intervenes]

COURT: Yes, counsel?

MR SIBANDA: That is ...[intervenes]

COURT: The essence.

MR SIBANDA: ... the essence of the application.

COURT: Indeed.

MR SIBANDA: The affidavit of the applicant then goes to further give justification as to why it is necessary for this virus to be produced. Otherwise, who is to tell whether the
10 measures that are being taken; whether the measures to be taken; whether the measures that have been taken are in keeping with the exact nature of the virus that we do not know? We are told, Your Ladyship, that it's a novel Coronavirus.

COURT: We've been told. We're told since last year, isn't it?

MR SIBANDA: Absolutely and this is the ...[intervenes]

COURT: We've been told since last year.

MR SIBANDA: This is the whole point, Your Ladyship.

COURT: Ja. Novel

20 MR SIBANDA: And we are told that it has variants and we are told that novel as it is, it has different waves. So, it... that is why it becomes necessary to identify this ...[intervenes]

COURT: Is it really urgent, counsellor? I'm sorry to sound like a broken record, but I'm stuck there. I can't move from that. Isn't this urgency self-created?

MR SIBANDA: No, it's not self-created, Your Ladyship. The unemployment of the people of this country is not self-created; the closure of businesses is not self-created; the death of people is not self-created.

COURT: No.

MR SIBANDA: The number of people, Your Ladyship, who are denied access to the hospital on the basis that wards are being reserved for Coronavirus patients, is not self-created.

COURT: And graves being dark.

10 MR SIBANDA: Graves being dark at the behest of the respondents and how many of those graves have been used, Your Ladyship?

COURT: But my question was not referring to that. My question was not referring to that. Is it correct that this is not the first time this matter has enrolled?

MR SIBANDA: It is correct, Your Ladyship.

COURT: It was last enrolled when? In March?

MR SIBANDA: It was in April, Your Ladyship.

COURT: Was it in April?

20 MR SIBANDA: 20 April, Your Ladyship, yes.

COURT: And then subsequent to that, what happened?

MR SIBANDA: Subsequent to that, Your Ladyship, the respondents did not meet the timelines which had been made an order of the Court. The respondents proceeded to request for indulgence from the applicant's attorneys, which indulgence

they were given and the primary reason why they are being this indulgence is because, Your Ladyship, this is a matter of State interest. This is a matter of national interest to every citizen of this country and even with having been given that particular indulgence, today they are not here. They filed their papers out of time, they don't apply for condonation and today they are not here. They have been informed, even this morning that ... reminded about this matter coming to court and still they are not here.

10 COURT: So in actual fact, it's for the third time the matter is on the roll, not the second time?

MR SIBANDA: It is the second time as far as I'm aware, Your Ladyship, which is the 20th and the 27th.

COURT: Can you help me, sir? Sorry.

MR SIBANDA: Thank you. Your Ladyship, my co-counsel informed me, I sincerely apologise. I was not aware of that particular date. But at that time the applicant had come before the Honourable Court in his personal capacity ...[intervenes]

COURT: Ja, it doesn't matter, it's still the same applicant.

20 MR SIBANDA: It's the same applicant.

COURT: Still the same applicant.

MR SIBANDA: I just say that particular aspect and Your Worship... Your Ladyship, I apologise, the mere fact that the applicant came before this Honourable Court on 8 March and now we're at the 27th of May, does not take away from the fact

that it's still an urgent application.

COURT: But counsel, people have already been vaccinated, lockdowns have already happened.

MR SIBANDA: Your Ladyship, if I may, with all due respect and humility correct that position. Some people have been vaccinated.

COURT: People. It doesn't matter ...[intervenes]

MR SIBANDA: And we ...[intervenes]

COURT: It doesn't matter, it's people.

10 MR SIBANDA: The important thing, Your Ladyship, is that those who have not been vaccinated still have a right to know about this virus, whereby it indeed exists or not ...[intervenes]

COURT: Counsel ...[intervenes]

MR SIBANDA: ... because they are being vaccinated against something that has not been proved. We are against something that the respondents are incapable of producing, because all that has to happen is for the respondents to simply say, here is the virus. That's the ...[intervenes]

COURT: Yes.

20 MR SIBANDA: ... end of the equation, My Ladyship.

COURT: Don't get me wrong.

MR SIBANDA: Yes, Your Ladyship.

COURT: I'm not dealing with the merits of the matter. I'm merely dealing with urgency.

MR SIBANDA: Absolutely, Your Ladyship.

COURT: As the applicant has got an onus to show that this matter warrants to be heard on urgent basis. Isn't it, counsel?

MR SIBANDA: Absolutely, Your Ladyship.

COURT: It's not a matter of making assertion that the matter is urgent, then it's going to be dealt with on urgent basis.

MR SIBANDA: Absolutely, Your Ladyship.

COURT: Yes. So don't misunderstand me, counsel. Any further submissions pertaining to urgency, counsel?

MR SIBANDA: Your Ladyship, the more critical aspect really
10 as regards urgency, is that it is of national interest as a matter of urgency that people be freed from this fear that is daily instilled upon them. That people be allowed to think outside the media that on a daily basis will bring figures which necessarily end up with their psychological integrity being compromised, because they are now living in a state of fear; and, Your Ladyship, that is absolutely critical.

And Your Ladyship, further, the urgency is that the young children who are at school, who are being subjected to masking without any evidence of the efficacy of the mask in
20 protecting them against this so-called virus against the... their rights to breath natural fresh air. That is urgent, Your Worship... Your Ladyship, I apologise; and it becomes absolutely critical that regardless of the period 8 March up to now, the protection of the nation of South Africa in as far as this lockdowns are concerned, be given serious attention.

COURT: So ...[intervenes]

MR SIBANDA: And there has been actually ... so we've actually produced evidence to the effect that this is costing the economy.

COURT: Essentially you are saying, counsel, there is inherent urgency in this matter.

MR SIBANDA: Absolutely, Your Ladyship.

COURT: Alright. One last question ...[intervenes]

MR VILJOEN ADDRESSES COURT: M'Lady, if I may address
10 the court on one aspect on the urgency?

MR VILJOEN: M'Lady will notice from our annexures that this is not a self-created urgency, M'Lady. M'Lady will see since the lockdown has started, the applicant has engaged in emails with the State President, with the ministers, asking them to produce this virus, which they simply ignored. Then he brought an application in terms of the PAYA Act, which was ignored, M'Lady. And then out of desperation, he approached the Court himself. Unfortunately, that shows the urgency and that he wasn't creating this urgency. He was simply a layman
20 trying to find his way in the legal and the political system to have his voice heard, M'Lady.

So there was no delay or self-created urgency, M'Lady. The urgency here was created by the respondents not reacting to his enquiry and all he's asking is show us the virus, M'Lady. And the urgency is that there is no end in sight to this

lockdown and there's simply talk that it's going to continue and it's seriously damaging the entire nation's economy and people's health by wearing masks and people getting vaccinated and reports of people dying afterwards, M'Lady. So it needs to be addressed urgently. Thank you, M'Lady.

COURT: So socially, before you sit counsellor, before you sit. Essentially, what you are saying, the WHO does not have any credibility as far as the applicant is concerned?

MR VILJOEN: M'Lady, we're not asking the Court or making

10 ...[intervenes]

COURT: No.

MR VILJOEN: ... any submissions on that.

COURT: No, I'm asking. No, I'm asking.

MR VILJOEN: M'Lady ...[intervenes]

COURT: I'm asking because the WHO and which we happen to be part of, isn't it?

MR VILJOEN: Yes, M'Lady.

COURT: Yes, said there is a virus.

MR VILJOEN: They said so, M'Lady.

20 COURT: Please ...[intervenes]

MR VILJOEN: And, M'Lady, there's a saying ... I can't... I'm not allowed to swear in court but it says, assumption is the mother of all f-ups, M'Lady, and that's what we're all doing here. We can't go on assumption because somebody told us. We need to have the evidence produced and it's part of our

legal system, M'Lady.

COURT: Okay.

MR VILJOEN: If you allege you must show.

COURT: What about the powers of the executive to govern the country?

MR VILJOEN: M'Lady, we're also not asking for that. And it's a simple fact, the next step is to actually determine whether this virus really exist. From there, M'Lady, other court cases may follow, but for this specific one, we've got a right to

10 information, M'Lady. The Government says this virus exist; we're asking them show us. That's all, M'Lady.

COURT: Can't this issue be adjudicated in the normal way?

MR VILJOEN: It can't, M'Lady. We've tried and it's too urgent, M'Lady, and if we go in the normal way, when will we get onto the post draw? How many people will still die from the vaccinations? How many children will become asthmatic because of the mask, M'Lady? It's very urgent. M'Lady, we're not asking the Court to make a finding on anything. We're simply asking the Court to instruct the respondents to follow

20 the rule of law by producing something they say they have and we have that right to access the information.

COURT: Thank you, counsel.

MR VILJOEN: And from there, other cases might follow with determination on scientific facts etcetera, M'Lady.

COURT: Thank you, counsel.

MR VILJOEN: Thank you, M'Lady.

COURT: Anything further, counsel?

MR SIBANDA: Your Ladyship, you asked the question as regards the applicant's attitude towards the World Health Organisation. Your Ladyship, one of the reasons why the applicant is before the Honourable Court is founded on the fact that the World Health Organisation, for one, changed the definition of pandemic to enable a situation like what we have right now. And at the same time, the World Health
10 Organisation, according to its own website, has conceded the fact that the PCR test, which is supposed to be the test establishing the existence of COVID-19, is actually giving false positives. It's there on their website.

The Centre for Disease Control in the United States has confirmed the position of the World Health Organisation. That is why the applicant has found it necessary to come before the Honourable Court and say, if this is what the World Health Organisation is saying, an organisation that we trusted and believed in and thought is looking after our best interest, but
20 they are the one saying this test is not accurate, then there must be something wrong. If the CDC is also supporting that position, then there must be something wrong. Hence, the applicant saying hold on, maybe our Government can assist us here and show us this virus that is leading to these policies. And further, Your Ladyship, the World Health Organisation is

the same entity that tells the world that no autopsies must be done when it comes to death supposedly related to COVID. How then do we know that this is the virus causing this thing called COVID-19 deaths if no autopsies are being done?

Because it is trite, Your Ladyship, that one of the co-fundamentals behind an autopsy is to establish the cause of death. Hence, the reason why the doctors in Italy decided to define the World Health Organisation and came instead with thrombosis according to their autopsies. Hence, the reason
10 why the applicant is saying there must be something out there that is killing our people and we need to find out what it is. If it's this SARS-CoV-2 virus, let's see it, so that we can help each other to be able to respond as to how exactly we protect ourselves as a nation. Because we are caught in a situation where literally on a daily basis, Your Ladyship, people are being compromised left, right and centre and, Your Ladyship, amongst the issues that has concerned the applicant, is the research that shows the dangers of sanitisers. And we are caught literally, Your Ladyship, in a scenario whereby at
20 national level, at international level, at World Health Organisation level, no one has basically been able to say this is the virus.

And, Your Ladyship, Your Ladyship mentioned the issue of the vaccine. One of the reasons why the applicant has found it necessary, Your Ladyship, is because none of these

vaccines are premised on an attenuated natural virus. Some of these so-called vaccines, Your Ladyship, are actually premised upon genetically modified organisms. They got aborted foetal cells in them, Your Ladyship, and it goes against the ethics of some people, it goes against the religious beliefs of some people in this country and the respondents are not coming clean to the nation to say these are the issues. And further, we've seen it in the media, Your Ladyship, where one of the unions representing the health workers, is saying they
10 are being gagged in as far as reporting the adverse effects. Hence, the reason why the respondents finds it necessary to come before the Honourable Court and say this is our last port of call, this is our last hope as a nation.

COURT: Sorry, sorry to do it to you counsellor. It has been brought to my attention that the respondent has finally graced us with their presence.

RESPONDENTS' ATTORNEY: Morning Judge.

COURT: Good morning, sir.

RESPONDENTS' ATTORNEY: Sorry to interrupt the
20 proceedings.

COURT: Yes, the bus is already in motion.

RESPONDENTS' ATTORNEY: My apologies, judge. I am representing the first to the fourth respondents in this matter. I've been communicating with my colleague for the applicant and we are under the impression that he would advise us when

the matter would be heard. We ... I'm quite surprised that our matter is proceeding, that he didn't revert to us to tell us that our matter is proceeding, because he have indicated in the morning that the matter was not on the court roll. He is taking the file to bring it to you, judge.

COURT: Perhaps it's something which you should canvass between yourselves. I was not privy to that. I was only informed that they do not know where you are. As I said, the horses have already boarded and not that you cannot join us,

10 if you wish, we are busy with the aspect of urgency. I asked the parties to address the Court on urgency.

RESPONDENTS' ATTORNEY: Thanks judge. The counsel who is assisting us in respect of Advocate Tsegari, he is on standby. He is also waiting to be alerted by my colleague.

COURT: How ...[intervenes]

RESPONDENTS' ATTORNEY: So if the matter may stand down, judge, so that I can contact him to rush to court.

COURT: Counsel, I am on urgent duties. There is another counsel waiting for me. I would like to hear the respondents.

20 I would like to hear the respondents and I cannot really shut the door at the respondents, but I don't have the luxury of time. I've got a stack of files waiting for me for tomorrow, which I need to read. I'm not really amenable to adjourning. I'm not sure. I'm really between the rock and the hard place. Counsel, what do you say?

MR VILJOEN: M'Lady, the matter was a court order to be at court today. M'Lady, I met my colleague at the steps this morning and I said to them the matter is not on roll; I'll find the file and I'll put it before the judge and we'll be waiting in court. M'Lady, I can't run the case for them. If they decided that they'll be on standby until whenever they feel it's convenient, M'Lady, there's rules of court. The matter has been set down today and if they decide it's not convenient to wait in court until the matter is being heard, M'Lady, and the matter has

10 already started as the Court said, M'Lady. And there's no good grounds for them to come in now, M'Lady, and for us to delay the entire process. This is an urgent matter, M'Lady, and it's clear that the State is just playing games in their response.

COURT: I ...[indistinct]

MR VILJOEN: Ja.

COURT: You don't know whether they would concede to urgency. But even if they concede to urgency, if I'm not convinced that that concession is correctly made and I may overrule that concession.

20 MR VILJOEN: Exactly, we don't know, M'Lady, but we'll object for the Court to bring them in at this late stage, M'Lady. There's rules of court and there's procedure and we can't just come to court whenever we feel it's convenient, M'Lady. Thank you, M'Lady.

COURT: I'll... no, I'll give you an opportunity now, counsel.

Yes, counsel?

MR SIBANDA: Your Ladyship ...[intervenes]

COURT: Are you still continuing?

MR SIBANDA: Yes, I'm continuing on that.

COURT: Now there's something which is interjecting now. Let's deal with that issue first.

MR SIBANDA: No, it's the issue of their being in court ...[intervenes]

COURT: Oh alright.

10 MR SIBANDA: ... in the first place, Your Worship.

COURT: Alright. Alright.

MR SIBANDA: Your Ladyship, it is my humble opinion that before the Court can basically determine the issue as regards at which point they get into the proceedings, the critical question to be answered is who are they in as far as this proceedings are concerned? Necessarily meaning from the papers that they can file regardless of the extensions given and agreed upon, they were still out of time and did not apply for condonation. That is the first part.

20 Secondly, Your Ladyship, according to the papers that they have been submitted, there are four respondents. There is no answering affidavit for the first respondent, no answering affidavit for the second respondent, the third respondent is represented by the person who has taken over, Mr Ndizana, who has taken over and all he has filed is an explanatory

affidavit explaining his stepping into the shoes of Mr Karim.

COURT: Alright.

MR SIBANDA: And the fourth respondent is represented by one Professor Poolen, who according to him, says in paragraph 5 of their papers:

> "I serve as the technical manager for quality assurances."

And proceeds to say he is duly authorised to depose to the affidavit, not necessarily saying, Your Ladyship, that he is duly

10 authorised to represent the fourth respondent. And there is nothing that has been submitted to confirm this assertion on his part. No documentation to say that this quality assurance manager has the authority to come and stand in court and ...[intervenes]

COURT: No, I heard you, counsellor.

MR SIBANDA: Thank you, Your Ladyship.

COURT: From the matter you are saying you don't have a problem if this court disposes of this issue of the respondents?

MR SIBANDA: Absolutely, Your Ladyship.

20 COURT: And after all, the onus is upon the applicant to convince this court that there is urgency.

MR SIBANDA: I appreciate that as per Your Ladyship.

COURT: That the Court *mero moto* raise the issue of urgency. So you say you're happy if we can proceed without the respondents if this matter of urgency can be addressed without

the respondents?

MR SIBANDA: Yes, that we are saying, Your Ladyship. But however, which way the Court decides on the issue, there's no problem.

COURT: Alright.

MR SIBANDA: But the most fundamental aspect is that we are not at this stage going to condone the respondents ...[intervenes]

COURT: It's the Court's duty ...[intervenes]

10 MR SIBANDA: ... coming ...[intervenes]

COURT: ... to ...[intervenes]

MR SIBANDA: No, that's what I'm saying, M'Lady, they have not applied for condonation. So we are not amenable to suggesting that of our own we will open the door and say they should come in ...[intervenes]

COURT: Alright.

MR SIBANDA: ... and participate in the proceedings.

COURT: You've made your point, counsel. You made... otherwise we're going to be here for the entire day. Thank

20 you.

MR SIBANDA: Thank you, M'Lady.

COURT: You may be seated, counsel. Counsel, we are in not even in the middle. We're at the end of the urgency aspect. You may sit down counsel, and listen, alright. It's too late now. It seems as if you've got reservations.

RESPONDENTS' ATTORNEY: Judge, may I just draw this to your attention the conversations I referred to earlier were actually ... not only when we met with Advocate... counsel in the morning. However, we also communicated over the phone where he indicated that if there's any progress in the matter, he would revert to me and advise me accordingly.

COURT: So ...[intervenes]

RESPONDENTS' ATTORNEY: So now the matter proceeding without my colleague reverting to me to alert me to that

10 ...[intervenes]

COURT: Ja.

RESPONDENTS' ATTORNEY: ... is like misleading in a sense, because he had indicated that he would revert to us. The recordings are in the phone, M'Lady, and M'Lady, the advocate who assisted us in preparing the opposing papers, is not present. It would serve ...[intervenes]

COURT: Where is the advocate?

RESPONDENTS' ATTORNEY: In chambers. In chambers.

COURT: Here?

20 MR TSEGARI: That's correct.

COURT: Around.

RESPONDENTS' ATTORNEY: Around here. In Keerom... Keerom 60 something. I'm not sure. I think it will take him about 10 minutes to come here. I'll just call him now.

COURT: It's going to be lunchtime now. It's important... not

that I'm going to condone, I'll love to hear from the counsel why should this Court hear him or her on this aspect of urgency which we've… we were almost done with it. Right, on that aspect.

RESPONDENTS' ATTORNEY: [Indistinct]

COURT: So now, it's 4 minutes to 1. We might as well take our lunch break. We are going to come back at quarter past 2. Right? Quarter past 2.

RESPONDENTS' ATTORNEY: That would be sufficient.

10 COURT: Thank you.

MR SIBANDA: I am indebted to Your Ladyship.

COURT: Court then adjourns.

COURT ADJOURNS [12:58]

COURT RESUMES [14:20]

COURT: Why are you standing, counsel?

MR VILJOEN: M'Lady? I had a good think about the allegations by the State, M'Lady, and I realised that I didn't know when the matter is going to be called because the …

20 M'Lady said we'll be heard and I… but later in the day and I relayed that message. And then we waited outside, M'Lady. We didn't know whether we're going to be called and when. So, it's not that I deliberately not informed my colleagues that we've been called, M'Lady.

COURT: No. If you were in contact with them, perhaps you

could have said let's wait, let me get into contact.

MR VILJOEN: Yes, M'Lady, I could have done that, yes. Thank you, M'Lady.

COURT: Yes, counsel?

MR TSEGARI: M'Lady ...[intervenes]

COURT: But counsel how can you rely on the other party?

MR TSEGARI: M'Lady, that is the most difficult part which I had to deal with. If I may... if you receive this ...[intervenes]

COURT: No.

10 MR TSEGARI: (Playing call recording.)

COURT: It is not necessary, counsel. It's not necessary to do that.

MR TSEGARI: I don't have to do that? But the problem is, M'Lady, if you have collegiality amongst colleagues and you know that the matter is opposed and you know that you have told your colleague when the matter will be called, you do not call your colleague to say that you will deal with the matter, but you went ahead anyway. I do not know what inference one can draw from that. And that is the disappointing part is that,

20 you know, it's not a situation that we say that we try to ambush each other. It's just, I think it's collegial to notify your colleague that the matter is about to be called. Have you... can you be here in two minutes. I'm two minutes away.

The only thing which I hear is my learned... and my attorney comes gasping to me to say that we're in trouble, that

the matter has already been heard and the persons have addressed the Court. So what do you do in a situation like that? So I'm here and the respondents was always ready to deal with the matter.

And what makes it worse, M'Lady, is the fact that this morning we received what is referred to a practice note, argument to be postponed on 27 May 2021, which I'm not sure it's part of your bundle. But those are the communications which up until this morning before the matter has actually even

10 gone into court and before that message came, that was the information which was conveyed to us.

So we have no reason to believe that the matter will continue in our absence. That is the problematic part, M'Lady. But I'm here now and I would like to address you on... if I may ...[intervenes]

COURT: Ja.

MR TSEGARI: ... when I have my opportunity to address you on the respondents' position in this matter.

COURT: Are you aware where are we?

20 MR TSEGARI: I have no idea where we are, because I... I miss ... I'm not even sure how long my learned friend was on his feet to address you, what he have covered.

COURT: We were about to finish their arguments pertaining to urgency because the Court requested them to address the Court regarding urgency.

MR TSEGARI: Yes. Are they finished with that?

COURT: Not yet.

MR TSEGARI: Okay.

COURT: I'm sure they're about to finish. So we'll take it from there.

MR TSEGARI: We can take it from there. I'll... ja, I'll assess the... sorry, I'll assess the argument as I go along.

COURT: Yes, counsel?

MR SIBANDA: Thank you, Your Ladyship. Your Ladyship, we
10 maintain basically in summing up that indeed this matter is urgent. And the aspect of urgency has to be viewed from basically a perspective that speaks to each own situation in the sense that in this particular instance, we are dealing with a continuous process which basically has the potential to compromise much more than have already been compromised.

COURT: Yes. As you said earlier on, counsel, that you're relying on inherent urgency.

MR SIBANDA: Absolutely. If I could just draw another to Your Ladyship, a scenario where someone is assaulted, bashed to
20 the ground, that for all intends and purposes would be classified as a crime. If that person is on fire and you bashed him and rolled him on the ground to switch out a fire, you are actually saving their lives, because there is a fire.

COURT: Ja. But is it an appropriate analogy under the circumstances of this matter?

MR SIBANDA: It is very appropriate, Your Ladyship. In the sense that if you vaccinate someone or you lock down or you pass different protocols, supposedly to save lives and there's nothing there, then it's an assault against that particular individual, but if it's done and there is actually something, then you are protecting them, which is why the applicant is then simply saying just to produce this item, so that even for those people within the nation who might be called anti-vaxxers or called sceptics or whatever, they themselves will also take an

10 informed position and say, yes, this thing does exist and for that particular reason, I must also be part of the process that saves the entire nation.

COURT: Isn't the ... I said earlier on, we should try not to delve into the merits of this matter.

MR SIBANDA: Absolutely.

COURT: But now that you are addressing that, isn't there scientific proof to that effect, scientists?

MR SIBANDA: That is what we are asking the respondents to show us; the scientific proof that there is a virus called

20 themselves COV-2. That is the science that we are asking for, Your Ladyship and that is the urgency.

COURT: Thank you.

MR SIBANDA: Thank you.

COURT: Counsel, I do understand that you are handicapped. Do you need to address the Court pertaining to urgency?

MR TSEGARI: M'Lady, let me try my best. I will address you.

MR SIBANDA: M'Lady ...[intervenes]

COURT: Stop, stop, stop.

MR SIBANDA: Can I just repeat it? Your Ladyship, before we broke for lunch, we had raised an issue about the right of the respondents to be heard. Has Your Ladyship made a ruling on that for the respondents to address the Court?

COURT: Meaning they are not supposed to address the Court based on late filing of the documents?

10 MR SIBANDA: Meaning, Your Ladyship, that on one aspect there's the issue of late filing.

COURT: Yes.

MR SIBANDA: On another aspect there is the issue of who exactly is before the Honourable Court in the sense that the first respondent, there are no papers for the first respondent. Second respondent, there are no papers for the second respondent. The third respondent simply files an explanatory affidavit and then the fourth respondent is represented by one referred to as a technical quality assurance manager without

20 any authority ...[intervenes]

COURT: Okay. Counsel, aren't you defeating your own argument?

MR TSEGARI: Yes.

COURT: Because you are asserting that this is an urgent application.

MR SIBANDA: Yes, Your Ladyship.

COURT: And consequent to that, the rules of the Court should not be adhered to.

MR TSEGARI: Yes.

MR SIBANDA: Absolutely.

COURT: Now you say the Court should penalise them because of a, b, c. Yet, on the same breath you say this is an urgent application where normally the rules of the Court are not adhered to.

10 MR SIBANDA: This is why, Your Ladyship, when I rose I asked the Honourable Court to confirm if a ruling has been made on that particular aspect.

COURT: Remember when you are ... when you made those assertions there was no one from the side of the respondents, whether it's for the first respondent, second respondent or whatever. You said those assertions in their absence. Perhaps you should repeat them so that they can hear you, so that they can answer to that.

MR SIBANDA: The instructing attorney was present, but for

20 the sake of the counsel, I will repeat. But it's basically what I've already said now, that the issues, even the affidavit deposed to by Professor Purinis very clear, that he says:

> "I am accordingly duly authorised to depose to this affidavit on behalf of the fourth respondent."

There is no affidavit that has been submitted to say it's on

behalf of the first respondent. Nothing to say on behalf of the second respondent.

There's another affidavit from one Mr Buthelezi who says he is also deposing to an affidavit on authority for the fourth respondent. And then there is an affidavit from Mr Ndizana who says he is deposing to an affidavit for the third respondent, purely on an explanatory aspect, not for purposes of being heard, because all that the respondents says in this affidavit, in the interest of simplicity, the first,

10 second and fourth respondents are referred to here by their abbreviated title. It doesn't say that he is now also representing them. He is purely confined to the fourth respondent. So there is the aspect of condonation which they have not applied for regardless of the agreed timelines they still file their papers out of time.

COURT: Yes.

MR SIBANDA: Yes, they will argue that they sent an email, but that particular email was only sent at 20 to 5 in the afternoon or thereabouts, but the papers were actually filed

20 the following day. So on that ...[intervenes]

COURT: But did they cause ... are they dealing with urgency?

MR SIBANDA: I beg your pardon, Your Ladyship?

COURT: Are they dealing with urgency?

MR SIBANDA: Yes, their papers are dealing with the... their filing notice, everything. It was emailed and yes they raised

some point *in limine*.

COURT: No, no, counsel. No, no, we are not on the same page. Are the papers dealing with urgency? We are currently dealing with urgency.

MR SIBANDA: Yes, their papers do deal with the aspect of urgency. Their points *in limine*, their first point *in limine* actually talks to the aspect of urgency.

COURT: Alright. I think you said enough, counsel. Thank you very much. Thank you, counsel?

10 MR TSEGARI ADDRESSES COURT: M'Lady, as it may please you. May I apologise for the fact that I could not introduce myself. M'Lady, Cecil Tsegari, I'm a member of the Cape Bar and may I, with your leave, hand up these – these documents?

COURT: Which documents are those, counsel?

MR TSEGARI: This is a, what we would be referred to as service document and a note and the heads of argument by the respondents.

COURT: In doing so, you intend to reply to the latter part of the submissions?

20 MR TSEGARI: It will... my reply is contained in, amongst others, the note which is annexed to the heads of argument. But before I do that, M'Lady, may I just say, for purposes of my address, I would like to follow the full instruction.

The first thing I would like to address you on the procedural steps taken by the applicants thus far and

thereafter I would like to address you on the first point *in limine*, which the respondents contend is dispositive of the matter.

And the second point is the issue relating to the question of urgency and whether a case has been made out. Remember, the urgency or the interdict which is sought here, is seek against the executive or the organ of state. There is different requirements which apply and I would take to the notice of motion where the relief is set out in the applicant's

10 papers.

And the third point I would like… I would take you which is connected to the second point, is the issue relating to whether a *prima facie* grounds has been set out for the relief sought. And then I'll deal, obviously, if necessary, with the other points. But because ...[intervenes]

COURT: No, counsel, you are moving very fast.

MR TSEGARI: Ja.

COURT: We are still at the stage of urgency before we get to any other thing.

20 MR TSEGARI: M'Lady, I would be, amidst as an Officer of the Court to not tell you the sequence, since my learned friend has referred to the alleged lateness of the filing of the papers, I would have to deal with those aspects. And we've done so by way of an affidavit, the affidavit of Mr Mgabene.

COURT: Unfortunately, the record is not ...[intervenes]

MR TSEGARI: It is a stapled document which I've just handed up to you now, M'Lady.

COURT: Alright. Amongst these. Alright.

MR TSEGARI: The Court will see that ... may I interrupt myself before I address you on that point?

There is an assertion made without justification that there is no affidavits or the respondents are not properly before you. M'Lady, if you have proper regard to the second paragraph, the relief in prayer 2 of the applicant's notice of

10 motion, you would note that what they're seeking there is in essence issues which relates… of which… issues of a scientific matter.

As far as you know and it's public knowledge that the President is not a scientist and that within the Government there are organisations or institutions who deals with these particular aspects. So, it's appropriate that we don't place hearsay evidence before the Court, but we place the information before the Court with the persons who can properly respond thereto. But I will in the process of my address deal

20 with that particular aspect. You'll see this is where they ask for, they say that:

> "The respondents must produce the isolated and purified physical SARS-COVID 2 virus."

They don't want a photograph. They don't want any mixtures. They don't want sequencing, RNA sequencing.

"To the applicant at the place and in terms of the security measures of choice within 7 days."

That's the relief which they seek. And then turning back, they ask then for the urgent relief.

I'll address you properly on the issue of urgency. May I then return to this... the procedural steps which then transpired subsequent. On the 18th in paragraph 3.1; on the 18th there was an email correspondence which is referred to in their affidavit as MM1, which was correspondence between the
10 attorney and Mr Viljoen or Advocate Viljoen, dealing with the indulgence, a request for filing the papers at – at a later stage.

You'll see, if you refer, return to MM2. MM2 is a response coming back from Mr Viljoen or from Carlo & Victor Attorneys saying that, he say:

"Dear Mr Mlungisi,

Thank you for the update. We will grant you until next week Tuesday, which is the 25th. Please keep in mind that we will still need to reply and both parties need to submit heads of argument."

20 Now, if you look at ... there was an email then sent subsequently, MM3, where the answering affidavits and the annexures and the confirmatory affidavits was then forwarded by email and I must also state that the parties have agreed they can serve by way of electronic means, i.e. sending of an email and that's precisely what the attorney has done in

relation to MM3.

And then if you take it to MM4, basically deals with the same thing. But then if you go to MM6 where Attorney Victor came back and say that:

> "Dear sirs,
>
> We received it."

With reference to the documentation which was sent to them. So, what my learned friend, I hope, was also ... was supposed to be before you, was then on the 25th or the 21st, the
10 applicant was serving, what is referred to, a notice of bar. And in the notice of bar, and I'll address whether or not that is proper; in the notice of bar they say, on their own notice, they say that:

> "You are called upon to delivery your answering affidavit to the applicant before 12 o'clock on the 25th."

Again, with reference to the date of the 25th.

> "And within one day of service of this notice you will file it, which the respondents will then be *ipso fictio*
20 barred."

In other words, they would be barred if they do not do so. If you have a look at that notice, you will see that it's dated the 21st of May 2021, which was last Friday. If you take a literal reading of the notice, it means in essence that the respondents was supposed to comply on the Saturday, which is not a court

day. But if you take a more generous approach and you say that their five days, which was supposed to be, and they with reference they referred to Rule 26. And Rule 26 makes it very clear. It says that the party is supposed to, if you put... if you request a party to deliver further pleadings, that must be done in a period of five days. But if you take the court days, it then will be from the Monday up to the 5th – the five days will at least run out on the 28th of this month.

But be that as it may, the respondents submit that there

10 is no procedure and I could not find any law that you can in motion proceedings use a notice of bar. Notice proceedings accurately belongs in action proceedings. What, if the applicants have failed to do, is that they have omitted to utilise a process which is set out in practice note. And I refer to that more fully in the note which I have also attached to you at paragraph 8.

So on the face of their own notice of bar that how, request for complying with for filing the papers is premature. But be that as it may, we then find that in motion proceedings

20 a party can use a chamber book application and that chamber book application practice directive 37-19 provides that you can apply in chambers compelling the respondents to comply, failing which you can then set the matter down on the unopposed motion, on an unopposed basis. That is the procedure which is open to you. They have not done so.

It's a flagrant disregard for not only the rules, but also for the practice directive. Now may I turn against that background, we then say that there is no basis to say factually or otherwise that the respondents were either out of time or that their papers were not properly before you. You sit with a notice of intention to ... a notice to oppose. You receive the papers, you've never rejected it on the 25th when you received it. On the 26th you also receive the court issued papers.

Now, on that score, now let me take ... and on that basis
10 we say there's no basis to say that we... that the respondents are not properly before you. They are parties to these proceedings and they are properly... they've properly complied with the requirements which is set out in the rules. And the Court must, as a matter of law and in terms of the rules, ignore that notice of bar, because the notice of bar is incompetent for the proceedings which the applicant seeks to enforce.

Now may I then turn to the issue which you say we should lastly address you. And the reason why I would like to take a slight detour from this process is for the following
20 reasons. And then may I take you to the respondent's heads of argument. Again may I interrupt myself, is that, in terms of that arrangements or the agreement between the parties, the parties were supposed to submit their heads of argument by Wednesday, which was yesterday. We still await the respondents' heads of argument, nothing has forthcoming and

the respondents receive the ... the applicants received the respondents heads of argument yesterday, which was sent to them via email.

Now, may I then turn to page 4 of my heads of argument? M'Lady, may I request that you keep your finger on and just turn to the notice of motion, paragraph 2. Paragraph 2, as I read earlier on, there is... the applicants are seeking that:

> "The respondents must produce the isolated and
> 10 purified physical Sars-Covid-2 virus to them within 7 days."

Now, as any democratic country would have done it, is that there are regulations and procedures which regulate issues relating to such sensitive matters.

So, I would like the Court to view the first point *in limine* against paragraph 2 that the respondents contend that there is non-compliance with the Health Act of 2003, the regulations with reference to paragraph 2. And they say, and specifically and I have taken the liberty in attaching the regulations to my
20 heads of argument. You'll find at the very end. There is, what is referred to and I'm not going to deal with the definitions. But may I take you to paragraph 15, then?

COURT: Paragraph?

MR TSEGARI: Paragraph 15 on page 6 of the heads of argument. Paragraph 15 say that:

"Section 3 of the NHI Regulations 203 provides as follows"

They say:

"No person shall acquire, receive in court human pathogens or handle, manipulate, maintain, store, culture or in any way process issue or in any way dispose of any human pathogens or so acquired receive imported, unless..."

There's the qualification.

10 "... the person is registered with the Department as a..."

Page 7.

"... a microbiological laboratory, in terms of Regulation 6(1)(a)(ii)."

MR VILJOEN: M'Lady, I feel ...[intervenes]

COURT: You may sit, counsel. Counsel, you may sit, I want to hear your colleague.

MR VILJOEN: I feel ...[intervenes]

COURT: Counsel, you may sit. Yes?

20 MR VILJOEN: I feel obliged to object to this line of arguing. There's no relevance towards the urgency that the Court asked my learned counsel to address the Court, M'Lady. I don't know when... if we're going to get there, but ...[intervenes]

COURT: Ja, you are a bit premature. Let's hear him out.

MR VILJOEN: Thank you, M'Lady.

COURT: Yes. May you proceed, counsel?

MR TSEGARI: M'Lady, the relevance is self-explanatory. If your... if the Court were to... amenable to even consider the relief which they seek on an urgent basis, then the Court will have to deal with the regulation, Regulation 3. And you'll see in ... the applicant, Mr Maarman, is not a scientist or arranges the person as required by the regulations. For that reason we say they're not even getting out of the starting blocks with their application and the Court must have regard to the
10 regulations.

And that regulations has been set out in paragraph 15 and 16 where it's clearly stated that if you... if you turn the page, M'Lady, at paragraph 17.1. That facts are, which are stated in there is common cause and at paragraph 17.2, it is clear that the founding affidavit contains no possible other averment which indicates or to show that he was registered as required by the regulations. In any event, there's no permit to substantiate that. The short point is this, M'Lady, is that for the Court to comply with the question of legality and for the
20 Court to provide the relief which they seek, the Court cannot ignore the requirements of the regulation. The Court must have regard to that, even before ...[indistinct].

But let's then deal with the second leg, which I will deal at paragraph... at page 9, which is the second point *in limine* and the question which my learned friend would like to urge me

to, to get to. The question there was is whether a case of urgency has been made out in the affidavit. Now the respondent say:

> "It is trite that in accordance with the uniform rules and case law, the applicant must make out a case for urgency in his founding affidavit."

That is trite. Then the above ...[intervenes]

COURT: Sorry, counsellor, to interject.

MR TSEGARI: Yes?

10 COURT: Before you move on, are you done now with the aspect of whether you are properly before the Court? Are you done with that aspect?

MR TSEGARI: I didn't hear the last part?

COURT: Are you done with the aspect that you are properly ... if ... whether you are properly before the Court?

MR TSEGARI: The respondents are properly before the Court, M'Lady.

COURT: Alright.

MR TSEGARI: And I'll say... and perhaps if the question

20 which M'Lady would like to address with regards to urgency, I would be compelled to go into... to the merits of the matter. And I'm not sure whether the Court would like me to address you on the merits of the matter ...[intervenes]

COURT: Not.

MR TSEGARI: ... as to why that is the case.

COURT: Not.

MR TSEGARI: And the Court would know that the affidavits constitute the evidence which is before the Court. We cannot place hearsay evidence before the Court. We will have to place ... and the reason why the affidavits were structured in this manner, the Court will know that there are certain individuals which are implicated. For example, Dr Tau was implicated in his capacity as the head of the centre. There's no... and as the head of the centre, he then give an

10 explanation of the supporting affidavit setting out his position.

Now, it would be amiss to say that if we would like to ask the first respondent where there's no allegations which directly or indirectly implicate the first respondent in the affidavit, that we ask the first respondent to deal with questions of science, for example. So for that reason, if the Court will have regard to ... before I deal with that issue, if the Court will have regard to the affidavit by Professor Purin, right?

COURT: Is it contained in your bundle?

20 MR TSEGARI: It's in the... it's part of the answering affidavit, M'Lady. The answering papers were filed, but if... it was filed ...[intervenes]

COURT: Professor? Professor?

MR TSEGARI: Professor Purin. He sets out a comprehensive part in paragraph 2 where he say that:

"The NICD..."

Which were reference to the National Institute of Communicable Diseases, which is referred to here in his abbreviated form or title.

"... is a National Public Health Institute of South Africa providing reference to microbiology, virology and epidemiology and it provides a surveillance in public health research in support to the South African government."

10 So here he's not ... we're dealing with the institution which actually deals with the matter which were are called upon to answer.

COURT: In this affidavit?

MR TSEGARI: In this affidavit. Ja, in this affidavit we are called upon to say produce these isolated purified. But the best person who can give not hearsay evidence, who is in fact dealing with this particular subject matter, not only as a profession, but on a daily basis, he is best placed to give that evidence. And for that reason he is the person who is

20 supposed to give a... the answering affidavit and answer the allegations which are made, which relate to the scientific matter.

So therefore it is ... it's not a question, there's no question of *locus standi*. It is plain that the persons have made out a case for that. And he also attach the minimum

requirements and macro requirements for dealing with that.

But if we turn… if … the following paragraph will then be obviously the affidavit of Dr Tau. Now, if the Court will have regard to page 3, paragraph 8, 9 and 10 and even if we go to the first part of his affidavit where he say:

> "I'm the Head of the National Disaster Management Centre."

And why he say that, is that the Court will see there are certain paragraphs in the founding affidavit which implicate
10 him or refer to him in his official capacity. So we cannot ask Dr Purin or Professor Purin or anyone else to deal with those matters other than that. We cannot ask the minister to say why are you not dealing with this if there is a head appointed? And this person is directly implicated.

The second respondent as a minister or an executive in an official capacity is not implicated. So while we have information or an affidavit before the Court which does not … which will related in essence to hearsay evidence. So this is, because it is trite that the affidavit constitute the evidence
20 which is before the Court. And they form the evidence which is supposed to be led. So the person who is with personal knowledge, is the person who is supposed to depose to the affidavit. And reference is also made to Professor Salim Abdool Karim on behalf of the Governmental Covid-19 Advisory Committee.

Now, there is an explanatory affidavit which deals with the fact that the Professor has resigned from this. So the co-chair is setting out the position and she deals with the particular aspects which are being set out or required. No express implication is made against Professor Abdul Karim in his capacity at the time, that he must give evidence by way of affidavit. He is just cited in the same way that the President is just cited. They're just cited as parties, but no specific relief is sought against them.

10 It is on that basis, M'Lady, that if you make allegations in your founding affidavit and you implicate certain persons in that affidavit, the persons who are appropriately in possession of the knowledge or access to that, those are the people who's supposed to give evidence by way of an affidavit. To that extent, M'Lady, it is submitted that there is no merit in the submission to say that the respondents are not properly before you. The respondents are before you.

In any event, there is no affidavit... replying affidavit to counter that. To say, well, you don't have to give, other than 20 submissions from the bar, to say that, that to take that particular point. So there's no evidence before you as matter of law.

So may I then, and that is the point, M'Lady, the point is that the respondents are properly before you and they answered the allegations which are raised against those

particular respondents.

COURT: And the affidavits are properly before the Court?

MR TSEGARI: The affidavits are properly before the Court as I've explained and I've set out in that service affidavit that you can't say the order in the first place was taken by agreement. The parties have an agreement, you can file your papers by a certain date. You then file your papers by a certain date and now the parties are ... the agreement ... you're not permitted to do that. There's nothing in the email, MM2 from Victor to say
10 that, well, in the event that you do not file your papers by that time, you will... we will then approach the Court to ask that the matter be heard on an unopposed basis. Then you have to go for chamber book applications as I've set out.

And I've set it fully out in my notes where... what is the actual procedure which you need to follow. So this is not a question that you will have to say at best for the... for the applicant is to say that we have to apply for condonation for two, for the two hours that the matter is... that... but they show no; they show no prejudice. They have not produced an
20 affidavit to say that they have been prejudiced. There's no affidavit before you to say because you only give it not at 12, you give it at 3, therefore I was prejudiced and therefore you need to punished. We have to look at the degrees of what it is. That's assuming the Court accepts that they've made out a point, which we deny, we say that there's no basis.

Let me then turn to the issue of urgency, if I may.

COURT: Before you turn to that issue, counsel, I need to make a ruling regarding those aspects. I need to make a ruling regarding those aspects whether you are properly before the Court. Let me give them an opportunity to reply.

MR TSEGARI: Alright.

COURT: Yes, counsel, do you wish to reply or not, before I make the ruling?

MR SIBANDA ADDRESSES COURT IN REPLY: Thank you,
10 Your Ladyship. Your Ladyship, as regards to the aspect of the exchange of emails. Indeed emails were exchanged and the emails were very, very specific as to say that they were speaking to the filing of papers, service of papers as compared to filing are two separate issues. What was emailed to Mr Viljoen was a document which had not been filed. The actual filing only happens on the 26th after the agreed period that they had requested for and got.

And Your Ladyship, to the suggestion that there must have been a proviso to the effect that if you do not file,
20 therefore it defines logic that having requested for indulgence you get the indulgence and still you want a warning that says if you do not file we will proceed and set the matter as unopposed.

And further, Your Ladyship ...[intervenes]

COURT: What about the aspect of the bar?

MR SIBANDA: I beg your pardon, Your Ladyship?

COURT: What about the aspect of the bar? The notice of bar?

MR SIBANDA: The aspect of the bar, Your Lordship, even if that aspect could be considered as being irregular in the sense that it speaks to actions as against an application, that of itself does not give them the right to come before the Court and say they are not out of time, because the issue, Your Lordship, is that when it comes to condonation, a party has to make an

10 application for condonation, not to just come before court and say my papers have been filed.

COURT: Yes.

MR SIBANDA: In this particular instance, the respondents have not even made an attempt to say they are making an application. They, on the contrary want to create a scenario that necessarily confuses service and filing. Those are two separate issues altogether. They did not file and serve.

COURT: Aren't you really being technical here? And keep in mind that the rules are not there to be used as technical tools,

20 but they are there for the smooth running of matters in order to facilitate matters to be ventilated and it's highly important that matters should be fully ventilated between the parties, right? Again, it seems as if you are not in disagreement pertaining to the aspect that it was served within the time period. Isn't it?

MR SIBANDA: We are in disagreement, Your Ladyship.

COURT: Alright.

MR SIBANDA: The disagreement being that service entails a filed document.

COURT: Remember, there is delivery of pleadings. Delivery entails service and filing. You file at court, you serve at a party, right? So, my question is, was the service within time?

MR SIBANDA: Your Ladyship, I'll still maintain that ...[intervenes]

COURT: No, no just answer the question, counsel or else

10 you're going lose me. Was the service within time?

MR SIBANDA: If service means a filed court process, then no it was not.

COURT: No, no, no.

MR SIBANDA: If service simply means putting your intention across to the other party ...[intervenes]

COURT: No ...[intervenes]

MR SIBANDA: ... then, yes, it could be said that it was being served.

COURT: We can't talk over each other. Delivery entails

20 serving and filing, right. Filing, you file at court. Serve, you serve the other party. Now, my question is, were you served within the time, agreed time?

MR SIBANDA: The papers were emailed on the 25th.

COURT: Yes.

MR SIBANDA: That is conceded.

COURT: Let’s go there. Let’s go then. So the respondents only failed with the first part of the order, filing.

MR SIBANDA: Yes, that’s the aspect that they failed.

COURT: Ja, they’re only failing that part, filing.

MR SIBANDA: Yes, M'Lady.

COURT: However, service was done within the timeframe as indicated in the order. Isn’t it?

MR SIBANDA: If I’m ...[intervenes]

COURT: Now the question of prejudice?

10 MR SIBANDA: Your Ladyship, in as far as prejudice is concerned the... on the aspect of prejudice that necessarily occurs is that in as much as the papers were ...[intervenes]

COURT: Were served.

MR SIBANDA: ... served ...[intervenes]

COURT: ... within the agreed time and the agreed from.

MR SIBANDA: ... on the agreed day at 16:39, the applicant necessarily was denied an opportunity to reply on time.

COURT: How so now, if it was served on time? It’s only the Court which was denied an opportunity to have insight to the

20 documents within time, isn’t it? You were served in accordance with the Court Order.

MR SIBANDA: In the evening, Your Ladyship.

COURT: But the assertion was that there was no time agreed upon.

MR SIBANDA: Absolutely. That is possibly the case, that

there was no time agreed upon.

COURT: Let's move on. Let's move on.

MR SIBANDA: Ja, the time agreed upon was Wednesday at 12 for the heads of argument, but all I'm saying, Your Ladyship, is that the ability to therefore reply having been served in the evening and they've only one day left before court, surely that is prejudicial? But all the same, the most critical aspect in as far as the respondents are concerned, would have to be that they've not made their application. But

10 if the Court ...[intervenes]

COURT: Wouldn't you agree, sorry, sorry... wouldn't you agree that it's very important that the matter should be fully ventilated, particularly if regard is had to the issues which were raised?

MR SIBANDA: Absolutely, absolutely.

COURT: So why should I close the door in the face of the respondents then?

MR SIBANDA: It's not a question of simply closing the door, Your Ladyship. It's a question of them at least accepting

20 where they have also been at fault and them follow the procedure. And be that as it may, the aspects that have also been tabled ...[intervenes]

COURT: Where are you go now?

MR SIBANDA: I beg your... still on their right.

COURT: On this aspect?

MR SIBANDA: Yes, on the same aspect, Your Ladyship. My learned friend raises the issue about the technical nature of the application and talks to the regulations, the NHA regulation. Your Ladyship, with all due respect, this application is not about the applicant seeking to own a pathogen. This is not about the applicant seeking to take possession of a pathogen. So that aspect is misplaced.

COURT: Alright.

MR SIBANDA: So to say the least. And the citing of the first

10 respondent, the President ...[intervenes]

COURT: The President?

MR SIBANDA: ... is necessarily founded upon the fact that he is ...[intervenes]

COURT: I don't think they got an issue with that. They can't dictate to you who you cite.

MR SIBANDA: Indebted to you, Your Ladyship. That is what I was going to ...[intervenes]

COURT: Alright. So you're done?

MR SIBANDA: ... allege further. Ja, and I'm done with them.

20 They are ...[intervenes]

COURT: Ja, then let me make my ruling. I have heard the parties.

- - - - - - - - - - - - - - - - -

RULING

It appears that the respondents failed to file the answering or opposing papers as ordered by the Order dated 21 April 2021.

It is also evident that it's common cause between the parties that the papers were served within the ordered time. As I said, or indicated to the counsel on behalf of the applicant, orders and rules are not there to be used as technical tools. They are there to facilitate smooth running of matters. It's highly important that matters should be fully
10 ventilated. It's also not encouraged that parties should litigate in an ambush way.

I am not convinced that I should not condone the late filing of the answering affidavits and I am convinced that the respondents are properly before this court.

Consequently, the respondents can proceed and address this court pertaining to urgency.

- - - - - - - - - - - - - - - - - -

MR TSEGARI: M'Lady, as it may please you. May I then on that basis turn to page 9 of my heads
20 of argument? And before I address you, I think the first point *in limine*, assuming that the Court... the first point *in limine*, is still a very strong point *in limine*, because if the Court have regard to what they want, physical, so they must acquire, they must take possession.

So that end, you cannot just simply say that any person

can make a call or request that you ... that a court must come and say and where ... what the applicant is missing the boat, is that there is the trice political principle and separation of powers that constitutionally they do what they're supposed to do within their powers.

COURT: But you agree, counsel, if they fail on urgency ...[intervenes]

MR TSEGARI: Then it's the end of ...[intervenes]

COURT: Yes.

10 MR TSEGARI: Even so, M'Lady, then that's the end of the matter. But let me turn to that point, that particulars. As I said, as a starting point it is trite that the applicant must and as I said at paragraph 20, the applicant must make out its case in his founding affidavit.

Now with reference to paragraph 1, at page 21, that in the notice of motion paragraph 1, the applicant say that they want this application to be heard as a matter of urgency and that the applicant's failure to comply with the time limits imposed by the rules of this Honourable Court, be condoned in 20 terms of Rule 6(12). And may I just add that you will have to provide reasons and circumstances which render your matter urgent.

Now, I would like the Court to read paragraph 1 together with the allegations or averments which are set out in the applicant's founding affidavit at paragraph 10 to 24. There the

Court will see, they give it a heading and they sought to say that these are the circumstances. On the affidavit this is the circumstances which they say we'll have to meet. They set out as being the basis for the urgency.

Now, for completeness, if the Court turn the page that the respondents have referred specifically to the allegations which are set out in paragraph 10 to 24 where at best, paragraph 10 is argumentative and it's not a factual matter which is before you, where they say:

10 "I respectfully submit that this matter cannot wait to be dealt with in the ordinary course."

There is no facts which precede that conclusion. That is a legal conclusion and there is no facts which precedes that. Now if I may, if I turn to page... to paragraph 23 at page 11, there the respondents ...[intervenes]

COURT: [Indistinct]... page 11, not 10?

MR TSEGARI: It's page 10. Paragraph 22 is still part of the heads of argument, page 10. If you turn the page ...[intervenes]

20 COURT: Where are we now?

MR TSEGARI: At the heads of the argument. The heads of argument, sorry. What I've done, the Court will see is that I've just ... the respondents took the ... those allegations and incorporated it in the heads of argument also to create a better flow of it.

Now, the respondents are amiss to find any facts or circumstances which render the matter urgent on the applicant's own version. Where they say that:

> "This matter is of such urgency that it simply cannot wait for the normal procedure to be completed. I respectfully submit that this application should be heard other than in the normal course.
>
> Now, currently the entire country..."

And there is a reference to:

10

> "... it's under lockdown 1, which is a serious violation of the citizen's right. To date the Minister of Health has uttered and there are circulating discussions..."

They say, which deals with it. Now, the respondents say that those allegations or legal arguments does not answer the requirements for why the Court should exercise its discretion in favour of the applicant, where the applicant can actually say I have made out a case on papers for the question of urgency.

And then they say there is ... the Court will also see that

20 there is a ...[indistinct] on rollout of vaccines and the vaccine rollout has begun in other countries and that the outcome of the order could very will mean a quick recovery to normal circumstances for the entire nation.

I must just add that there is as much as the applicant seeks to represent the entire nation, there is no confirmatory

affidavits or any other corroboration for his assertions that he's actually here on behalf of other persons. So what we have at best for the applicant is his allegations which he made under disguise that he say he is representing the entire country.

But let me turn to paragraph 23 where the respondent made the following contention. They say that:

> "The respondent contend that the applicant's application falls to be dismissed in that he failed,
> 10 amongst others, to show that he will not otherwise be afforded redress at the hearing in due course."

The applicant contend that the applicant faintly asserted in paragraph 11...if the Court ... well, there in paragraph 11, this is what the applicant say at best. They say that:

> "This matter is of such urgency that it simply cannot wait for the normal procedures to be complied with."

That is the only faint reference to the question of urgency.

There's no other circumstances or facts which is advanced to demonstrate the existence of this particular
20 urgency. And that point is made at the latter part where the respondents say that:

> "Apart from the letters, statement or no material facts or circumstances are advanced to support."

Now, if you turn the page on the heads of argument at page 12, paragraph 24, that in order to put the applicant's

averments in context I digressed to refer to the reasons why the matter should ... the matter is not urgent, before I deal with the proposition that the urgency was self-created. The main point which the respondents make is to say that the urgency which they referred to here are self-created urgency.

But before I address you later on in the heads of argument, may I just deal with certain observations which is of importance, which is referred to in the cases and I've dealt with that in paragraph 25 and 26. The respondents say that:

10 "They contend that the only reasonable inference which could be drawn from the lack of any particularity or facts in the founding affidavit about the substantial redress, stems from the fact that the applicant in essence are seeking final relief."

And this is clear, M'Lady. If the Court will just keep the Court's finger there, we'll see that nowhere in the notice of motion is any reference made to any pending matter.

And that the interim, in as much as they say it's interim urgent interdict, this is in essence a request for final relief.

20 So they will have to demonstrate a clear right, not a *prima facie* right.

In other words, the granting of an interdict in the manner fawned by the applicant would be dispositive of any matter between the parties. This is so because the applicant is not seeking the relief in paragraph 2 of the notice of motion

pending the resolution of the main or other proceedings. There's no other proceedings. The affidavit or the founding affidavit is silent as to whether or not there are any other proceedings.

In this regard, the respondents referred to *Pikole v President of the RSA*, 2010(1) SA 400 at 403 paragraph H to R. That is on page 11... of page 12 of the heads of argument. Thus, the applicant in paragraph is seeking final relief or relief with final effect. In any event, the applicant is not suggesting
10 that he's seeking through the interdict a freezing of existing rights which are threatened by irreparable harm. That is at paragraph 26, M'Lady.

Now, at paragraph 27, despite or apart from the other defects contained of not complying with the rules in compelling the respondents to come to court on an urgent basis, the respondents contented the urgency which is referred to in this matter, is self-created urgency.

And may I turn the page, M'Lady, at page 13. Now at page 13, the respondents say that:

20 > "Although it lacks the requisite factors to show urgency, the only allegation in the founding affidavit which contains some vague elements or alleged urgency appears in paragraph 20 of the founding affidavit."

Where they make the following statement. They say:

> "In South Africa there's a vast unemployment and poverty as such, the question of the very cause threatens to drastically increase the already desperate circumstances must at least be thoroughly investigated with utmost haste."

That appears to be the basis for why they say this matter should be heard on an urgent basis.

Now the respondents contend that paragraph 20 of the founding affidavit must be read together with the allegations
10 set out at paragraph 62 of the applicant's ... of the applicant's founding affidavit. There the Court will see that there would be assertion.

> "The applicant has a reasonable suspicion about the existence of Sars-CoVid-2 virus."

That has been dealt with in paragraph 62 of the founding affidavit. Now the respondents say that:

> "That's on the applicant's own version. If the Sars-CoVid-2 virus does not exist, then..."

That's the logic which they say, the Court must accept.

20
> "... if the virus does not exist, then the other restrictions, namely the lockdown unlawful, irregular and such violates his fundamental rights."

That is the logic of the... of where they're going with this.

> "The respondents contend that the applicant commits an elementary error in that no right is

absolute."

That we know. It's trite and it's appropriate in these circumstances that the rights carried in certain circumstances be limited in terms of Section 36. The Court will recall that their case is in essence that you cannot limit any of those fundamental rights.

Now, if we turn the page, M'Lady, to paragraph 31 of the heads of argument where they say... where the respondents make the point to say that the respondents contended:

10 "If the applicant failed to comply with the requirements of the National Health Regulations, then this court may in any event not in law exercise the discretion in favour of the applicants."

That's the first point. So in addition we say that:

"The granting of the relief sought may thereby enter into the exclusive domain of the executive or the organs of state in circumstances where no case is made out as to whether or not the executive was acting irregular or violate the Constitution."

20 So may I then now turn to the contention or the argument that the urgency which we deal with here are self-created? That I will deal with more fully in paragraph 33. Now, since the application or the founding affidavit is largely based amongst others on hearsay evidence and matters which appears to be public knowledge, it is common cause that the applicant knew

about the lockdown restrictions, at least from 15 March 2020, on their own version. They knew about it since then. And on their own version they should know that in or during January 2020 the world, on their own application become aware of the so-called Coronavirus. And that the applicant knew or reasonable should have learned that... about the vaccination rollout programs in this country, at least since March 2021.

And in addition... and in the reported cases, the
10 reported cases of infected persons in the country are also within the public domain. The applicants on their own papers say they knew about the existence of that.

COURT: There was a contention which was made that it’s not allowed that post-mortems should be done.

MR TSEGARI: The question is, if that is the contention which is made. But the premise of that contention must move from a scientific fact. As a scientist, you will have to follow certain ethical and legal processes before you can do what they ask the Court to do. So, it’s quite another thing to say you can’t
20 have a post-mortem. That’s been the argument, but the... at the end of the day you have to produce facts and circumstances, not legal conclusions or statements unsupported by facts. And that’s the... that is the Achilles heel of the applicants that they failed to produce those.

And even if one have regard to what they on their own

papers say, that they say the instances when the President address the citizens of the country about the restrictions is similarly in the public domain. The President most recent even during the beginning of April addressed the citizens of the country. That's in the public domain. And they knew about it since April. They come to this court and they say to the Court, ignore all the processes.

COURT: No, their contention is right. The situation is so fluent, it's continuing. Consequently, they claim the urgency
10 stems from the nature of the relief sought. According to him... to them the urgency is inherent with the nature of the relief sought.

MR TSEGARI: I was lucky enough to hear that analogy which my learned friend was putting forward with regards to the person who was assaulted and with reference to that, that particular person that a crime is committed. And we know that it is not ... it's common knowledge that when a person commit a crime, you follow the CPA and you lodge a complaint, you go to the police, there's a crime. There's a certain procedure
20 which follow. In any democratic country there's certain procedure which is followed. To characterise what is happening or unfolding in the country despite the objective evidence as falling into the same category, is baseless, M'Lady. With great respect, it's baseless. There's no factual information which is put before you.

But the more fundamental problem is this, the Court will know it is trite, if a party depose to an affidavit, that party must have personal knowledge of the facts which he depose to. Now let me again just step aside for a minute and just go to ... it forms part of the question of urgency and their claim that this is, if the Court will have regard to paragraph 2 of the founding affidavit. There the applicant say:

> "It's an adult male, Ricardo, who holds an MA International Politics obtained at the University of
10 Leister in the UK. He specialise in post-cold war order, international security, intelligence and security and US foreign policy."

Right? That is the sum total of what is the deponent say the scope and nature of his knowledge are. Right? Now, if in certain circumstances, hearsay evidence may be permitted in urgent applications, we're dealing here with a matter where a person who is not otherwise qualified or as an expert on the field, give evidence on matters where he bears no personal knowledge about.

20 So the Court will have to take that into account when the Court have to assess whether or not the relief which the applicant seeks are properly before you. That he can properly obtain the relief which he seek.

Now, because most of the... Court will see if you have reference to even RM1, RM2, RM3, RM4, all those letters in

particular RM4, relates to a statement on the virus isolation in their papers. That raise the question as to whether the Court can actually have proper regard to when that paper is written by a scientist and the person is not a scientist, either microbiology or any of those other fields, that the Court can say that I have regard to the probative value of what he's saying because the evidence is in the affidavit. You will have to make out your case in your affidavit.

The respondents say that:

10 "Despite all the above information at the disposal at the time of the applicant, it now wishes to leapfrog the court procedure and insist that he must be heard on an urgent basis whilst no discernable case is made out in the founding affidavit for urgency. More importantly..."

And this is where the applicant is actually contradicting his own case. The court will recall that you can only come, assuming that they have a case for interim interdict, which is not, that they can only ask for relief if you have no alternative

20 remedy. That is the whole basis of it. May I then turn to paragraph 35 on page 15 of my heads? It say that:

"More importantly, the applicant rushes to court despite the fact that he on his own case, has an alternative remedy."

This is evident from paragraph 132 of his affidavit where he

make the following statement. He say that:

> "The applicant has a right to access to information in terms of Section 32 of the Constitution and that he is essentially..."

This is what he is essentially requesting here. This is what he say. The applicant is saying what is essence he's requesting the Court is the access to information, on his own version. That the Court will find at his own paragraph 132. If I may just take the Court there? It's at page 32, M'Lady of the founding

10 affidavit.

COURT: Hmm.

MR TSEGARI: This is what the applicant say:

> "The applicant has a right to access to information in terms of Section 32 of the Constitution."

And he say the following, he say that:

> "And that is what he is essentially requesting here."

Now on his own case ...[intervenes]

COURT: Isn't he making reference to the relief sought that ...[intervenes]

20 MR TSEGARI: Yes.

COURT: ... he's asking for the information ...[intervenes]

MR TSEGARI: Yes.

COURT: ... show me. Show me that there is a virus?

MR TSEGARI: Ja. That's the information. But the Court will see in the context of his own case where he dealt with *prima*

facie right and those list there. He want that information to be shown, on his own case, ja. So he can't say without having invoked his right to access to information in this year. We know that he previously have done so and he attach the papers that he ... the last time that he had done so was in... it was in May 2020 and in June. The Court will find that... they are unnumbered, but they will follow immediately after RM15.

COURT: Is your bundle not paginated?

MR TSEGARI: No, the file is not paginated, M'Lady. The file

10 is not paginated.

COURT: The Court has page 174, RM13. RM14, 179.

MR TSEGARI: There's certain aspects ...[intervenes]

COURT: 183.

MR TSEGARI: There's 187. 189 appears to be one of it and then ...[intervenes]

COURT: Are you referring to this document?

MR TSEGARI: Ja, that document. There... the point... the short point that I would like to make, M'Lady, is that there the Court can see in May 2020 he has requested information,

20 right? On 6 May there was another request for the information. And then on 18 June 2020, there was a response and another response appears also at what appears to be a numbered page 197, 198. It bears the same date namely 18 June 2020.

COURT: Indeed. 195.

MR TSEGARI: Ja. And even at page 202. Again, this information relates to information which appears to be done in 2020. The short point is this, if you had access, if you've previously invoked that right to access information and you now come to court and say you don't have an alternative remedy, why didn't you invoke this right? You could have done so in 2021 to ask for the information which you're now requesting.

COURT: Can't they say that process was not fruitful, hence
10 they are now approaching the Court?

MR TSEGARI: But they were asking different things, M'Lady.

COURT: Alright.

MR TSEGARI: At the time they were asking for different things. This appears to be… and M'Lady will see that the… at the time, the information which was, for example, requested at the time by the applicant was in his capacity as the National Coordinator. At the foot of 191. So this time around, this application appears to be he'd done it on his own basis. So nothing have stopped the applicant, the point being simply
20 this, is that nothing stopped the applicant to have requested the same information which he say, this is actually what he want. This is the alternative remedy. Again, on that basis, his … his application cannot be regarded as urgent. Because he have already at his own case demonstrated the existence of an alternative remedy.

In any event, M'Lady, when you deal with a matter such as this, which raise important legal questions and policy issues, the best place to deal with this particular matter is the unopposed ... is on the semi-urgent roll, where you allocate the matter and at best, because of the importance of this matter, or the issues which seems to be raised here, at best there's supposed to be at least two judges or more, or a full court. I think the issues is of such a nature that at least you're supposed to have a full court.

10 And I've referred in the note to the practice directive as to how you're supposed to deal with matters such as this, where you need to ... first of all you need to comply with the practice directive to paginate and index the file and then the matter needs to be referred to the semi ... at least the semi-urgent roll where it can be dealt with on that basis that the issues must be properly ventilated.

And even in this case where it is apparent that there will be a dispute of fact. So you cannot really deal with the matter on that basis alone. May I then return to say that at paragraph

20 36 where the respondents say that:

> "The applicant put up no grounds or facts why he omitted to invoke his rights to access information."

He doesn't say anything there. The respondents contended that:

> "It is in any event not suggested by the applicant in

> his affidavit that he during March or April 2021 submitted a request for information and his request was declined."

There's no evidence before you that his request was declined.

> "Accordingly, the respondents contend that on his own version that the applicant has an alternative remedy which he should have invoked before he come to court. In the circumstances, the respondents contend that the applicant's failure to
> 10 do so should be regarded as an abuse of the court process."

And this is so because, not only is the ... is he requesting relief with far reaching consequences for how the executive and the organs of state should positively comply with their constitutional obligations by protecting the population and the health resources of the country, but the [indistinct] of his relief, is that it might very well place the lives of millions of persons at risk in the event that the Court say I will grant paragraph 2, the physical, isolated, purified SARS virus.

20 Nowhere in his papers does he say the reasons for why he is requesting it. Be that as it may, I'll ... that being the issue of the mails.

> "So accordingly, the handover of the physical virus to him as requested pose serious dangers for the effective protection of the population. In the

premise, the respondents contend that the applicant's application falls to be dismissed on this ground also. However, should the Court nevertheless be amenable to, which is denied, to consider his application for whatever reason, the respondents contend that this application should be dismissed on the grounds set out below."

And that being the third point *in limine*, which I will not, since that would be with the merits, M'Lady.

10 COURT: You're going to stop there?

MR TSEGARI: Ja.

COURT: Yes.

MR TSEGARI: The Court say I must address you on the question of urgency.

COURT: Urgency, yes.

MR TSEGARI: So just to sum up, M'Lady. The first point is that you will have to make out your case in your founding affidavit. And two, you'll have to show or demonstrate that you have no alternative remedy. We have established that there's

20 an alternative remedy.

Three, you'll have to show the irreparable harm to your rights, but you'll have to show in your case. In this case, they're not asking the Court for an interim interdict. They're asking the Court for final ... a final relief or relief of a final effect.

If the Court were to grant that, it means its dispositive of the entire matter. Then it clearly cannot be done if one have regard to the issues raised on the papers before you. So, we submit that there's no circumstances set out or facts which supports the view that the Court can exercise its discretion in favour of the applicant to say that the matter must be regarded as urgent.

Accordingly, we submit that on the basis of urgency alone and given the fact that we know all these matters, it is
10 not enough to say that we are dealing with a continuous issue, therefore the urgency is on that basis self-evident, as I understand my learned friend to say. But then you will have to say that across the world, for example, that you will ... because that is a very wide point to make and that in itself is not sufficient to justify the granting of urgent relief. Because when you start speaking about the existence or the continuous threat it pose to the nation, you then have to deal with the issues relating to the science behind it. And you will have to corroborate your point of saying that I have found other
20 persons who support my position to say it's not only the applicant, but there's other persons also who have deposed to affidavits supporting that particular point.

So the question of a continuous danger and that's the reason and I think the Court must weigh it up against the following, the whole point of restrictions is really to attempt to

flatten the curve of the infection.

COURT: Sorry to interject, counsel. The converse of it from the applicant's side is that it's actually the respondents who are endangering the population.

MR TSEGARI: That's the converse what they say. But again, if they make that point which appears to be a legal one; if they make that point, that cannot be done on an urgent basis. That requires a court to ventilate all of the issues. The Court cannot on the basis only of urgency say that I will deal with it
10 on an urgent basis and for that reason. This is unlike a situation where you have a father or estranged persons. The father take the child without the consent of the mother and you now come to court and say to the Court you're upper guardian of the child, I need your assistance to come and help me to stop the husband to take the child away from me.

This is something which is much more complex than it appears. It is not something which only raise what the applicant seeks the Court to understand that, you know, it's simply you request the respondents, here is the virus. The
20 virus exist, you can just hand it over.

COURT: They say there's no virus.

MR TSEGARI: On their case there's no virus.

COURT: There's no virus.

MR TSEGARI: Despite the fact that on their own case they say there's infection of persons of in excess of 1.4 million.

And on their own case they say in the paragraphs which I have cited; on their own case they say that this is the amount of persons which have died as a result of, as they put it. They make that point in the, if I may just ... oh, ja. If one, if the Court will have regard to what is also before you, which is the founding affidavit at paragraph 51 read together to say at paragraph 57 of their founding affidavit.

COURT: 51 and 57?

MR TSEGARI: No, no, it ... at page 15, it's at paragraph 51 of

10 the founding affidavit. There the Court will see one will have to take this as to be their position with regards to the public knowledge. They say that:

> "During January 2020 the world become aware of the so-called Coronavirus."

I've referred to that again. At the writing, they take the point further, they say:

> "At the writing of this affidavit, the reported South African scientifical information of so-called virus are as follows..."

20 They referred to:

> "1.4 cases has been reported and... "

And then they attach RM6. Right. And then at paragraph 53, they make again references to the amount of persons who is infected by the virus and the recovery rate. It is 1.4 infected, 1.2 is the recovery rate. So ... and then they say in paragraph

54:

> "There are currently 150 800 people in South Africa had the so-called virus of which namely 546 are in serious or critical condition."

So on their own case, even if they say it doesn't exist, but they admit, this is the consequences of what is happening.

COURT: Are they really admitting or merely citing statistics which are there?

MR TSEGARI: But that's a case we can make, M'Lady.

10 COURT: Alright.

MR TSEGARI: That's the case I make. You cannot come to court and say, well, I can distance myself from my founding affidavit. You come to court and say I try to explain to the Court what is my position and then you use information like that, right? And you say in your own affidavit, you say that:

> "The facts deposed to in this affidavit falls within my personal knowledge."

And you ... and they say in their notice of motion that the application of ... or the affidavit of Ricardo will be used in 20 support of this application. So, you can't, like they were doing, M'Lady, they try to cherry-pick the matters which they feel it's comfortable for them to use and they say the Court must ignore the others.

The Court must have regard to the entire affidavit as it is in order that the Court can have a full picture of what they

actually try to ask the Court to do. So, it's of no consequence that they say that there's a continuous virus. We ... nobody knows how long the virus will be in existence. Nobody knows. No one even knows and the world can do it, they have remedial steps like vaccines to try to curb it. But nobody knows really how to deal with it. It's not something unique only to South Africa. It's something which is across the world.

COURT: I mean assertions – an assertion was made that the President has announced that we are going towards a third

10 wave.

MR TSEGARI: That's the assertion, M'Lady. But now we see, and if I may at this point and that is my ... that point is made or that allegation is made in paragraph 13 of the affidavit, right.

And may I just put it on record that the respondents has also filed an application to strike out some of the hearsay evidence or argumentative matter which is contained in this affidavit. But that's... that being an application which is not now going to be dealt with. We dealt with, if we have regard

20 for example to paragraph 13 where they say that:

> "Currently the entire state is under lockdown level 1, which is a very serious violation of the citizen's fundamental rights. To date the Minister of Health has uttered and there are circulating discussions that lockdown measures will be

tightened which begs these measures to be scrutinised."

And if the Court will have regard to what they try to rely on for that, they refer to RM1. RM1 appears to be newspaper or internet articles which they pull from the internet and they attach them in support of that allegation. And we, in our striking out application, which the Court will also have regard, is that we ask that that information because they amount to hearsay. There's no corroboration or no confirmatory affidavit
10 from the authors of these... of this particular articles to say that they support what the applicants have to say.

So on that score, M'Lady, one cannot simply say, you know, sort of there are circulating discussions. And if there is certain circulating discussions, it needs to be backed up by facts and circumstances, not mere say so or what is in the public domain. There's a lot of things in the public domain. But one needs to distinguish between what is factually correct and what is ... some assertions which are circulating in the public domain. And that is something which the applicant has
20 failed to do in his own case.

Because I did not have the benefit of hearing the other part of the question of urgency, I would like the Court to just remind me of the other aspects which I need to address because I haven't had that opportunity, apart from the ones which the Court now raised here.

COURT: No, I think you've traversed everything, counsel. I think you traversed everything. You canvassed everything.

MR TSEGARI: Thank you, M'Lady. So, in conclusion, the respondents would just like to request that this application ought to be dismissed because ...[intervenes]

COURT: Dismissed? Let's say the Court is inclined ... if the Court is inclined to find that there is no urgency ...[intervenes]

MR TSEGARI: Yes?

COURT: ... you are requesting that the Court should dismiss

10 the application?

MR TSEGARI: Ja. If there's no urgency, the application must be dismissed.

COURT: Not to be removed from the roll?

MR TSEGARI: The alternative is to remove it from the roll, M'Lady. If the Court say that there's no... then they must remove it from the roll and follow ...[intervenes]

COURT: Then it should go to the normal course.

MR TSEGARI: ... and follow the proper procedure. And more so, M'Lady, I cannot impress it more than in this division, the

20 Court makes it very clear, there's a reason why there's practice directives. There's a reason why there's rules. This case of the applicant is in flagrant violation of all the rules and the practice directives. The applicant, at best, should have at least anticipate that there's opposition, that the best possible way to deal with the matter is to either approach for request

for earlier allocation of the matter or to ask that the matter be placed on the semi-urgent roll so that the issues must be properly ventilated. This was not done.

They have not bring such a request to the Court to say this is what... this is the most appropriate way of dealing with the matter. What they want to do, is the Court to say well, let's leapfrog the procedures and then say to the Court that you must now hear us now, here and now and what makes it problematic, M'Lady, is that they are seeking final relief which
10 request that we have to look at the probabilities and we can't deal with probabilities on the papers. If there's no other, further questions, M'Lady, that's the ...[intervenes]

COURT: And costs? Costs?

MR TSEGARI: The cost, M'Lady, is, the cost we are compelled to come to court on an urgent basis. The cost must follow the event.

COURT: Isn't this public interest?

MR TSEGARI: M'Lady, in as much as you have a discretion to decide, it's a question of public interest, what is important in
20 this matter is that the persons who deposed to the affidavit are required to deal with more pressing issues and the ... we're dealing with scarce resources where we have to pull those people out of the work which are pressing in this ... in the rising of the infection rate.

COURT: Ja, but would it not be in a constitutional

democracy?

MR TSEGARI: I accept that, M'Lady. I accept that. But we say that if you do bring proceedings to court, you must at least make sure that those proceedings are properly before the Court.

COURT: But it's a situation of a citizen versus the executive?

MR TSEGARI: A citizen who was properly represented and from the look of things the citizen has an army of representatives. So this citizen is not a person who stand
10 alone. And he doesn't bring this in his… as a person who is doing his own matter. He has got an army of person who assist. So it's not ... this matter is similar from a situation where you have a concerned citizen who say I will litigate on my own and I'll bring this matter to court and that the Court can deal with it and in that regard we're not saying that the Court should close the door on people who raise issues, they can, after all we live in a democratic society where you have to tolerate freedom of expression and different views. People can do that.

20 All that we say in doing so, your right must be exercised in such a way that you attach reasonableness as to how it will impact on the other person. And that's the balance which we need to ... we're not always right, but that's balance and that's the reason why the practice directives and the rules seeks to strike a balance between this. So if the Court is not amenable

to dismiss the application outright, which we would ask, then it's within the Court's discretion to struck it from the roll.

And we would still urge the Court to consider a cost issue, but it remains within your discretion to say each party will carry its own cost, but that's a decision which the Court will have to make. M'Lady, if there is no any other matter, that is the submissions on behalf of the respondents.

COURT: No. Thank you, no counsel.

MR VILJOEN: M'Lady ...[intervenes]

10 COURT: I will allow one counsel to address, not two.

MR VILJOEN: Thank you, M'Lady. It's actually a very simple matter, M'Lady. Whenever we address there's circumstances of the virus. We say the so-called virus. M'Lady, there is factual evidence of urgency and harm here. RM6 is an attachment of the Government Gazette where the lockdown has been announced, M'Lady. Now, what can be more urgent than a lockdown that locks down the entire nation, it locks down the economical activities, it locks down the freedom of choice whether they can wear a mask ...[intervenes]

20 COURT: But that was in the past, isn't it?

MR VILJOEN: It's happening right now, M'Lady. You don't have a freedom of choice whether you're going to wear a mask or not. And, M'Lady, we're talking about vaccination passport. So, the respondents are saying we're not going to force you do to it, but we'll exclude you from the entire community if you

don't do it. M'Lady ...[intervenes]

COURT: Has that been said?

(AFFIRMATIVE REACTION FROM WHOLE COURT ROOM)

MR VILJOEN: Yes, M'Lady.

COURT: Is it?

MR VILJOEN: And it's happening in circumstances already. M'Lady, and then there's also the circumstances of people whose apparently dying from taking the vaccine.

(AFFIRMATIVE REACTION FROM WHOLE COURT ROOM)

10 COURT: People, please try and restrain yourselves.

MR VILJOEN: M'Lady, there can't be any more urgency than violating an entire nation's right to freedom of movement, their right to earn a living, their right to decide at what time they'll drive at night. And that has been submitted in the Government Gazette. That's a factual fact that their fundamental rights and the economic ...[intervenes]

COURT: [Indistinct] before, counsel, sorry to disturb. What's the point of a Government then?

MR VILJOEN: Exactly, M'Lady. This is being, and this is our

20 point. The point of Government is do ... make rational decisions, not on assumptions, M'Lady. So all we... we're not asking the Court to make any decision. We have a right; Section 25 of the Constitution give us the right to freedom of information. This is amended by the Promotion of Access to Information Act, Section 12 that says – and Section 11,

M'Lady.

So the applicant has followed these process, M'Lady. He's been ignored. How many times must you be ignored before you can say okay, he's been ignored three times at least, M'Lady. So, he has exhausted all other revenues. He's been desperate from the beginning, M'Lady. So, one can't say this is self-inflicted. And secondly, the ... I can't think of anything more urgent than this current lockdown on our economic and on the freedom of movement of people and the
10 freedom of movement.

M'Lady, and we're talking about a third wave. The Court can take judicial notice of that. M'Lady, that means that we're going to go up to a level 2 or level 3 where people's prevented from going to the beach ...[intervenes]

COURT: But you're speculating.

MR VILJOEN: No, M'Lady. It's a fact. We're on level 1 now. What's to say that we'll go into level 2 tomorrow? We don't know, M'Lady. And this is all based on the assumption and the respondents is saying the virus is existing. We say; all we're
20 asking is show us. We're not asking give it to us, we'll go around the corner and play with it, M'Lady. We're asking ... our wording is very specific, produce it in circumstances that you're happy with, M'Lady, to the applicant. Meaning the applicant will come with his people and they'll confirm whether the virus actually exist or not, M'Lady.

And then from there further actions can follow. That's all we're asking is the Court to make an order that our right to access to information be respected and that the Government show us what they allege is existing, M'Lady. There's nothing ... we're not asking them to go through financial burdens or to ... the Court to make any prejudicial orders against them. We're just simply asking them to produce us what they're claiming that they have, M'Lady.

And under the circumstances that they prefer. We're not
10 asking to take the virus and go with it, M'Lady. Definitely not and that's not our application.

COURT: Thank you, counsel.

MR VILJOEN: Thank you, M'Lady.

MR SIBANDA: Your Ladyship ...[intervenes]

COURT: What I'm going ... I said I was only one.

MR SIBANDA: May I just request that one important point, Your Ladyship on the issue of costs.

COURT: Oh yes.

MR SIBANDA: Please hear me on the cost, Your Ladyship.
20 My learned friend makes a very important point about the applicant engaging the services of several lawyers. Indeed, that is correct. The reason why applicant had to take that particular route is because when he tried it on his own, he failed because he just didn't know what he was doing procedurally, which then explains the 8th of March when he

tried to push his case through to the Court. And my learned friend fails to basically address the aspect as well that there are lawyers who do work *pro bono* and there are lawyers who will do public interest cases because they believe in the necessity to protect the interest of the citizens of the country. So I'd love Your Ladyship in applying her mind to the issue of costs to be cognisant ...[intervenes]

COURT: I always apply my mind to everything, counsel.

MR SIBANDA: Particularly we're talking about costs at this

10 particular stage, Your Ladyship, to be cognisant of the fact that the applicant has got a *pro bono* team of lawyers in that, Your Ladyship.

COURT: Thank you. What I'm proposing to do, I'm only going to give ruling pertaining to the aspect of urgency. Right? Reasons, unfortunately will have to follow as I am on urgent duties.

RULING

COURT ADJOURNS [16:04]

20

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