



Explanatory Note

Classification, Declaration and Extension of a State of Disaster



Prepared By:

**Chief Directorate: Legislation and Policy
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CONTENTS

| | |
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| LIST OF FIGURES..... | 4 |
| LIST OF TABLES..... | 4 |
| 1. INTRODUCTION | 5 |
| 2. CONTEXT OF THIS EXPLANATORY NOTE | 5 |
| 3. DISCUSSION | 6 |
| 3.1 Disasters occurring or threatening to occur in provinces..... | 6 |
| 3.2 Declaration of provincial state of disaster..... | 7 |
| 3.3 Duration..... | 7 |
| 3.4 Declaration of a state of disaster after three months..... | 8 |
| 3.5 Important considerations when dealing with a disaster | 9 |
| 3.5.1 Executive responsible to manage a disaster irrespective of whether a provincial state of disaster has been declared..... | 9 |
| 3.5.2 Rationale for declaring a state of disaster | 9 |
| 3.5.3 The classification of a disaster | 11 |
| 3.5.4 Annual Division of Revenue Act (DORA) | 11 |
| 4. SOURCES..... | 13 |
| 5. APPENDICES | 14 |
| 6. APPROVAL..... | 15 |

VERSION CONTROL



Classification, Declaration and Extension of a State of Disaster

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LIST OF FIGURES

None listed.

LIST OF TABLES

None listed.



1. INTRODUCTION

Legislation has become government's chief instrument for changing and shaping society and for regulating virtually all spheres of life often in minute detail. Many actors across the spheres of government and in society are involved in the legislation making process, all having varied degrees of expertise and experience. This diversity in the skill of the practitioners involved and the process in making laws, results in a statute book that varies in quality and style despite efforts to ensure its uniformity. This makes it all the more difficult for those who must interpret and apply the laws to do so uniformly¹.

Much has been written on the interpretation of law and in particular on the methods that can be employed to ensure universal understanding of the law thereby reducing disputes or wrongful acts. One such strategy is the issuance of an explanatory note. An explanatory note is intended to make people better understand a legal statute by either describing its constructs and or clarifying the interpretation of the constructs. An explanatory note therefore aims to clarify the ambiguity, vagueness or generality of a legal statute that may cause interpretation discrepancies.

2. CONTEXT OF THIS EXPLANATORY NOTE

The Disaster Management Act, 2002 (Act No. 57 of 2002) ("the Act") in Section 42 provides for the declaration of a state of a provincial disaster. The Section also states that the provincial state of disaster lapses after 3 months, or may be terminated by the Premier before it lapses, or may be extended by the Premier for one month at a time, by notice in the gazette, before it lapses.

Given the provisions of Section 42 and the ongoing drought in the Republic, the question was posed to the National Disaster Management Centre (NDMC) if the extension period could not be made for a period longer than one month as provided

¹ (UJ, 2011: 7)



for by the statute on the basis that the conditions of the drought will not be alleviated within the three month period following the declaration of a provincial state of disaster.

3. DISCUSSION

It is central to the conception of the Republic's Constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. Administrative legality is a principle used by the courts to determine whether administrative action was not only authorised by law but also performed in accordance with the prescripts laid down by the law. The public administration must serve and promote the public interest, protect and respect fundamental rights. Within the constitutional framework this means that the Executive "may exercise no power and perform no function beyond that conferred upon them by law" (*Fedsure Life Assurance LTD v Greater Johannesburg 1999 (1) SA 374 (CC)*). In order to clarify these principles in the context of disaster management and specifically in the context of the question posed, the following explanation is presented.

3.1 Disasters occurring or threatening to occur in provinces

Section 35 of the Act provides as follows:

- 35.** (1) *When a disastrous event occurs or threatens to occur in a province, the disaster management centre of the province concerned must determine if the event should be regarded as a disaster in terms of this Act, and, if so, the centre must immediately-*
- (a) *initiate efforts to assess the magnitude and severity or potential magnitude or severity of the disaster;*
 - (b) *inform the National centre of the disaster and its initial assessment of the magnitude and severity or potential magnitude or severity of the disaster;*



Classification, Declaration and Extension of a State of Disaster

- (c) *alert disaster management role-players in the province that may be of assistance in the circumstances; and*
 - (d) *initiate the implementation of any contingency plans and emergency procedures that may be applicable in the circumstances.*
- (2) *When informing the National Centre in terms of sub-section (1)(b), the provincial disaster management centre may make such recommendations regarding the classification of the disaster as may be appropriate.*

3.2 Declaration of provincial state of disaster

Section 41 of the Act provides as follows:

- 41.** (1) *In the event of a provincial disaster, the Premier of a province, after consultation with the other MECs, may, by notice in the provincial gazette, declare a provincial state of disaster if-*
- (a) *existing legislation and contingency arrangements do not adequately provide for the provincial executive to deal effectively with the disaster: or*
 - (b) *other special circumstances warrant the declaration of a provincial state of disaster.*

This provision read with Section 35 of the Act implies that the Provincial Disaster Management Centre performed the required assessments of the magnitude and severity of the event, concluded that the disastrous event should be regarded as a disaster in terms of the Act, initiated the implementation of any contingency plans and emergency procedures that may be applicable in the circumstances, and found that the existing legislation and contingency arrangements do not adequately provide for the provincial Executive to deal effectively with the disaster, or other special circumstances warrant the declaration of a provincial state of disaster.

3.3 Duration

Section 41 (5) of the Act provides for the legal duration of the declaration.



- (5) A provincial state of disaster that has been declared in terms of sub-section (1)-
- (a) lapses three months after it has so been declared;
 - (b) may be terminated by the Premier by notice in the provincial gazette before it lapses in terms of paragraph (a); and
 - (c) may be extended by the Premier by notice in the provincial gazette for one month at a time before it lapses in terms of paragraph (a) or the existing extension is due to expire.

It is clear that in terms of Section 41(5) of the Act any provincial state of disaster automatically lapses after 3 months, unless it is terminated or extended by the Premier **before it lapses**. The following key provisions need to be noted.

- i. The Premier has the authority to extend the provincial state of disaster;
- ii. It must be extended each time **before** it lapses;
- iii. It can only be done on a **month to month** basis;
- iv. A notice must be **published in the provincial gazette** to give effect to the extension.

The extension of the state of disaster merely involves confirming that the conditions as determined in the original considerations that led to the declaration of a state of disaster, continue and then requesting the Premier to sign an extension notice to maintain the required regulations, directives or authorisations issued or in force. This notice must be published in the provincial gazette.

3.4 Declaration of a state of disaster after three months

In terms of the Act, it is possible to issue a new notice declaring a provincial state of disaster, which will negate the need for extension notices issued monthly. If this route is followed, it however needs the same processes to be followed for declaration in the first place, i.e. consultation with the other MEC's, ensuring that existing legislation and contingency arrangements do not adequately provide for the provincial executive to deal effectively with the disaster, assessing the magnitude and severity or potential magnitude and severity of the disaster.

In essence, there is no legal way around this matter. Either the disaster is extended on a month to month basis, or alternatively a new notice must be issued every 3



months. Regardless of the approach taken it should however be stated that the decision to extend a state of disaster should not be taken automatically without first validating that the original conditions of the disaster still necessitates the existence of a state of disaster.

3.5 Important considerations when dealing with a disaster

It is important to consider the following in dealing with a disaster in the Province:

3.5.1 Executive responsible to manage a disaster irrespective of whether a provincial state of disaster has been declared

Section 40 (1) of the Act, 2002 indicates that the Executive of a province is primarily responsible for the coordination and management of a provincial disaster, irrespective of whether a provincial state of disaster has been declared in terms of Section 41. Section 35 of the Act indicates that the PDMC, in the event of a disaster, must perform certain functions including the initiation of contingency plans and emergency procedures and inform role players including the NDMC (to obtain classification). Section 40 (2) of the DMA elucidates how the provincial Executive (and PDMC for that matter) must deal with a provincial disaster by,

- (a) managing it in terms of existing legislation and contingency arrangements [Section 38 (1)(a)(vi) in particular] if a provincial state of disaster has not been declared in terms of Section 41; or
- (b) managing it in terms of existing legislation and contingency arrangements [Section 38 (1)(a)(vi) in particular] as augmented by Regulations or directives made or issued in terms of Section 41, if a provincial state of disaster has been declared.

3.5.2 Rationale for declaring a state of disaster

Section 41 (1) of the Act states that in the event of a disaster (the event must satisfy the test criteria of the definition of a disaster), the Premier of a province, after consultation with the other MEC's may declare a provincial state of disaster if,



- (a) the existing legislation and contingency arrangements do not adequately provide for the provincial Executive to deal effectively with the disaster, or
- (b) other special circumstances warrant the declaration of a provincial state of disaster.

These provisions mean that the provincial Executive (and the PDMC for that matter) is empowered to manage a disaster in terms of the existing legislation and contingency arrangements of the province [established by other legislation and its Section 38 (1)(a)(vi) of the Act] without the need to declare a state of disaster. Only when it is clear that existing legislation and the contingency arrangements do not adequately provide for the provincial executive to deal effectively with the disaster, or other special circumstances prevail, the declaration of a provincial state of disaster is warranted.

The need for extra-ordinary measures such as regulations, issuing directions or authorising the issue of directions, should be a key consideration before declaration of a provincial state of disaster [see Section 41(2)]. Such a declaration will then empower the Premier to make fast, legally binding and enforceable, regulations, directives or authorisations outside of the normal prescribed process(es). For this reason the intention of Parliament was that such determinations only be valid for a limited period (during the state of disaster) and when the state of disaster lapses, the regulations, directives or authorisations lapse or are terminated. This action can only be taken to achieve the specific objectives set out in Section 41(3).

As outlined in the Whitepaper on Disaster Management, the reasons for the declaration of a disaster should thus include the following:

- Facilitating quick response to emergencies
- Facilitating the speedy release of funds
- Ensuring the rapid mobilisation and deployment of resources
- Granting special powers to the Municipal Manager, the Premier and other relevant officials so that they can take appropriate action
- Expediting the implementation of disaster management plans



- Expediting or waiving tender procedures

The declaration of a state of disaster must set out the regulations, directives or authorisations the Premier wishes to issue (which may include the need to access the grant funding) and must explain why such actions cannot be achieved by the contingency arrangements (incl. reasons for the failure of the contingency) or existing legislation which should be in place.

3.5.3 The classification of a disaster

For an event to be classified as a disaster, the NDMC must determine if a disastrous event that occurs should be regarded as a disaster in terms of the Act and if so, section 23(8) designates primary responsibility to a particular sphere of government for the co-ordination and management of the disaster (local, provincial or national).

The classification of a disaster involves two steps. The first step is to determine if a disastrous event that occurs should be regarded as a disaster in terms of the Act. The second step is to assess the magnitude and severity of the disaster in order to determine the primary sphere (local, provincial or national) to be responsible for the management and coordination thereof.

The Act, in Section 23, and the NDMF establish a clear process that must be followed for the classification of a disaster by the NDMC. Section 23 also provides for other sphere(s) to legally assist the designated sphere to deal with the disaster. The declaration of a state of disaster is not a requirement to enable a sphere of government to manage and coordinate a disaster, or for one sphere to assist the other.

3.5.4 Annual Division of Revenue Act (DORA)

The Annual Division of Revenue Act provides for the equitable division of revenue raised nationally among the national, provincial and local spheres of government for the financial year, the determination of each province's equitable share and allocations to provinces, local government and municipalities from national government's equitable share and the responsibilities of all three spheres pursuant to such division and allocations; and to provide for matters connected therewith.



Section 7 of the DORA appropriates conditional allocations to provinces whilst Section 8 appropriates conditional allocations to municipalities. Perusal of the DORA and the schedules indicates that these allocations are conditional and can only be allocated once the conditions for allocation are met [the conditional framework for the funds are published in terms of Section 16(1)(c) of DORA].

Perusal of the conditions published in terms of Section 16(1)(c) of DORA shows that the common denominator in all the respective conditions listed are that a provincial disaster must be declared in terms of Section 41 (and Section 55 for municipalities) of the Act, for that sphere to access and spend the grant appropriation.

The consequence of this condition is that a situation is created where often, the only purpose to declare a state of disaster is to access grant funding and not to achieve the broader objectives of Section 41 (see **Rationale to declare a state of disaster**). Careful consideration should however be given as to what is the purpose and what needs to be achieved by declaring a state of provincial disaster. The declaration of a state of disaster is not a prerequisite for the effective management of that disaster and the implications of a declaration of a state of disaster, go much further than merely accessing conditional grant funding in terms of the DORA.



4. SOURCES

Malherbe, R. Meyer, A. 2011. Certificate in legislative drafting, CLD0010. University of Johannesburg, unpublished course material.

SOUTH AFRICA. Parliament. 2002. *Disaster Management Act, 57 of 2002*. Cape Town: Government Printers.

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UJ (See Malherbe, R. Meyer, A.)



5. APPENDICES

None listed



6. APPROVAL

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Policy Brief noted

Policy Brief approved/.....

Mr Ken Terry

Head: National Disaster Management Centre

Date: 21 January 2016



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