IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

Case Number: 3623/21

In the application of:

HEALTH JUSTICE INITIATIVE	Applicant for admission as an *amicus curiae*

In the matter between:

SOLIDARITY	First Applicant
AFRIFORUM NPC	Second Applicant
and	
MINISTER OF HEALTH	First Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Third Respondent
THE CHAIRPERSON OF THE COVID-19 SCIENTIFIC MINISTERIAL ADVISORY COMMITTEE	Fourth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, WESTERN CAPE	Fifth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG	Sixth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, FREE STATE	Seventh Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, EASTERN CAPE	Eighth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, NORTHERN CAPE	Ninth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, LIMPOPO	Tenth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, MPUMALANGA	Eleventh Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, NORTH WEST	Twelfth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, KWAZULU-NATAL	Thirteenth Respondent
PHARMACEUTICAL SOCIETY OF SA	Fourteenth Respondent
COUNCIL FOR MEDICAL SCHEMES	Fifteenth Respondent
SOUTH AFRICAN MEDICAL ASSOCIATION	Sixteenth Respondent
PHARMACEUTICAL INDUSTRY ASSOCIATION OF SA	Seventeenth Respondent

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NOTICE OF APPLICATION FOR ADMISSION AS AN *AMICUS CURIAE*: UNIFORM RULE 16A

KINDLY TAKE NOTICE THAT the Applicant for admission as an *amicus curiae* applies to this Court for an order in the following terms:

1. The Applicant is admitted as an *amicus curiae* in the Main Application;

2. The Applicant is granted —

   2.1. the right to file written submissions in the Main Application; and

   2.2. the right to present oral argument at the hearing of the Main Application,

   provided that such argument does not repeat matters set forth in the arguments of the parties and raises contentions which may be useful to the Court.

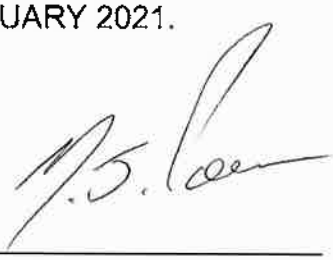
3. The affidavits of Fatima Hassan, Dr Tlaleng Mofokeng, Professor Leslie London and Professor Saad Bin Omer are admitted as evidence in the Main Application.

4. Further and/or alternative relief.

TAKE FURTHER NOTICE that the affidavit of **FATIMA HASSAN** and the annexures thereto, together with the affidavits of **DR TLALENG MOFOKENG**, **PROFESSOR LESLIE LONDON** and **PROFESSOR SAAD BIN OMER**, will be used in support of this application.

TAKE FURTHER NOTICE that the Applicant has appointed the address of its correspondent attorneys, Lawyers for Human Rights, at Kutlwanong Democracy Centre, 357 Visagie Street, Rosebank, as the address at which it will accept notice and service of all process in these proceedings. The Applicant's attorneys will also accept electronic service at the following email addresses: michael@powersingh.africa and slindile@powersingh.africa.

DATED JOHANNESBURG ON THIS THE 18th DAY OF FEBRUARY 2021.



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TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT**
Pretoria

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AND TO: **STATE ATTORNEY, PRETORIA**
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FOUNDING AFFIDAVIT

I, the undersigned,

FATIMA HASSAN

hereby make oath and state:

INTRODUCTION

1. I am the Head of the Health Justice Initiative ("**HJI**"), a registered not-for-profit organisation with registered offices at 41 Salt River Road, Community House, 2nd Floor, Salt River, Cape Town.

2. I am duly authorised to bring this application and to depose to this affidavit on behalf of the HJI. A duly signed resolution by the Board of the HJI is attached marked as annexure "**FH1**".

3. The facts to which I depose are true and correct and are within my personal knowledge, except where it is apparent from the context that they are not. Where I make submissions of law, I do so on the advice of HJI's legal representatives.

4. This is an application in terms of Rule 16A of the Uniform Rules of Court ("**the Rules**"), in terms of which HJI seeks leave to be admitted as an *amicus curiae* in this matter.

5. In line with the HJI's particular areas of interest and expertise, and being aware of the need not to repeat any of the submissions that have already been made by the parties, the HJI's proposed submissions are narrowly tailored to two key issues which I submit are of relevance to the present matter:

   5.1. **First**, the proper interpretation of the constitutional right to health care in the context of a pandemic, where there is a scarcity of vaccine supplies, and the substantial inequity which will result should the private sector and/or provincial government/s, be authorised, in effective competition with national government, to procure, allocate and in turn distribute vaccines for COVID-19 outside of the parameters of a nationally accepted and approved strategy.

   5.2. **Second**, the comparative position in various foreign jurisdictions, which supports the strategy of state-centralisation regarding vaccine negotiation, procurement, and allocation to ensure fairness and equity, that is rooted in public health principles and epidemiological needs, with

the aid and partnership of all societal sectors, to achieve widespread population immunity.

6. This affidavit deals in turn with the following matters:

6.1. **First**, the interest of the HJI in the main application;

6.2. **Second**, a brief overview of the position that the HJI proposes to adopt in this matter;

6.3. **Third**, an outline of the submissions that HJI proposes to advance.

6.4. **Fourth**, why the HJI seeks leave to adduce expert evidence, and the expert evidence on which it relies.

6.5. **Fifth**, the HJI's compliance with the relevant procedural aspects of the Rules;

6.6. **Sixth**, the HJI's proposed timeframes for the filing of written submissions in these proceedings.

I. THE INTEREST OF THE HJI IN THIS MATTER

7. The HJI is a not-for-profit organisation, established in July 2020. It is a dedicated public health and law initiative which addresses the intersection between racial and

gender inequality with a special focus on access to life-saving diagnostics, treatment, and vaccines for, *inter alia*, COVID-19, tuberculosis, and HIV. The HJI's staff Board and reference advisory group constitute a multi-disciplinary team with extensive experience in rights protection, pertaining in particular to South Africa's dual health care system.

8. The HJI's focus areas include advocating for equitable health care, access to affordable life-saving medicines, and national profiteering. Throughout the COVID-19 pandemic, the HJI has engaged in activities concerning among other things the conduct of the private sector in the pricing of personal protective equipment ("PPE"), and access to vaccines in South Africa.

9. As a result of the HJI's concern regarding the lack of meaningful engagement and transparency from the state with regard to its vaccine plans, the HJI repeatedly wrote to various government officials, namely the Minister of Co-operative Governance and Traditional Affairs, the Minister of Health, the Head of Centre: National Disaster Management Centre, the Presidency: National Command Council and more recently, the Speaker of Parliament. Those letters raised issues related to the government's readiness during a global health crisis for vaccine acquisition, equitable allocation, and administration as well as other concerns that had not been adequately discussed with the public or civil society. Correspondence was sent on 16 November 2020, 2 December 2020, and 15 December 2020.

10. When the Ministry of Health released its COVID-19 Vaccine Rollout Strategy on 3 January 2021, the HJI published a preliminary commentary on this strategy.

11. The HJI has previously engaged in litigation as *amicus curiae*, as follows:

    11.1. In August 2020 the HJI, together with Open Secrets, participated as joint *amicus curiae* in *Babelegi Workwear and Industrial Supplies CC v The Competition Commission,*[1] regarding excessive and exploitative pricing of face masks during a pandemic.

    11.2. In the same month, the HJI, together with Open Secrets, participated as joint *amici curiae* in the matter of *Dis-chem Pharmacies Ltd v Competition Appeal Commission*[2] in which Dis-Chem appealed the Competition Tribunal's finding that its pricing of surgical masks was excessive and imposed a fine amounting to R1 200 000. The Competition Appeal Court noted that '*...its conduct was not only exploitative of vulnerable consumers, especially the poor, but was especially egregious.*'[3] Dis-chem withdrew its appeal on 21 August 2020.

12. In those matters the HJI introduced evidence that the excessive pricing of PPE and medical supplies in a pandemic threatens the right to access to healthcare, life, and dignity. The HJI pointed out that this disproportionately affects indigent

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[1] 186/CAC/JUN20.

[2] The case number of the matter at the CT is CR008April20 and at the CC is 2020Apr0035.

[3] *Competition Commission of South Africa v Dis-Chem Pharmacies Limited* (CR008April20) at para 252.

and vulnerable people, including the unemployed, those who are not members of any medical aid schemes, undocumented migrants. The HJI standpoint is that in the context of a pandemic, the portions of the private sector trading in PPE and medical suppliers are bearers of constitutional and human rights obligations towards all members of the public, with the need to prioritise the most vulnerable.

13. This case raises important questions related to the harm which may be caused by non-state actors and/or provincial government/s if they are authorised to procure vaccines, without oversight and overall management by national government, and outside a national strategy that include all role-players. In an unprecedented health crisis, with global and epidemiological ramifications, South Africa's two-tier health system and wealth disparities should not result in greater inequity in access through unfair preferential treatment that is not based on health need, and is instead based on access to financial resources or provincial advantage.

14. The Main Application falls squarely within the HJI's particular areas of interest and expertise. I respectfully submit that the HJI is well-placed to be of assistance to this Court.

II OVERVIEW OF THE POSITION TO BE ADOPTED BY THE HJI

15. If admitted as amicus curiae, the HJI will submit that the relief sought by the Applicants is inconsistent with a proper interpretation of section 27, read together with section 8, of the Constitution:

16. The HJI will submit that where access to vaccines is limited due to high demand and limited supply, vaccines must be regarded as a public good and the allocation of vaccines must be done in a fair and equitable manner, starting first with those most at risk of severe outcomes.

17. The HJI will submit further that comparative foreign practice during the pandemic provides useful guidance on current public health practices in relation to the procurement, allocation, and distribution of vaccines. An assessment of publicly available policies adopted in other jurisdictions supports the approach of the national government in spearheading the vaccine supply and price negotiations with the support of non-state actors (for example, those currently on the Vaccine Acquisition Task Team for South Africa), and in procurement and allocation, while partnering with various sectors for effective administration to ensure national reach and equity.

18. The HJI will submit that at this stage, should the private sector and/or provincial government/s, in parallel to national government, procure vaccines without oversight and management by the national government, this would have dire implications for the right to access to healthcare, life, and dignity, and on the ability of the state to ensure equity in allocation and distribution. Where there is a scarcity of vaccines as there is in this pandemic, a restriction on direct procurement by the private sector and/or one or more provincial government/s to procure vaccines without oversight and management by the national

government, is fully justified. It is not a violation or unjustifiable limitation of section 27 of the Constitution.

19. The HJI will not address the legal question whether the national government's policy in fact constitutes a prohibition on the procurement and/or allocation and/or distribution of a vaccine.

20. The HJI submits that its submissions are of relevance to the Main Application. Given the national importance of this matter, and the magnitude of the consequences of this Court's decision, either way, it is imperative that all relevant material be placed before the Court, and all relevant issues before it be fully ventilated. The issues that the HJI proposes to raise have not, to the best of my knowledge, been canvassed by any of the parties to the proceedings.

21. The HJI's proposed submissions are supported by the affidavits of the following experts, which are filed as part of this application:

    21.1. **Professor Leslie London** is a professor at the School of Public Health and Family Medicine at the University of Cape Town (UCT). Professor London states that it is an "incontrovertible reality" that there is an absolute shortage of vaccine supplies globally, at least at this early stage of the epidemic. For this reason, it is widely recognised that rationing based on public health evidence, data, need and the input of public health and scientific experts will be necessary at least at the early stage of the epidemic. He states that if provinces and some trade unions and private groups select, procure, allocate and distribute vaccines

independently and outside of national processes and guidelines, there will be a lack of coordination, poor accountability and an inability to ensure equity in access, which will be at the cost of the health and survival of high-risk and vulnerable groups in our country. Such an approach has no support in any of the large body of technical, scientific, and ethical guidance presently available in the public domain.

21.2. **Professor Saad Bin Omer** is a Professor and the Director of the Yale Institute for Global Health, Yale University, USA. His evidence addresses the vaccine rollout strategy which is being implemented in the United States of America. He was also a member of a special expert committee tasked with developing recommendations on equitable allocation of vaccines, or the *US National Academies of Sciences, Engineering, and Medicine* first referred to in paragraph 45 below.

21.3. **Dr Tlaleng Mofokeng** is the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Her evidence addresses the policy positions of the United Nations and the World Health Organisation (WHO) on the allocation and prioritisation of vaccine, and vaccine equity.

III THE SUBMISSIONS OF THE HJI

Understanding the context in which access to procure vaccines is sought

22. According to the World Health Organisation (**"WHO"**), supplies for the first vaccine (or vaccines) to be authorised will be limited in the short to medium term. I refer in this regard to the WHO Values Framework for the allocation and prioritisation of Covid-19 vaccines (**"the Values Framework"**) which is annexed marked **"FH2".**

23. The limited supply is because, around the world, some governments are taking steps to ensure access of their populations to safe and effective Covid-19 vaccines to cover the majority if not all of their populations alone. The scale and complexity of the allocation, distribution, and prioritisation of the vaccines is such as has never been seen before.

24. Gaining access to vaccines is an integral part of most governments' strategy to prevent and manage Covid-19. Africa is said to require approximately 1.5 billion doses of Covid-19 vaccines in order to immunise 60% of inhabitants, the threshold for "herd or population immunity". I refer in this regard to the *"African Union Framework for Fair Allocation of Vaccines"* attached as **"FH3".** Global inequalities in vaccine access could translate into delays in achieving vaccine roll-out in Africa. According to the affidavit of Dr Mofokeng, three-quarters of the vaccinations so far have occurred in ten of the world's biggest and richest economies, while almost 130 countries have yet to administer a single vaccine.

25. In early February 2021, in Foreign Policy, the Director-General of the WHO wrote about the harm of "vaccine nationalism" from a rights, public health, and epidemiological perspective. He noted that 16 % of the world's population have

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bought up to 60% of the world's vaccine supply and that COVAX — the multilateral mechanism created by the WHO — is struggling to purchase enough doses to cover just 20% of the population of lower-income countries by the end of 2021. He states:

> *"Vaccine allocation must not become a zero-sum game. Vaccine nationalism is not just morally indefensible. It is epidemiologically self-defeating and clinical counter-productive. Market-driven mechanisms alone are insufficient to achieve the goal of stopping the pandemic by achieving herd immunity with vaccines. Limited supplies and overwhelming demand create winners and losers. Neither is morally or medically acceptable during a pandemic.*
>
> *A hermetic seal between the world's haves and have nots is neither desirable nor possible. This coronavirus spreads quickly and often silently, before symptoms develop, or with mild ones common to multiple diseases. These clinical characteristics combined with uncontrolled spread and the global flow of people means that there is a risk that new variants will continue to emerge and spread between countries. Most troublingly, new mutations could lead to vaccine resistance. There is already evidence that some vaccines are less effective against the variants first identified in Brazil and South Africa. Vaccines were based on version 1.0 of the virus—but new viruses, like software, are constantly evolving. The new variants may infect people who have already survived an earlier version of the virus. It is also possible that the virus could become more deadly. A small increase in lethality would have a catastrophic effect. Growing vaccine nationalism is also socially and economically counterproductive. Unprotected populations and communities everywhere will continue to suffer the enormous secondary effects of the pandemic."*

26. The supply of vaccines is made even more difficult by the fast-moving nature of clinical research into vaccines during this pandemic. Accelerated vaccine research in 2020 and now in 2021 means that some countries are administering vaccines based on emergency use authorisations (EUAs), while trial data is still being collated and processed. For example, the WHO recently granted emergency authorisation for the AstraZeneca vaccine, in order to make the vaccine available as rapidly as possible to address the emergency. In its

statement, the WHO notes that there is a need to keep up the pressure of increasing manufacturing capacity. The statement is attached marked **"FH4".**

27. In the very short time between the Applicants filing their papers in this matter, and this admission application, the clinical data relating to vaccine efficacy for our country has shifted again. On 7 February 2021, the National Department of Health (**"NDoH"**), the Ministerial Advisory Council (**"MAC"**) Chair, the Medical Research Council (**"MRC"**) Head and trial scientists and clinicians presented to the nation data affecting the rollout of vaccines to health care workers originally planned for the second week of February 2021. The presentation was followed by a NDoH press statement entitled, *"What you need to know about vaccine efficacy against the 501Y.V2 Variant"*. The statement indicates that there has been a *"substantial drop"* in AstraZeneca's efficacy against the 501Y.V2 variant, and its roll-out will be temporarily placed on hold (as supplied by the Serum Institute of India). This is the vaccine of which the South African Government had bought 1.5 million doses, at a time when it was not (and could not be) known that it was not as efficacious against the newly discovered 501Y.V2 Variant.

28. This places the country in a position where there are potentially fewer vaccines that can be accessed for use in the context of the variant discovered here, and has led to a WHO and COVAX deliberation on next steps, as well as a substantial pivot in South Africa's vaccine strategy. The NDoH press statement is attached hereto and marked **"FH5"**. Simply put, the fast-evolving nature of the virus and ongoing results of clinical research are such that the government's plans and

previously preferred or acquired vaccines have and may quickly become less effective, thereby exacerbating shortages even further.

29. It is inevitable that limitations in volume and supply will result in difficult decisions having to be made on the prioritisation and fair allocation of vaccines in South Africa.

The international law position

30. In *Glenister v President of the Republic of South Africa and Others,*[4] the Constitutional Court noted that public international law includes binding as well as non-binding law which can be used as tools of interpretation. The Court said that in appropriate cases this would also include "reports of specialised agencies", which may guide the interpretation of a particular provision of the Bill of Rights. The HJI will argue that this is an appropriate case for the Court to take guidance from the reports of the WHO as the specialist body on this issue.

The WHO Values Framework for the allocation and prioritisation of COVID-19 vaccination

31. Given the limited supply of vaccines in the short to medium term, the WHO has developed a *Values Framework* which provides recommendations on priority target groups for specific Covid-19 vaccines at different stages of supply availability.

[4] [2011] ZACC 6; 2011 (3) SA 347 (CC) at para 178, fn 28.

32. The WHO states that their overriding goal is that:

> *"COVID-19 vaccines must be a global public good. The overarching goal is for COVID-19 vaccines to contribute significantly to the equitable protection and promotion of human well-being among all people of the world."*

33. The *WHO Values Framework* identifies six key principles which should guide the allocation and prioritisation of COVID-19 vaccines. The principles are under the headings of "human well-being", "equal respect", "global equity", "national equity", "reciprocity" and "legitimacy". I expand further on some of these principles which are relevant to this application:

33.1. The human well-being principle requires that those making decisions on vaccine allocation and prioritisation determine what vaccine deployment strategies will best promote and protect all the implicated dimensions of well-being, including strategies for containing transmission, reducing severe disease, and death: page 6 of the Values Framework **("FH2").**

33.2. The national equity principle requires that states ensure that:

> *"…vaccine prioritisation within countries takes into account the vulnerabilities, risks and needs of groups who, because of underlying societal, geographic or biomedical factors, are at risk of experiencing greater burdens from the COVID-19 pandemic."*

33.3. This requires that vaccine access is made available to priority populations. The WHO notes that although everyone is affected by the

Covid-19 pandemic, the burden of the pandemic is not experienced equally by everyone. For example, people who are older or have co-morbidities are more at risk of severe disease. The WHO noted that poverty, racism, and systemic disadvantage are also associated with a disproportionate pandemic burden. The WHO states that *"[p]romoting equity requires addressing higher rates of COVID-19 severe illness and mortality among systematically disadvantaged or marginalised groups."* (Page 7 of the Values Framework, "PH2".)

33.4. The WHO states:

> *"While the principle of first come, first served is often applied when allocating resources in health care settings, it is rarely appropriate in an emergency. In practice, it is very likely to favour certain groups, such as those closest to a distribution centre, those with access to better information, or those who are most well-off."*
>
> (*Ethics and Covid-19: Resource Allocation and Priority-setting*" annexed as **"FH6**".)

33.5. The reciprocity principle requires the prioritisation of those individuals who face high risks, like medical professionals, to support the rest of society.

34. The WHO thus recommends a prioritisation that is not simply driven by market forces or economics. The WHO places an obligation on states to ensure a fair allocation of vaccines by ensuring that vulnerable populations, those at risk of

severe disease who bear a disproportionate pandemic burden and those tasked with helping others are given priority.

The WHO SAGE Roadmap for Prioritising Uses of COVID-19 Vaccines in the Context of Limited Supply

35. In addition to the Values Framework, the WHO's Strategic Advisory Group of Experts on Immunisation (**"SAGE"**) developed an approach, the *WHO SAGE Roadmap for Prioritising Uses of COVID-19 Vaccines in the Context of Limited Supply* (**"the SAGE Roadmap"**), to help inform strategies that may be appropriate under different epidemiologic and vaccine supply conditions. SAGE is charged with advising the WHO on overall global policies and strategies, including in respect of vaccines and technology, research and development, delivery of immunisation, and its linkages with other health interventions.

36. The SAGE Roadmap considers priority populations for vaccination based on epidemiologic setting and vaccine supply scenarios. It builds on the *WHO Values Framework* and considers different vaccine supply scenarios and impact on policymaking.

37. The scenarios are:

    37.1. Epidemiologic setting scenarios depend upon the burden of disease and on the local epidemiology, particularly the incidence rate of infection in a setting at the time vaccination is being contemplated for deployment.

37.2. Vaccine supply scenarios deal with the reality that sufficient vaccine supplies will not be immediately available to immunise all who could benefit from vaccination in three situations - limited vaccine availability, some availability and moderate availability - with recommendations on how each of these three vaccine supply scenarios can be considered in recommendations for use in priority groups. (Pages 5 and 6 of the SAGE Roadmap, attached as **"FH7"**.)

38. These strategies accommodate the dynamic nature of vaccine supply and epidemiologic conditions in each country, with an initial focus on direct reduction of morbidity and mortality and maintenance of most critical essential services (such as health care) while considering reciprocity towards groups that have been placed at disproportionate risk to mitigate consequences of the pandemic (for example, front-line health workers).

39. The *SAGE Roadmap* pays special attention to functions that disproportionately impact children and to the reduction of morbidity and mortality in disadvantaged groups, in keeping with the principles of the Values Framework (Pages 12 and 13 of "FH7)".

40. Expert input and advice rooted in scientific data and public health considerations are core to an effective, equitable, and efficient response to the pandemic based on targeting priority groups, which reduces overall mortality and maintains critical

societal functions. Undermining this approach would lead to an ineffective, inefficient and inequitable pandemic response.

The African Union framework for fair, equitable and timely allocation of Covid-19 vaccines in Africa

41. In January 2021, the African Union (AU) published its '*Framework for Fair, Equitable, and Timely Allocation for COVID-19 Vaccines in Africa*' ("FH3"). This framework gives consideration to African indigenous values, which underscore the need to the ensure that the most disadvantaged are not excluded from accessing the COVID-19 vaccine in a timely fashion. The framework encourages regional organisations, civil society, and the media to fully engage in vaccine allocation, while serving as watchdogs of the government.

42. The AU Framework notes the following:

    42.1. Through values such as Ubuntu, the good of the community and that of the individual are intricately interwoven. In the context of access to vaccines, *"the culture of the African society would translate to decision-making towards the greater good for all while protecting vulnerable individuals and groups from exploitation and other forms of harm and wrong."* (Page 4 of the AU Framework.)

    42.2. Noting the imbalance that exists between the supply and demand for the Covid-19 vaccine due to scarcity, the AU states that:

> "*The decision to allocate this scarce resource should be informed by considerations of maximising the benefits produced by scarce resources, promoting instrumental values, and treating people equally, giving priority to the most vulnerable, independent of socioeconomic means and status In effect, the Ubuntu philosophy should inform considerations for efforts to save as many persons and the most life-years as possible, prioritizing populations whose services are critical to the survival of others, and facilitating processes that ensure access to vaccines to those eligible is in an agreed randomized allocation process.*" (Page 7 "FH5")

42.3. The AU's Framework is guided by African values which include:

42.3.1. Affirming the humanity of others: Allocation decisions must be for societal benefit and promote the common good while respecting human dignity.

42.3.2. Survival of the community: Essential service workers and those who contribute to the prevention and treatment of diseases could be considered as essential for the survival of the community. Those at greatest risk of severe illness and death could be included in the priority groups.

42.3.3. Social solidarity: Allocation decisions should consider the bonds unifying communities and the fact that the pandemic may widen existing inequalities and create new inequalities.

43. The AU Framework places obligations on the state to ensure fair allocation. There is, at this stage, no role envisaged for private parties to acquire vaccines given the limited supply and the global need.

Statement by UN Human Rights Experts

44. The UN Human Rights Experts have also issued a statement, to which Dr. Mofokeng is a signatory, regarding universal access to vaccines. The statement notes that states have an obligation to make a vaccine available to all who need them. The UN experts highlight, however, the obligation on states to make vaccines available to people in vulnerable situations. The statement says that people in vulnerable situations:

> *"...have lived experience of poverty and find themselves in situations where they are most likely to be exposed to the risk of contagion, yet the least likely to be protected from COVID-19 or supported by adequate and timely tests and health services. It is imperative that access to COVID-19 vaccines and treatment is provided to all without discrimination and prioritized for those who are most exposed and vulnerable to the risk of COVID-19'."*
>
> (The statement is attached to Dr Mofokeng's expert affidavit.)

The US National Academies of Science, Engineering, and Medicine

45. The *US National Academies of Sciences, Engineering, and Medicine* recently published an extensive report entitled, '*Framework for Equitable Allocation of COVID-19 Vaccine*' (**"National Academies Report"**). The National Academies Reports traditionally documents the evidence-based consensus on a study's

statement of task (problem statement) through an authoring committee of experts including Professor Omer. Prior to publication, each report is subjected to a rigorous and independent peer-review process.

46. The National Academies Report offers a framework for equitable allocation of COVID-19 vaccines. It '*is built on widely accepted foundational principles and recognises the distinctive characteristics of COVID-19 disease, including its rates of infection, its modes of transmission, the groups and individuals most susceptible to infection, and varying rates of severe illness and death...*"

47. The National Academies Report highlights that even when it is necessary to ration vaccines due to scarcity, the principle of equal concern must still apply. This principle concerns the equal worth and value of each person. According to this report, this principle requires the allocation of vaccines to be based on an impartial and fair criterion. (Page 94 of the National Academies Report, attached as **"FH8**".)

The comparative policy positions taken by other governments

48. Multiple jurisdictions which have begun the vaccine administration process have elected for national government to bear the responsibility for negotiating, acquiring and allocating vaccines. The national governments then partner with other societal sectors to administer and distribute the vaccines. The policy positions taken by other governments are a useful yardstick with which the Court could assess the reasonableness of the measures proposed by South Africa's

national government.

India

48.1. The position in India at present is that there will be a single centralised procurement pathway for vaccines. India's National Expert Group on Vaccine Administration for Covid-19 has stated that *"the States have been advised not to chart separate pathways of procurement."*[5] India has indicated that there is no plan to bring the Covid-19 vaccine into the private market. The reason for this according to a senior health official is that *"vaccines are not available in excess for doling it out in the private sector 'for the groups who don't need it urgently'"*.[6] The health official continued to say that:

> "Whatever we are producing, we need to first serve the priority groups (of vulnerable and poor) and help other countries meet their urgent needs. We are living in the pandemic era. Hence, there are no extra supplies to fill in the private market.
>
> The intelligent strategy is to share vaccines first with those who need it most, whether they are within national boundaries or beyond. We should not confuse it with COVID-19 testing strategy where involvement of the private sector proved (to be a) boon because we wanted to control the outbreak...
>
> ...

[5] "Single central procurement pathway for vaccines against Covid-19: Health Ministry" https://www.livemint.com/news/india/single-central-procurement-pathway-for-vaccines-against-covid-19-health-ministry-11597237203163.html (accessed on 12 February 2021).

[6] Himani Chandna "Why govt isn't planning to make Covid vaccines available at your next-door pharamacy just yet." 19 January 2021 https://theprint.in/health/why-govt-isnt-planning-to-make-covid-vaccines-available-at-your-next-door-pharmacy-just-yet/588199/ (accessed on 12 February 2021).

> None of the other countries, for instance, the United States which has vaccine makers including Pfizer and Moderna, have given priority to a private roll-out."[7] (Own emphasis)

48.2. India will leverage its own domestic manufacturing capacity and engage with international players for early delivery of vaccines for itself as well as low and middle-income countries.[8]

United States of America

48.3. In a document titled *"National Strategy for the Covid-19 Response and Pandemic Preparedness"* ("US Strategy Document") dated January 2021, the new President of the United States sets out the policy position to be followed by the Federal Government in response to the Covid-19 pandemic. The US Strategy Document outlines the Federal Government's plan for vaccine rollout, amongst other things. While it contemplates a role for the private sector, that role is within the parameters of the Federal Government's plan. Significantly, President Biden noted in his introduction that the strategy, '*...will be driven by scientist and public health experts...free from political interference as they make decisions strictly on science and public health alone.*'

48.4. The US Strategy document states that the goal of the Federal Government is to protect those most at risk and advance equity,

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[7] Ibid.

[8] "Single central procurement pathway for vaccines against Covid-19: Health Ministry" https://www.livemint.com/news/india/single-central-procurement-pathway-for-vaccines-against-covid-19-health-ministry-11597237203163.html (accessed on 12 February 2021).

including across racial, ethnic, and rural / urban lines. This includes ensuring equitable access to critical Covid-19 PPE, tests, therapies, and vaccines. It states:

> *"The continued surge of COVID-19 highlights the critical importance of meaningful access to PPE, tests, therapies, and vaccines to prevent spread and reduce illness and death in high-risk populations and settings. The federal government will centre equity in its COVID-19 response, providing PPE, tests, vaccines, therapeutics and other resources in a fair and transparent way. A targeted, stakeholder- and data-informed vaccination communication campaign will be launched to encourage vaccination in all communities. Additionally, the CDC will work with states and localities to update their pandemic plans. Finally, through prioritizing diverse and inclusive representation in clinical research and strengthening enforcement of anti-discrimination requirements, the federal government will increase access to effective COVID-19 care and treatment."*

48.5. The US Strategy Document aims *inter alia* to support communities most at risk for Covid-19. It states:

> *"The federal government is committed to supporting populations that are most vulnerable to COVID-19. Whether residing in congregate settings (such as prisons, nursing and group homes, and homeless shelters), serving as essential workers, living as a person with a disability, or bearing the burden of chronic medical conditions, these vulnerable populations are disproportionately composed of people of color. The CDC will develop and update clear public health guidance for such high-risk populations and settings to further minimize the risk of COVID infection, and work with states to update their pandemic plans to incorporate such guidance as necessary."*

48.6. The US Strategy Document places emphasis on the essential role of Federal Government as the national vaccination effort is described as

one of the *"greatest operation challenges"* the USA has ever faced. It states that:

> *"the President has developed a plan for expanding vaccine manufacturing and purchasing COVID-19 vaccine doses for the U.S. population by fully leveraging contract authorities, including the Defense Production Act, deploying onsite support to monitor contract manufacturing operations, and purchasing additional FDA-authorised vaccines to deliver as quickly as possible."*

48.7. The US Strategy Document confirms national and state vaccination progress is to be monitored by the Federal Government, with the support of immunisation managers and localities. Relevant extracts of the US Strategy document are attached as **"FH9"**.

European Union

48.8. The European Union is negotiating to acquire vaccines as a regional bloc. Individual member states are prohibited from attempting to procure vaccines outside the EU framework. In an article titled *"EU chief warns members cannot negotiate vaccine deals"* it is noted that:

> *"the European Commission negotiates vaccine contracts on behalf of EU member states and... had sealed contracts for more than two billion doses with Moderna, AstraZeneca, Sanofi-GSK, Janssen Pharmaceutica NV, Pfizer-BioNTech and CureVac. Only the Pfizer-BioNTech and Moderna vaccines have been approved for use so far in the bloc."*
>
> (A copy of the article is attached marked **"FH10"**).

49. Finally, of the 197 countries listed on the International Monetary Fund policy

tracker (last updated on 5 February 2021), not one mentions private procurement as part of national policy responses to COVID-19. All indicate that states, regional entities (e.g. the EU) or UN agencies are responsible for procurement.[9]

50. In light of the above, the HJI will submit that in interpreting the right to healthcare in the context of a pandemic, the Court must take into account the policies and strategies adopted by other countries and regions in assessing whether the national government's stated policy in rational and justifiable.

51. In its written submissions, the HJI will expand on the argument that the strategies followed by other governments can be of great assistance.

The proper interpretation of the right to access to health care in a pandemic

52. The HJI will submit that the right to access to health care services in section 27 of the Constitution imposes a positive obligation on the state to *"...take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."*[10]

53. The Constitutional Court has grappled with the duty imposed on the state by section 27 of the Constitution, and has explained the meaning of *"reasonable legislative and other measures"*.[11]

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[9] International Monetary Fund, Policy Tracker accessible: https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19.

[10] Section 27(2) of the Constitution.

[11] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169.

53.1. In the *Grootboom* judgment, the Court stated that in fulfilling its obligation, the state will need to take measures that are supported by appropriate, well-directive policies and programmes implemented by the executive.[12]

53.2. In the *TAC*[13] case, the Court noted that state policy must take into account the difference in the positions of those who can afford to pay for medical services and those who cannot.

54. In the context of the acquisition of vaccines in a pandemic where there is limited supply, the Constitution requires the state to provide access to vaccines through a process of fair allocation that prioritises those most at risk. Given the limited supply and the need to have a coordinated national response within our borders and a coordinated regional and international response with other states, it is appropriate, reasonable, and constitutionally compliant that the national government drives the procurement, acquisition and allocation of vaccines for the Covid-19 pandemic and that it is supported by all role-players to do so particularly to administer and distribute them fairly

55. The HJI will submit that at this time, direct and parallel procurement by the private sector and/or one or more provincial governments, without national government oversight and centralised allocation, in a context of limited vaccine supply, may

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[12] Ibid para 42

[13] *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) at para 70.

jeopardise efforts to achieve widespread population immunity. At this stage of the country's COVID-response, independent procurement, without oversight by the national government, will lead to the prioritisation of individuals who have the financial means to obtain vaccines for themselves (regardless of the risk they face), and push vulnerable people (including those many of those who are most at risk) to the proverbial "back of the line".

56. HJI does not argue that private procurement in and of itself is inherently a problem; but it will submit that at a time of scarcity, private sector procurement without adherence to government strategy is likely to result in the violation of constitutional rights and obligations. This makes it necessary for the selection, procurement, allocation and distribution to take place under and in accordance with the leadership of the national government.

IV. LEAVE TO INTRODUCE EXPERT EVIDENCE

57. The Constitutional Court has held that where an *amicus curiae* wishes to adduce evidence, this should be permitted by the court of first instance, where the reception of the evidence would be in the interests of justice.[14]

58. The evidence of **Professor Leslie London** appears from his affidavit. I have summarised it above. He states:

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[14] *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (1) BCLR 1 (CC) at para 29.

58.1. The pathway to herd immunity cannot be reached by disregarding the priority needs of those most at risk. This principle is enunciated in every international guidance document on vaccine access.

58.2. The "rapid and effective" distribution of vaccines will only contribute to the effective management of the COVID-19 pandemic if it is done in line with scientific principles.

58.3. The requirement to ensure "equity in vaccine access and benefit within countries for groups experiencing greater burdens from the COVID-19 pandemic" will be undermined by diverting vaccine to those who have lesser or no burden.

58.4. There is no recognition of reciprocity in the proposals for private sector procurement.

58.5. The proposed relief sought by the applicant will create inconsistency in who will receive the vaccine, inequity in distribution and unfairness in a situation of already extreme pre-existing inequalities.

59. Professor London concludes that:

> *"this application cannot be supported on public health, ethical and human rights grounds. If provinces and some trade unions and private groups select, procure, administer vaccines independently and outside of national processes and guidelines, there will be a lack of co-ordination, poor accountability and an inability to ensure equity in access, which will be at the cost of the health and survival of high-risk and vulnerable groups*

in our country. Such an approach has no support in any of the large body of technical, scientific, and ethical guidance presently available in the public domain."

60. The evidence of **Dr. Tlaleng Mofokeng** is set out in her affidavit. She states:

60.1. Authoritative global bodies such as the UN, the UN, Committee on Economic, Social and Cultural Rights (CESR) and the WHO have issued statements, resolutions and guidelines clearly indicating that international obligations necessitate the adoption of a human rights approach in addressing COVID-19.

60.2. Equity, fairness and public good must underpin national efforts to vaccinate everyone, particularly in light of the scarcity of vaccine supplies.

60.3. There is a stark disparity between that part of the South African population which has private medical membership, and the majority who rely on the public health system. This necessitates co-operation between state and non-state actors to prevent a vaccine divide.

60.4. Based on South Africa's ratification of the International Covenant on Economic, Social and Cultural Rights, the state has a duty to take all necessary measures to guarantee access to all persons.

61. Dr Mofokeng refers to international instruments which affirm the HJI's position.

62. **Professor Saad Bin Omer** confirms the correctness of my account, in this affidavit, of the position in the USA with regard to its vaccine roll-out.

63. HJI respectfully submits that it is in the interests of justice that leave be granted to introduce the evidence of these experts, and the evidence contained in this affidavit.

V. COMPLIANCE WITH THE PROCEDURAL ASPECTS OF THE RULES

64. The HJI respectfully submits that its submissions will be of assistance to the Court in the determination of the issues before the Court.

65. In line with Rule 16A of the Uniform Rules of Court, on 5 February 2021 the HJI's attorneys wrote to the attorneys for the applicants and respondents seeking their consent for HJI to be admitted *as amicus curiae* in the main application. A copy of that letter is attached marked "**FH11**" and proof of electronic service thereof is attached and marked **"FH12".**

66. At the time of filing this application, the HJI had received formal consent from the Applicant's (Solidarity and Afriforum) for admission as an *amicus curiae*. However, Solidarity and Afriforum, through their attorneys, stated that they do not consent to the HJI's request to introduce expert evidence. A copy of the letter from the Applicants' attorneys is attached marked annexure **"FH13".** None of the other parties (16) to the main application responded to the letter seeking leave to intervene.

67. The HJI has been advised to file this application at this stage, to afford the parties and the Court a sufficient opportunity to consider the application.

VI. PROPOSED TIMEFRAMES FOR THE FILING OF WRITTEN SUBMISSIONS

68. In the letter requesting consent to the admission of the HJI as an *amicus curiae*, the HJI proposed the following timeframes for written submissions:

68.1. Any party which wishes to file an answering affidavit should do so by **Monday, 22 February 2021**;

68.2. The HJI will file its Submissions by **Wednesday, 24 February 2021**; and

68.3. To the extent that any of the parties wish to file Heads of Argument in response to the HJI's Submissions, they should be filed by **Monday, 1 March 2021**.

VII. CONCLUSION

69. The HJI respectfully submits that the proposed submissions are relevant, novel, and will be of utility to this Court in determining the issues before the Court. The issues that the HJI proposes to raise have not been canvassed by any of the parties to the proceedings, and I respectfully submit that they should be considered by the Court in making an appropriate determination in this matter.

70. The HJI respectfully requests that the Court grant the relief set out in the Notice of Motion.

FATIMA HASSAN

I hereby certify that the deponent stated that she knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at Rosebank on this the 18th day of February 2021. The Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

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