# HIGH COURT OF SOUTH AFRICA
# (GAUTENG DIVISION, PRETORIA)

**CASE NO: 21542/2020**

**DELETE WHICHEVER IS NOT APPLICABLE**
**(1) REPORTABLE: NO.**
**(2) OF INTEREST TO OTHER JUDGES: YES**
**(3) REVISED.**
**DATE 02 June 2020**
**SIGNATURE**

In the matter between:

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| **REYNO DAWID DE BEER** | First Applicant |
| **LIBERTY FIGHTERS NETWORK** | Second Applicant |
| **HOLA BON RENAISSAINCE FOUNDATION** | Amicus Curiae |

and

| | |
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| **THE MINSTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS** | Respondent |

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## JUDGMENT

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**DAVIS, J**

[1] Nature of the application

This is the judgment in an urgent application which came before me last week Thursday, 28 May 2020. In the application, the validity of the declaration of a National State of Disaster by the respondent, being the Minister of Cooperative Governance and Traditional Affairs ("the Minister"), and the regulations promulgated by her pursuant to the declaration are being attacked. The attack is by a Mr De Beer in person and by a voluntary community association known as the Liberty Fighters Network ("the LFN"). Another non-profit organization, the Hola Bon Renaissance Foundation ("HBR"), which also styles itself as "the African Empowerment", has been allowed to address the court as an amicus curiae (a friend of the court).

[2] Introduction:

As will appear hereinlater, the constitutionality of the regulations currently imposed on South Africa and its citizens and inhabitants in terms of Section 27 of the Disaster Management Act, 57 of 2002 (the "DMA"), referred to as the "lockdown-regulations" or the "COVID-19 regulations" (hereinlater simply referred to as "the regulations") is central to this application. I therefore deem it apposite to commence this judgment with the following quotations:

2.1 "*The exercise of public power must ... comply with the Constitution, which is the supreme law and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, it one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this*

*sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power*[1] *".*

2.2 *"When deciding a constitutional matter within its power, a court –*

*(a) Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency and*

*(b) May make any order that is just and equitable, including –*

*(i) an order limiting the retrospective effect of the declaration of invalidity and*

(ii) *an order suspending the declaration of invalidity for any period and on my conditions to allow the competent authority to correct the defect*[2]*".*

2.3 *"The essential humanity of man can be protected and preserved only where the government must answer – not just to the wealthy; not just to those of a particular religion, not just to those of a particular race, but to all of the people. And even a government by the consent of the governed, as in our Constitution, must be limited in its power to act against its people: so that there may be no interference with the right to worship, but also no interference with the security of the home; no arbitrary imposition of pains or penalties on an ordinary citizen by officials high or low; no restriction on the freedom of men to seek education or to seek work opportunity of any kind, so that each man may become all that he is capable of becoming*[3]*".*

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[1] Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) per Ngcobo, J (as he then was).
[2] Section 172(1) of the Constitution.
[3] "Day of Affirmation Address" by US Attorney-General Robert F Kennedy on 6 June 1966 at the University of Cape Town and which include the *"we live in interesting times"* quotation included in the judgment in Mahomed

[3] The relief claimed in this application and matters ancillary thereto:

3.1 The applicants claim the following relief (paraphrased in part and summarised from the Notice of Motion):

3.1.1 That the national state of disaster be declared unconstitutional, unlawful and invalid;

3.1.2 That all the regulations promulgated by the Minister be declared unconstitutional, unlawful and invalid;

3.1.3 That all gatherings be declared lawful alternatively be allowed subject to certain conditions;

3.1.4 That all businesses, services and shops be allowed to operate subject to reasonable precautionary measures of utilizing masks, gloves and hand sanitizers. This relief was, however, only sought as an alternative and made subject to consultation with the Essential Services Committee contemplated in Section 70 of the Labour Relations Act, 66 of 1995.

3.2 It must immediately be apparent that some of the relief claimed has, to a larger or lesser extent, either been overtaken or, at least been impacted on, by subsequent events. These are the promulgation of the latest set of regulations signed by the Minister and promulgated during the course of the hearing of this application, being the regulations published in government Notice 608 of 28 May 2020, the "Alert Level 3 Regulations" which added Chapter 4 to the existing regulations.

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and Others v The President and Others (referred to in paragraph 3.5 of this judgment) which came some time after his speech at the Joint Defense Appeal on 21 June 1961 in Chicago.

3.3 The applicants urged me to, in considering the application, have regard to the facts in existence prior to the date of hearing, but were constrained to concede that the changing of the factual landscape on the day of hearing would be relevant when any appropriate relief is to be formulated, should the applicants be successful. I might add that the matter was initially set down by the applicants for hearing on 19 May 2020. The Minister was given an admittedly short time by them to deliver answering affidavits, which she failed to do. An extension was negotiated by the State Attorney until 22 May 20202 which deadline was also missed. After I had ruled that the answering affidavit need to be delivered by close of business on 26 May 2020, it was eventually deposed to by the Director-General in the Minister's department ("COGTA"), authorized by the Minister to speak on her behalf.

3.4 A further issue of concern for me, namely the possibility of conflicting judgments due to a multiplicity of applications in different courts and at different times, dealing with matters related to the same subject matter of this application, was confirmed in another affidavit filed on behalf of the Minster in her application for condonation for the late delivery of the answering affidavit. I interpose to state that the condonation application was not opposed and, in order to reach finality in the application, it was consequently granted. Four different such applications were identified in the said affidavit, being applications by inter alia the Democratic Alliance, Afriforum and the Fair Trade Independent Association, in all of which some of the regulations or parts thereof were challenged. Neither the counsel for the Minister nor the State Attorney could enlighten me of the exact nature or status of these other applications, save to indicate that most of them are pending and due to be heard some time in June 2020. This lack of cohesion and coordination is unsatisfactory but the multitude of

regulatory instruments issued by different role-players over a short space of time is the most probable cause thereof.

3.5 Another aspect that needs to be dealt with is that of an as yet unreported recent judgment by my colleague, Neukircher, J in the matter of Mohamed and two others v The President of the Republic of South Africa and others Case no 21402/20 in this Division on 30 April 2020. In that matter an application to have Regulation 11 B(i) and (ii) of the regulations which predated the Alert Level 3 regulations declared to be overbroad, excessive and unconstitutional, was dismissed. Neukircher, J found that the restrictions then in force, constituting a blanket ban on religious gatherings to be "(n)either unreasonable (n)or unjustifiable" (paragraph 77). She further found that every citizen was called upon "in the name of the greater good" and in the spirit of Ubuntu to make sacrifices to their fundamental rights (paragraph 75). Her judgment was however based on an application whereby the applicants therein asked for "an exception" to be made for them whilst they accepted that the regulations were rational and a constitutionally permissible response to the COVID-19 pandemic (paragraph 65).

3.6 The relief claimed in that application and in the current urgent application differ materially from each other. In addition, the facts on which the applicants rely in the present application are also different from those relied on before Neukircher, J. The current applicants also do not accept either the rationality or constitutionality of the regulations. In fact, that is the very basis of their attacks. I find that the two applications are sufficiently distinguishable that the issues in the present application are neither *res iudicata* nor that I am bound to follow that judgment. I shall now deal with the current application hereunder.

[4] The Disaster Management Act, 57 of 20002 ("the DMA") and the Minister's conduct thereunder:

4.1 The preamble to this Act states that the Act is to provide for an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery. The Act established national, provincial and municipal disaster management centers.

4.2 In terms of section 23(1) of the DMA, when a "*disastrous event occurs or threatens to occur*" the National Disaster Management Centre must assess the magnitude and severity of the disaster and classify it as a local, provincial or national disaster.

4.3 The nature and spread of the novel Coronavirus causing the COVID 19 epidemics in numerous countries, having originated, to all accounts in Wuhan, China, has received unprecedented media coverage since the beginning of 2020. The nature of the virus and COVID 19 need not be restated here and has been covered in other judgments in this division, notably the Mahomed-case mentioned in paragraph 3.5 above and the widely publicized but as yet unreported judgment of my colleague Fabricius, J in Khosa and Others v Minister of Defence and Military Veterans and of Police and Others, Case No 21512/2020 in this Division dated 15 May 2020. The rapid proliferation of COVID 19 epidemics to 114 countries caused the World Health Organisation (the "WHO") to characterize COVID 19 as a global pandemic. In announcing the declaration, the President of the WHO inter alia stated the following with reference to measures taken to reduce the impact of the pandemic:

"*We know that these measures are taking a heavy tall on societies and economies, just as they did in China. All countries must strike a fine balance between protecting health, minimizing economic and social disruption and respecting human rights ... . Let me summarise it in four key areas:*

- *First, prepare and be ready,*
- *Second, detect, protect and treat,*
- *Third, reduce transmission,*
- *Fourth, innovate and learn ...*".

4.4 Pursuant to the above, Dr Tau, in his capacity of the National Disaster Management Centre on 15 March 2020 after assessing the potential magnitude and severity of the COVID-19 pandemic, classified the pandemic as a national disaster in South Africa as envisaged in aforesaid section 23 (1) of the DMA.

4.5 Dr Tau, in the notice published by him regarding the abovementioned classification, also referred to section 23 (8) of the DMA which, when read with section 26(1) thereof, provides that "*the national executive is primarily responsible for the co-ordination and management of national disasters irrespective of whether a national state of disaster has been declared in terms of section 27*". The applicants have not attacked Dr Tau's assessment or classification. Dr Tau went further in his notice and called upon all organs of state "*to further strengthen and support the existing structures to implement contingency arrangements and ensure that measures are put in place to enable the national executive to effectively deal with the effects of this disaster*".

4.6 The DMA further prescribes the national executive's obligations in dealing with a national disaster in section 26(2) thereof. In terms of this section, the national executive "must" follow one of two courses: in terms of section 26(2)(a), in the event of no declaration of a national state of disaster, it must deal with the disaster in terms of existing legislation and contingency arrangements. The second course of conduct occurs when a national state of disaster has been declared. In that instance, in terms of section 26(2)(b) the national executive must deal with the disaster, again in terms of existing legislation and contingency arrangements, but in this instance "... *as augmented by regulations or directives made or issued in terms of section27 (2)*".

4.7 When and how is a national state of disaster declared? This occurs when the Minister, by notice in the Gazette makes such a declaration. She may do so in terms of section 27(1) of the DMA in the following circumstances, namely if –

(a) *"existing legislation and contingency arrangements do not adequately provide for the national executive to deal efficiently with the disaster; or*

(b) *other special circumstances warrant the declaration of a national state of disaster*".

4.8 The Director-General of COGTA, described the national executive's reaction to the looming pandemic as follows:

> "*The government sought medical advice from medical and scientific experts (national Corona Task Team) to prepare in order to manage and minimize the risk of infection and slow the rate of infection to prevent the overwhelming of the public healthcare facilities. There*

*is no existing legislation and contingency arrangement to adequately manage COVID-19.*

*The WHO also issued guidelines as to how countries can slow the rate of infection and prevent many deaths. The government also learnt from other countries which were already grappling with the measures to contain the disease. An effective means to slow the rate of infection and "flatten the curve" was to employ measures to manage the COVID-19 by ensuring a coordinated response and putting the South African national resources of the national government together to deal with this pandemic. There were no effective measures to manage the risk of infection or prevent infection and to ensure that the government was prepared to deal with Covid-19 pandemic. The government had to consider placing measures to deal with the outbreak, considering the consequences of those measures on the South African population and economy.*

*The purpose of curbing the spread of the COVID-19 disease was to save lives. After consultation with the Minister of Health and Cabinet, it was agreed that the most effective measures to manage COVID-19 and the consequences of this disease on the society and the economy, was to declare a national state of disaster in terms of section 27(1) of the DMA. Thus, on the 15th March 2020, the Minster declared a national state of disaster*".

4.9 The mere say-so that there exists no existing legislation by which the national executive could deal with the disaster is disputed by the applicants and they contend that any such determination by the Minister was both misplaced and "irrational". Their contention is made with reference to the

International Health Regulations Act, 28 of 1974. In terms of this Act the President may, by mere proclamation, invoke the International Health Regulations for dealing with the disaster. These regulations appear, however not to have been updated and neither do they specifically provide for COVID-19, presumably due to the novelty thereof. It is therefore difficult to assess whether this Act can "adequately provide for the national executive to deal effectively with the disaster".

4.10 The Minister, however, did not in her declaration seek to rely on section 27(1)(a) of the DMA and the issue of insufficiency of existing legislation. She relied on the following factors for the declaration of a national state of disaster:

- The magnitude and severity of the COVID 19 "outbreak"
- The declaration of the outbreak as a pandemic by the WHO
- The classification thereof as a national disaster by Dr Tau as referred to in paragraph 4.4 above
- The "*need to augment the existing measures undertaken by organs of state to deal with the pandemic*" and
- The recognition of the existence of special circumstances warranting such a declaration.

4.11 It is unfortunate that the Minister chose not to enlighten the court what the abovementioned "special circumstances" are, but left it to the Director General to make generalized statements. Neither the Minister nor the Director-General elaborated on the shortcomings in "existing measures undertaken by the organs of state". A somewhat disturbing fact is that there

was no time delay since the declaration by Dr Tau and that of the Minister during which such shortcomings could have manifested themselves as the Minister's declaration followed that of Dr Tau on the same day. In fact, they were published in the same Government Gazette, No 43096 of 15 March 2020.

4.12 The applicants however did not attack the declaration on any of the abovementioned grounds or shortcomings but based their attack on the alleged irrational reaction to the coronavirus itself and the number of deaths caused thereby. Numerous publications were referred to, proclaiming the reaction to COVID 19 as a gross over-reaction. The applicants referred to various comparisons to other diseases plaguing the country and the continent, such as TB, influenza and SARS COV-2. Various statistics, infections rates, mortality rates and the like were also referred to. This attack was, however, not launched by way of a review application, which limited the scope of affidavits and facts placed before the court, particularly in an urgent application. Taking into account, however, the extent of the worldwide spread of the virus, the pronouncements by the WHO and its urging of member states to take the pandemic very seriously in order to protect their citizens and inhabitants as well as the absence of prophylaxes, vaccines, cures or, to this date, effective treatment, I cannot find that the decision was irrational on what was placed before me. I am also prepared to accept that measures were urgently needed to convert an ailing and deteriorated public health care system into a state of readiness, able to cope with a previously unprecedented demand for high-care and intensive care facilities should there not be a "flattening" but an uncontrolled "spike" in the rate or number of seriously affected patients, constitute "special circumstances".

4.13 Having stated that, though, the declaration of a national state of disaster by the Minister, had important consequences. It allowed her to make regulations and issue extensive directions regarding a wide range of aspects. Section 27 (2) of the DMA is the enabling provision in this regard and reads as follows:

> " *(2) If a national state of disaster has been declared in terms of subsection (1), the Minister may, subject to subsection (3), and after consulting the responsible cabinet member, make regulations or issue directions or authorize the issue of directions concerning –*
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> *(a) the release of any available resources of the national government, including stores, equipment, vehicles and facilities;*
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> *(b) the release of personnel of a national organ of state for the rendering of emergency services;*
>
> *(c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;*
>
> *(d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;*
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> *(e) the regulation of traffic to, from or within the disaster-stricken or threatened area;*
>
> *(f) the regulation of the movement of person and goods to, from or within the disaster-stricken or threatened area;*
>
> *(g) the control and occupancy of premises in the disaster-stricken or threatened area;*

*(h) the provision, control or use of temporary emergency accommodation;*

*(i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;*

*(j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;*

*(k) the dissemination of information required for dealing with the disaster;*

*(l) emergency procurement procedures;*

*(m) the facilitation of response and post-disaster recovery and rehabilitation;*

*(n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimize the effects of the disaster; or*

(o) *steps to facilitate international assistance*".

4.14 It is clear from a reading of the enabling provisions, that disasters other than the one currently facing us as a result of the COVID-19 pandemic, were contemplated by the DMA. The occurrence of a flood, for example, would fit neatly into the provisions – evacuation would be needed, traffic would need to be regulated, shelters would be needed, lines of communications would need to be installed or re-installed and post-disaster recovery and rehabilitation would be needed. These occurrences have happened in our recent past where measures of this nature had been necessary. The floods in various parts of our country in 2016 and 2019 are but examples of recent memory. In those instances members of the

SANDF deployed rescue teams and rendered assistance in the various of the aspects covered by Section 27 (2)(a) – (n) quoted above, rather than patrol the streets armed with machine guns. I shall return to this aspect later.

[5] The nature of the "lockdown regulations":

5.1 When the President of South Africa eleven weeks ago announced a "hard lockdown" in South Africa when the COVID 19 pandemic hit our shores, the country and indeed, the world generally lauded him for the fast and decisive action taken to guard us against the anticipated debilitating (and deadly) consequences of the disaster. The rationality of this policy direction taken by the national executive then appeared readily apparent to virtually all South Africans.

5.2 In the President's speech whereby he announced the move to "Alert Level 3", he introduced the issue of the regulations promulgated and implemented as a result of the Minister's declaration under consideration as follows: "*It is exactly 10 weeks since we declared a national state of disaster in response to the coronavirus pandemic. Since then, we have implemented severe and unprecedented measures – including a nationwide lockdown – to contain the spread of the virus. I am sorry that these measures imposed a great hardships on you – restricting your right to move freely, to work and eke out a livelihood. As a result of the measures we imposed – and the sacrifices you have made – we have managed to slow the rate of infection and prevent our health facilities from being overwhelmed. We have used the time during the lockdown to build up an extensive public health response and prepare our health system for the anticipated surge of infections*". This accords with the stated objective identified in the Directive General's answering affidavit as quoted in

paragraph 4.8 above. (I interpose to state that the parties and the amicus have, both in their affidavits and heads of argument (as well as in court) repeatedly referred to various websites and other sources of public media. Evidentiary value apart, I had been enjoined to take judicial cognisance of these references, hence the source for this quotation).

5.3 Despite having attained the abovementioned laudable objectives with the assistance of the initial "lockdown regulations", the applicants contend they were unlawful for want of prior approval by the National Council of Provinces. Many of the functional areas referred to in Section 27 (2) of the DMA fall, in terms of Schedule 5 of the Constitution, within the areas of provincial legislative competence, such as liquor licenses, provincial sport, provincial roads and traffic, beaches and amusement facilities, cemeteries, funeral parlours and crematoria, markets, public places and the like (subject to certain monitoring and control aspects by local spheres of government which are not relevant to the current issues). In order to avoid conflict between national and provincial legislation, section 146 (6) of the Constitution requires laws made by an Act of Parliament to prevail only after approval by the National Council of Provinces ("NCOP"). Section 59 (4) of the DMA provides that regulations made by the Minister should also be referred to the NCOP for approval first. This provisio, however, only refers to regulations promulgated in the ordinary course of business in terms of section 59(1) of the DMA. It does not apply to all regulations under the Act. Upon a reading of sections 27 (2) and 27 (5) of the DMA it is also clear that the regulations (and directions) provided for therein, are of an urgent or emergency nature and clearly intended to be for a temporary period only. They are distinguishable from those mentioned in sections 59(1) and 59(4) of the DMA and to equate the two types of regulation with each other and require consideration, debate and approval by the NCOP for

Section 27(2) regulations might frustrate or negate the whole purpose of urgent action and augmentation of otherwise insufficient disaster management provisions.

5.4 I therefore find that this ground of attack cannot succeed. What it does highlight however, is the consequences of invoking a national state of disaster and reliance on section 27 (2): it places the power to promulgate and direct substantial (if not virtual all) aspects of everyday life of the people of South Africa in the hands of a single minister with little or none of the customary parliamentary, provincial or other oversight functions provided for in the Constitution in place. The exercise of the functions should therefore be closely scrutinized to ensure the legality and Constitutional compliance thereof.

[6] <u>The legality of the "lockdown regulations"</u>.

6.1 The making of regulations and the issuing of directives by the Minster in terms of the DMA are subject to the following limitations:

- They may only be made after consultation with "the responsible Cabinet member", responsible for each specific functional area of jurisdiction (Section 27(2))

- The power to make regulations and directions "*may be exercised only to the extent that this is necessary for the purpose of –*

  *(a) assisting and protecting the public;*

  *(b) providing relief to the public;*

  *(c) protecting property;*

  *(d) preventing or combating disruption; or*

(e) *dealing with the destructive and other effects of the disaster*" (Section 27(3))

- as an exercise of public power or performance of a public function, the regulations and directions may not go beyond that expressly provided for in the enabling section of the DMA mentioned in paragraph 4 above[4].

- In every instance where the power to make a specific regulation is exercised, the result of that exercise, namely the regulations themself must be rationally related to the purpose for which the power was conferred[5]. This is the so-called "rationality test". It answers the question: Is there a rational connection between the intervention and the purpose for which it was taken? I shall elaborate on this hereunder.

- In the last instance, where the exercise of a public power infringes on or limits a constitutionally entrenched right, the test is whether such limitation is, in terms of Section 36 of the Constitution, justifiable in an open and democratic society based on human dignity, equality and freedom (the "limitation test").

6.2 In para 2.1 of the introductory part of this judgment, I also referred to the supremacy of the Constitution and the principle of legality that requires the steps taken to achieve a permissible objective to be both rational and

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[4] Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1)SA 374 (CC) at para [58]; Minister of Public Works v Kayalami Ridge Environmental Association 2001 (3) SA 1151 (CC) at para [34]; Affordable Medicine (Supra) at para [49] and Masetlha v President of the Republic of South Africa 2008 (1) SA 566 (CC) at para [80]

[5] DA v President of the RSA 2013 (1) SA 248 (CC) at para [27] and Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the RSA and Others 2000 (2) SA 674 (CC) at para [85].

rationally connected to that objective. This entails the rationality test referred to above[6].

6.3 The rationality test is concerned with the evaluation of the relationship between means and ends *"... it is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred*[7]".

6.4 Where a decision is challenged on the grounds of rationality or, as in this case, the regulations are attacked on the basis of irrationality, *"... courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed in that the purpose of the enquiry is not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution*"[8].

6.5 The Chief Justice labelled such a failure a "disconnect" between the means and the purpose[9].

6.6 It must also follow that, if a measure is not rationally connected to a permissible objective, then that lack of rationality would result in such a measure not constituting a permissible limitation of a Constitutional right in the context of Section 36 of the Constitution.

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[6] Law Society v President of the RSA 2019 (3) SA 30 (CC) at [61] – [63].
[7] DA v President of RSA (supra) at para [32].
[8] Allbert v Centre for the Study of Violence and Reconciliation and others 2010 (3) SA 293 (CC) at para [51].
[9] Electronic Media Network v e.tv (Pty) Ltd 2017 (9) BCLR (CC) 8 June 2017.

6.7 In the answering affidavit by the Director General of COGTA on behalf of the Minster, clearly being aware of the abovementioned limitations on the exercise of public power, she said the following:

> "*I am advised that in determining whether the decision of the functionary is rational, the test is objective and is whether the means justify the ends. Thus, I submit, with respect, that under the circumstances, the means justify the ends*".

6.8 Apart from the fact that this statement says factually very little, if anything, I questioned whether the Director-General had not intended to argue that the "end justifies the means[10]". Counsel for the Minister assured me that the Director General meant exactly what she said.

6.9 The Director General correctly contended that the COVID 19 pandemic implicates the constitutionally entrenched rights to life[11], to access to health care[12] and an environment that is not harmful[13]. As a result of this, she submitted that "*the South African population has to make a sacrifice between the crippling of the economy and loss of lives*". Her submission further was that the regulations "... *cannot, therefore, be set aside on the basis that they are causing economic hardship, as saving lives should take precedence over freedom of movement and to earn a living*".

6.10 Of course the saving of lives is a supreme Constitutional imperative and one of the most fundamental rights entrenched in the Bill of Rights in the Constitution. An equally anguishing conundrum is the resultant choice

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[10] Being a reference to the Machaivellian principle of justifying any, even unlawful, means as long as the end is good or beneficial or, put differently: a good outcome excuses any wrongs committed to attain it.
[11] Section 11 of the Constitution.
[12] Section 27 of the Constitution.
[13] Section 24 of the Constitution.

between "plague and famine" as a leading journalist has recently described the situation.

6.11 All the instructions to deal with the pandemic referred to earlier, being the WHO declaration, the declaration of Dr Tau and the DMA self, however go beyond the mere issue of saving lives, some of which, with the greatest degree of sensitivity, international experience has shown, may inevitably be lost. The object is, if one is not able to completely prevent the spread the infection, to least attempt to limit the spread or the rate of infection whilst at the same time maintain social cohesion and economic viability. All these instruments, and in particular the enabling legislation, confirm this. Sections 27(2) and 27 (3) of the DMA states the aim thereof to be "*assisting the public, providing relief to the public ... and ... dealing with the destructive effect of the disaster*".

[7] Applying the rationality test:

It is now necessary to test the rationality of some of the regulations and their "connectivity" to the stated objectives of preventing the spread of infection:

7.1 When a person, young or old, is in the grip of a terminal disease (other than COVID 19) and is slowly leaving this life, to ease that suffering and the passing, it is part of the nature of humanity for family and loved ones to support the sufferer. Moreover there are moral, religious and Ubuntu imperatives demanding this. One might understand the reluctance to have an influx of visitors should the person at death's door be inside the doors of a medical facility for fear of the spread of COVID 19, but what if the person is in his or her own home or at the home of a family member or friend? Loved ones are by the lockdown regulations prohibited from leaving their home to visit if they are not the care-givers of the patient,

being prepared to limit their numbers and take any prescribed precautions, But once the person has passed away, up to 50 people armed with certified copies of death certificates may even cross provincial borders to attend the funeral of one who has departed and is no longer in need of support. The disparity of the situations are not only distressing but irrational (Regulation 35).

7.2 There are numerous, thousands, no, millions of South African who operate in the informal sector. There are traders, fisheries, shore-foragers, construction workers, street-vendors, waste-pickers, hairdressers and the like who have lost their livelihood and the right to "eke out a livelihood" as the President referred to it as a result of the regulations. Their contact with other people are less on a daily basis than for example the attendance of a single funeral. The blanket ban imposed on them as opposed to the imposition of limitations and precautions appear to be irrational.

7.3 To illustrate this irrationality further in the case of hairdressers: a single mother and sole provider for her family may have been prepared to comply with all the preventative measures proposed in the draft Alert Level 3 regulations but must now watch her children go hungry while witnessing minicab taxis pass with passengers in closer proximity to each other than they would have been in her salon. She is stripped of her rights of dignity, equality, to earn a living and to provide for the best interests of her children. (Table 2 item 7).

7.4 There were also numerous complaints referred to in papers about Regulation 34 placing irrational obstacles in the way of those responsible for children or in the position of care-givers of children to see that their best interests are catered for.

7.5 Random other regulations regarding funerals and the passing of persons also lack rationality. If one wants to prevent the spreading of the virus through close proximity, why ban night vigils totally? Why not impose time, distance and closed casket prohibitions? Why not allow a vigil without the body of the deceased? Such a limitations on a cultural practice would be a lesser limitation than an absolute prohibition. If long-distance travel is allowed, albeit under strict limitations, a vigil by a limited number of grieving family members under similar limitations can hardly pose a larger threat. And should grieving family members breach this prohibition, their grief is even criminalized (Regulations 35(3) and 48(2)).

7.6 There is also no rational connection to the stated objectives for the limitation on the degree of the familial relationship to a deceased in order to permissibly attend his or her funeral. What if the deceased is a clan elder or the leader of a community or the traditional head of a small village? Rather than limit the number of funeral attendees with preference to family members, exclusions are now regulated, arbitrarily ignoring the facts of each case (Regulation 35(1)).

7.7 The limitations on exercise are equally perplexing: If the laudable objective is not to have large groups of people exercising in close proximity to each other, the regulations should say so rather than prohibit the organizing of exercise in an arbitrary fashion (Regulation 33(a)(e)).

7.8 Restricting the right to freedom of movement in order to limit contact with others in order to curtail the risks of spreading the virus is rational, but to restrict the hours of exercise to arbitrarily determined time periods is completely irrational (also Regulation 33(1)(e)).

7.9 Similarly, to put it bluntly, it can hardly be argued that it is rational to allow scores of people to run on the promenade but were one to step a foot on the beach, it will lead to rampant infection (Regulation 39(2)(m)).

7.10 And what about the poor gogo who had to look after four youngsters in a single room shack during the whole lockdown period? She may still not take them to the park, even if they all wear masks and avoid other people altogether (also Regulation 39(2)(e)).

7.11 During debate of the application, the argument was tentatively raised that all the limitations on Constitutional rights were recompensed by the government. Counsel for the Minister had been constrained to concede that, even if the government's attempts at providing economic relief functioned at its conceivable optional best, monetary recompense cannot remedy the loss of rights such as dignity, freedom of movement, assembly, association and the like.

7.12 The practicalities (or rather impracticalities) of distributing aid relief in the form of food parcels highlights yet another absurdity: a whole community might have had limited contact with one another and then only in passing on the way to school or places of employment on any given day prior to the regulations, but are now forced to congregate in huge numbers, sometimes for days, in order to obtain food which they would otherwise have prepared or acquired for themselves.

7.13 I am certain, from what I have seen in the papers filed in this matter and from a mere reading of the regulations, even including the Alert Level 3 regulations, that there are many more instances of sheer irrationality included therein. If one has regard to some of the public platforms to which I have been referred to, the examples are too numerous to mention. One

need only to think of the irrationality in being allowed to buy a jersey but not undergarments or open- toed shoes and the criminalization of many of the regulatory measures.

7.14 Despite these failures of the rationality test in so many instances, there are regulations which pass muster. The cautionary regulations relating to education, prohibitions against evictions, initiation practices and the closures of night clubs and fitness centres, for example as well as the closure of borders. (Regulations 36, 38, 39(2)(d)and(e) and 41) all appear to be rationally connected to the stated ojectives.

7.15 So too, are there ameliorations to the rationality deficiencies in the declarations by other cabinet members in respect of the functional areas of their departments promulgated since Alert Level 3 having been declared, but these have neither been placed before me nor have the parties addressed me on them. This does not detract from the Constitutional crisis occasioned by the various instances of irrationality, being the impact on the limitation issue foreshadowed in section 36 of the Constitution referred to in paragraph 6.1 above.

7.16 I debated with counsel for the Minister the fact that I failed to find any evidence on the papers that the Minister has at any time considered the limitations occasioned by each the regulations as they were promulgated, on the Constitutional rights of people. The Director General's affidavit contains mere platitudes in a generalized fashion in this regard, but nothing of substance.

7.17 The clear inference I draw from the evidence is that once the Minister had declared a national state of disaster and once the goal was to "flatten the curve" by way of retarding or limiting the spread of the virus (all very

commendable and necessary objectives), little or in fact no regard was given to the extent of the impact of individual regulations on the constitutional rights of people and whether the extent of the limitation of their rights was justifiable or not. The starting point was not "how can we as government limit Constitutional rights in the least possible fashion whilst still protecting the inhabitants of South Africa?" but rather "we will seek to achieve our goal by whatever means, irrespective of the costs and we will determine, albeit incrementally, which Constitutional rights you as the people of south Africa, may exercise". The affidavit put up on behalf of the Minister confirms that the factual position was the latter. One should also remind oneself that the enabling section of the DMA sought to augment existing measures, not replace them entirely.

7.18 This paternalistic approach, rather than a Constitutionally justifiable approach is illustrated further by the following statement by the Director General: "*The powers exercised under lockdown regulations are for public good. Therefore the standard is not breached*".

7.19 The dangers of not following a Constitutional approach in dealing with the COVID 19 pandemic have been highlighted in the judgment of Fabricius, J referred to in paragraph 4.3 above. In his judgment, the learned judge, amongst other things, raised the following question:

> "*The virus may well be contained - but not defeated until a vaccine is found - but what is the point if the result of harsh enforcement measures is a famine, an economic wasteland and the total loss of freedom, the right to dignity and the security of the person and, overall, the maintenance of the rule of law*"?

7.20 In a recent article by Calitz in De Rebus 2020 (June) DR 9 entitled "Government's response to COVID 19: has the Bill of Rights been given effect to?" the following apposite views are expressed:

> "*COVID-19 is a fierce pandemic with numerous deaths across the world and unfortunately there is no date on our calendar, which we can circle, to indicate when the storm will finally pass. Yes, there are unprecedented hardships on social, political, health, and economic sectors, but even more so on basic human rights. These distresses are felt more harshly by the least protected in society who do not have access to adequate housing, clean running water, health care, food, or social security, which are all guaranteed basis human rights.*
>
> *The protection of inherent human dignity is another constitutional right guaranteed in s 10 of the Constitution. While it goes without saying that the loss of employment or livelihood impact on one's dignity; the rapidly increased rate of gender-based violence during lockdown raises concern and alarm. Women and men are beaten and abused by their partners while being compelled by law to stay inside their homes. They cannot run or escape and are eft helpless.*
>
> *During a pandemic, government should never lose sight of basic human rights. In fact, it should prioritise their realization and protection of human rights in such a time even more so. In my view, the Bill of Rights has not been given effect to. A pro-human rights lockdown would have perhaps looked much different –*
>
> - *Military officials would have acted more humanely;*

- *Lockdown regulations would have not been equally strict over different parts of the country and would have taken into account personal living conditions of the poor; and*
- *The fulfilment of human rights would have been the most important priority to attain*".

I agree with these sentiments.

7.21 I find that, in an overwhelming number of instances the Minister have not demonstrated that the limitation of the Constitutional rights already mentioned, have been justified in the context of section 36 of the Constitution.

[8] Further aspects

There are two further aspects which I need to deal with:

8.1 The first is the applicants' contention that the regulations breach the right to hold gatherings as contemplated in the Regulation of Gatherings Act, No 205 of 1993 (the "Gatherings Act"). In particular, section 14 (1) of that Act is relied on. It reads: "*In the case of a conflict between the provisions of this Act and any other law applicable in the area of jurisdiction of any local authority, the provisions of this Act shall prevail*". The reliance on the Gatherings Act is misplaced: the Act does not create the right to hold gatherings, it merely regulates the exercise of those rights. The actual rights are founded in sections 17 and 18 of the Constitution itself[14]. While "gatherings" in the form of religious congregation has been allowed under the Alert Level 3 regulations under strict conditions (in giving effect to the

[14] Section 17:Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.
Section 18: Everyone has the right to freedom of association.

rights to freedom of religion, belief and opinion as guaranteed under section 15 of the Constitution), no recognition has been given to any section 17 rights nor has any consideration been given to the infringement thereof or whether a blanket ban could be justifiable as opposed to a limited and regulated "allowance" of the exercise of those rights. The reversion to a blanket ban harks back to a pre-Constitutional era and restrictive State of emergency regulations. In the context of this judgment, I need not further dwell on this aspect apart from the lack of justification already referred to earlier.

8.2 The last aspect is that of the blanket ban on the sale of tobacco products. Apart from the fact that this prohibition contained in the regulations form part of the overall attack by the applicants on the regulations as a whole, none of the parties have expressly and separately attacked this aspect or dealt with it, either in their affidavits or in their arguments. The issues relating to this ban are varied and multitudinous. It involves not only those using tobacco products but also those selling it. The fiscus also has an interest in the matter. The impact of this ban on Constitutional rights are also more oblique than the in respect of other rights contained in the Bill of Rights. I have been advised that an application wherein many more of the affected role players than those featuring in this application, is pending in this Division. That application, by direction of the Judge President, it to be heard by a full court later this month. It appears to me to be in the interest of justice that the issues relating to the ban on the sale of tobacco products be dealt with in that forum. For this reason I shall excise this aspect form the order which I intend making, for the time being.

[9] Conclusions:

9.1 The Minister's declaration of a national state of disaster in terms of Section 27(1) of the Disaster Management Act in response to the COVID 19 pandemic is found to be rational.

9.2 The regulations promulgated in respect of Alert Levels 4 and 3 in terms of Section 27(2) of the Disaster Management Act by the Minister in a substantial number if instances are not rationally connected to the objectives of slowing the rate of infection or limiting the spread thereof.

9.3 In every instance where "means" are implemented by executive authority in order to obtain a specific outcome an evaluative exercise must be taken insofar as those "means" may encroach on a Constitutional right, to determine whether such encroachment is justifiable. Without conducting such an enquiry, the enforcement of such means, even in a bona fide attempt to attain a legitimate end, would be arbitrary and unlawful.

9.4 Insofar as the "lockdown regulations" do not satisfy the "rationality test", their encroachment on and limitation of rights guaranteed in the Bill of Rights contained in the Constitution are not justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in Section 36 of the Constitution.

9.5 The deficiencies in the regulations need to be addressed by the Minister by the review and amendment thereof so as to not infringe on Constitutional rights more than may be rationally justifiable.

9.6 One must also be mindful of the fact that the COVID 19 danger is still with us and to create a regulatory void might lead to unmitigated disaster and chaos. Despite its shortcomings, some structure therefore needs to remain

in place whilst the Minister and the national executive review the regulations and their constitutional approach thereto.

9.7 The role and existence of the "National Coronavirus Command Council" did not feature in this application.

9.8 The legality of the ban on the sale of tobacco and related products shall, as set out in paragraph 8.2 above, stand over for determination by a full court of this Division, already constituted for that purpose.

[10] Relief

10.1 At the inception of this judgment I referred to the fact that section 172(1) of the Constitution obligates this court to declare any law or conduct inconsistent with the Constitution invalid.

10.2 The same section authorises the court to make any order that is just and equitable. In doing so, a court must still remind itself, as I hereby do, that "ours is a constitutional democracy, not a judiciocracy[15]". Courts must always remain alert to the principles of separation of powers. The Chief Justice has explained the principle as follows:

> "*The Judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government. Court ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures*

[15] Electronic Media Network – above at para [1].

*of their powers, they must be on high alert against impermissible encroachment on the powers of the others arms of government*[16]".

10.3 Any remedial action, amendment or review of the regulations, should therefore be undertaken by the Minister.

10.4 Having regard to the nature of the application, I am of the view that it is appropriate that costs follow the event. The applicant's case went beyond a mere Constitutional attack and the Biowatch-principle should not apply[17]. I am further of the view that the amicus curiae, represented by one of the members should, in view of the lateness of its attempted joinder to the applications and the fact that it ultimately sought to enroll its own application way out of time, bear its own costs.

[11] Order:

1. The regulations promulgated by the Minister of Cooperation and Traditional Affairs ("the Minister") in terms of section 27(2) of the Disaster Management Act 57 of 2002 are declared unconstitutional and invalid.

2. The declaration of invalidity is suspended until such time as the Minister, after consultation with the relevant cabinet minister/s, review, amend and re-publish the regulations mentioned above (save for regulations 36, 38, 39(2)(d) and (e) and 41 of the regulations promulgated in respect of Alert Level 3) with due consideration to the limitation each regulation has on the rights guaranteed in the Bill of Rights contained in the Constitution.

3. The Minister is Directed to comply with the process ordered in paragraph 2 above within 14 (Fourteen) business days from date of this order, or such

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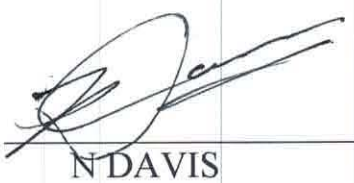
[16] Economic Freedom Fighters v Speaker of the National Assembly 2016 (3) SA 580 (CC) at paras [92] and [93].
[17] Biowatch Trust v Registrar Genetic Resources 2009 96) SA 232 (CC)

longer time as this court may, on good grounds shown, allow and to report such compliance to this court.

4. During the period of suspension, the regulations published in Government Gazette No 43364 of 28 May 2020 as Chapter 4 of the regulations designated as: "Alert Level 3", shall apply.

5. The regulations pertaining to the prohibition on the sale of tobacco and related products is excluded from this order and is postponed sine die, pending the finalization of case no 21688/2020 in this court.

6. The Minister is ordered to pay the costs of the first and second applicants. The amicus curiae shall pay its own costs.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 28 May 2020

Judgment delivered: 2 June 2020

APPEARANCES:

| | |
|---|---|
| For the first Applicant: | In person |
| For the Second Applicant: | Mr Z Omar |
| Attorney for Second Applicant: | Zehir Omar Attorneys, Springs<br>c/o Friedland Hart Solomon & Nicholson<br>Attorneys, Pretoria |
| For the Respondent: | Adv M S Phaswane |
| Attorney for Respondent: | State Attorney, Pretoria |